COMICS, CRIME, AND THE MORAL SELF

An Interdisciplinary Study of Criminal Identity

Submitted by

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I certify that all material in this thesis which is not my own work has been identified and that no material has previously been submitted and approved for the award of a degree by this or any other University.

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Abstract

An ethical understanding of responsibility should entail a richly qualitative comprehension of the links between embodied, unique individuals and their lived realities of behaviour. Criminal responsibility theory broadly adheres to 'rational choice' models of the moral self which subsume individuals' emotionally embodied dimensions under the general direction of their rational will and abstracts their behaviour from corporeal reality. Linking individuals with their behaviour based only on such understandings of 'rational choice' and abstract descriptions of behaviour overlooks the phenomenological dimensions of that behaviour and thus its moral significance as a lived experience. To overcome this ethical shortcoming, engagement with the aesthetic as an alternative discourse can help articulate the 'excessive' nature of lived reality and its relationship with 'orthodox' knowledge; fittingly, the comics form involves interaction of rational, non-rational, linguistic, and non-linguistic dimensions, modelling the limits of conceptual thought in relation to complex reality. Rational choice is predicated upon a split between a contextually embedded self and an abstractly autonomous self. Analysis of the graphic novel *Watchmen* contends that prioritisation of rational autonomy over sensual experience is symptomatic of a 'rational surface' that turns away from the indeterminate 'chaos' of complex reality (the unstructured universe), instead maintaining the power of rational and linguistic concepts to order the world. This 'rational surface' is maintained by masking that which threatens its stability: the chaos of the infinite difference of living individuals. These epistemological foundations are reconfigured, via *Watchmen*, enabling engagement beyond the 'rational surface' by accepting the generative potential of this living chaos and calling for models of criminal identity that are 'restless', acknowledging the unique, shifting nature of individuals, and not tending towards 'complete' or stable concepts of the self-as-responsible. As part of the aesthetic methodology of this reconfiguration, a radical extension of legal theory's analytical canon is developed.

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"Every concept arises through the equation of unequal things".

> – Friedrich Nietzsche, quoted in Battersby, *The Sublime, Terror, and Human Difference*: p. 188.

CHAPTER ONE

Introduction

1.1 Approaching the living other

This thesis examines, and proposes an alternative approach to, the way in which criminal responsibility theory models the responsible self. It has an epistemological focus, and is about *identity*, primarily how we *think about* identity, in criminal responsibility theory. Stemming from concern with the ethical approach to the 'other', this thesis aims to produce an epistemological concept that can enable access to the non-rational and non-linguistic dimensions of the self in attempts to model criminal identity.   In order to situate and explain this aim, an understanding of the 'ethical/other' debate is needed. Anne Barron provides a detailed overview of this debate from the perspective of legal theory, starting from the moral philosophy of Immanuel Kant.[1]   The basic claim is that dominant approaches to understanding individuals focus upon their supposedly 'universal' attributes (reason, rights, autonomy), whilst 'real' individuals are far more complex and unique than is suggested by Kant's abstract vision. As Barron observes:

> "...from the Kantian perspective a person only deserves respect insofar as s/he can assume the position of the moral subject, and since the moral subject is premised upon a denial that human difference has any moral relevance (except as an impediment to moral action), Kantian respect comes to be seen as a kind of disrespect: a disrespect for the radical 'otherness', or 'alterity', or unique particularity, of persons. Kantian justice thus reduces the other to the same, and is inconceivable without this reduction."[2]

The concern, then, is that the way in which the moral self is modelled, the way individuals are understood on a theoretical level, cannot fully capture or comprehend the vast complexities and uniqueness of concrete, living, embodied humans, and thus

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[1] See, especially pp. 1072-1077 of, Anne Barron, '(Legal) Reason and Its "Others": Recent Developments in Legal Theory' in *Introduction to Jurisprudence and Legal Theory: Commentary and Materials*, edited by James Penner, David Schiff, and Richard Nobles (Oxford: Oxford University Press, 2002).

[2] ibid: p. 1073.

theoretical models of the moral self remain reductive and inaccurate as against the 'real' individuals they try to describe. This 'injustice' in the understanding of individuals, the ethical concern with the other dictates, needs to be rectified: models of the moral self must be ethical, they must 'do justice' to the fullness and 'alterity' of unique, living humans; they must treat the other 'as other', and not as 'the same'.[3] Although there is much debate over the term 'justice' and what it entails,[4] the concern with justice in this thesis is to be understood in these 'ethical/other' terms.

To be clear, 'doing justice' in this sense involves understanding, or approaching understanding of, the individual as a unique, living being; an embodied human who lives and breathes and experiences lived reality in a unique and limited way; who is more than simply a conceptual category or a node of 'rights' or 'autonomy', but navigates the complexity and irreducibility of the unstructured universe in the richness and fullness of his or her contexts of experience. To attempt to 'do justice' in this way in modelling the moral self, we must attempt to approach that self not as an abstract 'idea', but as a unique, living, embodied human – an individual. The irreducibility of these unstructured (non-rational and non-linguistic) dimensions suggests that settled concepts or understandings that approach the individual in this way are impossible. On the practical level of judgment, this fluid nature of the living self raises significant problems. The uniqueness of individuals suggests that if we approach them ethically, if we 'do justice' to their unique alterity, then there can be no concept of the responsible self, or of responsibility, at all, because each and every person will need their own radically subjective standard of judgment. Although some consideration of an individual's unique living context is undertaken at the sentencing stage of the criminal process, this equivocation over an individual's punishment undermines the judgment

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[3] See Helen M. Stacy, *Postmodernism and Law: Jurisprudence in a Fragmenting World* (Aldershot: Ashgate, 2001): pp. 161-64.

[4] See, for a brief discussion on the problems of defining or 'discovering' justice, Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Oxford: Hart, 2005): pp. 28-32. For an extended introduction to the enduring problems with 'justice' in a criminal perspective, see Barbara Hudson, *Understanding Justice: An Introduction to Ideas, Perspectives, and Controversies in Modern Penal Theory*, 2nd ed. (Buckingham: Open University Press, 2003).

of guilt already made in relation to the question of responsibility.[5] The argument of this thesis, however, is that we need to ethically engage with the living human on a theoretical level. The way we theoretically construct models of the moral self can be opened up to deeper or enriched consideration of the lived reality of individuals without collapsing the actual processes of judgment; such enrichment will undoubtedly be filtered through more practically-oriented theory before it affects legal processes. Maintaining an 'ethical ideal' in the development of theory, however, may be a vital concern in the advancement of an ethical justice system.

Substantively, this thesis is concerned with the dominant understanding of the moral self in criminal responsibility theory: 'rational choice'. This understanding of criminal identity relies upon the general ability of the self to direct *rationally* (that is, coherently and based upon normatively accurate beliefs or perceptions of external reality) its various dimensions, including fluid aspects such as emotions, desires, beliefs, and general characters. The indeterminate nature of the living individual, the fluid dynamics of a person's living, emotionally embodied existence, are thus encountered in this general model of 'rational choice' as being subservient to the rational will. This prioritisation of the rational dimension of the self suggests that criminal theory does not meaningfully or properly encounter the living dimensions of the unique individual. It is this ethical shortcoming that this thesis substantively engages with through theoretical engagement with the aesthetic. Merely pointing out this 'blindness' to individuality or unique otherness in criminal theory, however, is not enough; we need also to produce an alternative approach that can be more 'ethical'.[6] The epistemological underpinnings of rational choice are seen in this thesis to be shaped by the conceptual category of 'modern masculinity', typified by the masking of indeterminacy with an image of stable knowledge. This is reconfigured to produce the concept of 'relational masculinity', which is derived from both the study of masculinities and feminist philosophy, prioritising individual difference over gender

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[5] See Alan Norrie, *Crime, Reason, and History: A Critical Introduction to Criminal Law* (London: Butterworths, 1993): pp. 36-58.

[6] See Barron, '(Legal) Reason and Its "Others"': p. 1075.

difference. This concept is typified by an approach to the indeterminacy of the living self that does not turn away from the challenge posed by the infinite difference of embodied beings, but adopts a 'restlessness' in the approach to the construction of concepts of the self in criminal theory. Moreover, this 'restlessness' precludes the development of settled and stable models of moral selfhood. Hence this thesis is unable to propose a new model of 'ethical' judgment,[7] or even a new *substantive* or practical model of criminal responsibility; such attempts at model-making are constantly undermined by the indeterminacy of life. Rather, this thesis examines the epistemological underpinnings that shape the limits of the existing models of criminal responsibility and reconfigures those foundations, aiming to increase theoretical engagement with the indeterminacy of the living self and the embodied world(s) it inhabits, and hence to enable 'more just', or more ethical, approaches to criminal responsibility.

1.1.1 *Aesthetics and comics*

In order to undertake such a reconfiguration towards the unique otherness of the living individual, this thesis is turning to aesthetics as a form of alternative discourse that can assist in moving beyond the 'rationality' of general categories. Of aesthetics, Desmond Manderson claims the following:

> "Above all... the aesthetic dimension is of great force: something about the particular moment, the concrete case, and the symbolism it connotes shakes us to the depths of our being. The aesthetic makes ideas tangible, and in giving them form it gives them meaning and power. Whether a metaphor or a painting or a piece of music, the aesthetic creates meaning through concrete sensation and belief through feeling."[8]

The aesthetic, then, may be able to help us engage with those dimensions of the individual that relate to the concrete and the particular; the unique, living, embodied human. This thesis aims to move not only beyond the 'rationality' of general categories, towards the non-rationality of the unique, but also beyond the purely

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[7] See, for a discussion on Douzinas and Warrington's attempt at such a task, ibid: pp. 1075-77.

[8] Desmond Manderson, *Songs without Music: Aesthetic Dimensions of Law and Justice* (London: University of California Press, 2000): p. 201.

linguistic, towards the non-linguistic, as part of the ethical approach to the individual. Thus, a major call of this thesis is for a methodological shift to the inclusion of multiple aesthetic forms as alternative discourses that can help to triangulate understanding of the embodied reality of human agents in criminal theory. This 'widened net' will help theoretical engagement with otherness by increasing the ways in which our model-building and conceptualisation are influenced by the unstructured universe 'outside' orthodox knowledge. The aesthetic is particularly important in this activity, because it has an irreducible quality of its own due to the affective nature of its forms as artworks. Although some interdisciplinary legal theory has engaged already with the aesthetic in a number of forms (literature, visual art, film, and so on), this thesis aims to expand the analytical horizons of law to include the art-form known as 'comics'; the unique attribute of the comics form in this context is that it involves the textual and the visual, and can thus help us model the relationship between the two and encounter multiple interacting ways of understanding the complex dynamics of lived reality. The inclusion of comics in this way will expand the analytical 'canon' of legal theory in a unique and original manner. It is through the non-rational and non-linguistic, this thesis argues, that the lived reality and embodied individuality of unique humans can be more meaningfully encountered. The aesthetic is an alternative discourse that can assist, alongside 'rational' or more orthodox discourse, in accessing this indeterminate realm, and the comics medium can play a vital role in this enrichment due to its use of multiple interacting modes of articulation and being uniquely 'in-between'.

Although the medium of comics in general may potentially be included in interdisciplinary legal theory's analytical canon, this thesis will reconfigure the epistemological foundations of criminal theory's limited models of the moral self specifically through the aesthetic lens of one graphic novel, *Watchmen*.[9] This comic, created by Alan Moore and Dave Gibbons, is set in an alterative 1980's world against the looming backdrop of potential nuclear war. It has Anglo-American origins, being

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[9] Alan Moore and Dave Gibbons, *Watchmen* (London: Titan Books, 1986).

created by two British comics artists under contract to the US comics publisher, DC. The central narrative follows a small, disparate group of 'costumed adventurers', or superheroes, as they uncover a plot to destroy New York City. One of the express aims of this work is to explore the idea of 'superheroes' being real: what if people really did dress up in colourful costumes and fight crime and injustice on our city streets?; what if a truly super-powered being really did exist?[10] Taking these ideas seriously, *Watchmen* explores philosophical and psychological complexities and uncertainties in understanding identity in a context concerned with human moral agency, and undermines the view of the 'simplicity' and 'certainty' traditionally associated with superhero comics. Although there are also themes of vigilantism and the legitimacy of state violence ('costumed adventurers' were outlawed following public outcry in *Watchmen*'s diegetic past), it is the philosophical concerns with identity and lived embodiment, and the aesthetic navigation of these themes through *Watchmen*'s uniquely comics form, that make this particular comic of relevance to the project of this thesis as part of the ethical concern with the other.

1.1.2 *Disciplinary location of the thesis*

As may already be noticeable, this thesis has a dual structure. On the one hand, it is a substantive engagement with criminal justice theory relating to responsibility; on the other it is a methodological treatise arguing for the use of comics in legal theory. Its substantive concerns are similarly dual: on one hand it is concerned with how criminal categories substantively fail to capture the 'reality' of living beings; on the other, it is concerned with the epistemological concept that grounds these categories. Further, it has a dual outcome: it produces a new epistemological concept that can enable more ethical understanding of individuals; and simultaneously expands the concerns of legal theory with aesthetic forms to include comics. It is in this dual conclusion that we can see both the key original features of the work and the shared focus between its two dimensions: the pioneering methodological expansion is a suitable tool with which to engage the substantive issues that the development of a new epistemological concept

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[10] See Dave Gibbons, Chip Kidd, and Mike Essl, *Watching the Watchmen* (London: Titan, 2008): pp. 1, 29.

aims to rectify. It is the concern with the ethical approach to the other than inspires both the substantive concerns with epistemological improvement and the methodological innovation. Due to this underlying drive, then, this thesis cannot accurately be labelled as simply 'law and aesthetics', or even 'criminal legal theory' or 'criminal justice theory', but is more broadly concerned with the philosophical underpinnings that shape legal theory's understandings of responsibility and with critiquing those foundations from an ethical standpoint. This thesis, then, is perhaps most suitably labelled as a work in critical legal theory, with a particular interest in criminal justice.

1.2 Thesis overview

The thesis is divided into four Parts, and consists of ten chapters (including this introduction as Chapter One and the overall conclusion as Chapter Ten). Each of these chapters is divided into numbered sections and subsections (referenced as, for example, 'Section 1.1'). The argument proceeds through these four over-arching sections as follows.

1.2.1 *Part one: 'Literature review'*

Part One constitutes the literature review and consists of Chapter Two, entitled 'Enriching Understanding'. This review gives a purposive overview of major work done in the interdisciplinary study of law in relation to aesthetic forms, focusing upon the methodological and epistemological issues related to the use of fiction in legal theory; and the current project is broadly situated in relation to this interdisciplinary field. The chapter argues that a common thread of 'enriching understanding' can be identified to run through these approaches to law, grounding the turn to alternative aesthetic discourses. This 'enrichment' involves not just the quantitative increase in knowledge, but a qualitative shift in understanding to include the multiple, experiential, lived, and broadly 'aesthetic' aspects of questions of justice; it is a mode of understanding that is inclusive, moving towards increasingly 'holistic' knowledge, and is not limited by pre-existing categories and the limitations they may engender. This thesis continues this

general scheme in its reconfiguration of how we approach understanding of the moral self.

1.2.2 Part two: 'The turn to the graphic'

Part Two continues the concern with method, outlining the turn to graphic fiction as part of the general critical project of enriching understanding and developing the specific reading scheme adopted in this thesis. It consists of two chapters, the first of which introduces the comics form whilst the second expounds the aesthetic methodology adopted for the reading of Alan Moore and Dave Gibbons's graphic novel *Watchmen* undertaken in Parts Three and Four (and that can also be applied to the comics medium more broadly). Chapter Three, 'Introducing Comics', argues that products of the comics form should be included as potential objects of study. Comics, however, need to be read in a very different way from traditional narrative forms; hence Chapter Three undertakes a detailed examination of the form, including its definition, cultural perception, and boundaries with other media (including historical uses of image-text combination). The perceived juvenility and simplicity of comics are argued against as universal characteristics of the form, which actually involves an epistemological 'in-betweenness' (due to its dual textual-visual nature) and a potential for sophistication that predisposes it as a useful aesthetic object to be analysed in interdisciplinary study.

Chapter Four builds upon this critical introduction of the comics form, expounding the aesthetic approach that is adopted in this thesis. This chapter, 'Comics and Aesthetics', introduces the continental philosophical discourse on aesthetics. The approach taken to reading comics in this thesis is adapted from Friedrich Nietzsche's aesthetic metaphysics and the comics analysis of Charles Hatfield. This approach is developed in such a way that the epistemological 'in-betweenness' in the comics form (which includes interaction between the rational, non-rational, linguistic, and non-linguistic) is not effaced, but in a way that does not instrumentalise or reduce a potentially richly aesthetic graphic work to being merely a model for epistemological interaction. Adopting this approach thus makes comics a uniquely situated aesthetic

medium for the examination of issues related to the ethical concern for the lived reality of individuals, as it is able not only to (aesthetically) cross into the indeterminacy of the non-rational and non-linguistic, but also, due to its epistemological interaction, to model the boundaries and relationships between the rational, non-rational, linguistic, and non-linguistic. With these grounding methodological concerns explained, the thesis then turns to the substantive analysis of criminal identity and the graphic novel *Watchmen*.

1.2.3 *Part three: 'Criminal identity and the rational surface'*

Part Three is divided into three chapters, and sets up the problem with criminal theory's understanding of the moral self in terms of the abstraction of the moral self from the living individual. In Chapter Five the major model of moral identity in criminal theory is examined. The foundational issue with respect to the ethical concern for the other is argued to be the divide between a self that is abstract and rational, and a self that is embedded within living and social contexts. This extreme division is found to structure Kantian philosophy, but also to permeate criminal theory in a less extreme form. The model of 'rational choice' holds that the responsible self is generally able to rationally direct its various dimensions, including character, belief, emotion, and behaviour. It is this primacy of the 'rational' that limits criminal theory's models of identity with respect to the living, embodied human, by subsuming the self's indeterminate and fluid dimensions under the rational will. By basing responsibility upon this rational will, criminal theory (partially) abstracts one dimension of the self away from its lived entirety. It is argued, through deployment of phenomenological aesthetics, that we need to more profoundly encounter the lived, embodied dimensions of criminal behaviour and the self if we are to meaningfully and ethically comprehend the responsibility-linkages between individuals and their lived behaviour.

Chapter Six, 'Spectrality and Self-Making', puts forward an indicative model of the self in order to demonstrate what is excessive to rational choice models – the self as a nexus, or connected group, of drives and influences. In doing this, Chapter Six also exposes the 'spectrality' at work in attempting to understand the moral self.

Spectrality has two dimensions: one substantive, and one epistemological. Substantive spectrality relates to the excessive nature of the self, of the living individual, with respect to general categories that try to 'capture' or describe it. Epistemological spectrality refers to the origins of understandings of the self in the experiences and lives of astonishing individuals who 'make' those understandings. General understandings of the self are thus 'haunted' by that which is excessive to, and thus ruptures, the concepts they create, and also by the human and cultural origins of those concepts. This is particularly poignant in relation to the idea of rationality, which seeks to deny the contingency of the humanity that created it. Understandings of the self are deeply interlinked with understandings of the world in general, because, this thesis argues, all knowledge ultimately derives from the ability of the self to experience, and to synthesise that experience, and how we relate to the world around us has a bearing upon our capacity for free will (broadly, whether or not our actions and selves are determined by the 'laws of nature'). Through examination of how we 'make' the self over time, it is seen that we are neither our minds, nor our memories, nor our bodies, nor a result of the influences of the world upon us, nor a product of our own will or indeterminate drives, but rather a complex nexus of all these (and other) things that variously impinge upon the self as it develops over time but can only ever be understood in relation to its world-immersed nature and never simply as an abstract idea or concept.

Having seen in Chapter Six something of the complexity and excessive nature of the self with respect to attempts to conceptualise it generally, Chapter Seven, 'Making Criminal Identity', analyses the epistemological spectrality that underpins the rational choice understanding of the moral self specifically in criminal theory. This analysis sets up the move beyond the epistemological foundations that shape the limits of the rational choice approach. This chapter exposes the perspectivism inherent in the epistemological foundations that ground the making of criminal identity, and which remains limited through the adherence to rational ways of knowing. Nietzsche's metaphysics suggests an understanding of the surface of reality as complex and folded, unable to be experienced in its entirety, only able to be understood from limited

perspectives. The perspectives of rational language encounter only limited dimensions of this complex surface, and set up what is termed a 'rational surface'. Through a general application of Foucaultian disciplinary philosophy, concepts and understandings that are constructed upon this rational surface are seen to be symptomatic of their adherence to it. Rational choice is such a concept, and thus it is with the world 'beyond' the rational surface that we need to engage if we are to overcome the limitations of rational choice models of the moral self. In short, we need a different epistemological perspective from which to build, or make, models of the self-as-responsible; a perspective that can encounter the complex and indeterminate (non-conceptual) world outside the rational surface. Part Four of this thesis undertakes this task.

1.2.4 *Part four: 'Escaping the rational surface'*

Part Four is divided into two chapters. Chapter Eight looks at what it is that maintains the rational surface and thus perpetuates its blocking of the indeterminate world beyond its borders, whilst Chapter Nine puts forward an alternative epistemological approach that reconfigures the rational surface and thus our ability to conceive of the moral self in criminal theory. In examining the epistemological spectrality of the idea of 'rationality', which took place in Chapter Six, the masculine imperatives of the culture inhabited by Kant was seen as an important factor in shaping the key divide between the abstract and embedded self. In Chapter Eight, 'Maintaining the Rational Surface', the modern-masculine characteristics of the rational surface are analysed in more detail, again through the lens of *Watchmen*. Masculinity in this thesis is approached as non-monolithic, and is understood as a purely conceptual category, with associated characteristics such as power, strength, independence, and rationality – characteristics shared by 'rational' conceptions of the moral self. These traditionally masculine aspects constitute what is termed 'modern masculinity', a concept that this thesis argues as being typified by the masking of internal weakness or threat with an external projection of rational certainty. Under the aesthetic approach put forward in Chapter Four, the comics form encounters the limits of the rational and linguistic, that is, of rationally structured or 'conceptual' thought. The Kantian sublime also

encounters the limits of conceptual thought, and it is through analysis of the sublime that the way in which the rational surface is maintained is exposed. As the limits of conceptual thought, of the rational surface, are approached, the Kantian sublime turns away from the indeterminacy that threatens from beyond those limits – the formless 'chaos' of the unstructured universe of experience which is synthesised into knowable, rational forms on the rational surface. This modern-masculine masking of indeterminacy with the image of stable, rational forms is what maintains the borders of the rational surface, and thus blocks access beyond those borders. It is this modern-masculine approach that needs to be reconfigured.

Chapter Nine, the final substantive chapter of this thesis, puts forward a reconfigured epistemological concept of 'Relational Masculinity' (this is also the chapter title). This concept engages with feminist theory, specifically the work of Christine Battersby, and the Nietzschean metaphysics that informed the reading model of comics in Chapter Four, builds upon the self as a nexus of drives and influences expounded in Chapter Six, and is developed through the aesthetic lens of *Watchmen*. The relationship between the 'surface' of conceptual (rational and linguistic) knowledge and the indeterminate universe 'beyond' (unstructured, experiential existence) is reconfigured from one of masking the threat of chaos with an image of stable certainty, in modern masculinity, to one of 'peaceful' symbiosis and generative change that is able to engage with pre- or non-synthesised reality free from the dictates of rational knowledge. The chaos beyond conceptual understanding, in relational masculinity, is approached not as something that threatens order or brings inherent nihilism, but as a vast and restless world of generative potential that brings with it the challenge of difference and the meaningful lived realities of embodied individuals. It includes not only the non-rational and non-linguistic (non-conceptual) dimensions of the universe beyond the rational surface, but also the (substantive) spectral dimensions of the self beyond the hegemony of rational choice.

To close this final chapter, the rational choice models of criminal theory that opened Part Three of this thesis are considered in light of this new epistemological model. The central problem in rational choice is seen to be in making the fluid

dimensions of the self subservient to the rational will. The approach of relational masculinity suggests that this relationship needs to be re-ordered, with the rational will becoming merely one dimension of the complex, living self. The shifting indeterminacy of this self, and of the universe beyond the rational surface, also demands a 'restlessness' in the conceptualisation of both the self and the world(s) it inhabits; a restlessness that does not tend towards general settled categories and the presumption of rationality, but constantly re-engages with 'reality' via manifold forms of representation, including the aesthetic. The methodological contribution of this thesis is a vital part of this restlessness, as it opens criminal theory (and legal theory more generally) to engagement with aesthetic and artistic forms that have previously been omitted from the 'analytical cannon'. Reconfiguring criminal theory under relational masculinity moves us closer to understandings of the moral self that are better able to triangulate the qualities of the living, embodied self, and its astonishing behaviour, and thus develop more ethical understandings of responsibility that restlessly encounter these fluid and shifting dimensions.

PART ONE

LITERATURE REVIEW

CHAPTER TWO

Enriching Understanding

"The aesthetic speaks to our senses and not our intellect; our emotions and not our logic are engaged".[1]

2.1 Introduction

This thesis argues that the models of identity in criminal theory need to be enriched through engagement with the human and experiential dimensions of the moral self, and that we can approach these dimensions via an aesthetic methodology. This 'aesthetic enrichment' involves examination of the various human and experiential dimensions of legal phenomena, coupled with a questioning of settled boundaries and concepts, via engagement with various cultural and artistic products. The overview of work relating to this approach to enriching understanding in this chapter broadly relates to the use of non-rational or unorthodox forms of knowledge and analysis to bring legal theory closer to human life. On an epistemological level, it involves a tension between the ability of rational knowledge to construct general or abstract concepts or models of the world, and the fluid and irreducible dimensions of living reality that such rational approaches cannot properly access. Employing aesthetics can at least partially short-circuit this tension; it is the rich aesthetic quality of various artistic forms (literature, images, music), their 'non-rational' nature, that enables them to engage more meaningfully with the experiential dimensions of the human world.

This chapter identifies five major means of enriching understanding that a turn to the aesthetic may adopt. These are enriching understanding: of legal structures (Section 2.3); by exploring alternatives (Section 2.4); through example (Section 2.5); through supplementation (Section 2.6); and, of human nature (Section 2.7). All of the categories described below have fluid boundaries; they are not exclusive or comprehensive, and any one project may move between two or more of them. The

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[1] Manderson, *Songs without Music*: p. 11.

examples given under the headings below are by no means exhaustive, rather they are indicative of the predominant sorts of ideas that these indefinite categories represent and the varieties of ways in which cultural and artistic products have been used to bring insight in a legal context. It should be noted that there is a strong leaning towards literary or textual resources in the following overview. Partly this is because the field of 'law and literature' is an excellent and prolific example of how cultural and artistic products can be used to enrich legal theory. More importantly, however, in approaching the non-rational and the non-linguistic, we need not only an approach that can move beyond the rational limits of orthodox analysis (via engagement with images and the aesthetic in general), but also one that is sensitive to the quintessentially *textual* make-up of law and legal knowledge. Moreover, the major analysis in this thesis, of a work of comics, requires an understanding of interdisciplinary legal theory that is grounded in specifically narrative forms. Although it is the aesthetic in general that grounds the current project's methodology, importantly including the use of the visual, the use of narrative texts remains a central concern.

This thesis is interdisciplinary, but is substantively a critical legal theory study of criminal justice. In Chapter Five the 'legal' element of this thesis is specified in more detail,[2] but it needs some general clarification at this point. Although the current chapter refers to 'law' and the 'legal', the overall thesis does not look directly at the law per se, or even the criminal law more specifically. The focus is on moral identity, and how we think about moral identity, in criminal responsibility *theory*. It is a study that is 'once removed' from the hard law of criminal cases and doctrines. In this chapter 'law' oriented terminology is used because we are discussing the general interdisciplinary and epistemological issues involved in studying law via an aesthetic methodology, but as the thesis moves to consider its particular substantive topic, terminology will become more specific. The terms discussed will then be 'criminal

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[2] See Section 5.3.

theory' or 'criminal responsibility theory', or how more general legal knowledge or understanding relates to this area of theory, rather than loose references to 'law'.

Two things need to be mentioned (Section 2.2) before we turn to the five categories of enriching understanding. Firstly, given the importation of traditionally non-legal forms and ideas into legal theory the approach of this thesis involves, we need to examine the various issues related to interdisciplinarity generally. Secondly, we need a brief discussion of the debate surrounding the creation and location of meaning in processes of interpretation, an integral issue in both legal practice and the analysis of cultural resources. Crudely put, the question is whether we are actually uncovering an 'objective' or 'true' meaning, or merely constructing meaning through our subjective analyses (or somewhere in-between), and what problems or connotations this may have. Both of these preliminary issues remain of relevance throughout the remainder of the chapter.

2.2   Interdisciplinarity and indeterminacy

2.2.1 Interdisciplinarity

Interdisciplinarity can help to open up knowledge through its inclusivity, but there are risks involved, including dilettantism and undermining disciplinary authority. These risks need not mean that interdisciplinary approaches should be discounted. Imagining legal and various artistic or cultural products as partaking in a 'shared enterprise' of engaging with law and justice avoids treating either reductively and enables interdisciplinary approaches to enrich our understanding. Without the ordering force of disciplinary organisation, it has been argued, our knowledge of the world would be chaotic;[3] the disciplinary classification of knowledge has enabled thought to become more structured, thus empowering our ability to understand

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[3] Douglas W. Vick, 'Interdisciplinarity and the Discipline of Law' *Journal of Law and Society* 31, no. 2 (2004): p. 166. Indeed, as we shall see in Part Four, the chaos of the unstructured universe constantly threatens to disrupt the rational order of the world. See in particular Sections 8.2, 8.5, and 9.4.

reality.[4]   However, disciplines have also given rise to subject-specific meanings, terms, and 'jargon'.[5]   Furthermore, a narrow disciplinary focus may cause the ramifications of research to be overlooked, resulting in unforeseen social harm.[6]   *Interdisciplinarity* crosses the boundaries between existing disciplines.   Minimally, this is an integration or synthesis of theories or methods of one discipline with those of one or more other disciplines; an interdisciplinary study can be located upon a sliding scale from this minimum up to a maximum where two or more disciplines may become a single entity, capable of being a discipline in its own right.[7]   Interdisciplinarity can also be understood as an attempt to 'colonise' other disciplines (or elements thereof) in order to expand the disciplinary 'empire';[8] or, as working in the unexplored 'grey areas' *between* disciplines.[9]   Nissani, a notable voice in interdisciplinary theory, gives a succinct and encompassing definition:

> "To begin with, a *discipline* can be conveniently defined as any comparatively self-contained and isolated domain of human experience which possesses its own community of experts.   *Interdisciplinarity* is best seen as bringing together distinctive components of two or more disciplines."[10]

This description is fluid, allowing variation in both the number of disciplines and the level of integration involved in the specific research.

In a legal context, it has been argued that law "is a social practice that embodies a complex intersection of theories; it is not a theory unto itself",[11] and thus legal understanding necessarily involves looking at external disciplines – it is *inherently*

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[4] Jack M. Balkin, 'Interdisciplinarity as Colonization' *Washington and Lee Law Review* 53 (1996): p. 955; Vick, 'Interdisciplinarity and the Discipline of Law': p. 167.

[5] Vick, 'Interdisciplinarity and the Discipline of Law': p. 167.

[6] Moti Nissani, 'Ten Cheers for Interdisciplinarity: The Case for Interdisciplinary Knowledge and Research' *The Social Science Journal* 34, no. 2 (1997).

[7] Vick, 'Interdisciplinarity and the Discipline of Law': pp. 164-65. (Citing Nissani.)

[8] Balkin, 'Interdisciplinarity as Colonization': p. 960.

[9] Nissani, 'Ten Cheers for Interdisciplinarity': p. 207.

[10] ibid: p. 203. (Emphasis in original.)

[11] Kathleen M. Sullivan, 'Foreword: Interdisciplinarity' *Michigan Law Review* 100 (2002): p. 1220.

interdisciplinary.[12] Similarly, Richard Posner states that legal analysis of judgments and statutes is made up of techniques borrowed from elsewhere (typically logic and the careful reading of texts).[13] Despite this apparent inherence of interdisciplinarity in law, there are still traditional, or orthodox, approaches to law which are generally seen as 'acceptable' (Posner's logic and careful reading, for example) and those which are outside the boundaries of standard legal studies. It has even been argued that interdisciplinarity is actually impossible: supposed interdisciplinary studies, it is claimed, are merely answering questions of one discipline utilising methods and theories from another, and thus remain in their 'home' discipline. For instance, a study is answering *legal* questions and hence remains *legal* (rather than interdisciplinary), despite the use of external methods and ideas.[14] Whether it is the claim of impossibility or of inherence that is most convincing, on a practical level Nissani's definition allows distinction between areas of research which have a more focused disciplinarity (those that are 'acceptable') and those which gain insight from beyond traditional boundaries. Getting embroiled in the semantics of labelling a work as interdisciplinary or not may arguably go against the spirit of boundary crossing, but it is still important to be aware of any possible 'interdisciplinary' (or, more accurately, 'unorthodox') status for the purposes of justifying our particular approach, and to ensure we are aware of any potential pitfalls.

The negative reaction against much interdisciplinary legal scholarship stems from fears that it will undermine law's unique identity as a discipline.[15] This concern is not distinct to law: more generally it has been observed that "the interdisciplinarians' concern with interconnections [between disciplines] and the larger picture may be viewed as potentially subversive".[16] However, the legal discipline's central links to a particular professional practice arguably means that it cannot be fully undermined or

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[12] ibid: pp. 1219-20.

[13] Richard Posner, 'Law and Literature: A Relation Reargued' *Virginia Law Review* 72, no. 8 (1986): pp. 1358-60.

[14] Balkin, 'Interdisciplinarity as Colonization': p. 959.

[15] ibid: p. 950; Vick, 'Interdisciplinarity and the Discipline of Law': p. 187.

[16] Nissani, 'Ten Cheers for Interdisciplinarity': p. 213.

absorbed by another discipline.[17]   The very fact so many studies take the form 'law and…' shows law's strong identity alongside other disciplines.[18]   More generally, Nissani points out that:

> "Even under the best circumstances, an interdisciplinarian is unlikely to gain as complete a mastery of her broad area as the specialists upon whose work her own endeavor is based. She must risk dilettantism to gain her bird's eye view. She may become jack of all trades, master of none."[19]

This problem of only achieving superficial engagement with other disciplines is an important one. When we turn to literature or images to assist us in the study of law, if we fail to properly understand or comprehend the aesthetic object we are examining this may have important ramifications. It has been argued that the relevance and usefulness to a study of law should be assessed from a legal perspective, regardless of the shortcomings that the study may have in other epistemes.[20] This instrumentalises other disciplines, and raises issues: of whether it is acceptable to ignore the arguments, findings, and significance of that which we are instrumentalising within its own discipline; whether or not this is sensible; and whether or not, if it is impossible to take these things on board completely, we should even try. It may be easier and more acceptable to leave other disciplines well alone and 'stick to what you know'.

On some level, all knowledge is incomplete: we are engaged in an on-going process of learning, and we are far from achieving all the answers.   Debate and experimentation continue across all disciplinary fields. If we accept that we have not yet availed ourselves of all the answers, criticising interdisciplinarians for occupying a space where they cannot 'know everything' seems untenable.   As Nissani inspirationally tells us:

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[17] Balkin, 'Interdisciplinarity as Colonization': pp. 965-66; Vick, 'Interdisciplinarity and the Discipline of Law': p. 188.

[18] Balkin, 'Interdisciplinarity as Colonization': pp. 965-66; Vick, 'Interdisciplinarity and the Discipline of Law': p. 188. These two authors also claim that 'indoctrination' into specific legal modes of thought will ensure the perpetuation of law as a distinct discipline.

[19] Nissani, 'Ten Cheers for Interdisciplinarity': p. 212.

[20] Mark Tushnet, 'Interdisciplinary Legal Scholarship: The Case of History-in-Law' *Chicago-Kent Law Review* 71 (1996): pp. 932-34.

"…if we mistake disciplinary knowledge for wisdom; if we forget how much we don't know; if we forget how much we cannot know; if we don't set for ourselves, in principle at least, the idea of the unity of knowledge; we lose something of great importance. By persistently aiming at the hazy target of omniscience, interdisciplinarians help us remember these things. They spur us to see the various components of human knowledge for what they are: pieces in a panoramic jigsaw puzzle."[21]

If a study is being done in a genuine effort to open up the field of knowledge, to bring new and deeper insights into the questions of law and legal theory (through the innovative use of non-legal methods and theories, for instance), then that goes to the heart of what interdisciplinarity hopes to achieve as a general scheme – a move towards holistic knowledge. If, however, the study is being done purely because the author is 'bored' with their home discipline, or wants to show off their non-legal knowledge, or their writing ability, then this intellectual 'titillation',[22] or 'disciplinary tourism', may severely damage the study's worth. Although we have to accept that we may only be engaged in superficial dabbling with multiple disciplines, provided a genuine effort is made to know and understand as much about our chosen disciplines as we can then this superficiality can be mitigated. Partaking in disciplinary tourism goes against this call.

The aesthetic approach to law taken in this thesis is an interdisciplinary endeavour: it straddles the disciplinary boundary between legal studies and the worlds of literary fiction, of visual culture, of sensory experience; it brings together distinctive components of law, legal theory, jurisprudence, aesthetic philosophy, fiction, image, and literary studies. It may seem that law and literature is an overt example of legal aesthetics: components of literature, such as metaphor and narrative, are brought together with components of legal studies, such as concepts of reasonableness and moral agency; or the analytical tools of literary studies are brought together with legal judgments and statutes. Desmond Manderson, however, argues that law and

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[21] Nissani, 'Ten Cheers for Interdisciplinarity': p. 210.

[22] See, for example, Tushnet, 'Interdisciplinary Legal Scholarship': pp. 910-14. Note also, more generally: "Some people feel that any attempt at interdisciplinarity smacks of dilettantism, perhaps even charlatanism", Nissani, 'Ten Cheers for Interdisciplinarity': p. 203.

literature tends to treat its two elements separately, linking 'law' with 'literature' only though analogy or metaphor; legal aesthetics, meanwhile, engages with the aesthetic as a way of knowing that legal knowledge cannot exclude and which stems from our embedded experiences as living humans.[23]   Despite this difference, and as already suggested in the introduction to this chapter, as an area of interdisciplinary or culturally-oriented legal theory that has received a great deal of attention, various works of law and literature remain important in grounding the broader aesthetic approach taken in this thesis, particularly given the focus on examining a pseudo-literary narrative form such as comics.

Applying an aspect of interdisciplinary study specifically to law and literature, Binder and Weisberg observe the following:

> "All such interdisciplinary importations share an implicit logic. The host and guest disciplines are in one sense interchangeable – each can illuminate the same phenomena. Yet their powers of illumination differ in quality or quantity. The guest discipline can correct the host's deficiencies, either improving it or displacing it altogether. To import literature into law is therefore to see the two enterprises as potential collaborators or competitors in the same enterprise."[24]

Legal theory, amongst other things, tackles many issues relating to jurisprudential and moral philosophy, such as the nature of the responsible moral agent.[25]   Seeing literature as a collaborator or competitor in this endeavour, as an *alternative discourse*, we can use literary texts to explore diverse notions of moral agency alongside 'standard' legal theory,[26] the resultant 'shared enterprise' giving us a more holistic view of the issues in question. This argument can be extended to include aesthetic forms other than literature: film, television, poetry, music, painting, and comics, can also be seen as alternative discourses alongside mainstream theory or orthodox rationality. This co-operative relationship is also helpful in understanding the

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[23] Manderson, *Songs without Music*: p. 35.

[24] Guyora Binder and Robert Weisberg, *Literary Criticisms of Law* (Princeton NJ: Princeton University Press, 2000): p. 5.

[25] See Chapter Five of this thesis for discussion of criminal responsibility theory.

[26] For example, Williams, *Empty Justice*.

benefits of the aesthetic in the study of law without relegating both disciplines into reductive categories, where 'law' is "instrumental, analytic, rational, non-emotional, mechanical, and seriously doctrinal"[27] and art is its experientially rich, morally deep saviour, reconnecting law to the human nature which its doctrinal focus cannot comprehend.[28] As a shared enterprise, neither law nor the aesthetic is reductively stereotyped, but rather both can be employed together, each bringing their own usefulness, to tackle the complex problems of justice. It is this approach of a shared endeavour that underpins the aesthetic approach in this thesis: including alternative discourses such as literature and, more distinctly, comics will help to enrich our understanding and our ability to engage with the fluid and living dimensions of the moral self.

2.2.2 Indeterminacy of meaning

A general issue in studying anything, literary, pictorial, or legal, is the indeterminacy of meaning. With textual interpretation, for example, the challenge to traditional views of objectivism is that words are radically indeterminate, with no 'prior' nature that fully constrains how they can be read. As an arm of the aesthetic, literature (like law) relies strongly upon the interpretation of texts, including the study of that interpretation. The indeterminacy debate in literary theory questions where, or even if, the meaning of a text can be found. Ian Ward gives a comprehensive overview of the relevant debate.[29] He begins by arguing that, although it may be fashionable to hail the 'death of the author'[30] with respect to the creation of meaning, in a more practical sense the author is important in determining the function of a created text

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[27] Jane B. Baron, 'The Rhetoric of Law and Literature: A Skeptical View' *Cardozo Law Review* 26, no. 6 (2005): p. 2274.

[28] Regarding seeing 'literature' reductively as this saviour, see Jane B. Baron, 'Law, Literature, and the Problems of Interdisciplinarity' *Yale Law Journal* 108 (1999): pp. 1073-85; Baron, 'The Rhetoric of Law and Literature'. Note also the distinction between the rationality of law and the fluidity of the visual argued by Douzinas and Nead (see n. 76).

[29] See chapters two and three of Ian Ward, *Law and Literature: Possibilities and Perspectives* (Cambridge: Cambridge University Press, 1995).

[30] See Roland Barthes, 'The Death of the Author' in *Image-Music-Text*, edited by Stephen Heath (London: Fontana, 1977). Essentially, Barthes claims that it is in the *destination* of a text, in the reader and his or her act of interpretation, not in the text's origin (the author), where meaning and unity is to be found.

(for instance, whether it is a novel or a legal judgment). Indeed, Ward observes that most debate relates to the author's ability to control the significance, not the meaning, of a text.[31] Whether a text has a given meaning or whether meaning is generated by the reader, Ward continues, is important in the discovery of meaning in *any* interpretive exercise, legal or literary[32] (or, indeed, visual), and has significant bearing on our ability to share understanding of an interpretive object.[33] Ward concludes that this debate is ultimately irresolvable, placing the onus on us, as readers, to make up our own minds:

> "Is there a meaning to this text, this chapter? Well, I hope so but, if not, how will I ever know, so why should I worry about it? It is you, not me, who really matters, and you, as reader, must reach your own conclusions."[34]

The debate surrounding the indeterminacy of meaning in texts is thus a perennial issue, and is so for any project that seeks meaning through interpretation, including the application of law.

Focused on law's interaction with literature, Richard Posner avoids the problem of the indeterminacy of meaning in legal interpretation by distinguishing legal and literary texts.[35] Legal texts are functional, he argues, written for guidance and not, like literature, for appreciation. Whereas in literary interpretation we may happily subscribe to a more subjective view of interpretation, where texts can be deconstructed and meaning drawn out in indefinite ways by many interpreters, in the interpretation of legal texts this is an irresponsible practice:

> "The critic who interprets an ambiguous work of literature is not imposing his view on anyone else; the court that interprets an ambiguous provision... is

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[31] Ward, *Law and Literature*: pp. 28-42.

[32] ibid: p. 43.

[33] The typical rivalry, Ward observes, is between hermeneutics and deconstructionism: the hermeneutic claim is that intersubjective relationships between text and reader and between readers constrain meaning, thus enabling a community of readers to share meaning; deconstructionism, however, maintains that texts are radically indeterminate, unable to be constrained by any circumstance. See ibid: pp. 43-44.

[34] ibid: p. 56.

[35] Posner, 'Law and Literature'.

imposing its view on the rest of society, often with far-reaching practical consequences. This makes free legislative... interpretation problematic in a way that the free interpretation of works of literature can never be."[36]

Although literary analysis may be useful in better understanding the role and operation of rhetoric in judicial opinion, practically there is no problem with radical indeterminacy because, he claims, consensus of interpretation in law can be found through recourse to the intention of those who drafted the legal text in question, and thus meaning is not left wholly to the interpreter.[37] A major approach in the exposure of the radical indeterminacy of texts is that of deconstruction. Simply described, this approach treats legal language as inherently literary, as text the same as other forms of text, and hence it can be analysed in a way that exposes multiple meanings and interpretations, dependent upon the way the text is broken down, or deconstructed.[38] Posner argues that the deconstructive analysis of texts, which he claims breeds the indeterminacy of meaning, has no place in legal studies as it is a philosophical tool, not a legal one,[39] and thus again avoids the problems of indeterminacy. Posner, however, is focused on the practical concerns of interpretation in the legal profession. If, however, an indeterminate or deconstructive interpretation of a fundamental legal text is made in the pages of an academic journal, Posner's wide ranging consequences would arguably be hard to show. This is not because academic publications have no point or social consequences, but because academic inquiry is something very different from the binding legal pronouncements of judges in their official capacity. Posner's argument that to employ literary theory in the study of legal texts is irresponsible may not be as problematic as it first seems, at least not for the kind of philosophical or theoretical enquiry undertaken by many legal studies, including this thesis.

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[36] ibid: pp. 1373-74.

[37] ibid: p. 1365.

[38] Deconstruction derives from the work of Jaques Derrida. For overviews of his work from a legal perspective, see Douglas E. Litowitz, *Postmodern Philosophy and Law* (Lawrence: University Press of Kansas, 1997): pp. 87-108; Stacy, *Postmodernism and Law*: pp. 83-100.

[39] Posner, 'Law and Literature': p. 1360.

Even in a court setting, however, the subjective judicial interpretation of legal authority can be recognised without widespread social harm. The radical indeterminacy of texts in a legal setting is best represented by the work of Stanley Fish.[40] In general, for Fish:

> "...meaning cannot be formally calculated, derived from the shape of marks on a page;... there is no such thing as literal meaning, if by meaning one means ... a meaning that because it is prior to interpretation can serve as a constraint on interpretation."[41]

Despite this, Fish continues, a belief in the 'natural' meaning of words and language underpins the adherence to the 'plain use' of language in law and reliance upon language-based rationality.[42] Even if we adhere to interpretation constrained by recourse to authorial intent, as suggested by Posner, because authorial "intentions themselves can be known only interpretively, the meanings that follow upon the specification of interpretation will always be vulnerable to the challenge of an alternative specification".[43] Fish seems to imagine a world where texts cannot be meaningfully read as we can only ever gain an interpretation of a text, not its inherent 'truth', and thus we are deprived of any certainties. However, Fish refutes this reading of his anti-foundationalism. He breaks down the distinction between 'mere preference' and the constraint of an objective doctrine, such as law. Given that both 'mere preferences' and law are linked with (internalised) socio-cultural contexts and norms, the distinction, Fish claims, is merely one between two sets of normative obligations.[44] This broad notion sees theory as being only "one among many rhetorical forms whose impact and sway are a function of contingencies"[45] that cannot exist apart from a context of practice; thus there are no 'higher' principles for Fish, only

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[40] See Ward, *Law and Literature*: p. 46.

[41] Stanley E. Fish, *Doing What Comes Naturally: Change, Rhetoric, and Practice of Theory in Literary and Legal Studies* (London: Duke University Press, 1989): p. 4.

[42] ibid: p. 6.

[43] ibid: p. 8.

[44] ibid: p. 11.

[45] ibid: p. 25.

different principles from different places.[46] This complete lack of a realm of meaning prior to interpretation, Fish maintains, does not leave us fending for ourselves in a nihilistic free-for-all:

> "...the removal of independent constraints to which the self might or might not conform does not leave the self free [to do or interpret as it wishes,] but reveals the self to be always and already constrained by the contexts of practice (interpretive communities) that confer on it a shape and a direction... [Anti-foundationalist thought] deprives us of nothing; all it offers is an alternative account of how the certainties that will still grip us when we are persuaded to it came into place."[47]

The major criticism of this line of argument, Fish observes, is that if anti-foundationalism is claiming to be a 'true' foundation then it is a contradiction: either it inherently undermines itself, or it is just one opinion among many and thus has no serious claim. However, Fish notes, this:

> "...mistakes the nature of anti-foundationalism, which is not that there are no foundations, but that whatever foundations there are (and there always are some [as we can never not be in a context]) have been established by persuasion... [that is both] cultural and contextual".[48]

Foundations, he claims, are vulnerable to challenge from other localities and times, and this includes anti-foundationalism: it is not a contradiction for anti-foundationalism to assert the *vulnerability* of its own foundations as it would be to assert their impossibility.

Focusing specifically on the interpretation of precedent, and thus of a specific legal history, Fish applies the point that we are always interpretive and thus that there is no prior realm of knowledge or principle:

> "All histories are invented in the weak sense that they are not simply 'discovered', but assembled under the pressure of some present urgency; no history is invented

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[46] ibid: pp. 13-14. This is the basis of his argument that there is no such thing as 'theory' in the sense of there being some realm of abstract reason which informs and describes practical contexts.

[47] ibid: p. 26.

[48] ibid: p. 29.

in the strong sense that the urgency that led to its assembly was unrelated to any generally acknowledged legal concern".[49]

This application addresses the fears that if we accept that texts have no core meaning then judges can deviate from established doctrine in unacceptable ways, 'inventing' law from an 'invented' history of legal precedent. Although Fish's arguments are directed at Ronald Dworkin's metaphor of common law interpretation as a 'chain novel', they can also assuage Posner's fears as outlined above. With anti-foundationalism, Fish claims, judges are not unconstrained radicals: they cannot judge depending upon what they 'feel like', but rather they are restricted by their having to be 'judicial', because they are interpreting whilst being embedded in a certain (legal) context.[50] This is an application of Fish's broader point that we are always already in a context and always already involved in interpretation, and the various contexts we traverse in our lives are linked with different, potentially conflicting 'identities' and lead to different, potentially conflicting interpretations.[51] Interpreting in a judicial role is constrained by the judge's interpretations of what it means to 'be judicial', namely his or her interpretations of the guidelines and principles of law and policy.

In contrast to Fish, Owen Fiss has argued that although legal processes are based upon the interpretation of legal texts and rules, there are supreme governing rules and standards which constrain that interpretation.[52] Fiss's notion of objective constraints upon interpretation holds that there is an objective, 'correct', and 'true' interpretation of authoritative texts such as the US Constitution, whereas there may not necessarily be for other texts such as a novel or poem. What Fiss fails to see here, and similarly Posner with his recourse to authorial intent, is that these 'objective constraints' (or, for Posner, the reading of authorial intention) are necessarily interpreted as they are

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[49] ibid: p. 94.

[50] ibid: pp. 92-94.

[51] ibid: pp. 30-32. Fish gives the examples of being, variously, a father, a teacher, a son, a homeowner, and so on. Each of these 'identities', he claims, involves different constraints upon our interpretation, upon our understanding; they interact and potentially conflict with each other, but "being embedded means … being embedded always, and one does not escape embeddedness by acknowledging … that it is itself a fractured, fissured, volatile condition" (p. 32).

[52] See Owen Fiss, 'Objectivity and Interpretation' *Stanford Law Review* 34 (1982).

applied. When people have ideas and proceed to write them down, to translate them into marks on paper, to claim that sometimes the created text has a core, discoverable meaning, and sometimes it does not, seems highly arbitrary. Posner, at least, does not go this far; merely proposing instead a differentiation between the interpretive schemes employed in different (legal or literary) contexts. Claiming that some texts have a discoverable meaning and others do not is further undermined by Fish's anti-foundationalism – accepting that all is interpretation does not lead us to a problematic nihilism, but merely shows us that our foundations are changeable.[53] Following Fish, it is not such a difficult issue to accept radical indeterminacy, since interpretations are never unconstrained – judges still behave and think like judges.

The purpose of this chapter is not to become embroiled in this potentially endless debate, but to show that it is the move towards enriching understanding that inspires the use of the aesthetic and cultural forms in legal analysis, making such use a suitable grounding for the overall project in this thesis. In analysing the general ethos of 'enriching understanding' in aesthetic approaches, and its role in this thesis, the issues involved in undertaking interdisciplinary study just outlined, including the indeterminacy of interpretation, will remain important concerns.

2.3 Enriching understanding of legal structures

Enriching understanding of legal structures has two major dimensions: the study of processes and methods of interpretation of law qua text; and, the study of legal texts and institutions as cultural or aesthetic creations, which can be analysed to 'uncover' their cultural bases and techniques of rhetorical operation. Both of these approaches examine legal structures (textual and institutional) in ways that open them up to the epistemological limits of orthodox analysis, by situating them within wider contexts of reading and writing methods, and of their cultural locations and origins.

As already indicated, law and literature is an area of legal theory that has much to say about the analysis of textual interpretation. Even Richard Posner, despite his

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[53] See Fish, *Doing What Comes Naturally*: p. 27.

reluctance to engage with indeterminate or deconstructive readings of legal authorities, accepts that a "sympathetic engagement with literature" can be beneficial to our understanding of judicial opinions in terms of rhetoric.[54] For Kieran Dolin, who links law and literature through their shared "verbal character", it is a major intuitive connection between law and literature to see 'well-written' legal judgments as a form of literature.[55] This shared use of language undoubtedly makes it possible to apply literary methodologies to legal texts, but the question is one of appropriateness; judgments and statutes are not novels and poems, they operate within a distinctly legal field, being both functional and authoritative.[56] Legal texts, it might be said, should be analysed in light of their specifically *legal* worth – their relevance or 'correctness' in light of doctrine and theory – not whether they are 'well-written' or have linguistic flair. However, using literary methods to study law is not an attempt to show how 'literary' they are,[57] but rather explores the nature of linguistic meaning in the interpretation of texts and the connotations these findings may have for law as a quintessentially *textual* phenomenon.

On this level, rather than looking at literature itself, we should examine literary theory.[58] By showing the importance of language and increasing understanding of its operation for lawyers, there is a benefit to legal education that this methodology can bring.[59] James Boyd White, for example, focuses on the reading and writing practices of the legal profession and on how we control language to particular ends, using

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[54] Posner, 'Law and Literature': p. 1392.

[55] Kieran Dolin, *A Critical Introduction to Law and Literature* (Cambridge: Cambridge University Press, 2007): p. 25.

[56] Posner, 'Law and Literature'. See also law's famous 'field of pain and death' in Robert M. Cover, 'Violence and the Word' *Yale Law Journal* 95 (1986).

[57] If this is the aim, then the question of legal relevance becomes a strong one. Thus Dolin's claim that 'well written' legal judgments are a form of literature (note 55, above) has dubious relevance for the study of law.

[58] Baron, 'Law, Literature, and the Problems of Interdisciplinarity': pp. 1064-65.

[59] See, for example, Ward, *Law and Literature*: pp. 23-27. Generally, Ward holds that law and literature should focus more on education rather than getting too involved with the politics of law: pp. 22-3.

examples not only from law but also from literary fiction and academic texts.[60] Similarly concerned with uprooting the operation of language in law's construction, it has also been argued that statutes can be studied as if they were stories, examining them holistically and analysing their tone, theme, voice, style, characters, heroes, plot structure, and genre. This way of looking at evidence statutes for example, Ledwon claims, can enable us to re-imagine them in a different way, and brings awareness of the inherent role of storytelling in evidence law, both in terms of the use of evidence in constructing a convincing narrative and the particular narrative constructed by the law to govern the use of that evidence.[61] The general aim of examining the operation of language can help to enrich our understanding of legal texts, of how they are or should be constructed and applied by legal professionals, and the perspectives they adopt.

Although law relies heavily upon text and language, it does have other dimensions too (courtrooms and police officers, for example); hence aesthetically enriching understanding of legal structures entails more than just examining the interpretation of written language. Broadly, it includes the literary or cultural analysis of law, which, amongst other things:

> "...employs the techniques and principles of literary criticism, theory, and interpretation to better understand the writing, thought, and social practice that constitute legal systems and offers these techniques and principles as tools for reforming those legal systems".[62]

So, for example, through the literary analysis of the judgments in two cases of provocation to murder, looking at their linguistic style and construction, Dolin shows us two different legal voices, one authoritative and impartial, underpinned by patriarchal values, and one more personal, underpinned by a vision of law as

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[60] See James Boyd White, *The Legal Imagination: Abridged Edition* (London: University of Chicago Press, 1985). See also, for a more philosophical consideration of reading and writing practice in law, James Boyd White, 'Writing and Reading in Philosophy, Law, and Poetry' in *Law and Literature*, edited by Michael D. A Freeman and Andrew D. E. Lewis (Oxford: Oxford University Press, 1999).

[61] See Lenora Ledwon, 'The Poetics of Evidence: Some Applications from Law & Literature' *QLR* 21 (2003).

[62] Binder and Weisberg, *Literary Criticisms of Law*: p. 3.

instrumental in, and shaped by, social forces.[63] Although not a groundbreaking insight given the work of the critical legal studies movement, Dolin shows that different judges in different cases may differ in the cultural values they bring to their judgments, thus critiquing law's claim to objectivity. His example does, however, show how the cultural values of law can be 'extracted' using literary analysis. With Dolin's approach here we are not on a quest for the meaning of a legal *text*, but rather using literary analysis of form, style, and content to uncover the cultural bases and ideologies that shape that text. This in turn may be an important dimension of an examination of law within its cultural context. This approach, however, encounters the problem of interpretive indeterminacy, although not as profoundly as the explicit focus on interpretation just discussed. If we are analysing a legal text to uncover cultural and ideological bases, the question arises whether those foundations are actually being uncovered, or merely constructed through the analysis. A critical awareness must be maintained when undertaking or considering studies of this type, especially with respect to any conclusions or proposed reforms.

More broadly, Binder and Weisberg carve out four main types of literary criticism of law (hermeneutic, narrative, rhetorical, and deconstructive) and blend them into a cultural approach.[64] For Binder and Weisberg, hermeneutic criticism sees law as fundamentally interpretation. The debate over the objectivity of legal interpretation, they claim, takes place on a level that is too general to be useful and amounts only to sceptical misuse of literary theory.[65] Since legal interpretation "is an unavoidable and practical activity, theoretical demonstrations of its impossibility – or its possibility – seem somewhat beside the point".[66] Rather than observing this general indeterminacy of legal texts, Binder and Weisberg's hermeneutic criticism looks to the questions of why various interpretations come about and from what or where they stem,[67] locating

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[63] Dolin, *A Critical Introduction to Law and Literature*: pp. 33-40.

[64] See Binder and Weisberg, *Literary Criticisms of Law*.

[65] ibid: pp. 21-22.

[66] ibid: p. 199.

[67] For example, the resistance of constitutional amendments to uniform interpretation, they claim, is more insightfully understood as to stem not so much from the inherent indeterminacy of 'text' as from

various views of interpretation as emanations of particular political and cultural traditions.[68] This is similar to the cultural excavation attempted by Dolin, but for Binder and Weisberg it is but one limited tool that a broader cultural criticism can bring to the study of law.

Narrative criticism of law, they continue, sees law as narrative.[69] They claim that these types of critique have value and bite not in their challenging of law with some abstract notion of 'narrative', but by "examining, critiquing, and revising the particular narratives embedded in law, and the identities and institutions... [they] enable".[70] This understanding clarifies the benefit that approaches such as Ledwon's bring by linking the operation of narrative with the practical and constitutive functions of law. Rhetorical criticism of law, for Binder and Weisberg, draws on classical philosophy of literature, being "a concern with how language affects the emotions of the hearer" through the specific literary devices utilised within the text.[71] Deconstructive criticism, they say, "treats law as no more and no less literary than any other use of language", as an "inherently literary practice of [figurative] signification" which reduces its richness and complexity to being ostensibly 'letter' and no more.[72]

All four of these separate parts come together under Binder and Weisberg's notion of cultural criticism of law:

> "...the cultural criticism of law portrays law as an arena within which participants contest how persons, groups, institutions, and values are to be represented. In so doing, they interpret texts [hermeneutic criticism], retell and reframe narratives [narrative criticism], perform characters [rhetorical criticism], and use and reshape languages [deconstructive criticism]."[73]

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conflict between America's history of racial hierarchy and exclusion and its textual promise of equality; see ibid: p. 22.

[68] ibid: p. 199. See also Chapter Two of the same work.

[69] ibid: p. 22.

[70] ibid: p. 23.

[71] ibid: pp. 23-24.

[72] ibid: p. 25.

[73] ibid: p. 27.

This mixing into a cultural approach, they claim, changes each of the four types of criticism, each limited on their own but not exclusive, "into a more flexible and eclectic understanding of law as a practice that constantly appropriates, reproduces, and reshapes a culture",[74] thus transcending a simple textual association between law and literature and tapping into a more general aesthetic method of legal analysis. For Binder and Weisberg, 'literary criticism' is a vast toolbox which can be implemented with respect to legal texts variously to explore different aspects thereof.

Binder and Weisberg's work begins to take us beyond the textual dimensions of law. In this regard, the system's institutional and symbolic operation has also been examined from a specifically aesthetic or visual perspective. Costas Douzinas and Lynda Nead, in the introduction to their edited volume *Law and the Image*, observe a number of connections between the legal and the visual.[75] The general relationship between the two is seen as one of opposition:

> "Modern law is born in its separation from aesthetic considerations and the aspirations of literature and art, and a wall is built between the two sides. The relationship between art, literature, and law, between the aesthetic and the normative, is presented as one between pluralism and unity, surface openness and deep closure, figuration and emplotment. Art is assigned to imagination, creativity, and playfulness, law to control, discipline, and sobriety."[76]

Despite this, the two arenas share an interest in the proper demarcation of boundaries: both law and art want to maintain themselves as legitimate and distinct.[77] The connection runs deeper, they claim, with the display and maintenance of legal power through the deployment of particular aesthetic signs, dress codes, and images of authority.[78] The image of Justitia, with her sword, scales, and blindfold, is also related to elements of legal philosophy: images of Justitia can be seen to represent the

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[74] ibid.

[75] See Costas Douzinas and Lynda Nead, 'Introduction' in *Law and the Image: The Authority of Art and the Aesthetics of Law*, edited by Costas Douzinas and Lynda Nead (London: University of Chicago Press, 1999).

[76] ibid: p. 3.

[77] ibid: p. 4.

[78] ibid: pp. 8-9.

nature and role of law in various ways, and may reflect cultural changes through history.[79] It is also observed that law is an aesthetic creation that denies its created nature.[80] Although the texts in *Law and the Image* may be disparate with respect to an overall unifying approach to both 'law' and the 'image',[81] what it does show is that the visual and the legal are not simply distinct fields: there are both overt and more subtle areas where they intersect. Moreover, through examining the aesthetic or visual dimensions of the legal institution we can further engage with the cultural foundations or contexts that surround it, and thus enrich our understanding of its structures.

2.4 Enriching understanding by exploring alternatives

The second category of enriching understanding this chapter examines is that of 'exploring alternatives', and relies heavily upon the worlds and understandings explored in primarily literary texts. One approach associated with reading legal texts involves looking at full trial transcripts in order to identify alternative or suppressed stories and voices as they unfold in the contest over the 'true facts' of a case, which may differ from the official story told in the judgment, thus enabling critical challenges to be brought against the justice process.[82] As Dolin notes, the goal with this type of approach is "seeking justice through supplementary storytelling and making the law a more inclusive forum".[83] This type of approach exploits the use, by both the legal and the literary, of narrative and storytelling techniques.[84] In a broader sense, the

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[79] For a discussion on representations of Justitia, particularly focused on the addition of the blindfold, see Martin Jay, 'Must Justice Be Blind?: The Challenge of Images to the Law' in *Law and the Image: The Authority of Art and the Aesthetics of Law*, edited by Costas Douzinas and Lynda Nead (London: University of Chicago Press, 1999).

[80] Douzinas and Nead, 'Introduction': p. 5. This aspect of the aesthetics of law is discussed in more depth in Chapter Seven.

[81] See Anne Baron, 'Spectacular Jurisprudence' *Oxford Journal of Legal Studies* 20, no. 2 (2000).

[82] Dolin, *A Critical Introduction to Law and Literature*: pp. 30-32. Indeed, as Skinner tells us, one of the main focuses of Dolin's work is on the hearing of alternative voices: Stephen Skinner, 'Keiran Dolin, a Critical Introduction to Law and Literature' *International Journal for the Semiotics of Law* 21 (2007): p. 163.

[83] Dolin, *A Critical Introduction to Law and Literature*: p. 32.

[84] ibid: p. 29.

exploration and opening up of possibilities beyond the dominant discourses of law and the legal subject is one justification for the study of any form of narrative fiction alongside law. For example, Thomson, writing from a feminist perspective, has shown how the dominant story of the medical doctor as normalising and prescriptive, found in both 1940s cinema and the legal imagination, needs to be challenged by writing alternative stories and discourses, thus enabling the facilitation of a role for the doctor which allows greater female autonomy.[85]

Working from a psychoanalytic perspective, Maria Aristodemou contends that the 'reality' in which we exist – that of reason, law, objectivity, and truth – is based upon language and linguistic forms, and that the 'real' world is not objectively knowable, not wholly discoverable or understandable. In other words, she argues, linguistic forms are inherently incomplete and contingent, they cannot fully describe the 'real' world, and thus our 'reality' is not objective, it is not 'true': it is a fiction. Artistic literary forms, she continues, do not deny their contingency and construction, their incompleteness; they are not afraid of contradiction and ambiguity. Due to this recognition of the inability to describe the 'real' world, literary realities are not attempting to discover the objective world; rather, Aristodemou claims, they create complete realities of their own, where dominant meanings can be challenged, disrupted, and our conceptions of self, identity, reason, truth, and law can be uprooted and subjected to speculation, projection, and possibility. Rather than causing far-reaching problems of indeterminacy, she holds that this projection of possibility opens up reality, expands meaning, and invigorates our experiences. In short, she maintains, fiction can bring the challenge of difference to the established order; it can uncover the representative, sign-based, contingent nature of 'reality' by recognising those elements in itself.[86] The idea that our world is a socio-linguistic construction rather

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[85] Michael Thomson, 'From Bette Davis to Mrs Whitehouse: Law and Literature - Theory and Practice' in *Law and Literature*, edited by Michael D. A Freeman and Andrew Lewis (Oxford: Oxford University Press, 1999): pp. 236-7. He adds that women's relation to science and to other health-care workers also need to be considered as areas for change: pp. 237-8.

[86] Maria Aristodemou, *Law and Literature: Journeys from Her to Eternity* (Oxford: Oxford University Press, 2000): pp. 1-28.

than a purely natural thing, a type of fiction rather than a plain fact, is not a new one,[87] although it remains in oppositional tension with the notion of reality as an objective fact that we can discover. Given that Aristodemou is talking psychoanalytically, however, her arguments take on a different nature: it is not that the physical, ontological reality we occupy is a socio-linguistic construct, but rather that the way in which we interact with, understand, and comprehend it is a function of language deeply embedded in our psyches.

Jerome Bruner taps into similar concerns when he examines the relationships between culture and law from a narrative perspective. For Bruner, stories are fundamentally about deviations from what is normally expected;[88] whilst literature looks to imagination and possibility to explore how we might overcome these unexpected events, law looks to the past and diffuses (or incorporates) the deviation in terms of accepted decisions in similar cases.[89] Similarly to how language constitutes the world for Aristodemou on a psychic level, it is narrative for Bruner that enables us to understand and manage the world in which we live on a cultural level. Bruner argues that culture in general is a repository of what is normal and of breaches to that normality,[90] and sees law as part of this cultural dialectic, attempting to deal with discrepancies between what is expected and what actually occurs.[91] As cultural navigations of the vicissitudes of life, then, both law and fiction engage with what the

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[87] Since Plato, philosophers such as Kant and Nietzsche have recognised a difference between an 'objective' or 'true' reality, that may or may not be accessible or even exist, and the world that we can experience or know only through our senses. On Plato, see Wayne Morrison, *Jurisprudence: From the Greeks to Post-Modernism* (London: Cavendish, 1997): pp. 31-33. Both Kant and Nietzsche play major roles in the overall thesis. On the truth/appearance distinction, see Sections 4.4 and 9.4 regarding Nietzsche, and Sections 5.2, 5.4, 6.3, and 8.5 regarding Kant.

[88] Jerome Bruner, *Making Stories: Law, Literature, Life* (Harvard MA: Harvard University Press, 2002): pp. 3-35.

[89] ibid: pp. 37-61.

[90] ibid: pp. 15-16.

[91] ibid: pp. 92-93.

world might be like, with the possible alternative paths of life and how they might be reconciled. In so doing, we may also ask or imagine what life could, or should, entail.[92]

Cultural products can also be used to explore alternative theories and conceptions of justice. Arguably more 'free' than traditional academic and philosophical discourse, which is constrained by disciplinary boundaries and conventions, literature can bring alternative and fresh ideas to a restricted academic discourse.[93] This notion highlights the interdisciplinary nature of the project of enriching understanding through aesthetic engagement in that it follows the line of aiming towards holistic knowledge of humanity, of bringing knowledge and skills from beyond law's standard disciplinary border to give a more comprehensive understanding of the problems of justice. Specifically on the use of literature as a way of constructing alternative models of morality, Melanie Williams for example extracts from various works some alternative and challenging models to be countenanced in moral philosophy.[94] Elsewhere, David Gurnham has studied traditional fairy tales in order to uncover the deep-rooted cultural conceptions of justice they express.[95] Fairy tales, he argues, make typical hierarchical distinctions between the seemingly 'good' and the seemingly 'bad'. These distinctions, however, are not as stable or unproblematic as they seem, as many fairy tales involve threats of danger from inside the family, but distanced through narrative devices such as denoting a mother as a 'step' mother, or symbolically relocating the danger 'outside' in the forest.[96] This destabilisation of oppositional terms, as with Aristodemou, can help us to re-think justice in novel ways, different from and beyond established orthodoxy and reductive oppositions.

Moving toward a more practical relevance of the literary in the public and political sphere more generally, Martha Nussbaum claims that reading literature, rather than

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[92] ibid: p. 94.

[93] See Williams, *Empty Justice*: p. 191.

[94] ibid. Williams's work is discussed in greater detail in Section 2.7.

[95] Note that fairy tales are not simply literary in the same way as a novel, deriving from rich folk traditions and oral histories. This point is returned to in the following section (Section 2.5).

[96] See David Gurnham, 'The Forest-Path of Law and the Wolf-Belly of Justice: Legal Theory and Fairy Tale' *Northern Ireland Legal Quarterly* 56, no. 4 (2005).

being an experience that can give insight into moral theory, can actually help us to move closer to justice through understanding people in relation to their complex histories.[97] She shows that reading literature can help educate us to imagine meaningfully the inner worlds of other people, and this 'literary imagination' can play a significant role in the construction of ethical judgments.[98] The novel-reading mind, she argues, is more able to avail itself of a concrete understanding of the humanity involved in a case due to its ability to imagine the lives of distant others. Through the use of a more aesthetic description of 'facts', and a more spectatorial participation in events, she claims that judgments can be ethically strengthened.[99] Nussbaum states that the 'literary judge' is:

> "Intimate and impartial, loving without bias, thinking of and for the whole rather than as a partisan of some particular group or faction, [and] comprehending in 'fancy' the richness and complexity of each citizen's inner world".[100]

The meaningful imagination of the inner world of others causes us to treat those others with respect; it gives a *practical* defeat of the solipsistic problem, in that the novel-reader treats others *as if* they have an inner world and history of their own.[101] Although it may not be possible to explore a person's history as fully as we can study a character in a novel, we can still recognise that humans have complex inner lives and bear this in mind when constructing rules and making decisions.[102]

Reaching a similar conclusion, but by a different route, Jody Freeman argues for a recognition of law as being an inherently *literary* activity.[103] She claims that this

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[97] Nussbaum, *Poetic Justice*.

[98] ibid.

[99] Perhaps ironically, given his famously critical stance on the use of literature with respect to law, she uses a judicial opinion of one Richard Posner as an example of how the use of the literary imagination can ethically strengthen legal judgments. See ibid: pp. 99-117.

[100] ibid: p. 120.

[101] She argues this with reference to children's stories, where reading and imagining teaches the young valuable moral skills. See ibid: pp. 38-42.

[102] ibid: p. 44.

[103] Freeman, 'Constitutive Rhetoric'.

literary nature of law plays a significant role in constituting our socio-cultural identities, in determining who we are, and often detrimentally so:

> "The ideology of the adversary system imagines that identity is constant, that we can capture, as if in a photograph, a person or a group's character in order to resolve a dispute. Not only does the system seem incapable of tolerating conflicting accounts of identity, it often perpetuates harmful, limiting stereotypes of particular kinds of people."[104]

Thus, in order to try and avoid the damages of reductive constructions of identity in law, we need to recognise this important legal effect. Freeman argues that we need, self-consciously, openly, and reflectively, to treat law as literary. Being aware that legal rhetoric is constitutive rather than expressive of reality will concurrently make us more aware of the effect legal constructions have on the socio-cultural identities of various people, and help us to treat these identities with more respect, and to aim to be more 'true' to the lives of the 'real' people that the law influences.[105] Rather than a focus on law as knowledge external to the individual, "a literary view of law", Freeman tells us, "points us to an inquiry that is directed inward, toward the speaker, the goal of which is to create greater flexibility in our literary and legal practice".[106] This argument overlaps with Nussbaum, in that both present a model which could potentially enrich our understanding of alternative voices, of alternative modes of life, which the law may currently attenuate or even exclude.

These approaches just discussed all attempt to develop ways of engaging with that which is alternative to, or different from, orthodox legal understanding. They traverse the lived realities of those whom the law affects, the ways in which legal knowledge constructs reality and attempts to manage deviations from what is expected or normal, different structures of morality, and the possibility of assembling trial

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[104] ibid: p. 311.

[105] Indeed, the concern with the limited nature of legal constructions of identity with respect to the living individual underpins the central concern of this thesis: that the models of moral identity in criminal responsibility theory are unable to encounter the richly complex lived realities of embodied individuals, and thus engender injustice in the attribution of responsibility. See, for extended discussion setting up this problem in criminal theory, Chapter Five.

[106] Freeman, 'Constitutive Rhetoric': p. 322.

narratives in different ways. The alternatives explored, predominantly by law and literature, are thus both practical and abstract, but the inclusion of these alternatives has a common purpose: making legal understanding both richer and more contextual by including a range of cultural and literary perspectives beyond the legal.

2.4.1 *Indeterminacy and the turn to literary culture*

The indeterminacy of meaning problematises these various ventures of exploring alternatives in different ways and to different extents. The approach taken by Aristodemou, for example, of using fiction as a crucible within which dominant meanings can be challenged, arguably benefits from indeterminacy. If both the meanings being challenged and the interpretations challenging them are plural and shifting, then this brings an increased challenge, via increased difference, to the established order, enabling deeper criticisms to be made, questioning any form of 'answer' that may be established. This highlights the constructed nature of our world and our moralities and guards against taking anything as given and sacrosanct, thus enabling fluid engagement with all types of moral concepts; over-highlighting the inherent instability or impossibility of 'answers', however, could lead to practical problems in adjudication. At the other end of the scale, the project of uncovering alternative voices in trial narratives is strongly affected by the indeterminacy problem: whether we are uncovering what 'suppressed voices' are actually saying, or whether we are constructing them through analysis, is an overt problem. Indeterminacy problematises our ability to state how much of the critical challenge brought to the dominant trial narrative stems directly from the unheard stories.

The type of approach taken by Williams, of using literature as a source for alternative concepts and notions of morality and human nature, also encounters the indeterminacy problem. If we are extracting moral theory from literature, the question is whether that theory is actually part of the work, or whether it is being constructed through the analysis. The issues raised by this question vary depending upon what is claimed to be extracted, and how that extraction occurs. Williams argues, however, that approaching literature as an alternative discourse in the shared

project of trying to discover the nature of humanity, as a way of engaging with alternative philosophies of justice using fictional examples and metaphors, releases the freedom of literary texts to 'play' with moral theory and ethical modelling.[107] In this case, indeterminacy may not be so problematic as we are not claiming to uncover any prior moral theory within a text, but rather that events, characters, and exposition can be usefully read to demonstrate or problematise elements of moral philosophy. If, however, we *are* attempting to extract foundational values then the indeterminacy of the text becomes a bigger issue. However, Rob Atkinson argues that a denial of the ability to 'uncover' objective values in literature does not necessarily lead to problems of nihilism, because we interpret in a way that is meaningful to us, and can thus use alternative discourses, alongside orthodox approaches, to help in the construction of meaningful values that do not require objective grounding.[108]

Another critical issue with these approaches to the exploration of potential alternatives is the specific turn to literature or literary analysis. It may be possible to imagine alternatives without using the literary to do so. It may also be the case that different ideas can be put forward and examined in 'normal' academic debate, or uncovered through other types of socio-legal analysis, without recourse to literature (or, indeed, to aesthetic knowledge of *any* form). We need to consider what it is that a cultural product brings to this endeavour. This question is important in examining and establishing the link between law and literature (and to the aesthetic more generally), but it is also a question which is difficult to answer fully. The general idea behind this 'alternatives' approach is that we may be able to imagine alternatives and examine ideas in 'normal' discourse, but with issues as vast and seemingly insoluble as justice, morality, truth, and human nature in question, the more we can take into account, the more diverse our imaginings and alternative ideas, the better an understanding of the problems we will have. Indeed, as Bruner suggests, the imaginative tendencies of

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[107] Williams, *Empty Justice*: p. 191. See also, generally, her introduction to the same work.

[108] Rob Atkinson, 'Nihilism Need Not Apply: Law and Literature in Barth's *the Floating Opera*' *Arizona State Law Journal* 32 (2000).

stories in general, coupled with narrative's malleability and flexibility,[109] supplement well more factual approaches to understanding.[110] Furthermore, the rich aesthetic nature of literature means it may be able to access, as an alternative discourse, dimensions of existence that may be unreachable for more 'rational' or linear discourses alone.[111]

A caveat needs to be stressed in relation to this approach, however. Although in understanding complex problems of justice, morality, and human nature it is helpful to look beyond traditional borders, we must be discerning in what we take on board.[112] We may gain insight from engaging with literary culture, insight that might play a role in helping to construct a moral theory, but this role should not be as uncriticised foundations.[113] The specific insights of any interdisciplinary study must be subjected to critical scrutiny, not accepted without question. Findings and ideas from other disciplines have not necessarily taken the intricacies of law into account, just as legal insights may not have taken all dimensions of its social, cultural, or linguistic contexts into account. The move toward a more holistic knowledge is not a blanket justification for the use of the literary in every avenue of legal studies. Literature may be more relevant to some types of legal issue than to others, and a specific justification for the turn to literature (or another cultural form) needs to be made in each case. The more academically accepted methods for analysing cases and legal texts will always be there, and literary approaches must continually jostle for position, they must be carefully justified each time they are used, in a similar way to how the use of *any* methodology needs to be justified. Law and literature, however, being interdisciplinary (or unorthodox), also needs to justify itself over or alongside other, more disciplinary (or orthodox), methods of legal study, and it cannot do this in a

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[109] Bruner, *Making Stories*: pp. 27-31.

[110] ibid: pp. 102-07.

[111] See Section 2.6.

[112] See Williams, *Empty Justice*: p. xxi.

[113] Nussbaum, *Poetic Justice*: p. 12.

general sense; each work must be taken on its own merits.[114]   Bearing this and indeterminacy in mind, at the level of pure theoretical engagement (the level at which this thesis operates) the turn to the literary as an alternative discourse may be a rich tool for constructing and engaging with rich understandings of moral and criminal justice issues that deviate from those in more orthodox analyses.   It is this ability to engage with alternative conceptions that makes the specifically literary or narrative aspects of comics suitable for the project of enrichment undertaken in this thesis.

2.5   Enriching understanding through example

This third category of enriching understanding involves mining culture as a source of examples that can assist in the analysis of legal issues.   Ian Ward points out that the use of narrative example and metaphor in law is not new – certain jurisdictions (such as Jewish and Islamic law) have been using these devices as part of their orthodox jurisprudence for a long time, and classic writers such as Aristotle, Aquinas, and Bacon have also employed them.[115]   Contemporarily, on one level the aesthetic can arm us with detailed and illustrative examples and metaphors to help elucidate legal problems and principles.   It could be argued, however, that this approach puts literary and artistic culture in an almost instrumental role, as merely a way of helping to explain something else.   Giving the aesthetic a more central position, we can use it to supplement understanding of particular realms of human experience; for example, by using literature alongside other more established disciplines to help explore particular topics or socio-cultural groups.[116]   Prioritising even further, the aesthetic can be seen as something through which we can access understanding of ourselves; as a way of knowing that the study of which can help us get closer to human nature.[117]   In its most

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[114] For Baron, this issue is an outcome of the observation that we may be unable to discern a coherent 'movement' in law and literature.   However, she resists the descent into a detailed analysis of each and every work, opting rather to speak of a loose 'enterprise' of law and literature that explores connections between the two disciplines: see Baron, 'Law, Literature, and the Problems of Interdisciplinarity': pp. 1073-74.

[115] Ward, *Law and Literature*: pp. 4-6.

[116] See Section 2.6.

[117] See Section 2.7.

rudimentary sense, enriching our understanding of law through example can include the brief use of examples from literature in courtroom judgments to help make a particular legal point. The works cited (usually in passing) in this context are typically traditional literary 'classics' or 'greats', such as those by authors like Charles Dickens,[118] Franz Kafka[119] and George Orwell.[120] 'Classic' literary works have also been used in a more sophisticated way. For example, Marc Roark extracts three models of loneliness from three classic works of modern literature, using them to construct three different ways of thinking critically about law.[121]

As the large number of references to literary analysis so far in this chapter may suggest, it tends to be literature that is appropriated from the wider culture in attempts to enrich legal understanding. As Peter Goodrich observes:

> "It is language in the end which remembers, it is language which bears tradition and it is through language, through the dense pose of the text, or through the phonic rhythm of the oral history that we remember not simply the appearance of the past but also its discourse, namely that which must have been lived for that appearance and that speech to be possible."[122]

For Goodrich, textual language is part of a complex of forces at play in the movement of law through history, a complex which includes the oral and the visual as much as text and abstract authority.[123] Accordingly, Goodrich critically examines a number of images and visual artworks, giving an analysis that pushes us outside the orthodox

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[118] See, for example, *Bradford & Bingley Plc v Rashid* [2006] 4 All ER 705: p. 732.

[119] See, for example, *R (on the Application of Anufrijeva) v Secretary of State for the Home Department* [2003] 3 All ER 827: p. 841.

[120] See, for example, *R v A.M. (Attorney General of Quebec and Others Intervening)* [2008] 5 LRC 536: p. 552.

[121] See Marc L. Roark, 'Loneliness and the Law: Solitude, Action, and Power in Law and Literature' *Loyola Law Review* 55 (2009). The three modes of thinking he identifies are: following major social forces; reacting against social forces; and, the model he favours, using deliberative imagination to rectify socio-legal problems

[122] Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld & Nicolson, 1990): p. 3.

[123] ibid: p. 2.

rationality of the linguistic legal order.[124] This fits the more general point of this thesis that in attempting to understand questions of justice in a world of living humans, engaging with alternative approaches to knowledge is a central way in which one can enrich understanding. Mythic narratives are another example of how this can be done, as although ostensibly linguistic, they transcend their codification in language by deriving from a form of knowledge traditionally employed to explain life and the beyond. David Gurnham's essay 'The Otherness of the Dead', for example, uses the myth of Narcissus (cursed to stare at his own reflection until his death) to challenge the 'exteriority of otherness' in questions of ethics:

> "In his reflected image, Narcissus regards the otherness within himself, the part that he will always long for and yet will never conquer. Every attempt to reach it simply disturbs the water and destroys the image, causing him to despair... The other is present to Narcissus inasmuch as he knows that it is within him and he can see it there in front of him, within touching distance. On the other hand, it is absent from him as he cannot touch it; it does not satisfy his desire, it exists only as an image that vanishes when he leaves or disturbs the water."[125]

According to Gurnham, it is this interplay of the absence and presence of the other within the self that enables us to move towards ethical judgment. If the other is fully separate from us, ethics becomes impossible; we need to embrace the infinite variation in the other, and recognising the spectral presence of the other within ourselves causes us always to consider the other when tackling ethical problems.[126] Like his analysis of fairy tales, Gurnham here engages not simply with a literary object, but with an emanation of cultural history.

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[124] See ibid: pp. 297-323. Note also the general opposition between the visual and the rational observed by Douzinas and Nead (see n. 76, above).

[125] Gurnham, 'The Otherness of the Dead': p. 342. See also Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks*: p. 302.

[126] Gurnham, 'The Otherness of the Dead': p. 348. This theme is important for the overall thesis argument. See especially Chapter Nine.

Continuing the cultural concern with myth, Desmond Manderson reads the children's story *Where the Wild Things Are* as a myth about the emergence of modern law, civility, and modern subjectivity.[127]

> "...it is not just a story. [The main child character] Max's dream represents a child's growing up in terms that are embedded in the myths of the history of the West; its multiple layers echo, resonate, and parallel the emergence of civilization from savagery... Max's recognition of the need for order is nothing but the disciplining of the wild things of his own subconscious, and therefore precisely the internalization of self-restraint that Elias insists *is* 'the civilising process'."[128]

Manderson takes the story to be a metaphor of the shift from mere *obedience*[129] to being *responsible* for our moral decisions, responding to a particular situation and thus making a moral choice.[130] *Where the Wild Things Are*, for Manderson, argues that it is love (represented in the story by the love between mother and son) that allows us to recognise our difference from others, showing us how our actions may affect or harm other people, and thus enabling us to behave responsibly.[131]

With these types of approach, examples from culture are used to explain something else. Metaphors or examples are extracted from a literary work, visual art, myth, or folklore, in order to enable a particular point to be made, a particular idea to be explained or described, a particular insight to be gained. With judges who briefly use 'classic' literature to make a substantive legal point, although the interpretations employed tend to be orthodox and overtly textual, this instrumentalisation is overt. With approaches like those of Goodrich, Gurnham, and Manderson, the instrumentalisation becomes more subtle. Being more in depth analyses of the literature or art in question, and also as emanations of cultural knowledge, lengthy discussions are established relating to the relevant themes and interpretations of the

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[127] Desmond Manderson, 'Where the Wild Things *Really* Are: Children's Literature and the Law' in *Law and Popular Culture*, edited by Michael D. A. Freeman (Oxford: Oxford University Press, 2004).

[128] ibid: p. 59. (Citing Norbert Elias's 1939 work *The Civilizing Process*.)

[129] As he rather poignantly puts it in the wake of the Nuremburg trials, of 'only following orders'. See ibid: p. 53.

[130] ibid: p. 65.

[131] ibid: p. 67.

work. Although Goodrich's approach is more overtly aesthetic, being an examination of visual art, all three expound the legal and theoretical connotations of their readings of cultural products, using their chosen examples in order to elucidate a particular point. From an interdisciplinarity point of view, this instrumentalisation of literary and visual products could point towards a failure to engage fully with the non-legal discipline. However, if the analyses are well-argued and well-evidenced by reference to the original text, the interpretive scheme in use is satisfactorily situated and justified, and other works analysing the same text are not completely ignored, then this may not be as problematic as it first seems. This is especially so when we remember the issues surrounding the indeterminacy of texts, and their ability to be reinterpreted with potentially infinite variety.

Richard Weisberg's 1984 work *The Failure of the Word*[132] can also be situated predominantly under the heading of enriching understanding through example. He analyses major works by four authors (Dostoevsky, Flaubert, Camus, and Melville), focusing on notions of Nietzschean 'ressentiment' (a "lingering, unwanted dependence" that is seen as insulting, and thus the ressentient[133] person uses "pervasive observation and complex intellect to insinuate [themselves] into power"[134]) and the legal mode of understanding the world. Weisberg's analysis of these classic texts shows a confluence between the legal and literary modes of thinking and understanding the world – they both attempt to structure and formulate reality. He traces this understanding through various novels, linking it with Nietzsche's notion of ressentiment, which he finds in various characters that employ literary-legal ways of thinking and being. Thus, Weisberg not only argues for an inherent link between legal and literary modes, linking law and literature through their shared methods of

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[132] Richard H. Weisberg, *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction* (London: Yale University Press, 1984).

[133] As used by Weisberg, this is the adjective form of 'ressentiment.'

[134] Weisberg, *The Failure of the Word*: p. 14.

ordering, structuring, and formalising the world, but that legal-literary understanding has become embroiled in ressentient values.[135]

The literary-legal mode of understanding fails to comprehend, again and again, the experiential, non-verbal, spontaneous lives of those it encounters, and instead rejects them: in Dostoevsky's inquisitors,[136] in Flaubert's destruction of ancient heroism,[137] in Camus's legal constructions of guilt,[138] in Melville's depiction of the ressentient destruction of Billy Budd.[139] Weisberg uses examples from literary culture to show us the failure of the word; its inability to understand that which is not based upon words – sympathy, spontaneity, and joy. Despite this, however, Weisberg believes that "whatever has furthered the preoccupation of the narrative mode with ressentiment can yet be altered",[140] that literary art, "ever the reflection of a culture's sense of itself, may again join with a positive system of law to generate admirable language".[141] Weisberg hopes, then, for a re-joining of justice and the word, of art and heroism, of language and action. The descent into ressentiment is not inevitable for the literary-legal mode of comprehending reality: for Weisberg, as for the authors of the works he studies, "the use of words in the service of positive values remains... a magnificent possibility".[142] (The distinctive argument of this thesis, however, suggests that the attainment of justice may require that we also consider *non*-linguistic discourses.[143])

Weisberg relies upon his well-reasoned and well-evidenced reading of the chosen novels, and is at pains to incorporate the interpretations of others, predominantly those from literary (as opposed to legal) studies, critically referring to these other

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[135] ibid: p. 178.

[136] ibid: pp. 65-81.

[137] ibid: pp. 85-113.

[138] ibid: pp. 114-29.

[139] ibid: pp. 160-76.

[140] ibid: p. 175.

[141] ibid: p. 176.

[142] ibid: p. 178.

[143] Weisberg's work is important for this move into the non-linguistic: see Section 7.5.

readings and citing 'narrative evidence' against them where he disagrees. This type of approach avoids a potential pitfall of instrumentalisation by not ignoring the findings and arguments of the second discipline (in this case, literary studies); the texts are considered, within a literary studies framework, from a perspective of one looking to understand the specifically legal connotations of these works. As an interdisciplinary venture, then, it is arguably a success: literary examples are discussed with respect to their legal significance, and thus they enrich our understanding of law, namely its links with literary modes of understanding and with deep-rooted cultural notions of ressentiment.

The linking of law and literature through a shared mode of understanding, however, ultimately takes Weisberg's study beyond the simple use of example to make a jurisprudential point. Through seeing legal and literary understanding of the world as essentially the same, and linked with a negative concept like ressentiment, alternative ways of understanding the world, and alternative bases for establishing values, are strongly implied. This over-arching notion, of moving toward a more spontaneous and sympathetic understanding, arguably fits more comfortably under the idea of enriching understanding through the exploration of alternatives. Here we have a strong example, then, of how one study can bleed through the porous borderlines of the loose descriptive scheme that has been adopted in this chapter.

2.6 Enriching understanding through supplementation

The fourth category of enriching understanding, through supplementation, examines how alternative ways of knowing can be used alongside more 'established' disciplines in the analysis of issues of justice. It has been argued that narrative example and metaphor can supplement legal *education* by increasing engagement with legal issues through the use of engaging stories; Ward highlights this educational benefit of the legal-literary crossover as a way of increasing student engagement with legal issues.[144] The educational benefit of literature, however, is put forward in a more general sense

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[144] Ward, *Law and Literature*: pp. 23-27.

by Martha Nussbaum.[145]   Although not focused specifically on legal issues, she suggests that reading literature enables us to learn how to imagine the inner worlds of other people, thus inculcating important moral skills of compassion, empathy, and understanding.[146]   "A society that wants to foster the just treatment of all its members", she claims, "has strong reasons to foster an exercise of the compassionate imagination that crosses social boundaries, or tries to.   And this means caring about literature."[147]   Learning moral skills from literature in this way can help enrich our understanding of other people, especially those different from ourselves,[148] and thus enable more meaningful engagement with 'the other'.   This role for literature goes beyond the use of narrative and metaphor to explain particular problems and issues. What we find, however, should not be simply accepted as the way others are, but needs to be filtered through our critical sensitivities.[149]   Thus the role of literature put forward by Nussbaum, rather than prescribing our understanding of others, *supplements* that understanding by enriching and encouraging our literary imagination.

Similarly, literary examples have also been used as supplements to other forms of analysis in efforts to increase our understanding of certain realms of human experience, such as terrorism,[150] and violence and pain.[151]   As a means of giving us more detail about certain realms of experience, the question of what benefits fiction can bring instantly becomes apparent, and it needs to be explained why we cannot understand experiences and emotions sufficiently through more 'orthodox' studies in disciplines such as anthropology, psychology and criminology; why it is that *fiction* can

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[145] See Martha C. Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (London: Harvard University Press, 1997).

[146] ibid. For an extended discussion of the role of the 'narrative imagination' in public (political and legal) life, see Nussbaum, *Poetic Justice*. See also discussion of that work in Section 2.4.

[147] Nussbaum, *Cultivating Humanity*: p. 92.

[148] See ibid.

[149] ibid: p. 100.

[150] Ward, 'Towards a Poethics of Terror'.

[151] See Stephen Skinner, 'As a Glow Brings out a Haze: Understanding Violence in Jurisprudence and Joseph Conrad's Fiction' *Legal Studies* 27, no. 3 (2007).

give us a deeper understanding of experiences in *reality*. One answer is that literary fiction, unlike non-fiction accounts, has the ability to capture multiple dimensions of an event, giving a broader representation free from linear or logical constraints and from moral pre-judgment.[152]   Taking this idea from a different, broader, perspective, alternative realms of knowledge can be brought into legal studies in an attempt to supplement our understanding not of particular types of experience, but of the workings of legal doctrine within wider social and cultural contexts. Richard Sherwin, for example, engages at length with various cultural forms (film, literature, news-media, the visual) in an effort to understand how the rules and institutions of law interact with and are influenced by the proclamations and creations of contemporary popular culture.[153]

Ian Ward, taking a different approach again, argues that literature can provide "a vital supplement to the clearly limited strategies of classical legal and jurisprudential discourse" with respect to our understanding of terrorism in a post 9/11 world.[154]

> "Behind the rhetoric of the terrorist zealot, and the counter-rhetoric of the public official, there will always be human tragedy. It is important that this simple truth is not forgotten. There will always be troubled children and haunted parents."[155]

> "Those who perpetrate terrorist acts, like those who suffer and experience them, do so emotionally, even viscerally. The terrorists who populate these novels, and their victims, are defined not by their ability to reason, but by their capacities for pain and fear, love and compassion. So are we."[156]

We need to use literature to supplement legal and political discourse on terrorism because it is such a complex and, above all, *human* phenomenon that 'discourse' alone cannot cope; the complex humanity of the experience of terrorism, on both sides, can

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[152] ibid: p. 475. (This argument is in relation to experiences of pain and violence.)

[153] See Richard K. Sherwin, *When Law Goes Pop: The Vanishing Line between Law and Popular Culture* (London: University of Chicago Press, 2000).

[154] Ward, 'Towards a Poethics of Terror': p. 250.

[155] ibid: p. 275.

[156] ibid: p. 276. Indeed, as the overall argument of this thesis claims, our capacity for 'rational choice' is only one dimension of the vast indeterminate complexity of the living self. See Parts Three and Four in general, but especially Sections 5.4, 6.5, 9.2, and 9.6.

be countenanced more fully if literature is also included. In this 'supplementary' approach, Ward borrows strongly from the ideas of Nussbaum. Literature, they both seem to say, is a window to experience; it allows us understanding of and compassion towards people we do not know personally and who have experienced that which we have not. Whereas Nussbaum sees literature as a key element in our moral development, instilling in us from childhood the ability to imagine the inner lives of others, Ward gives literature an expressly supplementary role. For Ward, although literature is important, it is only so as a means of deepening and opening up our extant discourses relating to extreme and extremely human phenomena; for Nussbaum, it is the foundation of liberal ethics. Under Nussbaum, literature becomes not only a way of enriching our understanding of distant others through supplementation – both through study of the content of particular novels (of which we must be circumspect) and by encouraging us to imagine people's inner worlds and 'alternative' ways of living – but it actually forms the basis of our ability to relate to other people as more than merely human-shaped objects. Here Nussbaum, like Weisberg, transcends the borders of the descriptive scheme employed in this chapter, seeing literature as supplementary to our understanding but also as foundational in our ability to imagine alternative modes of being.

In a similar way to Sherwin's attempts to uproot the impact of the interaction between law and popular culture, Desmond Manderson's profoundly aesthetic approach to legal theory can also be seen as an attempt to supplement understanding of legal issues. Moving away from the tendency towards the literary, Manderson's *Songs Without Music* focuses upon aesthetic and cultural knowledge, including that of classical music. He uses the structures, themes, and 'moods' of various classical pieces to organise and inspire his engagement with law, and to enrich his understanding of the role of the aesthetic in the construction of legal systems.[157] Sherwin exposes many of the 'popular' or 'cultural' operational techniques that the law adopts, while Manderson brings out the more general aesthetic underpinnings of legal creation and

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[157] Manderson, *Songs without Music*.

development. Furthermore, whereas Ward and Nussbaum are attempting to use literary culture to help understand particular realms of experience, Manderson's approach is on more of a methodological or epistemological level, trying to pick apart the hegemonic and modernistic tendencies in legal rationalism in order to open legal theory up to a 'deeper' comprehension the role of law of human life.

In a similar vein, Ronnie Lippens examines the visual as a prophetic realm which manifests ideas in advance of more rational or textual constructions,[158] thus supplementing more orthodox understanding with aesthetic engagement. Analysing Gerard David's *Cambyses*, Lippens observes the emanation of a common idea of early modern governance in David's visual work over ten years prior to its diverse articulations in later textual productions.[159] Whereas Douzinas and Nead, as we saw earlier, suggest a relationship between rational text and aesthetic image of opposition or differentiation, Lippens suggests the ability of the visual's indeterminacy or openness to pre-empt the 'cleverness' of the linguistic.[160] Lippens's work may show the ability of images to articulate or 'contain' discourses that can supplement and help enrich the concerns of law and justice, but in relation to the approach in this thesis, like Douzinas and Nead, his examinations of law and the visual only touch upon the complex and intricate relationships that exist between text and image and the implications these may have for legal theory. The adoption of comics as a resource in this thesis, with the medium's distinct interaction of words and images, will require a consideration of this issue,[161] and this can help to overcome this lack of engagement with the relationship between words and images in a legal theory context. Indeed, as we will see, it is this epistemological 'in-betweenness' that gives the comics medium its unique insight when approached aesthetically.

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[158] Ronnie Lippens, 'Gerard David's *Cambyses* and Early Modern Governance: Notes on the Geology of Skin and the Butchery of Law' *Law and Humanities* 3, no. 1 (2009): pp. 6-10.

[159] See ibid. The textual works Lippens examines include those of Machiavelli (pp. 12-15), and Erasmus and More (pp. 15-20).

[160] See ibid: pp. 9-10.

[161] Part Two of this thesis engages with this relationship in a comics context, and with respect to the methodology of the current project, at length.

2.6.1 *Relevance and circumspection*

How we treat our 'findings' from such supplementary examinations is important. With this type of approach, aesthetic or cultural representations are not being used as *replacements* for other disciplines or methods, but merely to supplement them with an emotional and experiential understanding by examining different types of account and trying to move closer to the lived realities of other people, or to open knowledge up to different ways of approaching the world. This lessens art's ostensible irrelevance to studies of factual reality, as findings need to be situated within existing discourse.[162] The extent to which this is useful, however, remains debateable, and this kind of approach needs careful justification with each specific use. Ward's and Nussbaum's arguments are certainly alluring in the abstract, even romantic sense that we can better understand and help to heal the world by reading literature, but this abstract focus raises questions as to the relevance of their arguments. If taken on a practical level, the accuracy of depictions in literature of terrorist events – and the human emotion and existentialism that they engender – must be treated exceedingly carefully. This is not so much due to the rather dismissive argument that the author 'just made it up', but more to do with the inherence of textual indeterminacy discussed above. We may not be 'uncovering' experience, but rather constructing it through our own analytical lenses. Manderson's insights pre-empt this criticism by engaging directly with the ways in which knowledge is shaped by our analytical perspectives, and self-consciously attempting to supplement limited approaches with more culturally contextual ones. Manderson's work does not preclude issues of textual indeterminacy, however; if anything it exacerbates them. His work suggests that the extent to which experiences and emotions are actually being understood or uncovered by a supplementary analysis of literary or cultural forms, rather than merely constructed through that analysis, is always shaped by the particular perspectives and methods being used. By retaining awareness of this, the aesthetic can still be read as an insightful alternative discourse despite issues of indeterminacy; but if we are trying

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[162] See, for example, Skinner, 'As a Glow Brings out a Haze': p. 471.

to get to the 'true' reality 'behind' the text, however, the obstacle of indeterminacy remains.

2.7   Enriching understanding of human nature

The fifth category of enriching understanding examines how legal theory can enrich its understanding of human nature. The strongest defence of turning to literature in the study of law, Ward claims:

> "...is that law is a part of life and plays an integral role in the determination of the human condition. This is not, however, a purely legal condition. Once this is understood, then political, social and philosophical texts will be admitted to jurisprudential discourse. At that point there is also no reason why narrative texts should not be included in the discourse."[163]

This justification, that literature is just as much a part of human life as politics, society, and law, implies one major issue with the use of aesthetic culture as a means of deepening our understanding of ourselves (and hence of law and its role in our lives): that we need to situate law not simply in relation to some 'enriching' discipline, but also amongst a huge range of ideas (such as anthropology, medicine, philosophy, neurophysiology, and history) that are all trying to figure out who we are.[164] Again with a literary focus, Melanie Williams attempts to take up this challenge by extracting multiple conceptions of human nature from various novels, each linked with a different vision of morality. The question of human nature, she argues, is intimately and reflexively linked with questions regarding moral life.[165] The texts she studies uncover many ideas of humanity and fresh perspectives which, along with insights

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[163] Ward, *Law and Literature*: p. 154.

[164] See the introduction in Williams, *Empty Justice*.

[165] "But intimately, reflexively tied to the enquiry concerning the origin of the moral life, the origin of moral obligation, is that concerning the meaning(s) we ascribe to 'human nature'. For every hypothesis concerning the origin of the moral life predicates a conception of the key ingredients comprising human nature; conversely, each vision of human nature will participate in the production of a conception of the moral life and of moral obligation," ibid: p. 165.

from other disciplines, can help deepen our understanding of the "creature at the heart of philosophy and jurisprudence", ourselves.[166]

Anthropology, psychoanalysis, psychology, neurophysiology, and psychiatry, Williams argues, all have "crucial implications for our understanding of human 'nature', 'free will' and agency, in the realms of moral and legal philosophy".[167] One major point which comes out of Williams's complex overview of our knowledge of ourselves is that 'human nature' is an inherently unstable construction, existing in multiple and potentially infinite forms within the broad spectrum of human knowledge and experience.[168] This realisation, following Williams's argument that moral visions are derived from visions of human nature, has profound consequences for projects within the philosophy of justice.

> "Adrift in the cosmos, the unseemly scramble for *things*, and for others as things is the most meaningless project of all. For if no-one will come to our rescue [i.e. no God or gods exist], we must build in empty space from our frailties and our moral strengths as we come to know them, aspiring to the greatest good that we can muster from the fragments we collect of our joint humanity."[169]

We have to derive our morality from what or who we are – "the ought must derive from an authentic *is*"[170] – and the knowledge we have of ourselves, as Williams shows by placing her literary analyses alongside multiple other epistemological streams, consists predominantly of 'fragments', of glimpses and conjecture in various disciplines.

Here we have the heart of Williams's quintessentially interdisciplinary project, of her aiming towards the hazy target of omniscience lauded by Nissani.[171] Williams is

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[166] ibid.

[167] ibid: pp. 172-74. See also Melanie Williams, 'A Media Hijack - Rape, Householder Defence - Legal Debates Taken Hostage by *Straw Dogs*' in *Secrets and Laws: Collected Essays in Law, Lives and Literature* (London: UCL Press, 2005): p. 74.

[168] Williams, *Empty Justice*: p. 195.

[169] ibid: p. 216.

[170] ibid.

[171] See note 21, above.

taking on the huge task of collecting pieces of the panoramic jigsaw of human nature and trying to piece them together into an increasingly holistic view of humanity from which we can derive an increasingly universal moral vision.[172] Unsurprisingly, her work does not collate the entirety of human knowledge and meaningfully analyse it to bring out a comprehensive vision of the human subject. Rather, what she shows is the vast complexity and probable insolubility of the question of human nature, but in such a way that does not destroy the venture by rendering it hopeless. Throughout the work, Williams observes an 'existential anxiety', stemming from both the realisation that it is we, adrift in the void, that shape the moral world, and the terrifying responsibility that this entails.[173] Rather than crudely signalling the descent into nihilism, for Williams the removal of external sources of morality signals a need for a more deeply reflective consideration of our moral life:

> "That [our] speeding culture is accompanied by an existential anxiety reflects not only the need to shape a vibrant and relevant moral life and discourse, but one which is alive to the predominantly affective, rather than rational employment of essentialist views of otherness."[174]

Others, too, have made attempts to move beyond the 'nihilism' or 'relativism' that results from undermining universal or objective truths. There is obvious and on-going tension between claims to the impossibility of objectivity and those who claim that to appeal to objective truths and knowledge is the only way to establish a moral law. Many fear the rejection of objective absolutes because it can only end in nihilism or relativism:

> "...the suspicion lingers that the entire edifice of legal ethics, not to mention law itself, may crumble if it is not given a firmer basis or if loud lip service, at least, is not given to the notion that some such basis is really down there, discoverable if only we dig deep enough... Without such a foundation, critics fear, normative

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[172] Here we have a crossover between enriching understanding of human nature and through supplementation: Williams is using literature as a supplement alongside multiple fields of knowledge.

[173] See, for example, Williams, *Empty Justice*: p. xxiii.

[174] ibid: p. 215.

discourse will degenerate into either 'anything-goes' relativism or 'nothing-matters' nihilism."[175]

However, alongside Williams's claim that we can derive a meaningful ethics from our understanding of human nature, it has been argued that meaning can also be found in love and friendship once we reject objective principles, and that we can build a morality for ourselves without recourse to objectivity through open discourse and trust.[176] This may sound rather self-confident, but literature sounds a warning note that not everyone has the ability to form these 'close friendships', and that a breakdown of morality might ensue if we assume they can.[177]

It is not only literature that can enrich our understanding of human nature. Christine Battersby, in her extended feminist examination of the philosophy of selfhood, examines not only literary sources but also visual and artistic ones. Her analyses of these products do not only move us closer to understanding of living humans by engaging with the fluidity of aesthetic knowledge, but also enable the development and construction of models of selfhood that rely upon orders of knowledge that move beyond the traditional limits of masculine rationality.[178] Manderson's work on music and the aesthetic in general in the context of legal theory is again relevant here, as it exposes the inherently aesthetic structure of lived reality. Human nature is a profoundly aesthetic phenomenon – we exist and live not through rational understanding and logic alone, but through our physical senses, our emotionally embodied experience of the physical and symbolically accentuated world around us; even the supposed rationality of law is imbued with this enriched dimension of life, and an aesthetic methodology can expose us to deeper legal

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[175] Atkinson, 'Nihilism Need Not Apply': pp. 751-52.

[176] ibid.

[177] ibid.

[178] See Christine Battersby, *The Sublime, Terror, and Human Difference* (London: Routledge, 2007): pp. 135-56. Battersby's work, as the summary of her work just made in the main text may suggest, becomes important for the overall project in this thesis as we move to reconfigure the dominant and rational approach to knowledge-making in criminal identity in Part Four.

meanings.[179] In short, it is through engagement with the fluidity and expressiveness of art (literary, visual, musical) as alternative ways of understanding or knowing that we can come to enrich legal theory's comprehension of the world and the humans who inhabit it.

2.8 Conclusion

It could be said that any academic enquiry, any pursuit of knowledge, be it scientific or philosophical, is an attempt to enrich our understanding. If this is so, then claiming that law and aesthetics can be seen to inhabit a site of 'enriching understanding' is unhelpful; one could just as happily state, for example, that genetic botany and the history of European architecture also share the same predisposition. The phrase 'enriching understanding' used in this thesis, however, is not to be construed so widely. What it implies is not the general pursuit of knowledge, of learning, of 'enlightenment', but rather the move towards an understanding of legal issues and moral philosophy that is more concerned with experiential realities, lived experiences, and embodied emotionality – the broadly 'human' aspects and contexts of legal phenomena. Enriching, here, denotes not just the quantitative increase in knowledge, but rather a qualitative shift in understanding to include the multiple aspects relevant to questions of justice. This, essentially, is a shift towards an increasingly holistic knowledge, a mode of understanding that is inclusive, that is not restricted to or limited by pre-existing categories, that looks beyond the horizon of pragmatic legal abstraction to what might be overlooked in an effort to reassess the categories and assumptions that have already been established. This involves an important epistemological dimension of questioning established disciplinary boundaries and engaging with multiple fields of knowledge.

Thus, an aesthetic methodology can attempt to understand more about how legal texts and institutions operate – how they describe, how they categorise, constitute, control, and communicate – by applying literary theory to them and excavating their

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[179] See Manderson, *Songs without Music*: p. 52.

aesthetic dimensions. It can also explore alternative trial narratives, alternative conceptions of truth, justice, and reason, alternative modes of life, and how legal understanding deals with unexpected events, which might help to improve our legal structures. Culturally enriched examples, from literature, myth, art, and folklore, can be used to try and deepen our understanding and articulation of the human dimensions of legal issues. An aesthetic methodology can attempt to supplement our understandings of reality, of the lives of others, of extreme human experiences, of rational approaches to life, in an effort to maintain a more accurate or representative comprehension of reality and the human experience of it in our legal models. Moreover, attempts can be made to understand as much as possible about the very core of the legal and moral question, ourselves, by looking into our 'human' nature and the aesthetic structure of lived experience, of which both law artistic expression are but parts.

The current project continues in this general vein. In trying to understand the moral self, it is argued, we need to approach the non-rational and the non-linguistic to engage more fully with the meaningful dimensions of lived, embodied reality. The general ethos of legal aesthetics just described, of approaching the 'human', the experiential, and the emotionally embodied via engagement with alternative ways of knowing, underpins this argument: cultural knowledge can help in the approach to those things outside the rational and the orthodox, those things that are more fluid, lived, and embodied; broadly put, more *aesthetic*. This move also involves an approach to the non-linguistic – the strong adherence to the security of language is one of the major limiting factors in our understanding of the moral self. Thus, as can be inferred from Richard Weisberg's work, against the author's own views,[180] literature alone may not be the most suitable medium to study in this context because it is unavoidably embedded within the linguistic. Hence the concern not just with law and literature, but with studies looking beyond the linguistic. The purely visual, however, also suffers limitations; being exclusively non-linguistic, it may also be an unsuitable

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[180] Weisberg may argue that we can still attain a 'just language', but this thesis holds that by remaining linguistic understanding also remains limited: see Section 7.5.

source of insight on its own regarding the overtly textual form of law. As already suggested, this thesis supplements these two limited realms by turning to a medium that integrates *both linguistic and visual dimensions*: comics.

Unlike many of the approaches detailed above, engaging with the dual visual-textual medium of comics has the advantage of being able to model some of the relationships between the textual and the visual, the linguistic and the non-linguistic in its very form. As we have just seen, in attempting to enrich understanding of legal issues, a variety of cultural forms – linguistic, visual, aural – have been examined. The particular approach of this thesis, however, adds to this body of work not by simply undertaking another analysis of a work of literature, or a painting, or a piece of classical music, but via the dual textual-visual medium of comics. It is this dual nature that makes comics so unique and so uniquely suited in the project of enriching understanding: the 'in-betweenness' of comics gives rise to an epistemological perspective that is not only able to bring an aesthetic depth to understanding, but is simultaneously able to encounter the boundaries between aesthetic knowledge and the rationality of traditional approaches to the world. Due to this epistemological make-up, and the distinct insight it can afford, the original approach taken in this thesis involves examination of various elements of comics, including the form's visual, textual, narrative, rational, and aesthetic dimensions, and interactions between them. The following part of this thesis examines in more depth the medium of comics and how it can be read in a way that encounters these complexities and thus unlocks its potential insights.

PART TWO

THE TURN TO THE GRAPHIC

CHAPTER THREE

Introducing Comics

"Rather than seizing upon the superficial similarities between comics and films or comics and books in the hope that some of the respectability of those media will rub off upon us, wouldn't it be more constructive to focus our attention upon those ideas where comics are special and unique?"[1]

3.1 Introduction

This and the next chapter build on the foundations laid down in Chapter Two. They move towards the innovation of an aesthetic approach to the enrichment of understanding via the medium of comics. An aesthetic model of approach is put forward in the next chapter, whilst the current chapter introduces the comics medium – examining its definition, cultural perception, and boundaries – and argues that it both can be included in jurisprudential study and is uniquely suitable for the project in this thesis. A corollary of this overall project is the expansion of the horizons of interdisciplinary legal study, an opening up not simply to works beyond the so-called 'canon' of literary resources (others have already made moves in this direction[2]), but to works of fundamentally different narrative form that can enable simultaneous engagement with the linguistic, non-linguistic, rational, and aesthetic. Comics is such a form, and can help enrich our understanding not only beyond the boundaries of the linguistic, but of the boundary itself.

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[1] Alan Moore, *Alan Moore's Writing for Comics* (Rantoul, IL: Avatar Press, 2010): p. 4.

[2] Note, for example, Aristodemou, who brings into consideration 'non-canonical' works by more recent female writers such as Angela Carter: Aristodemou, *Journeys from Her to Eternity*. Theorists like Desmond Manderson and William MacNeil bring children's literature into the fold: William P. MacNeil, '"Kidlit" as "Law-and-Lt": Harry Potter and the Scales of Justice' *Law & Literature* 14 (2002); Manderson, 'Where the Wild Things *Really* Are'. Joseph and Carton take the television phenomenon 'Star Trek ' as their object of study: Paul Joseph and Sharon Carton, 'The Law of the Federation: Images of Law, Lawyers and the Legal System in 'Star Trek. The Next Generation'' *University of Toledo Law Review* 24 (1992). Others extend their analytical focus to the world of cinema: Thomson, 'From Bette Davis to Mrs Whitehouse'; Williams, 'A Media Hijack'. See also, regarding 'the canon' generally: Michael Benton, 'Canons Ancient and Modern: The Texts We Teach' *Educational Review* 52, no. 3 (2000).

This chapter first examines the definition and history of comics, arguing that the medium is not simplistic or juvenile, as it is often perceived to be (Section 3.2). Comics' perceived juvenility stems from its history of censorship, whilst the medium's simplicity is arguably linked with its visually representative nature and its formal mixing of words and images. Following this background discussion, the following section (Section 3.3) accordingly considers the relationship between word and image in comics, highlighting the uncertainty of the boundary between the two and also the boundary between comics and 'traditional' literature. The chapter concludes (Section 3.4) with a brief examination of existing comics analysis in academic discourse relating to criminal justice, observing the extreme lack of work in this area, especially within legal theory, and especially that considers comics' aesthetic or epistemological dimensions, along with an introduction to the graphic novel *Watchmen,* being the major comics resource with which this thesis engages.

3.2   Comics background and perception

Many names have been attached to the comics medium, including 'sequential art', 'graphic novels', 'comic strips', 'comic books', and 'graphic narrative'. Many of these (such as graphic novel) can be seen as attempts to give the medium a more sophisticated appearance. The term *comics* (used in plural form with a singular verb[3]) will generally be used in the current work because it is a widespread term in the relevant literature, and avoids the problems associated with giving something a 'fancy' name to make it seem legitimate, rather than showing value in its study.[4] Regardless of the name used, the underlying medium is ostensibly the same (as we will see, however, defining that medium is not simple). Despite the general formal similarity there are still many different types of comics, and some of the names given to comics do loosely relate to specific types of publication. There are those 'comic strips' that are created specifically for younger readers, such as the *Beano* or *Dandy*, which

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[3] See Scott McCloud, *Understanding Comics: The Invisible Art* (New York: HarperCollins, 1993): p. 9.

[4] See Douglas Wolk, *Reading Comics: How Graphic Novels Work and What They Mean* (Philadelphia PA: Da Capo Press, 2007): pp. 60-67.

employ simple images and construct short, generally humorous, narratives around recurring characters. Similar to these, but often aimed at more mature audiences, are the short comic strips or single-panel satirical cartoons found in many newspapers; however, there is some debate over whether single-panel cartoons can be termed comics given their non-sequential form.[5] Animated cartoons are generally distinguished from comics because they are not static, and thus operate differently, but the two media do share some common aesthetic ground in the styles of images used. Alongside shorter comic strips we also find mainstream 'comic books', such as those produced and published by Marvel or DC, which are generally around 30 pages long and involve narratives that continue across multiple issues. The famous superhero comics (such as *Spiderman*, *X-Men*, *Superman*, and *Batman*) originated in this form, and are still generally published like this alongside other non-superhero narratives. These continuing narratives are often collected into single volume compilations similar to graphic novels. They are also sometimes created directly as longer graphic novels,[6] or series of novels.[7] Comics magazines also exist, which publish short or continuing works by various artists.[8] The practice of collecting a complete narrative or section of continuing narrative from shorter comic books into a single volume or graphic novel is a common practice in comics publication, especially in the mainstream, but longer comics are also created and published directly into graphic novel form. *Watchmen*,[9] the focus of the substantive analysis in this thesis, was originally published as a monthly comic book in 12 issues, and then collected as a single volume graphic novel; as such, it is a self-contained, stand-alone narrative told in 12 chapters. This is important to note, because many other collected novels may be

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[5] See, for example, McCloud, *Understanding Comics*: pp. 20-21.

[6] For example, Grant Morrison and Dave McKean, *Batman: Arkham Asylum* (London: Titan Books, 2010).

[7] For example, Robert Kirkman and Tony Moore, *The Walking Dead, Vol. 1: Days Gone Bye* (Berkeley CA: Image Comics, 2010). *The Walking Dead* consists of a series of 12 short graphic novels.

[8] A classic example is Art Spiegelman and Françoise Mouly's *RAW* magazine, produced from 1980 to 1991.

[9] Moore and Gibbons, *Watchmen*.

merely a part of much larger narrative streams that could impact greatly on how that work can be read.

3.2.1 A brief history of text and image

It has been argued that the comics form can be defined as sequential art, and as such has a very long history that stems back through pioneering satirical and sequential artworks like those of William Hogarth, and visual narratives like the Bayeux Tapestry, to pictographic languages like that of the ancient Egyptians.[10] However, as the combination of words and images articulated through sequential panels, for example, comics may only have existed since the work of Rudolphe Töpffer.[11] Although the word-image combination of comics that we see today may appear to be a relatively new and quintessentially 'popular' art form, like the deployment of sequential images artistically utilising a combination of text and image is not a new, or even recent, phenomenon.

> "In fact, the association of the epigram with an object of visual art is one of the oldest in the long history of pictorialism: aphorisms appeared under urns, monuments, statues, and paintings in antiquity".[12]

Even without going as far back as ancient languages and antique art, however, there can be seen four main areas outside of modern comics where text-image combination has historically been employed: 1) the illustration of literary works; 2) medieval illuminated manuscripts;[13] 3) the visual designs sometimes employed alongside poetry (most obviously in the work of William Blake); and 4) modern-historical political cartoons and caricatures. This section will briefly consider each of these areas in turn,

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[10] See McCloud, *Understanding Comics*: pp. 9-19.

[11] Rudolphe Töpffer is widely recognised as inventing, at the turn of the twentieth-century, the modern comics form with his use of panel borders and text-image combination. See ibid: p. 17.

[12] Jean H. Hagstrum, *William Blake Poet and Painter: An Introduction to the Illuminated Verse* (London: University of Chicago Press, 1964): p. 13.

[13] Note that 'illuminated' technically relates to manuscripts that have been adorned with gold or other precious metals, not simply 'illustrated': see Zoltán Haraszti, 'Medieval Manuscripts' *The Catholic Historical Review* 14, no. 2 (1928): p. 239. However, this section will use the term 'illustrated manuscripts' loosely to describe this general category of religious text-image works, as opposed to an illustrated text or novel.

examining the relationship between text and image that they rely upon or exploit. As we move through the above list, we will see a deepening relationship and integration between the visual and the verbal, setting up and grounding the profound interaction of word and image that we will see when we turn to consider the definition of comics more directly, and helping to establish the medium's particular dual-form as a powerful method of communicating and articulating meaning and narrative that is generally distinct from previous word-image art-forms.

The relationships between text and image in the practice of illustrating literary novels do not generally involve much in the way of complex interaction or juxtaposition. With this use of text-image combination, we find for the most part pre-existing works of literature that have been adorned or added to with a visual interpretation or representation of a specific part of the text. Although this may have some influence upon how readers might experience or interpret a particular passage that appears alongside an image, the text-image relationship is not a particularly complex one, and is not part of a unified artwork as the images are generally added after the narrative is complete.[14] In illustration, the images have three main functions: to represent the contents of a particular narrative section, to interpret that section in some way, and to decorate the physical volume.[15] As we will see, in comics the function of the images alongside the text is much more integral to and constitutive of the medium's articulation, and involves a much more sophisticated interaction with the text; comics images do not simply 'illustrate' prose.

When we consider the illuminated manuscripts of the medieval period, we see a slightly more sophisticated, and hence more relevant, relationship between text and image. Although it may be true that the written text is the primary dimension of these manuscripts (generally being prayer-books or scriptures), the accompanying images "should harmonize with" the textual aspects.[16] Hence Myra Orth, for example,

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[14] See generally Edward Hodnett, *Image and Text: Studies in the Illustration of English Literature* (London: Scholar Press, 1982): pp. 1-26.

[15] ibid: p. 13.

[16] See Haraszti, 'Medieval Manuscripts': p. 243.

examines border designs in illuminated French manuscripts, observing that the visual dimensions of manuscript pages, coupled with the text, are an integrated art form, not simply a method of decoration. These marginal images, which may initially seem only to have a practical function (in that they act as a 'buffer' between the edge of the page and the central text itself, thus protecting the main text from the being damaged as the book is held[17]), are actually part of the book experience, "serving to surround the main picture [or text] with often fanciful visual commentary, to enhance (and even compete with them) by attention-getting contrast".[18] This includes operating as a sort of aide-memoir, where the illustrated borders give visual cues to help readers memorise the meaning of a text.[19] Although these border images are not always linked iconographically with the content of a text,[20] they also serve to isolate the central image or text,[21] again giving protection – this time not from physical damage, but from interpretive interference from beyond the page.   With illuminated manuscripts, then, we see images being created alongside text (not as an afterthought, as with illustrated prose) and interacting with that text in a way that affects its readers' interpretative experience.

As we move to the inclusion of images in poetic works, namely the distinctive work of William Blake, we begin to see an art-form that is increasingly similar to the dual word-image make-up of comics.

> "Blake's books unite the labours of the craftsman and the artist: he invents both the text and its illustrations (often at the same time), cuts both into the copper plate as parts of one total design, and prints them on his own press… In one sense, then, there is almost something perverse about discussing the 'relations'

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[17] See Myra D. Orth, 'What Goes Around: Borders and Frames in French Manuscripts' *The Journal of the Walters Art Gallery* 54 (1996): p. 189.

[18] ibid: p. 191.

[19] ibid.

[20] ibid: p. 199.

[21] ibid: pp. 194-5.

between the constituent parts of an art form which is so obviously unified in both conception and execution."[22]

In many ways this mirrors the creation of comics: it is common for works to be created by a single artist, or through the close collaboration between a writer and an illustrator, and to be produced as a single work of integrated words and images. Indeed, like comics, the images in Blake's work involve more than decorating text with images: "An illustration that merely repeats what the words say can be conceived of as purely ornamental in a way that verbal-visual counterpoint cannot possibly be".[23] Again, as with illuminated manuscripts, we see a distinction with the mere illustration of prose. Moreover, with Blake's method we see the recourse to images as a way of aesthetically augmenting the rationality and life-denying generalisations typically associated with textuality in neoclassical culture.[24]

Comics are largely differentiated from these various historical forms of word-image combination by the sophistication and unification they entail with respect to the visual-verbal relationship. As we will see throughout this and the following chapter, the comics form involves a variety of complex tensions and inter-relationships. The longstanding art of cartooning, or caricature, is overtly similar to the word-image appearance of contemporary comics (as Scott McCloud notes, they share much of the same 'visual vocabulary' as comics[25]). However, unlike the general representational immediacy of comics, David Carrier argues, making sense of caricature may require more external knowledge to contextualise a panel.[26] This is especially true of historical political cartoons, such as those found in the famous nineteenth-century satirical journal, *Punch*. This historical genre of cartoons and caricatures generally tap into the

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[22] WJT Mitchell, *Blake's Composite Art: A Study of the Illuminated Poetry* (Princeton NJ: Princeton University Press, 1978): p. 15.

[23] Hagstrum, *William Blake Poet and Painter*: p. 11.

[24] ibid: p. 20. Indeed, the relationships between text, image, rationality, and aesthetics, in comics are directly considered below (Chapter Four) and form an underlying part of the overall method of this thesis.

[25] See McCloud, *Understanding Comics*: p. 20.

[26] See David Carrier, *The Aesthetics of Comics* (University Park: Pennsylvania State University Press, 2000): pp. 15-18.

political issues of a particular historical moment, and have been studied quite widely as a means of accessing popular feelings relating to various points in political history. Looking specifically at *Punch*, for example, Michael Chaney undertakes a detailed examination of the influence and citations of the journal's cartoons in US public political discourse during racial emancipation. As 'cartoon', the stylised images of *Punch* were able to articulate key political issues and tensions through insightful satire, thus demonstrating the potential of such a 'comics' style aesthetic to penetrate political discourse.[27] Cartoon content can also be found in many other historical publications, and Samuel Hyde observes not only the ability of cartoons to articulate and satirise political feeling (this time around British communism and trade union disputes in the early twentieth-century), but the power these panels had to sway public opinion which resulted in attempts to censor or limit their freedom of content.[28] In France, too, there is a long history of attempts to curtail the autonomy of caricature based upon similar fears of the (negative or anti-establishment) effect they might have on the population.[29] Indeed:

> "…political cartoons reflect popular understandings and perceptions, sometimes at their rawest. Cartoons are, therefore, encyclopedias of popular culture… historical documents… that hold clues to ideological forces, beliefs, assumptions, and prejudices at work in society."[30]

Although political cartoons may tap into public and political feeling in this way, this kind of approach to reading society through culture is not the focus of this thesis. This thesis aims to read a work of comics as an alternative discourse on issues relating to criminal responsibility and personhood, not as a window into the past. This tradition of political cartooning, however, does show how the general make-up of the comics

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[27] See Michael A Chaney, 'Heartfelt Thanks to *Punch* for the Picture: Frederick Douglass and the Transnational Jokework of Slave Caricature' *American Literature* 82, no. 1 (2010).

[28] Samuel S. Hyde, '"Please, Sir, He Called Me 'Jimmy!'" Political Cartooning before the Law: "Black Friday", Jh Thomas, and the Communist Libel Trial of 1921' *Contemporary British History* 25, no. 4 (2011).

[29] See Robert J. Goldstein, 'Nineteenth-Century French Political Censorship of Caricature in Comparative European Perspective' *Law and Humanities* 3, no. 1 (2009).

[30] Christina Michelmore, 'Old Pictures in New Frames: Images of Islam and Muslims in Post World War Ii American Political Cartoons' *Journal of American and Comparative Cultures* 23, no. 4 (2000): pp. 37-38.

form can be employed to highly sophisticated and socially relevant ends, and that by being overtly visual can have an impact that pure text cannot.[31]

3.2.2 Defining comics

Having just examined some of the uses of text-image combination in historical art-forms, discussion now turns more directly to the definition of comics. Although some definitions of comics rely purely upon the sequential organisation of images, seeing comics as 'sequential art', attempts to define comics tend to oscillate between seeing word and image as integrated into a distinct form on the one hand, and as remaining separate but working together on the other, and thus generally involve 'word-image interaction'. As Varnum and Gibbons put it, "to say that comics is both an integral language and a partnership [of word and image] strikes us as like having one's cake and eating it too".[32] They add, however, that each view allows different aspects of comics to be observed: as an integrated language comics can be read as a single, coherent system of communication, whilst maintaining the separateness of word and image can allow insight into juxtapositions between the two which can deepen or problematise meaning.[33] Their approach suggests that it may be easiest to see a 'family resemblance' between various forms of comics – comic strips, graphic novels, wordless pieces, single panels – rather than one solid definition that covers them all.[34]

The difficulty in pinning down what comics is has not only led to many different views on the medium's nature, but also to some writers expressly avoiding the issue of definition and relying instead upon 'common sense' notions of what works of comics are: providing you have not spent "the last century trapped inside a magic lantern", Douglas Wolk colourfully tells us, "you already pretty much know what they are, and

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[31] See Goldstein, 'Nineteenth-Century French Political Censorship of Caricature in Comparative European Perspective': p. 29.

[32] Robin Varnum and Christina T. Gibbons, 'Introduction' in *The Language of Comics: Word and Image*, edited by Robin Varnum and Christina T. Gibbons (Jackson: University Press of Mississippi, 2001): p. xiv.

[33] ibid.

[34] ibid: pp. xvi-xvii.

'pretty much' is good enough".[35] Wolk, however, is a critic for the popular media, and thus likely not to be overly interested in a rigorous academic enquiry into comics' defining features: his (lack of) definition is arguably a practical move to avoid alienating readers. Someone with a more academic approach, however, is David Carrier, a professor of art history whose work comes down on the side of seeing comics as the union of word and image, rather than their mere cooperation. Carrier defines comics as:

> "...a narrative sequence with speech balloons... The speech balloon is a defining element of the comic because it establishes a word/image unity that distinguishes comics from pictures illustrating a text... [Comics is] neither a purely verbal nor a strictly visual art form, but something radically new... a composite art... [with] verbal and visual elements seamlessly combined."[36]

Carrier's notion of the speech balloon is broad. Although never expressly stated, it seems to include not only the balloon-shaped areas of comics images which denote direct speech from a character, linked to that character with some form of 'tail', but also thought balloons (usually linked by diminishing circles rather than a solid tail) and the boxes of narrative text in many comics panels. This broad notion makes Carrier's definition less problematic than it first seems, as it is not limited purely to works where characters speak, but relates to the general combination of word and image.

The focus on word-image combination as comics' defining feature, however, removes from consideration as comics those works which are 'silent', that is they use words very sparingly and only as part of the images themselves (for example, a picture of a street sign).[37] Another academic approach, under the rubric of 'philosophy of art', comes from Henry John Pratt, who claims that "narrativity is one of the defining

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[35] Wolk, *Reading Comics*: p. 17. It is interesting to note, also, that he admits he has been 'scared off' by the seeming insolubility of the definition problem.

[36] Carrier, *The Aesthetics of Comics*: p. 4.

[37] See, for example, the works discussed in David A. Beronä, 'Pictures Speak in Comics without Words: Pictorial Principles in the Work of Milt Gross, Hendrik Dorgathen, Eric Drooker, and Peter Kuper' in *The Language of Comics: Word and Image*, edited by Robin Varnum and Christina T. Gibbons (Jackson: University Press of Mississippi, 2001). Carrier does admit that some works use symbolic or allegorical images in their speech balloons (see Carrier, *The Aesthetics of Comics*: p. 31), but if the balloon is the solid defining feature of comics due to its exemplification of the union of word and image, as Carrier asserts it is, then this inclusion becomes problematic.

characteristics of the [comics] medium".[38]   He distinguishes between the literary dimension and the pictorial dimension of comics, observing that both, in their own ways, help to construct the narrative of a particular comic. This type of definition appears fruitful, especially when we note the necessity of a pictorial element claimed by Pratt: "Without pictures, an artwork is of some kind other than comics".[39] 'Silent' works that involve only pictures and no text can be encompassed, as they have both pictorial and narrative dimensions, and purely literary narrative, such as prose, is excluded due to its lack of pictorial element.

There are problems at these boundaries, however; both the line between pictorial narrative and film and the inclusion of accompanying illustrations alongside otherwise literary texts are potentially problematic. Pratt deals expressly with film, distinguishing it from comics by its physical form: a comic is multiple images "simultaneously present in different spaces, whereas the frames and shots of a film are projected on the same space at different times".[40] This aspect of comics' literary dimension, being physically similar to a prose novel that we access individually, at our own rate, and in book form,[41] is what distinguishes comics from film.[42]   Regarding the boundary with literature, the requirement for the images to constitute a dimension of pictorial narrative may exclude many works, but children's books (such as Maurice Sendak's *Where the Wild Things Are*) involve sequences of images that form part of the narrative, but arguably cannot be included as comics.[43]   The pictorial dimension, although ostensibly distinguishing comics from prose fiction, thus fails to delineate clearly between the two forms.

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[38] Henry John Pratt, 'Narrative in Comics' *The Journal of Aesthetics and Art Criticism* 67, no. 1 (2009): p. 107.

[39] ibid.

[40] ibid: p. 114.

[41] See ibid: pp. 109-10.

[42] See also Moore, *Alan Moore's Writing for Comics*: pp. 3-4. This is also a key distinction between comics and animation.

[43] Desmond Manderson, for example, in his analysis of law and the socialisation of children through the lens of *Where the Wild Things Are* includes the illustrations as part of the narrative communication in his discussion at a number of points: see Manderson, 'Where the Wild Things *Really* Are': pp. 51, 52, 58, 63, 66, 69-70, 70.

The focus on narrative may also exclude single-frame or single-panel cartoons. However, these single-panel cartoons arguably fit more comfortably as comics, as opposed to merely being images or pictures. Carrier notes that although these cartoons are only a single image, there may be some degree of narrativity taking place due to the implication of past and future events beyond the particular depicted frame.[44] In humorous cartoons, for example: something is about to happen in the cartoon, a future event is strongly implied through the construction of the image, and this is a source of narrative tension from which the cartoon derives its humour.[45] By projecting events through time, potentially both into the past and the future, a single image can be seen to constitute a form of narrative. Hence the 'narrativity' required by Pratt, like Carrier's combination of word and image, does not necessarily exclude single-panel cartoons.

Carrier also argues that to see comics as a mere combination of word and image, rather than a medium in its own right, leads to its perception as a "product of mass culture, [using] popularized versions of images from traditional visual art, supplemented with words to serve as easily accessible narratives for semiliterate audiences", which employs a compromise of word and image rather than anything innovative. In order to access comics' creative and narrative potential, we need to recognise that it is a unique medium and not be tempted to think that its unity is any less natural than that of paintings or novels.[46] Ironically, as we will see shortly, preserving a unique and unified language may entail tending towards simplistic images and words.

An alternative approach has been argued by Robert C. Harvey.[47] Many definitions of comics, he says, are too broad to be useful, claiming generally that any narrative sequence of images is a comic, including things such as Egyptian pictograms and the

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[44] Carrier, *The Aesthetics of Comics*: pp. 15-25.

[45] Carrier gives the example of Gary Larson's popular 'Far Side' panels: ibid: pp. 24-25.

[46] ibid: p. 74.

[47] See Robert C. Harvey, 'Describing and Discarding "Comics" as an Impotent Act of Philosophical Rigor' in *Comics as Philosophy*, edited by Jeff McLaughlin (Jackson: University Press of Mississippi, 2005).

Bayeux Tapestry.[48] (This definition is also suggested by Pratt's combination of pictorial and narrative dimensions.) A similar issue arises with simply relying on word-image combination, as the historical overview just undertaken suggests. However, Harvey notes that not all pictorial narratives are comics, just as not all quadrupeds, he observes, are horses.[49] Similarly, not all word-image combinations are comics (Blake's works, for example, cannot easily be defined as comic books). Harvey's focus is on delineating the modern comics form rather than trying to establish for it a rich history that transcends the image of the contemporary comic book. Thus he argues that pictorial or illustrated narratives include things such as Hogarth's *Tarzan* or many children's books, but they also include comics as a unique subset. He gives a self-proclaimed 'leaky' definition:

> "Comics consist of pictorial narratives or expositions in which words... usually contribute to the meaning of the pictures and vice versa."[50]

As he admits, this is more a useful *description* rather than an attempt at solid, comprehensive classification. 'Silent' or completely non-textual works, for example, merely dispense with the 'usual' practice of incorporating words, but they are still comics and the inclusion of words is still the 'usual'.[51] It was noted above that single-frame pieces can still constitute a form of narrative, but the addition by Harvey of 'expositions' makes their general inclusion less problematic. The interrelationship of words and pictures in the project of meaning-making, using the loose notion of 'contribution', enables various relationships of word and image in the comics medium to be explored, and does not make having word-image combination a sufficient aspect to make something a comic. 'Verbal-visual blending', as Harvey terms it, is a key feature of comics, but in a looser sense than Carrier's focus on the word balloon, given

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[48] ibid: pp. 14-18. This is essentially the definition favoured by McCloud. Thus, for a broad exploration of what falls under 'pictorial narrative' through history (including Egyptian pictograms, tapestries, and Hogarth's paintings), see McCloud, *Understanding Comics*: pp. 9-20.

[49] As he helpfully points out, for example, a dog is not a horse: Harvey, 'Describing and Discarding "Comics" as an Impotent Act of Philosophical Rigor': pp. 18-19.

[50] ibid: p. 20.

[51] ibid.

that using written words is only the usual practice for Harvey, rather than a solid necessity. The looseness of Harvey's approach also enables the combination of word and image to be recognised as a successful cooperation or unique language whilst not removing from analysis any layers of interaction or juxtaposition between them, thus transcending the binary opposition observed by Varnum and Gibbons between word-image unity and mere co-operation. Despite this, Harvey's approach shares much with Varnum and Gibbons's 'family resemblance' model, in that there is a familiarity of form implied in Harvey's 'usual practice' argument: for example, a silent piece is comics even though it dispenses with words because it is a narrative sequence of images recognisable as comics (rather than being a medieval tapestry, ancient language, children's book, Blake poem, or novel). In some respects, we have returned to the 'common sense' definition employed by Douglas Wolk, of only needing 'pretty much' to know what comics is. Harvey's model however, as he states, is a leaky *description* designed to loosely ring-fence "most of the artistic endeavours we call *comics*",[52] and as such is more detailed, and thus more useful, than a reliance upon the 'pretty much' of common sense.

3.2.3 *Recent history, censorship, and juvenility*

Although the heritage of various word-image and sequential-image formats is important in understanding modern comics in its cultural or aesthetic context, one of the most notable periods in recent comics history occurred around the middle of the twentieth century. The modern comics form, of which the American superhero has become largely emblematic and which Harvey's useful description is aimed at containing, arose in the United States during the 1930s. Although the superhero genre was immensely popular then, as it is now, many other types of comics were also widely read, including romance, crime, horror, adventure, and war comics. There was public outcry against this 'new' medium (especially relating to crime and horror comics), with its seemingly viral popularity amongst children, its depictions of immorality, violence, and sex, and fears that it would lead to moral degeneracy in the younger generation.

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[52] ibid.

There were even claims of direct links between comics and juvenile delinquency.[53] In the US this outcry, despite generally equivocal academic studies, led to the enforced self-regulation of the comics industry, under the infamous Comics Code of 1954.[54] This was a blanket code, covering all comics and leaving no avenue for publications aimed at different age groups. Comics were for children, and thus all comics had to be appropriate for consumption by children of all ages. In the UK there was a similar movement, stemming from the importation of American horror and crime comics, influencing the enactment of the Children and Young Persons (Harmful Publications) Act of 1955.[55] The key point to make in relation to these censorship activities is that, in both the US and UK, comics were defined as being a juvenile medium, as being *for children*, and thus their censorship was an issue of child welfare which made freedom of speech arguments in defence of their cultural or artistic value politically difficult.[56] The codes implemented acted in effect to solidify and perpetuate the view of comics as childish.[57]

Since the 1980s, a more relaxed attitude toward comics has developed. This change in attitude has been claimed to stem from recognition that comics are not inherently for children, but that, as the emergence of underground markets in 'non-code' comics demonstrated, they can also be aimed at more mature audiences.[58] The recognition that the comics form does not necessarily have any particular influence on the content

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[53] See Fredric Wertham, *Seduction of the Innocent* (New York: Reinhart, 1954). Wertham, a renowned psychiatrist, was the figurehead of the US anti-comics movement, influencing public opinion and even testifying at the Senate hearings that led to the implementation of the Comics Code.

[54] For a detailed history of the US Comics Code, including its origins, the events and concerns leading up to its implementation, how it was created, and its subsequent evolution, see Amy Nyberg, *Seal of Approval: The History of the Comics Code* (Jackson: University Press of Mississippi, 1998). Chapter Four of Nyberg's book is a detailed discussion of Wertham's influential work.

[55] See, for a detailed discussion of the British horror comics campaign, Martin Barker, *A Haunt of Fears: The Strange History of the British Horror Comics Campaign* (London: Pluto, 1984).

[56] See ibid; Nyberg, *Seal of Approval*.

[57] See Nyberg, *Seal of Approval*: pp. 129-54; Rocco Versaci, *This Book Contains Graphic Language: Comics as Literature* (London: Continuum, 2007): pp. 7-12.

[58] Douglas Wolk observes three major examples of works in the 1980s which helped to 'mature' the medium, one of which was Moore and Gibbons's *Watchmen*. The other two were Frank Miller's *The Dark Knight Returns*, and Art Spiegleman's *Maus*. See Wolk, *Reading Comics*: p. 8.

of a work is an important part of this 'maturation'; as McCloud notes, comics do not have to be about superheroes or funny animals, or aimed at a particular readership.[59] One of the most visible consequences of this today is the huge number of mainstream films that are based upon comics and their characters.[60]

Despite the developing cultural popularity of comics, and a concurrent yet tentative increase in academic interest in the medium,[61] there is still some generalised resistance to the idea that comics can be a serious medium, and this remains partly based on the assumption that comics are inherently juvenile. Note, for example, the controversy surrounding the 2004 comic book adaptation of the 9/11 Commission Report, with claims being made in the press that a depiction of something as *serious and sobering* as the vast terrorist attacks of September 2001 *in a comic book* could only be reductive and inappropriate.[62] Alongside this type of backlash, however, there is also genuine critical acclaim for the medium. Art Spiegelman, for example, won the Pulitzer Prize for his graphic work *Maus*, an adaptation of his parents' serious and sobering tale of Holocaust survival in comics form, depicting the Nazis as cats and the Jews as mice.[63] Indeed, for the most part it has become widely accepted that comics are not solely or inherently a children's medium.

3.2.4 The 'simplicity' of comics

Alongside the juvenility of comics, the medium is often perceived as simplistic, rendering it unworthy of serious critical attention. Obviously there are many mass produced and disposable comics that *are* 'simplistic' (just as there are novels and paintings that lack sophistication or critical worth), but this is far from being a universal

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[59] McCloud, *Understanding Comics*: p. 22.

[60] To name but a few: Christopher Nolan's *The Dark Knight* (2008); Frank Miller's *Sin City* (2005); Sam Mendes's *The Road To Perdition* (2002); Barry Sonnenfeld's *Men In Black* (1997); Edgar Wright's *Scott Pilgrim vs The World* (2010); James McTeigue's *V for Vendetta* (2006); Terry Zwigoff's *Ghost World* (2001); David Cronenberg's (2005) *A History of Violence*; and, of course, Zack Snyder's 2009 adaptation of *Watchmen*.

[61] See Section 3.5.

[62] See Versaci, *This Book Contains Graphic Language*: pp. 8-9.

[63] See Art Spiegelman, *The Complete Maus* (London: Penguin, 2003).

characteristic of the medium. However, David Carrier claims the generally 'simplistic' nature of comics derives from the fact that works of "comics are generally absolutely unambiguous, for they need to be read quickly".[64] In comics, he tells us:

> "...word balloons and narrative sequence present the story transparently, making the meaning of the depicted action obvious to everyone in the culture... almost everyone understands a commonplace comic strip without any need for explanation".[65]

On a narrative level, Carrier claims that comics share more with literary novels than with paintings,[66] and are thus able to be interpreted subjectively through the constructions of their readership.[67] On a visual level, however, he compares comics with 'old master' art:

> "Before a painting by Piero I ask myself, is Professor Marilyn Lavin's account right? *Only scholars like her can interpret such artifacts with authority*. Before a [Gary] Larson [creator of the 'Far Side' comics], I am usually certain that I, like everyone who reads the newspaper, am 'getting it'. Cartoon strips are *self-interpreting* pictures."[68]

Although the term 'self-interpreting' may appear nonsensical in light of the indeterminacy of meaning discussed in the previous chapter,[69] Carrier's focus on the distinction between 'old master' art and comics is instructive in understanding his notions of interpretation.

The simplicity and transparency that Carrier associates with comics in terms of their interpretation is not due to the fact that they are juvenile or simplistic as a medium – indeed, he claims that they give us insight into the philosophical problem of mind-body duality by simultaneously representing characters and their thoughts[70] – but rather that they are just not as visually 'sophisticated' or 'complex' as the old master art to

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[64] Carrier, *The Aesthetics of Comics*: p. 33.

[65] ibid: p. 85.

[66] ibid: p. 79.

[67] See ibid: pp. 80, 92.

[68] ibid: p. 86. (Emphasis added.)

[69] See Section 2.2.

[70] See Carrier, *The Aesthetics of Comics*: p. 73.

[This image has been removed by the author of this thesis for copyright reasons]

Figure 3.1: McCloud, *Understanding Comics*: p. 49.

which he compares them. Carrier maintains a notion of authoritative interpretations of old master art which he forgoes for comics. If a person goes to an art museum and stands before a painting, that person might gain some understanding of that artwork, might be moved by it in some way, appreciate the skill in creating it, the aesthetic pleasure in observing it. However, unless that person has any academic authority to interpret that work, according to Carrier his or her understanding is invalid. Conversely, we do not need "bookish analysis" in order to understand the images in comics that operate via common knowledge.[71] Thus, according to Carrier, comics may be a sophisticated narrative art form, continuing the classical tradition of narrative painting through to the modern era,[72] and worthy of our academic and critical study,[73] but the images in comics are merely a representational vehicle for the narrative and cannot be interpreted beyond what they 'transparently' depict.

Scott McCloud, however, highlights an aspect of the actual comics form which may help to explain why comics tend to be seen as simplistic without relying upon an unflattering comparison with 'high' art. In Figure 3.1 McCloud displays his diagram for the relationship between words and images, being a continuum from the realistic to

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[71] ibid: p. 83.

[72] ibid: p. 74.

[73] The existence of Carrier's work is testament to this.

the conceptual. McCloud argues that words are conceptual; they do not involve any type of visual representation, whilst images retain this representational quality.[74] The reason why comics tend towards the middle ground of 'simplistic' images and 'uncomplicated' language is related to the union of the two types of communication in the comics form. For visual art to be great, McCloud notes that it generally has to aim at accurate representation, or follow the 'great masters' of Western art; similarly for written art to be great it must learn from the 'Great Books' of Western literature. A rudimentary line drawing, or a short and unsophisticated sentence, will never achieve the 'greatness' of Michelangelo or Dickens.

If comics were to aim at this type of 'great' art product, their two elements (words and pictures) would end up at opposite ends of the reality-concept continuum, and would not be able to work together as a unified and unique language.[75] There is thus a tension in the creation of comics between artists wanting to prove that comics can tend towards 'greatness' or be as sophisticated as a classically 'higher' art-form, against their reputation, and wanting a form that attains integrity and uniqueness by involving the successful union of words and images.[76] Although word-image interrelation can still be navigated and exploited in sophisticated ways, McCloud argues, this need for the images and text to work well together leads to the tendency to use 'conceptual' images that are simpler than representational art, and less complex language than a literary novel. Thus, in order to operate as a coherent whole, a work of graphic fiction may need to *appear* unsophisticated or simplistic, but this does not mean that the work as a whole shares these traits.

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[74] McCloud's full model involves three elements: the representational, the purely abstract, and the conceptual. This creates a triangular field within which all artistic (i.e. visual) products can be located. Respectively: photo-realism and highly representational art like Rembrandt at one vertex, purely abstract art like Mondrian at another, and conceptual works involving only words at the third vertex. In between arts, such as impressionism (part representational, part abstract) and cartoons (part representational, part conceptual), are located in relation to these axes. See McCloud, *Understanding Comics*: pp. 50-57; see also p. 140.

[75] ibid: p. 48.

[76] ibid: p. 49.

3.3 Words and images

Comics, we have seen, are generally made up of words and images, in some kind of sequential order, and are involved in constructing or articulating a narrative. Discussion now turns to examine in more detail a key aspect of the medium, its word-image duality, which accesses the shared origins of words and pictures. As expressed through the comics analysis of Will Eisner and Scott McCloud, this shared origin suggests that the difference between text and image is arguably one of convention and a movement along McCloud's iconic abstraction continuum (see Figure 3.1), rather than anything 'natural'. This blurring of boundaries between words and images, it will be seen in this section, poses difficult questions when trying to distinguish clearly comics from prose literature. The softness of the distinction between literature and comics will also be observed through the example of concrete poetry, where the visual dimension of a text is employed to augment its meaning.

Will Eisner,[77] a 'legendary' figure in the creation of comics, examines the distinction between word and image. Although, like McCloud, he seems to require some form of sequence in his definition of comics (he coined the term 'sequential art'[78]), his understanding of the confluence of word and image in the comics medium is useful. McCloud defines comics as 'juxtaposed pictorial and other images in deliberate sequence'.[79] McCloud, as this definition suggests, does not see the combination of words and images as part of what the comics form involves in general. Eisner, despite his general reliance upon sequence, claims that comics are "a successful crossbreeding of illustration and prose", requiring the reader "to exercise both visual and verbal

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[77] Will Eisner (1917 – 2005) is probably most famous for his 'Spirit' comics of the 1940s and 50s. He is widely credited with 'inventing' the graphic novel form of comics with his 1978 'A Contract with God', which helped lead to the maturation of the comics medium through a more coherent narrative format than the sprawling instalments of traditional monthly or weekly comic books. (Note, however, that he did not coin the term himself: see Harvey, 'Describing and Discarding "Comics" as an Impotent Act of Philosophical Rigor': p. 20.) Eisner's name is given to one of most prestigious comics industry awards. For more information, see the biography on his official website: 'Will Eisner: Biography' http://willeisner.com/biography/index.html, accessed on 24 April 2010.

[78] See Will Eisner, *Comics and Sequential Art: Principles and Practices from the Legendary Cartoonist* (London: W. W. Norton, 2008).

[79] See McCloud, *Understanding Comics*: pp. 7-9.

interpretive skills".[80] Using an example panel, he observes how images can be seen to operate in a similar way to language:

> "A description of the action in this panel can be diagrammed like a sentence. The predicates of the gun shooting and the wrestling belong to separate clauses. The subject of 'gun shooting' is the crook, and [the character] Gerhard is the direct object. The many modifiers include the adverb 'Bang, Bang' and the adjectives of visual language, such as posture, gesture, and grimace."[81]

For Eisner, this is more than merely a metaphor for interpreting images. He goes on to argue that the separation between 'words' and 'images' is arbitrary, since historically they derive from a single origin:[82]

> "Words are made up of letters. Letters are symbols that are devised out of images, which originate out of familiar forms, objects, postures and other recognizable phenomena. So, as their employment becomes more sophisticated, they become simplified, abstract."[83]

McCloud makes a similar observation. Recalling his 'iconic abstraction chart' in Figure 3.1, he argues that the earliest words, which were actually stylised pictures, were located somewhere in the middle of the abstraction continuum. As both images and language developed, the two moved further apart, eventually occupying extreme positions.[84]

> "By the early 1800's, western art and writing had drifted about as far apart as was *possible*. / One was obsessed with *resemblance*, *light* and *color*, all things *visible*... / the other rich in *invisible* treasures, senses, emotions, spirituality, philosophy...
>   Pictures and words, once *together* in the center of our iconic abstraction chart, have at *this* point *drifted* to *opposite corners*."[85]

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[80] Eisner, *Comics and Sequential Art*: p. 2.

[81] ibid.

[82] ibid: p. 7.

[83] ibid: p. 8. Eric Drooker's silent piece *Flood! A Novel in Pictures* gradually simplifies the images and reduces the size of the panels on the page. The hero becomes more and more stick like, the images becoming more and more like symbols, moving toward the beginnings of development into language. See Beronä, 'Pictures Speak in Comics without Words': pp. 34-36.

[84] McCloud, *Understanding Comics*: pp. 141-45.

[85] ibid: p. 145. (Emphasis and ellipses in original.) Note that McCloud's work is in comics form, and hence this quotation employs the 'comics quotation notation' adopted throughout this thesis: '/'

The difference between written language and images, for both Eisner and McCloud, is only a matter of convention: the images we see as words with associated meanings are merely deemed to be so; words and their meanings are not naturally occurring.[86] The two forms collide in the comics medium, as words and images move back towards their conceptual common ground, and the boundaries between them, otherwise so common as to be 'natural', are broken down and they begin to operate as a whole. Thus in comics we have both linguistics and images operating together, both visually and linguistically. Comics is thus a unique medium, neither word nor image, but a place where their shared origin is accessed and a particular form of communication is produced.

The conventions of written language, however, are arguably very different from those of narrative images, despite words' and images' shared history. Eisner's reading of the comics panel quoted above, unpacking the sentence-like structure of its communication, may be more than a mere metaphor due to his claims of an arbitrary distinction between text and image, but written language has developed a rich array of conventions over its long history, and images also have their own conventions and associated methods of interpretation. To conflate them into a single interpretive strategy is reductive of the expansive nature of the various ways in which images can communicate, and removes from perception any juxtapositions or interrelations between the written text and the visual image that may be a profound source of meaning. Comics may be a unique and unified artistic form (rather than the mere conjunction of words and images), but to ignore the difference between the two removes from our interpretive sights the potentially rich interrelations of the visual and verbal aspects of comics.

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signifies where text continues from one speech bubble or narrative box to another within the same panel, whilst a new paragraph signifies continuity between panels.

[86] Carrier makes a related point: "Speakers of a language, like those who have mastered any convention, find it so 'natural' that reflection is needed to recall that it is a convention", Carrier, *The Aesthetics of Comics*: p. 45. It should be noted, however, that this argument only applies to written language; words themselves have other characteristics beyond their visual representation, such as their oral character as sound-forms.

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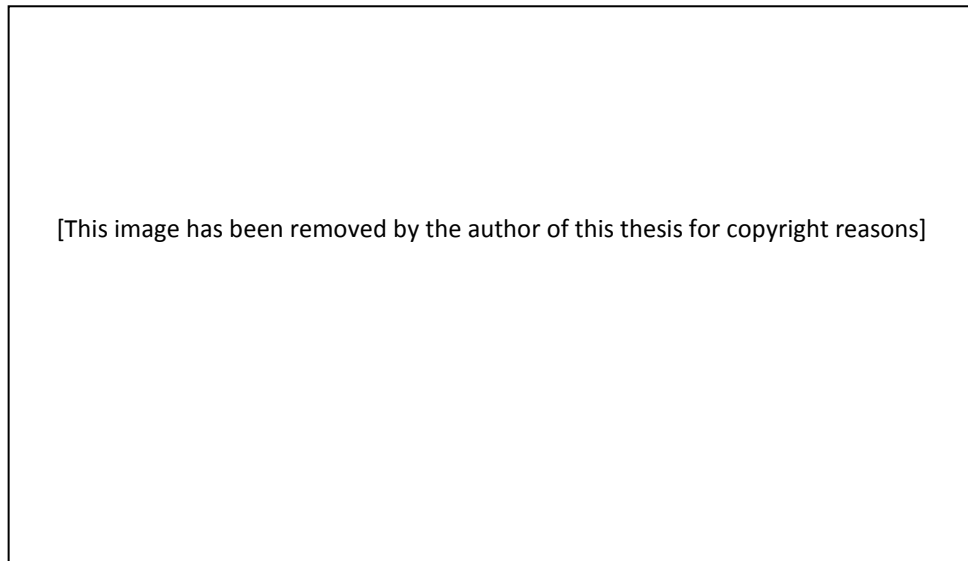
Figure 3.2: Untitled concrete poem, NASA Quest website.

3.3.1 *Comics and other literary forms*

The conflation of words and images also raises questions relating to the distinction between comics and prose narrative. If written words are a form of image, then a work of prose or poetry could arguably be termed a comic if we see it as a sequence of images that constitutes a narrative.[87] The shared history of images and text, then, produces an understanding of comics that is unable to distinguish them fundamentally from literature. The distinction thus arguably becomes an uncertain and indefinable boundary, related to the level of detail represented in the image, since one of the operational necessities of comics is arguably that the events portrayed need to be recognisable.[88] However, an artist may create a deliberately ambiguous or 'difficult' work, from which different readers will be able to 'decode' different levels of detail and accuracy.[89] Thus, as with Pratt's pictorial and literary dimensions, the unity of word and image raises problems when we come to try and clearly distinguish between prose narrative and comics. There is a difference to be maintained, as definitions like that of Carrier (the word balloon as emblem of word-image combination) remind us, but exactly where we draw the line is uncertain.

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[87] See McCloud, *Understanding Comics*: p. 8.

[88] As Carrier notes, they are designed to be read quickly: Carrier, *The Aesthetics of Comics*: p. 33.

[89] For example, see Drooker's *Flood* mentioned in n. 83, above.

This interrelation between words and images shows us an important aspect of the relationship between comics and more traditional literature. As Charles Hatfield observes, concrete poetry employs the visual aspects of words and how they are arranged to help construct meaning.[90] This crossover is important to highlight, because it shows an area of creativity where an 'accepted' form of literature (poetry) moves beyond being merely words or text to employ the visual techniques of graphic representation, yet remains seen poetry.[91] We can see in Figure 3.2[92] a very simple example of concrete poetry, where the visual arrangement of the text is a fundamental part of the poem's communication. As we read through the words, moving from one aeroplane/stanza to the next, from left to right, following its path as it 'takes off', the poetry is imbued with a far stronger sense of the thrill and movement of aviation than would be felt from the words alone. The speed and forward motion is emphasised by the shifting of the reading order of the text in the final aeroplane/stanza to follow the upward diagonal, leading us through the experience of that upward thrust, with the final line slowing us down as we read across the 'wings', implying the calm experienced once the aeroplane is safely in the sky. Another useful aspect of this particular poem is that it can be seen to construct a narrative which might be summarised as 'an aeroplane moves along the runway and takes off'. Taken as a single image, we have in this poem an example of 'synchronism', as Hatfield calls it,[93] or a 'polyptych' in McCloud's terms,[94] where multiple images, implying a movement or event, are shown over a single background or comics panel (this technique is employed regularly in the comics medium). This poem could also be seen as four separate sequential images,

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[90] See Charles Hatfield, *Alternative Comics: An Emerging Literature* (Jackson: University Press of Mississippi, 2005): p. 37. For extended analysis of concrete poetry in the latter half of the twentieth century, see, for example, K. David Jackson, Eric Vos, and Johanna Drucker, eds., *Experimental - Visual - Concrete: Avant-Garde Poetry since the 1960s* (Atlanta, GA: Rodopi, 1996).

[91] From the other direction (approaching from the visual), the artistic movement 'Dadaism' also employed the aesthetic or visual dimension of text: see McCloud, *Understanding Comics*: p. 148. Of similar importance on this point is the poetry of Blake, already discussed, which also employs visual representation yet remains 'literary'.

[92] This untitled poem can be found on the NASA Quest website. See 'Writing Experience: Writing Concrete Poetry' http://quest.arc.nasa.gov/aero/events/regimes/poet.html, accessed on 28 April 2010.

[93] See Hatfield, *Alternative Comics*: pp. 52-53.

[94] McCloud, *Understanding Comics*: p. 115.

and from this perspective the similarity with comics is even stronger. Thus here we do not only have a *literary* art form relying heavily upon the *visual* as a source for its meaning, but also employing that visual aspect, through what is ostensibly a sequence of images, to help construct a narrative that is fundamentally linked with the substantive content of the words.

3.4 Comics and the current project

3.4.1 *Comics and criminal justice*

Having just introduced and outlined the comics medium and some of its associated issues, this section undertakes a brief overview of the existing literature on comics in a criminal justice context, before introducing the graphic novel *Watchmen* and briefly discussing previous analysis of the work. It was noted at the beginning of this chapter that there is a burgeoning popularity of comics in mainstream popular culture. Alongside this, there can be seen an emergence in a number of academic fields of studies relating to the wider relevance of comics beyond popular entertainment. However, the unique dimensions of comics' formal composition that this chapter has just introduced have not yet been analysed in detail with respect to interdisciplinary legal theory, a gap that this thesis begins to fill. Specifically, there are no studies of graphic fiction or the comics form under the banner of law and literature or law and aesthetics despite the fact that, as we saw in the previous chapter, they are realms of legal study strongly oriented towards questioning epistemological boundaries and engaging with numerous narrative forms (including not just literary novels and painting, but also children's stories, plays, poetry, music, and film). Comics may be far from the main focus of discussion in fields such as politics, geopolitics, business ethics, disability studies, and environmental philosophy, but these disciplines have all positively engaged at some level with the comics medium;[95] and there has also been

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[95] Regarding politics, see, for example, Bill E. Peterson and Emily D. Gerstein, 'Fighting and Flying: Archival Analysis of Threat, Authoritarianism, and the North American Comic Book' *Political Psychology* 26, no. 6 (2005). Regarding geopolitics, see, for example, Jason Dittmer, 'Captain America's Empire: Reflections on Identity, Popular Culture, and Post-9/11 Geopolitics' *Annals of the Association of American Geographers* 95, no. 3 (2005). Regarding business ethics, see, for example, Virginia W. Gerde

some more general engagement between comics and philosophy.[96] Although the two disciplines most relevant to the current study (criminal justice and legal theory) have had some attention,[97] this work does not relate to criminal theory or moral identity, to the place of graphic fiction in legal study, or to the epistemological or aesthetic dimensions of the comics form.

In his 2002 article, for example, Jarret Lovell looks at the depictions of criminal justice in American true-crime comics during the 'war on crime' of the mid-twentieth century in an effort to explain why reprints of these old comics have come back into publication.[98] Whereas today there are comics that focus on the despair and failure of modern punitive justice (Lovell's example is *The Punisher*),[99] true-crime comics of the 1930s and 1940s, inspired by the FBI's attempts at garnering support for official justice through the popular media (including comics),[100] depict a world where "destiny and justice are one and the same",[101] and justice is inexorably done by an altruistic justice system at the hands of which criminals meet their deserved fate.[102] Thus, Lovell claims, in today's uncertain world we long for the certainties of a nostalgic past, represented in the idealised comics of the 1930s and 1940s.[103] In their content

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and R. Spencer Foster, 'X-Men Ethics: Using Comic Books to Teach Business Ethics' *Journal of Business Ethics* 77 (2008). Regarding disability studies, see, for example, Susan M. Squier, 'So Long as They Grow out of It: Comics, the Discourse of Developmental Normalcy, and Disability' *Journal of Medical Humanities* 29 (2008). Regarding environmental studies, see, for example, Kevin de LaPlante, 'Making the Abstract *Concrete*: How a Comic Can Bring to Life the Central Problems of Envrionmental Philosophy' in *Comics as Philosophy*, edited by Jeff McLaughlin (Jackson: University Press of Mississippi, 2005).

[96] See, for example, Jeff McLaughlin, ed., *Comics as Philosophy* (Jackson: University Press of Mississippi, 2005); Tom Morris and Matt Morris, eds., *Superheroes and Philosophy: Truth, Justice, and the Socratic Way* (Chicago: Open Court, 2005).

[97] Regarding criminal justice, see, for example, Jarret Lovell, 'Nostalgia, Comic Books, and the 'War against Crime!': An Inquiry into the Resurgence of Popular Justice' *Journal of Popular Culture* 36, no. 2 (2002). Regarding legal theory, see Jason Bainbridge, '"This Is the *Authority*. This Planet Is under Our Protection": An Exegesis of Superheroes' Interrogations of Law' *Law, Culture and the Humanities* 3 (2007).

[98] See Lovell, 'Nostalgia, Comic Books, and the 'War against Crime!''.

[99] ibid: pp. 342-44.

[100] See ibid: pp. 337-39.

[101] ibid: p. 339.

[102] ibid: pp. 339-42.

[103] ibid: p. 344.

analysis of a large number of contemporary comics, however, Phillips and Strobl found that the *dominant* ideologies in recent crime and superhero comics revolve around revenge fantasies and longings for an idealised social and democratic order based on Judeo-Christian notions of the duality of good and evil.[104] This again, like the idealised comics of the past, represents our general desire for order and justice in a world of uncertainty and fear of crime. Although Lovell's generalisation of contemporary comics from just one (*The Punisher*) may be inaccurate, the idealisation at work in the comics medium that he uncovers in 1930s and 1940s true-crime comics is arguably still at work today in the mainstream genre of superhero comics. However, neither of these studies tackle the aesthetic or epistemological dimensions of the comics form, nor the ethical concerns with moral identity that drive this thesis.

Specifically focused on legal issues, Jason Bainbridge looks at the interrogations of law and justice in superhero comics.[105] He highlights the importance of comics with reference to the issue, raised by Phillips and Strobl, that superheroes generally constitute a type of revenge fantasy and are a form of wish-fulfilment: the wish-fulfilling hero, he argues, can inform us about societal deficiencies, and more specifically about deficiencies in the legal system of that society.[106] Turning to his analysis of the superhero genre, Bainbridge claims that modern law and criminal justice (characterised by a concern for individual rights, rational argument, and due process ensuring equality and fairness) in superhero comics, where it does exist, exists only as a general backdrop at best, or as an obstacle to justice at worst.[107] Meanwhile, superheroes – with their transcendent justice, extra-legal status, direct access to truth, lack of accountability, and finding 'justice' in the fight between hero and villain (as opposed to a court judgment) – embody *pre-modern* justice.[108] Through the hero's orientation in opposition to rationality (they are generally 'created' by some 'divine'

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[104] See Nickie D. Phillips and Staci Strobl, 'Cultural Criminology and Kryptonite: Apocalyptic and Retributive Constructions of Crime and Justice in Comic Books' *Crime Media Culture* 2, no. 3 (2006).

[105] See Bainbridge, '"This Is the *Authority*. This Planet Is under Our Protection"'.

[106] ibid: p. 456.

[107] ibid: p. 458.

[108] ibid: pp. 457-59.

event, such as genetic mutation or scientific accident), and the worlds they inhabit being similarly irrational (alternative realities, science-fiction settings, super-powers), superhero comics can allow what Bainbridge terms 'postmodern' (in that they are oriented against modern rationality) interrogations of law and justice.[109] Some examples of this include: alternative (non-rational) world views, as mentioned above; justice as extra-legal, separate from law, and the relationship between the two;[110] and, the pro-active possibilities and limitations of law through depictions of pro-active modes of superhero operation, showing the dangers and difficulties of acting in this manner.[111]

Bainbridge claims that superheroes can reconcile pre-modern and modern ideals of law and justice in three ways: 1) by removing their masks and becoming legal (and thus modern and legitimate) citizens – a function of the 'secret identity'; 2) by attaining governmental sanction for their actions, and again becoming legitimate; or, specifically in relation to the *Daredevil* comic which features a lawyer-turned-superhero, 3) by navigating the conflicting ideals of modern and pre-modern justice and reconciling the respective legal and extra-legal activities. This reconciliation, Bainbridge argues, is a 'postmodern' navigation of law and justice, moving beyond the rights and rationality of modern law noted above. This 'postmodern' navigation embodies an oscillation between modern and pre-modern modes of law in order to see that justice is done.[112] Bainbridge's analysis, however, does not tap into the formal dimensions of comics, examining instead comics' purely narrative content. Neither the epistemological issues raised by the confluence of words and images in the comics form nor the aesthetic dimensions of comics' visual nature are considered. What Bainbridge's detailed analysis does show, however, is that even the most mainstream of comics genres, the superhero comic, breaks the shackles of the 'juvenile' or 'simplistic' stereotype examined above, and does so in ways that are significantly relevant to legal studies.

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[109] ibid: pp. 462-63.

[110] ibid: pp. 463-65.

[111] ibid: pp. 465-68.

[112] ibid: pp. 468-76.

Beyond Bainbridge's work there is very little that has been done around comics in relation to legal theory.

3.4.2 *Introducing* Watchmen

As mentioned in Chapter One, although potentially any comics work could be a suitable analytical object (depending upon its particular themes and artistry), the work selected for analysis in this thesis is Alan Moore and Dave Gibbons's acclaimed graphic novel *Watchmen*. As will become clear throughout the analysis in this thesis, the themes and formal dynamics of *Watchmen* lend it well to a philosophical examination of the limits of rational and linguistic understanding in relation to criminal identity. Set in an alternative 1980s, *Watchmen*'s narrative takes place against the backdrop of the cold war and the very real threat of nuclear destruction. It is an ensemble piece, with five main characters who are all 'superheroes', or 'costumed adventurers', the murder of one of whom at the outset provides the ostensible driving force behind the narrative progression. As the story unfolds, this initial murder becomes part of a much larger conspiracy that culminates in the destruction of half of New York City. The work is immensely complex, and engages with the psychological and social realities of *Watchmen*'s world and more general philosophical issues related to power, responsibility, and morality. Even within the space of this entire thesis, all the intricacies of the work have not been able to be encountered or discussed. As Moore himself states:

> "…with *Watchmen*, what we tried to do was give it a truly crystalline structure, where it's like this kind of jewel with hundreds and hundreds of facets and almost each of the facets is commenting on all of the other facets and you can kind of look at the jewel through any of the facets and still get a coherent reading… I mean, it's tailor made for a university class, because there are so many levels and little background details and clever little connections and references in it that it's one that academics can pick over for years."[113]

What this depth of the work means is that not all avenues of enquiry have been taken in the analysis of *Watchmen* in this thesis, nor could they be. The work tends to be

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[113] 'The Alan Moore Interview: Watchmen, Microcosms and Details' http://www.blather.net/articles/amoore/watchmen3.html, accessed on 3 May 2012.

CHAPTER THREE: *Introducing Comics*

seen as a superhero narrative – one that is more sophisticated than many others, but still primarily to do with that traditional comics trope. The complexity and scope of *Watchmen*, however, lends itself to much more than this, especially when we consider the motivations of the people by whom it was created.

Artist Gibbons's opinions on the creation of *Watchmen* focus primarily upon the superhero aspect, upon how that over-worked narrative trope could be challenged or subverted by placing them within a very *human* context. Writer Moore, however, seems to have broader aims in mind, as this excerpt from an interview with the pair indicates:

> "GIBBONS: …We realized we could create our own archetypes and tell a story about all superheroes. What were their motivations? How would their very existence change the world?
> MOORE: I also wanted to write about power politics… For me, the '80s were worrying. 'Mutually assured destruction'. 'Voodoo economics'. A culture of complacency… I was writing about times I lived in."[114]

Tying these two aspects together, Gibbons notes in his reflective account on the creation of the work that "one of the basic premises of Alan's story [was] that human society itself would be deformed by the presence of a superpowered being"[115]. Accordingly, Gibbons's visual dimensions of *Watchmen* work hard to move away from the traditional image of superhero comics, using a regular 9 panel grid rather than more accessible or dynamic panel layouts typically employed,[116] and working with colourist John Higgins to create a subtler and more sombre mood than the primary colours of *Superman* and *Spiderman*.[117]

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[114]   'Watchmen: An   Oral   History'   *Entertainment   Weekly*   847, http://www.ew.com/ew/article/0,,1120854,00.html, accessed on 3 May 2012. (Second ellipsis in original.)

[115] Gibbons, Kidd, and Essl, *Watching the Watchmen*: p. 29. See also the excerpt from Moore's original script reproduced at p. 1.

[116] ibid.

[117] ibid: p. 70.

When we turn to Moore's commentary upon *Watchmen*, the broader nature of the discourse available in the work becomes more apparent. Some academics preserve the superhero-centric view of *Watchmen*. Annalisa Di Liddo, for example, states that:

> "*Watchmen*, then, was born out of the will to revise the very presuppositions of superhero fiction and to use them to organize a renovated narrative that would offer fresh considerations on the contemporary context; in Moore's words, 'We produced a moral and political fable that used the icons of superhero adventure fiction to make its point'."[118]

Although she seems to recognise the allegorical or metaphorical layers of Moore and Gibbons's comics narrative, she only includes *Watchmen* in her extended study of Moore's work with respect to his general formal approach, failing to examine it in relation to the more substantive themes she was able to perceive in his other productions.[119] Iain Thomson also focuses upon the superhero dimension, reading *Watchmen* as a deconstruction of the very idea of heroism.[120] What this kind of focus overlooks is not only the potential for the overtly complex work to be revisited or reinterpreted in different contexts or on different topics, but also the stated motivations of Moore in his creation of it. Although in light of the indeterminacy debate we may not necessarily need to take into account Moore's or Gibbons's inspirations for or views about *Watchmen* in order to 'read' it successfully, the broader context and stated aims of the work usefully open it up to much wider readings than simply being about the limitations or narrative stagnation of the superhero genre:

> "*Watchmen* used the clichés of the superhero format to try and discuss matters of power and responsibility in an increasingly complex world. We treated these fairly ridiculous superhuman characters as more human than super. We were using them as symbols of different kinds of ordinary human being, rather than as different super beings… perhaps the most important [aspect] was the actual storytelling, where the world that was presented didn't really hang together in terms of linear cause and effect, but was instead some massively complex simultaneous event with connections made of coincidence, synchronicity. And I

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[118] Annalisa Di Liddo, *Alan Moore: Comics as Performance, Fiction as Scalpel* (Jackson MS: University Press of Mississippi, 2009): p. 55. (Quoting Christopher Sharrett's 1988 interview with Moore.)

[119] See ibid.

[120] See Iain Thomson, 'Deconstructing the Hero' in *Comics as Philosophy*, edited by Jeff McLaughlin (Mississippi: University Press of Mississippi, 2005). The deconstruction of heroism is considered in more depth in relation to masculinity in Part Four of this thesis: see Section 8.3.

think that it was this worldview, if anything, that resonated with an audience that had realised their previous view of the world was not adequate for the complexities of this scary and shadowy new world that we were entering into. I think *Watchmen*, if it offered anything, offered new possibilities as to how we perceive the environment surrounding us and the interactions and relationships of the people within it."[121]

It is this broader approach, of engaging with alternative approaches to understanding the world and the people within it, which underpins the reading of *Watchmen* in this thesis. It is also through accessing its symbolic or metaphorical dimensions that *Watchmen* can be most effectively read as an alternative discourse capable of enriching our understanding of issues of identity and morality in a human context. As already stated, this thesis is not able to comprehensively cover every dimension and reference that a complex work like *Watchmen* may contain; the particular aspects of the work that will be focused upon are those most relevant to the issues of selfhood and criminal responsibility that drive this thesis.

Although discussed in more detail as they become relevant, it is worth noting now that some of these aspects of *Watchmen* have already been examined in an academic (but not a specifically criminal justice) context. For example: James DiGiovanna examines the connotations for selfhood of the character Dr Manhattan's ability to teleport and change his physical make-up at will;[122] Jacob Held explores the Kantian dimensions of the character Rorschach;[123] Arthur Ward considers what Dr Manhattan's seeming ability to see all of time and hence predict the future might mean for our capacity of free will;[124] and, as already seen, Thomson reads *Watchmen* in the context

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[121] Dez Vylenz, 'The Mindscape of Alan Moore' (Shadowsnake Films, 2003).

[122] See James DiGiovanna, 'Dr. Manhattan, I Presume?' in *Watchmen and Philosophy: A Rorschach Test*, edited by Mark D. White (Hoboken, NJ: Wiley, 2009). This issue is discussed in more detail in Section 6.4.

[123] See Jacob M. Held, 'Can We Steer This Rudderless World? Kant, Rorschach, Retributivism, and Honor' in *Watchmen and Philosophy: A Rorschach Test*, edited by Mark D. White (Hoboken, NJ: John Wiley, 2009). This issue is discussed in more detail in Section 6.2.

[124] See Arthur Ward, 'Free Will and Foreknowledge: Does Jon Really Know What Laurie Will Do Next, and Can She Do Otherwise?' in *Watchmen and Philosophy: A Rorschach Test*, edited by Mark D. White (Hoboken, NJ: John Wiley, 2009). This issue is discussed in more detail in Section 6.3.

of the classical hero.[125]   These authors deal with important dimensions of the *Watchmen* narrative that relate to the central concern of this thesis, but they generally lack a rigorous engagement with the formal or epistemological dimensions of the work qua comics, and how this important and unique aspect relates to the themes and issues encountered.   Alongside the approach outlined above to engage with the symbolic or metaphorical dimensions of what *Watchmen* might be about, allowing the formal aspects of the work to influence the reading is a major commitment that this thesis makes in its analysis, and thus sets this work apart from those existing discussions of *Watchmen* and makes it more than simply another law and literature study that merely happens to be using a comics narrative.

3.5   Conclusion

The purpose of this thesis is to develop a way of understanding moral identity that is more sensitive to the lived realities of moral agents, and thus an understanding that is able to access the indeterminate dimensions of selfhood beyond the rational and the linguistic and enable the future production of more ethical models of the moral self in criminal theory.   In the previous chapter we saw that turning to artistic and cultural narrative products as alternative discourses can help in this task, but that the relationships between words and images have not been examined directly.   The current chapter has shown not only that the boundaries of the comics medium are not settled or impermeable, but that importantly the form encounters a complex interaction of words and images.   Comics also has the formal potential for sophistication, against what perceptions of its inherent juvenility or simplicity may suggest. These combined traits, coupled with a work of substantive relevance (such as *Watchmen*, with its themes of responsibility and examining alternative ways of understanding the world) mean that comics may be well suited to the interdisciplinary legal theory project generally, and the project in this thesis specifically.   In order to utilise comics successfully in this context, we need to be able to read the form in such

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[125] See note 120.

a way that its aesthetic and epistemological dimensions can be accessed. The in-between nature of comics means that it has both linguistic and non-linguistic elements, but comics also involves various degrees of rationality and logic in the technical operation of the page surface alongside its aesthetic quality and affect. These aspects must not be overlooked. In short, what is needed is a method of reading comics that enables the rational, non-rational, linguistic, and non-linguistic dimensions of the form to be encountered and considered in the interpretive process in a way that opens up meaning and does not block appreciation of its aesthetic and narrative dimensions. Such an expansive approach, coupled with a work of substantive contemporary relevance, will help to enrich our ability to understand moral identity beyond the confines of rational language. The next chapter develops such a reading of comics in preparation for the reading of *Watchmen* that constitutes the remainder of the thesis.

CHAPTER FOUR

Comics and Aesthetics

"Comics demand a different order of literacy: they are never transparent, but beckon their readers in specific, often complex ways, by generating tension among their formal elements. Recognition of this complex relationship is prerequisite to grappling with the literary, sociohistorical and ideological aspects of the form."[1]

4.1 Introduction

The previous chapter introduced the comics form, arguing against its general perception as juvenile and simplistic. It was suggested that in order to access comics' full potential for interdisciplinary insight, a mode of reading that did not overlook comics' aesthetic and epistemological dimensions was required. This current chapter puts forward such a model, derived from Charles Hatfield's analytical work on the comics form and Friedrich Nietzsche's aesthetic metaphysics of surface. Hatfield's work exposes the multiple layers of complexity at work in the comics page, whilst Nietzsche's metaphysics argues that the surface of reality is complex and unable to be experienced in its entirety. This chapter links these two theories to produce a comprehensive 'metaphysics of comics' that is able to access and encounter the manifold complexities and interactions within the comics form in a way that is sensitive to its epistemological, aesthetic, and narrative dimensions, including interaction between the rational, non-rational, linguistic, and non-linguistic. The model produced in this chapter releases comics' potential for interdisciplinary insight, especially with respect to the argument in this thesis relating to enriching understanding of the non-rational and non-linguistic dimensions of the moral self. This chapter thus grounds the substantive analyses that take place in Parts Three and Four of this thesis.

When considering the strategies of interpretation that relate to reading comics, it might be the case that we need to approach silent pieces that employ allegorical

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[1] Hatfield, *Alternative Comics*: p. 67.

images or symbols rather than text, single-panel works, short comic strips, and long-form graphic novels, in subtly or remarkably different ways. The current project is moving towards an analysis of *Watchmen*, which is a long-form graphic novel that uses traditional text, speech balloons, and sequential panel layouts. Thus, in the interests of simplicity, relevance, and the limits of space, the following discussion will focus upon reading this type of comic. However, due to there being many similarities of basic formal aspects, relevant discussion of other types of comics will not be excluded. In addition, where applicable this chapter employs the general 'law' terminology described in Chapter Two, as the focus of discussion is not yet in on the specific substantive topic of identity in criminal responsibility.

The opening section (Section 4.2) introduces the aesthetic approach taken in this thesis. This section argues that the comics form involves not only a collision of the linguistic and the visual, but also of the rational and the aesthetic, thus enabling their interrelations and boundaries to be examined. The remaining two sections develop the aesthetic model of reading comics adopted in this thesis. Firstly, Section 4.3 examines the complexity of the comics page, applying the analytical work of Charles Hatfield. Then Section 4.4 links this complexity of comics with the complexity of surface in Nietzsche's aesthetic metaphysics, producing a 'metaphysics of comics' that does not close down avenues of interpretation and is sensitive to comics' epistemological and aesthetic complexities.

4.2   Reason and aesthetics in the comics form

The research field of law and the image is generally concerned with exposing the visual dimensions of legal structures and operation. The concern with images in this thesis, however, is not with the visual dimensions of law, but with the use of graphic fiction as an alternative discourse on moral identity. In any crossover between law and images, Anne Barron argues, a foundational issue relates to what the key terms 'aesthetics' and 'image' entail.[2] For the purposes of this thesis, the conception of 'image' can be

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[2] Baron, 'Spectacular Jurisprudence'.

kept relatively precise: the images being looked at are restricted to the panels and representations within the pages of *Watchmen*. Epistemologically, however, more specificity in what 'image' entails may be required. The approach of this thesis is more related to philosophical aesthetics than 'the image' as a particular object of study in itself, but nevertheless an understanding of the visual in the comics context is important, and the analysis of the comics form in this chapter as a whole develops this understanding. Regarding 'aesthetics', the concern is with a more general aesthetics than merely the visual dimensions of law. Specifically, the concern is with continental aesthetic philosophy, which explores the uncertain boundaries and relationships between the aesthetic (as sensory perception) and more reason-based philosophical concepts, such as morality and science.

Baron observes that aesthetics has two broad aspects: one which sees aesthetics as discourse on beauty and taste, and one which sees it as a branch of philosophy alongside that of science and morality.[3] The overall argument of this thesis is a philosophical one relating to moral identity, rather than a discussion of the mere artistry of the comics form or of art in general; accordingly, the aesthetics employed in the reading of comics is philosophical. Even within this type of aesthetics, however, Baron observes that there is a split between analytic philosophy, which focuses on art specifically, its nature and value, and continental philosophy. Immanuel Kant's *Critique of the Power of Judgment* is the founding work of philosophical aesthetics,[4] at least in any systematic sense.[5] Whilst analytic philosophy reads Kant as successfully dividing science, morality, and aesthetics into separate concerns (thus allowing a consideration of art as a separate cultural phenomenon to science and morality), continental philosophy reads Kant as blurring the boundaries between these realms. Whilst analytic philosophy takes the separation to mean that aesthetic concerns of taste and beauty can be ignored in favour of the more important matters of morality and

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[3] Baron, 'Spectacular Jurisprudence': pp. 302-03.

[4] ibid: p. 302.

[5] Donald Crawford, 'Kant' in *The Routledge Companion to Aesthetics*, 2nd ed, edited by Berys Gaut and Dominic McIver Lopes (Abingdon: Routledge, 2005): p. 55.

science, continental philosophy's nuanced reading of Kant de-emphasises some aesthetic elements (such as beauty and taste) whilst reworking others, such as the sublime.[6] Part of this reconsideration involves a return to the classical notion of aesthetics as the perceptions of the senses, a view which thus infuses all human experience with an overtly aesthetic quality.[7] This broader view makes the segregation of aesthetics into the minor concerns of 'taste' dismissive and inappropriate, because the aesthetic is actually central to all human experience, rather than just the concern of analytic philosophers of art. It is in this continental tradition of philosophical aesthetics that the approach of this thesis is located. As we will see in later chapters, the softening of the boundaries between morality and aesthetics in Kant's philosophy is highly important in understandings of moral identity, specifically in relation to the sublime.[8] The technical specifics of the comics image, of the panel layouts and individual representations, need to be considered in relation to this notion of aesthetics.

Reading comics, Will Eisner claims, is both an *aesthetic perception* and an *intellectual pursuit*.[9] It involves both the aesthetic perception of visual images, and the intellectual decoding of the conceptual symbols of language. Comics do not only represent a meeting point of word and image, but also, in its blending of various elements, of reason and aesthetics. Against classical reason-based philosophy, Desmond Manderson notes that aesthetics was traditionally an alternative method of discovering objective truth.[10] Nietzsche, he claims, reacted against this orthodoxy, giving "a clarion call to attack the hegemony of reason in the construction of values",

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[6] Baron, 'Spectacular Jurisprudence': p. 303.

[7] Desmond Manderson subscribes to this view, as will be seen below. See generally Manderson, *Songs without Music*. Elaine Scarry also has a broad understanding of aesthetics: see generally Scarry, *On Beauty and Being Just*.

[8] See Sections 5.4 and 8.5.

[9] Eisner, *Comics and Sequential Art*: p. 2.

[10] Manderson, *Songs without Music*: pp. 5-7.

asserting that philosophy must justify itself to aesthetics.[11]   Although some have
claimed that aesthetics gives us a route to objectivity, the beauty and worth of an
artistic work is too contingent upon context and subjective response to enable
aesthetics to accept any notion of objectivity.[12]   "Aesthetics is [thus] a way of
knowing",[13] a method that does not rely upon logic or rationality[14] but rather runs
from our culturally and personally embedded contexts.[15]   Manderson claims that we
engage with the world on an aesthetic level, not merely with logic: "We do not listen
with our ears only, but with our minds and with a whole cultural framework which
sustains us".[16]   Indeed, Manderson accepts the broad continental notion of aesthetics
as linked with sensory perception.   He argues that aesthetics "suffuses our
engagement with everything about us",[17] including our interaction with logic and
reason:

> "Reason and aesthetics stand not in hostile counterpoint. Each in its own way is
> engaged in making of the bare bones of life a human being. Nothing remains
> untouched by the aesthetic temperament – not even that most ostensibly rational
> of human endeavours, the law."[18]

Manderson argues that we cannot escape our cultural context or our aesthetic
engagement, even when we are being logical – the aesthetic imbues everything we
experience, indeed it is *how* we experience.   Alongside aesthetic perception, the
notion of intellectual pursuit implies the use of reason and logic.   Just as the comics
medium may be a meeting point for word and image, a realm where the boundaries
between them begin to break down, so too is it a meeting point for reason and

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[11] ibid: p. 7. See also, regarding the justification of the world only as aesthetic phenomenon, Friedrich
Nietzsche, *The Birth of Tragedy*, trans. Douglas Smith (Oxford: Oxford University Press, 2000): pp. viii,
38.

[12] Manderson, *Songs without Music*: pp. 8-9.

[13] ibid: p. 10.

[14] ibid: pp. 10-11.

[15] ibid: p. 18.

[16] ibid.

[17] ibid: pp. 21-23.

[18] ibid: p. 24.

aesthetics. As Manderson's insights tell us, our intellectual pursuits are themselves experienced as aesthetic perceptions. This meeting, then, is not the simple union or juxtaposition of two distinct forms. Comics, rather, is an example or emanation of the interconnection of reason and aesthetics, of the ways in which they are non-oppositional, of how we rely upon seemingly 'reasonable' ways of understanding through language and logic, but that this understanding is embedded within and experienced through the aesthetic lens of the senses. Thus, embedded in the comics form, interlinked with its dual visual-textual nature, is a nuanced and non-oppositional relationship between reason and aesthetics, enabling the form to explore the complex epistemological boundaries between these two 'ways of knowing'.

In comics we have rationality in the form of linguistic conventions and narrative sequence, of the logical connections between images, and between images and text; we also have profoundly aesthetic dimensions in the overtly graphic form of the comics page, and the visual representations, symbolism, layouts, and physical form it employs. Although Manderson states that language in particular is strongly aesthetic,[19] on a general level language can be seen to have a strong rational dimension which aesthetic experience may not entail. The 'aesthetic' language of classic literature, for example, remains generally trapped within a rationally linguistic mode of representation and communication, and legal constructions are also associated with linguistic rationality, especially in the way they model reality.[20] The aesthetic, as we have seen, is associated with sensory experience, a prominent aspect of which is visual perception. This association does not reductively equate the visual with the aesthetic and the linguistic with the rational – there are obvious examples where the visual can be rational (such as a technical diagram) and literature and poetry show how the linguistic can also have an overt aesthetic dimension alongside its rational communication. The comics form may be both rational and aesthetic in its construction, but these dimensions do not map neatly onto comics' text and image respectively. The overtly rational elements of comics (sequential logic and so on) exist

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[19] ibid: pp. 11-12.

[20] See Weisberg, *The Failure of the Word*. See also Sections 5.2, 7.5, and 9.2.

alongside the form's overtly sensual dimensions (symbolism, layouts, and so on). Moreover, comics is primarily an artistic form, it is primarily aesthetic, and its rational elements are accordingly embedded within this aesthetic context. Similarly, Manderson observes how our engagement with reason remains infused with our aesthetic perception of the world. In exploiting interconnections between text and image, as well as between its rational and aesthetic elements, the comics form can help to model something of the relationships between these interrelated approaches to understanding the world.

Epistemologically, the comics medium can be seen to represent a meeting of reason and aesthetics – but a meeting that does not rely upon the strict differentiation or opposition between the two. The embedded nature of reason within aesthetic contexts, shaped by cultural and personal frameworks, can be seen metaphorically in the way that a speech balloon is embedded in the artwork of a panel, or a logical link between a visual representation and a real world referent is embedded in a symbolic or stylised image. Reason and logic are a part of our experience; they are not separate from it, they are not pure, entirely removed from the aesthetic realm, they are not in contention with our senses. Similarly, the logic of linguistic operation, or of visual representation, is part of the comics image, part of its aesthetic field, not separate from or outside of it. The discussion of the definition of comics in the previous chapter showed that comics is a point where words and images meet and the boundaries between them soften. It can now be said that comics is also a point where reason and aesthetics, the rational and the sensual, meet and their uncertain boundaries are exposed. The relationship between reason and aesthetics is not a simple or clear-cut one. The argument in this thesis is that we need to find a way to explore the indeterminate dimensions of the moral self beyond the limits of the rational and the linguistic. Recognising these limits is an important issue for how legal theory understands the moral self; and this issue of epistemological boundaries is ever-present in the comics form.

4.3   Reading the comics form

4.3.1 *Comics and semiotics*

We turn now to consider reading the comics form in a way that is sensitive to its interacting epistemological dimensions, first considering semiotics before turning to Charles Hatfield's analytical comics work. Semiotic theory has been used in the study of comics, but this section argues that only two elements of this are of significant use: that words and images operate differently, and that images can have multiple layers of meaning beyond the representational. An adherence to only semiotics, on the other hand, misses the importance of form in understanding the respective content. As with traditional literary texts or works of art, comics works need to be interpreted, or 'read':

> "We the readers, in synthesizing the successive scenes, recalling earlier events, and anticipating the conclusion, create the literary artwork from those mere printed words which are but ink on the page".[21]

Comics, too, are but 'ink on the page'. In a similar way to how literary texts are a creative product, a particular construction from a particular cultural or social standpoint, so are comics.[22] As we saw in relation to prose fiction, however, there are problems of indeterminacy inherent in any process of textual interpretation.[23] In comics the combination of word and image both mitigates and exacerbates this problem. The inclusion of images can help to clarify the meaning of a section of text, to limit the possible interpretations that can be made of that text. Images themselves, however, can have multiple levels of meaning that can be unpacked, and juxtapositions of apparent meaning between the text and the images can further

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[21] Carrier, *The Aesthetics of Comics*: p. 80.

[22] See Ann Miller, *Reading Bande Dessinée: Critical Approaches to French-Language Comic Strip* (Bristol: Intellect, 2007): p. 123; Wolk, *Reading Comics*: p. 118.

[23] See Section 2.2.

complicate the interpretive project. As Hatfield notes, "comic art is characterized by plurality, instability and tension".[24]

In undertaking an interpretive project in relation to comics, there are two useful things to note from semiotic theory as seen in the work of Ann Miller.[25] Generally semiotics, which developed from the writings of structural linguist Ferdinand de Saussure, involves the study of the *signifier*, the *signified*, and the associated *sign*, where the signifier is a vessel or vehicle (for example, the physically written or spoken word-form 'cat') that carries the signified meaning or value (the mental representation of a cat), and the sign is the combination of meaning and vessel (the word 'cat'); the syntagm is the location of a particular sign in a string or sequence of signs (for example, a word in a sentence, such as: 'My cat is called Witch-Hazel').[26] Miller's first important point is that words and images, although both conceivable as a nexus of sign, signifier, and signified, have different operational properties in the ways they can be employed to articulate a narrative. For example, images communicate in a different way to text: words are not naturally linked with what they signify, but are linked by convention; the relationship between an image (for example, a drawing of a cat) and what it signifies (the mental representation of a cat) is not purely conventional, operating due to the resemblance of the image to a real-world referent (an actual cat).[27] (The syntagmatic links between words as opposed to images may

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[24] Hatfield, *Alternative Comics*: p. 66.

[25] See Miller, *Reading Bande Dessinée*. It should be noted that Miller's study focuses on 'bande dessinée', a European form of comics art written in French. Although this type of comics is different in content to the typical Western comics (being far less dependent upon the superhero tradition than most mainstream works), the basic principles of its formal operation is the same, being narratives constructed via a (sequentially-based) confluence of word and image. Of course, the definitional problems relating to the relationship between word and image and the use of sequential images discussed earlier are also the same. Although not discussed in the current work, there is also a strong and popular tradition of narrative art in Japan known as 'manga', which again is formally similar to Western comics, but with its own subtle differences and conventions.

[26] For in-depth analyses of semiotics, see, for example: Roland Barthes, *Mythologies*, trans. Annette Lavers (London: Vintage, 1972); Peter K. Manning, *Semiotics and Fieldwork* (London: Sage, 1987); Gemma Penn, 'Semiotic Analysis of Still Images' in *Qualitative Researching with Text, Image and Sound: A Practical Handbook*, edited by Martin W. Bauer and George Gaskell (London: Sage, 2000).

[27] Miller, *Reading Bande Dessinée*: p. 77. This shows us another reason why Eisner's conflation of text and images is problematic (see Section 3.3).

also shape meaning in different ways; for example, particular conventions of grammar may operate in written text but not in a sequence of non-linguistic images.)

The referential link through resemblance, however, is only relevant for representational images; any symbolic or metaphorical levels of meaning operate in a more abstract or associative manner. Miller's second useful point, then, is that there may be multiple levels of 'signification' at work: an image may be representational, operating through resemblance, but there may also be confluent levels of metaphorical, symbolic, or associative operation. Miller notes that there is both metonymy and metaphor at work in comics, some examples of which have become conventional, such as 'speed lines' (a metonym denoting movement) and speech bubbles (a metaphor for the diegetic speech of the characters in the story).[28] A similar phenomenon can occur within a single work through cross-referencing, where multiple images are woven through the comic that are associated through their shared aspects, such as a panel's composition or page location, or a shared meaning, associations, or referent.[29]

Beyond these instructive observations, relying only on semiotics will miss some of the more subtle nuances of the form in its construction and communication of meaning.

> "Words and images are not like boxcars freighting reality around; they do not simply leave the scene once their load of meaning has been dumped in our minds. The language we use, like the technological forms of communication we inherit from the culture around us, helps to create the reality we live in. And as the means of communication change so too does our sense of ourselves, others, and the world around us."[30]

The form of an object is thus integral to the meanings we can construct from our analysis of that object. Images, as well as words, may have shifting and variable

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[28] ibid: pp. 78-82.

[29] See ibid: pp. 95-97. An example of this can be seen in *Watchmen*, with the shadowy image of an embracing couple that, through its deployment throughout the work, becomes a nexus of human feelings: see Section 6.2.

[30] Sherwin, *When Law Goes Pop*: p. 27.

meaning dependent upon the context they are being read within, for what purpose, and from what medium or artistic form they have been selected. Richard Sherwin observes the instability of meaning in our 'late modern' world where the plethora and proliferation of visual images, our increasing ability to access and control what we see, and increasing forms of communication, all play into the destabilisation of meanings (including legal meanings). The contingency of meaning is increased, bringing doubt and uncertainty. Accordingly, we have to *create* our own meanings, rather than 'discover' them.[31] This is an important aspect of comics in general, which solicit the reader into a strongly participatory role: we have to synthesise the various images and interrelations perceived from the page surface into some kind of coherent narrative; the meaning of a comics work is not transparently 'there' to be discovered.[32]

4.3.2 *The complexity of the comics page*

In approaching the comics page, we need an appreciation of the complexities at play in its construction. In the second chapter of his *Alternative Comics*, Charles Hatfield comprehensively outlines the areas of tension at work in the comics form. He identifies four conflicts or tensions that exist in comics and that artists can exploit as rich methods of articulation, and that readers must navigate as part of the interpretive project: 1) the tension between the two codes of representation at work, typically word and image; 2) the tension between each panel as a single image and as an image-in-series; 3) the tension between the sequence as a flowing narrative and as a static, graphically designed layout; and, 4) the tension between a comic as a narrative we experience and as a physical object we hold in our hands.[33] The reader is interactively involved at all levels of this complex comics model, and thus greatly participates in the reading of comics.

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[31] See ibid: pp. 6-9.

[32] cf. Carrier's arguments of 'transparency' and 'self-interpretation': Carrier, *The Aesthetics of Comics*: pp. 85-86.

[33] See Hatfield, *Alternative Comics*: pp. 32-67.

Hatfield's first tension, as just stated, is between the two codes of communication operating in the comics form. Due to the typically 'simplistic' style of comics images, there is a general assumption that comics images are inherently simple, open, and easy to understand,[34] whilst words may be complex, coded, and abstract.[35] However, the distinction between these two 'codes', as Hatfield terms them, is continually destabilised in the comics form.

> "Comics... collapse the word/image dichotomy: visible language has the potential to be quite elaborate in appearance, forcing recognition of pictorial and material qualities that can be freighted with meaning (as in, for example, concrete poetry); conversely, images can be simplified and codified to function as a language".[36]

The term 'codes', rather than words and images, is instrumental. In silent comics, for example, the written text that is 'normally' used to communicate speech, thought, and narration is replaced with yet more images. We saw in the previous chapter how this caused problems when defining comics as a juxtaposition or confluence of word and image, but in seeing the two as merely different ways of codifying information or communication, two different codes of signification, a distinction can be seen between symbols that 'show' (diegetic images that represent what is occurring) and symbols that 'tell' (non-diegetic words, balloons, or familiar icons). Thus, the difference becomes one between the two codes of signification operating in the comics form, rather than word and image in general.[37] This code-code distinction can be pushed and creatively manipulated to blur the differences, and thus we have a tension which is a potential resource for the medium's articulation of meaning.[38]

The fluid boundaries between words and images highlighted by the comics form do not only give us a potential tension or interaction between multiple codes that may be a site from which to construct meaning, but can also highlight something of the

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[34] For discussion on why comics images may tend towards simplicity, see Section 3.2.

[35] Hatfield, *Alternative Comics*: p. 36.

[36] ibid: pp. 36-37. See Section 3.3 regarding concrete poetry.

[37] ibid: pp. 39-41.

[38] ibid: p. 41.

arbitrariness of using linguistic representations to understand the world. This is a fundamental point in relation to law and legal theory, as it questions the need to adhere to language in order to understand and order our experiences and values. Sherwin, as we have just seen, observes that form is integral to the meaning available from a particular representation. Accordingly Douzinas and Nead, as noted above, highlight how the indeterminacy of images, their relative formlessness in relation to rational meaning and interpretation, leads to their general opposition to the rational requirements of legal understanding. Capitalising on the general indeterminacy of language observed in Chapter Two, the softening of the boundaries between words and images revealed in the comics form seen in Chapter Three can thus now be seen to raise a significant challenge to legal representation. In Chapter Nine we will see in more detail the security of language that is clung to in criminal theory's general approach to the complex surface of reality, and how Battersby's relational metaphysics may help transcend this. As we will also see, comics can help in this escape from the security of language, and also from its limitations.

The second tension in the comics form is between the single image and the image-in-series. The images depicted in a comic are selected, by the artist, from an almost infinite number of possible images that could be part of the narrative being constructed, and this selection, although in many ways arbitrary, is a fundamental part of the creative process, directly and functionally informing the progression and operation of the narrative. As Eisner puts it, the task of visual narration in the comics medium is done by "arbitrarily breaking up the flow of uninterrupted experience into segments of 'frozen' scenes and enclosing them by a frame or panel".[39] Scott McCloud highlights the importance of this sequential aspect of comics. In analysing how we read a sequence of images, he observes that comics employ a phenomenon known as 'closure' which occurs in the 'gutter', the (usually blank) space between panels. As we move from one image to the next, we are forced to make associations between those two images to construct in our imaginations what is diegetically occurring, what event

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[39] See Eisner, *Comics and Sequential Art*: pp. 39-40, quote at p. 40.

is being depicted as taking place.[40] As Henry Pratt observes, this involves a great deal of creative imagination on the part of the reader who has to piece the static images together and form a continuous narrative flow in his or her mind, and thus fosters a high level of intimacy between the text and the reader.[41] This is a prominent example of the interactive nature of comics reading. As Hatfield also notes, the reader's role is active and crucial to the success of the form's communication due to the requirement of the reader to achieve McCloud's 'closure' in order to 'read' the narrative effectively.[42]

The image sequence, however, is made up of multiple single images. Although the communication of a single image needs to be understood differently to that of an image-in-series (due to syntagmatic context), Hatfield argues that the single image should not be ignored in favour of the image-in-series, as we may overlook significant meaning. We need to understand the individual image in order to undertake the closure process and make connections between multiple images. These connections may be conventional, rather than natural, but they can be relatively straightforward (for example, using repetition or verbal cues) or more sophisticated (for example, different angles of perception at the same time to build up the 'image' of an event, or symbolic or conceptual links between panel images).[43] The tensions between the single image and the image-in-series, Hatfield notes, are complex and hard to codify; visual and verbal interplay may play a part, notably the use of words to bridge a jump in the images (for example, deceptively simple cues like 'later' or 'meanwhile') which could unify otherwise disjointed images, and the breaking down of continuous narrative into static images may depend upon the verbal-visual interaction, not just articulating the visual element.[44] Furthermore, the tensions between the two codes of

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[40] McCloud, *Understanding Comics*: pp. 62-69. This notion of 'closure' is discussed in relation to the synthesis of reality and identity in Section 6.4.

[41] See Pratt, 'Narrative in Comics': pp. 111-15.

[42] Hatfield, *Alternative Comics*: p. 41.

[43] ibid: pp. 41-43.

[44] ibid: pp. 44-48. See also McCloud, *Understanding Comics*: pp. 70-73.

signification, and between the image and the image-in-series, "interact to create a yet more complex tension, [further] soliciting the reader's active efforts at resolution".[45]

Hatfield's third tension is between the comic as a flowing narrative and the static layout of the comics page. This tension, between the image sequence of comics, of a series of 'moments', and the static layout of the page as a non-temporal graphic design, is also connected to the tension between the single image and the image-in-series, and relates most notably to how time is articulated in the comics medium. The image sequence generally denotes some passage of time, so the tension between sequence and static layout can be reduced to a tension between "perceived time and perceived space",[46] or more specifically between space-as-narrative-time and space-as-page-surface. This relationship can be exploited and manipulated to articulate the varying rhythm and pace of a narrative, even within a single page.[47] The tension between sequence and layout, between narrative time and page surface, is further complicated by the non-standard passage of time in comics. Both the amount of diegetic time passing within a panel, and between panels, is indeterminate, and can vary considerably within a narrative:[48] there is no need for time to pass within or between panels, but equally a single panel or gutter can potentially span hours of even days.[49] The amount of time passing in a particular panel is also not necessarily related to the physical size of that panel – a larger panel may denote a highly dramatic occurrence rather than one that takes any particular length of time to 'happen'.

Further, the code-code or verbal-visual tension noted above also plays a role in fixing the time-span of any particular frame due to the physical fact that words take time to say, or they can simply state the amount of time that passes.[50] There is tension between the time-span of any particular panel, the time occurring between or

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[45] Hatfield, *Alternative Comics*: p. 48.

[46] ibid: p. 52.

[47] ibid. See also, Versaci, *This Book Contains Graphic Language*: pp. 15-16.

[48] Miller, *Reading Bande Dessinée*: p. 89.

[49] Hatfield, *Alternative Comics*: p. 58.

[50] ibid: p. 52. See also: Eisner, *Comics and Sequential Art*: pp. 24-26.

across the panels of the image sequence, and the page surface as a non-temporal graphic layout. The timing of a comics narrative, then, can be articulated by exploiting the various tensions between the visual and verbal aspects of comics, the image and the image-in-series, and the sequence and graphic layout or page surface. The operation of narrative time in comics is thus highly complex, and the navigation of the various tensions that might constitute or problematise its articulation is not something to be wholly pinned down into a universal scheme. As Hatfield reminds us:

> "There is no single prescription for how the tensions of image/series or sequence/surface are to be resolved; rather, there is always an underlying tension between different possible ways of reading".[51]

More generally, there is no single 'objective' conception of a comics page, no single way to resolve the various tensions at work, and an awareness of those tensions serves to multiply meaning rather than narrow it down.[52] Here we see the point alluded to earlier that interpretation of the comics medium is just as unstable and indeterminate as the reading of other literary forms as we saw in Chapter Two.

The fourth and final tension identified by Hatfield is that between the comic as a narrative experience and the comic as a physical object. Perhaps more obviously than traditional books, Hatfield tells us, "long-form comics can exploit both design and material qualities to communicate or underscore the meaning(s) available in the text".[53] He gives a number of examples where the materiality of the comic is important, most obviously with respect to the particular style of artistry employed (the 'clear line' style, for example, like that of the *Tin Tin* comics, has ideological associations with clarity and the simplicity and innocence of children's comics which can be ironically juxtaposed with complex adult themes or humour).[54] Miller also

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[51] Hatfield, *Alternative Comics*: p. 58.

[52] ibid: p. 66.

[53] ibid: pp. 58-60. Hatfield's use of the term 'text' here is inclusive of the multiple codes of signification that comics employ, typically both word and image.

[54] ibid: pp. 60-61.

notes the importance of artistic style to the representations of character and setting in the comics medium:

> "The flexibility of the graphic line allows for varying degrees of precision and subjective investment by the narration in the representation of characters and decors".[55]

Forms of judgment can be implied of a character through the way they are depicted (lighting, exaggeration, or stylisation, for example, implying the 'badness' of a character), and the style of their representation can be varied through the narrative; unclear depiction could be employed for hazy memories, for example.[56] Instances where objects or people 'overlap' or appear outside the panels also call into sharp attention the physical form of the comic itself.[57] These aesthetically material aspects of comics can "highlight the distance between text and reader, and foreground the reader's creative intervention in meaning-making",[58] and thus our physical engagement with the comics work itself becomes a potentially important aspect of how the medium communicates.

Reading comics, then, is not a simple matter. It involves not only the recognition of the particular conventions and formal resources of the medium, but an understanding that these conventions are not fixed or solid. Rather, they are fluid – they can be manipulated, altered, or rejected completely. The articulation of any particular comics work depends upon exploitation of the various complex tensions and interactions that exist between the different levels of comics' formal elements – the visual, the verbal, the sequence of images, the page surface, the physical object we hold. All these aspects and their complex interactions are important to the meanings available in a particular comics work, and variously solicit the participation of the reader on a number of levels in the interpretive project. In the highly interactive process of comics reading, the reader has to navigate these vastly complex levels of textual, visual,

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[55] Miller, *Reading Bande Dessinée*: p. 124.

[56] See ibid: pp. 123-24.

[57] Hatfield, *Alternative Comics*: p. 64. See also Miller, *Reading Bande Dessinée*: pp. 136-38.

[58] Hatfield, *Alternative Comics*: p. 63.

aesthetic, and narrative awareness, which have varying importance (dependent upon the particular work being read, and how that work exploits the medium's various formal elements and the corresponding tensions between them) but are, to some degree, always present.

4.4   Metaphysics of surface

The previous section argued that the comics page is complex and indeterminate, involving audience participation in the construction of its reading. This section links this complexity of surface with the complexity of surface found in Nietzsche's aesthetic metaphysics. It was noted above with Manderson that we engage with the world via aesthetics, which is a way of knowing that infuses all our experiences – even those of reason and rational constructs such as law. Adam Gearey also claims an all-permeating nature for aesthetics, again derived from an engagement with Nietzsche. Gearey reads Nietzsche's 'will to power' as "an ontology that presents the essence of the human as the need to evaluate [and continuously re-evaluate] the world".[59] The will to power is linked with our creation of the world, and of knowledge. In Nietzsche's own words:

> "True philosophers reach for the future with a creative hand and everything that is and was becomes a means, a tool, a hammer for them. Their 'knowing' is *creating*, their creating is a legislating, their will to truth is – *will to power*".[60]

According to Gearey, this will to power enables and underpins not only our creation of the world, but also of law and its potential reimagining (or overcoming):

> "What allows the law to be posited in the first place could also perhaps lead to its overcoming... Aesthetics is, at heart, this energy to mandate the form of the world, to create oneself... the courage to will an ethics".[61]

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[59] Adam Gearey, *Law and Aesthetics* (Oxford: Hart, 2001): p. 67.

[60] Friedrich Nietzsche, *Beyond Good and Evil: Prelude to a Philosophy of the Future*, ed. Rolf-Peter Horstmann and Judith Norman, trans. Judith Norman (Cambridge: Cambridge University Press, 2002): p. 106.

The willing of an ethics is necessary, Gearey claims, to avoid the chaos of a world without structure.[62] Applying this reading of Nietzsche to legal theory, Gearey's claim is that through our will to power we evaluate the world, and thus we must take responsibility for our measurements, our interpretations of the world, and the resultant legal and moral structures that we create: we must will the law.[63] Furthermore, accepting the world and our engagement within it as an aesthetic phenomenon (as both Manderson and Gearey maintain we should, and Nietzsche before them) raises significant questions about the boundaries and limitations of reason; it also highlights our participatory role in the construction of that world and our knowledge of it.[64]

Nietzsche reconfigures the Kantian sublime with respect to questions of surface and depth. The Kantian sublime is related to the limits of our senses, and, more importantly, of what is knowable – it is where rationality and aesthetic sensuality meet.[65] It relies upon the metaphysical division between the world of appearance or experience (Kant's phenomenal) and the 'true' reality of the thing-in-itself which remains inaccessible 'behind the veil' of appearances (the noumenal). Nietzsche's metaphysics denies any depth beneath the surface, instead modelling reality as a complex surface which cannot be known in its entirety. For Nietzsche, the aesthetics of the sublime is not associated with the veiling of true reality. As Christine Battersby argues:

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[61] Gearey, *Law and Aesthetics*: p. 51. See also Friedrich Nietzsche, *Thus Spoke Zarathustra*, ed. Adrian Del Caro and Robert Pippen, trans. Adrian Del Caro (Cambridge: Cambridge University Press, 2006): pp. 42-44.

[62] Gearey, *Law and Aesthetics*: pp. 63-64. Note also Nietzsche's general distinction between the chaotic, communal Dionysian and the rational, individualised Apollonian forms which mask it: see Gearey, *Law and Aesthetics*: pp. 57-58; Nietzsche, *The Birth of Tragedy*. See also Section 9.4.

[63] See Gearey, *Law and Aesthetics*: pp. 51-76.

[64] Our participation in processes of world-making and self-making is the focus of Chapters Six and Seven.

[65] The sublime is discussed in more detail in Sections 5.4 and 8.5.

> "Nietzsche's restless attempt to revalue all values (including aesthetic values) led him to move from viewing art as a mode of access to a truth 'beyond' appearance to a reconfiguration of the notion of surface and its relation to depth".[66]

Indeed, as the following two quotations demonstrate, for Nietzsche there is nothing beyond the surface of life:

> "...the creative spirit who is pushed out of any position 'outside' or 'beyond'... whose solitude will be misunderstood by the people as though it were a flight *from* reality –: whereas it is just his way of being absorbed, buried and immersed in reality".[67]

> "...body am I through and through, and nothing besides; and soul is just a word for something on the body".[68]

Berrios and Ridley note a similar move in the development of Nietzsche's aesthetics:

> "On this new conception, the appearance/reality distinction is not a distinction between two logically differentiated 'worlds' – an apparent one [surface] and a real one [beyond or beneath the surface] – but a distinction that falls squarely within the ordinary, everyday world of actual experience".[69]

There is only surface, the surface we experience in our everyday lived realities, but this surface is far more rich and complex than pure reason can comprehend: it is something in which one can become 'absorbed, buried, and immersed' once we move 'outside' the limits of rationality. As Battersby terms it, the surface is 'folded' with multiple perspectives, rendering it "neither simply a plane nor a façade", nor able to be comprehended in its entirety.[70] Put simply, if we are too close to the surface or we look in too much detail we are unable to comprehend its entirety, and if we are too far

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[66] Battersby, *The Sublime, Terror, and Human Difference*: p. 160.

[67] Friedrich Nietzsche, *On the Genealogy of Morality*, ed. Keith Ansell-Pearson, trans. Carol Diethe (Cambridge: Cambridge University Press, 1997): p. 66.

[68] Nietzsche, *Thus Spoke Zarathustra*: p. 23.

[69] Ruben Berrios and Aaron Ridley, 'Nietzsche' in *The Routledge Companion to Aesthetics*, 2nd ed, edited by Berys Gaut and Dominic McIver Lopes (Abingdon: Routledge, 2005): p. 99.

[70] Battersby, *The Sublime, Terror, and Human Difference*: p. 182.

away we are unable to see its detail: our knowledge and experience of the surface is always limited by our perspective of it.[71]

This metaphysics of surface, the claim that there is no 'true' reality 'beneath' the surface, accordingly can be seen in Nietzsche's philosophical method. Rather than following a logical path of discussion, as traditional philosophical discourse tends to do, Nietzsche instead gives short vignettes, aphorisms, and snapshots of the topics he is considering. Rolf-Peter Horstmann observes this approach in his introduction to *Beyond Good and Evil*,[72] but it can also be seen in other works. These 'viewpoints' gradually build up the details and various different emanations of Nietzsche's thought in different contexts, around different 'folds' in the surface. This can also help to explain why Nietzsche's philosophy is notoriously difficult to synthesise into a coherent and non-contradictory whole.

The complexities and relationships between various dimensions of the surface of the comics page can be seen to model very closely this Nietzschean configuration of surface. Nietzsche's aesthetics is thus useful in approaching comics, and vice versa. In the tensions associated with interpreting comics – between text, image, image-in-sequence, physical layout, and physical object – the complex and multifaceted nature of comics can clearly be seen. The 'surface' of comics is intricate, layered with symbolic, representational, associative, and textual meaning, and multiple interplays between these layers. Coupled with this is the aesthetic quality of the comics page in general, of which the rational logic of linguistic and visual operation is only a part. In short, the comics surface has 'depth': it is richly complex, 'folded' with manifold dimensions and interactions, and cannot be synthesised into a single coherent whole. In a similar way to how reason is merely one way of approaching the infinite surface of the world for Nietzsche, so the rational tools of textual interpretation and visual logic is merely one way of approaching the reading of comics. By embedding rational elements within a complex field of aesthetic perception, comics helps us to understand

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[71] This aspect of the metaphysics of surface underlies Chapter Seven of this thesis: see Section 7.5.

[72] Nietzsche, *Beyond Good and Evil*: p. xxiii.

Nietzsche's point that rather than attempting to go beneath the surface of life or reality into some veiled or objective 'beyond', we can instead recognise the complexity and indeterminacy of that surface, and of our limited experiences of it. Moreover, in limiting our approach to only one (rational) tool, we will be unable to see many of those details and complexities. By recognising the interrelation of the rational and the aesthetic, this 'metaphysics of comics' taps into the complexity of the formal elements of comics in a way that is sensitive to its aesthetic and epistemological dimensions, able to encounter the rational, non-rational, linguistic, and non-linguistic aspects of comics and the manifold interactions between them, but in a way that does not efface the narrative and aesthetic quality of a comics work (because different perspectives can always be adopted, and the tensions between them examined). The metaphysics of comics is thus a highly suitable model for approaching comics in a way that opens up their rich potential for interdisciplinary inquiry, and for moving beyond the rational and the linguistic.

The metaphysics of comics is an expansive interpretive model, opening up our ability to understand the operation and meaning of a graphic narrative. Taking the relationship between word and image as an example, it has already been noted in the previous chapter that defining comics typically involves an oscillation between seeing word and image as combined into a unique and unified language, and seeing word and image as simply working together. The unified language approach enables comics to be understood as a unique art-form in its own right, but may overlook the interactions and potential juxtapositions between words and images that can be encountered by seeing comics as the simple cooperation of word and image. Under the metaphysics of comics proposed here, however, neither of these perspectives is excluded: we may recognise on one level that comics involves a unique and unified language derived from both words and images, but we may also recognise that words and images have their own interplay that may be exploited in meaning-making. These multiple dimensions of how comics are constructed are part of what makes the comics surface complex, and remaining sensitive to these and the other complexities in the comics form, their potential for interaction, and the potential for the form always to be

understood or synthesised differently (by different reader participations), allows the richness of the comics medium to be accessed without prioritising one particular dimension or interpretive practice over another, and without closing down alternative avenues of meaning.

4.5 Conclusion

This thesis argues that we need to explore the non-rational and non-linguistic in our approach to the moral self in criminal theory. Building on the previous chapter, the current chapter has put forward the model of approach to be taken in this thesis, which recognises that the comics form involves not only a collision of the linguistic and the visual, but also of the rational and the aesthetic (or non-rational). By linking the complexity of the comics page with the complexity of surface in Nietzsche's aesthetic metaphysics, an approach to comics that taps into its narrative and formal elements whilst remaining sensitive to its epistemological and aesthetic complexities has been achieved. This chapter has thus produced a 'metaphysics of comics', an interpretive model that is highly suitable for approaching comics in a way that opens up their potential for interdisciplinary inquiry, especially in relation to enriching understanding of the non-rational and non-linguistic. The remainder of this thesis employs this 'metaphysics of comics' approach in undertaking an analysis of Moore and Gibbons's *Watchmen*, focused on the substantive problem of the understanding of the moral self in criminal theory. The various complexities of the comics pages in *Watchmen* will be examined and an alternative discourse on issues of moral identity will be constructed from the graphic novel in conjunction with critical discussion of more 'orthodox' philosophical and theoretical discourse. Methodologically, what will be seen is that by approaching *Watchmen* using the metaphysics of comics developed in this chapter, this thesis will benefit from the work's rich potential for insight into our understanding of moral identity.   It should be highlighted that although this thesis engages substantively with only one example of comics (*Watchmen*), the potential for the medium to be an enriching object of study for legal theory extends well beyond this single work. Indeed, as we have seen over the previous two chapters, beyond the

specific themes encountered in a work it is the general characteristics of the form (the intersection of words and images, its epistemological 'in-betweenness', coupled with its aesthetic or narrative affect) that make comics of distinct significance as a potential resource in the study of law and justice.

PART THREE

CRIMINAL IDENTITY AND THE RATIONAL SURFACE

CHAPTER FIVE

Rational Choice and Criminal Justice

"They had a choice, all of them... Don't tell me they didn't have a choice."[1]

5.1 Introduction

The argument of this thesis is that the dominant models of the moral self found in criminal theory do not meaningfully or sufficiently encounter the lived reality of individuals. Behaviour, including criminal behaviour, takes place in lived contexts of embodied action and experience; if an individual is modelled as abstracted from this 'living' context, then that individual cannot meaningfully or ethically be linked with his or her behaviour, and thus cannot justly be understood as responsible. Models of criminal identity that undertake such abstraction engender an injustice in how they understand responsibility. The central issue with this injustice relates to the division between a self that is abstractly autonomous and a self that exists in a lived context of emotionally embodied reality. This extreme division can be seen clearly in Kantian moral philosophy, where it forms the basis of Kant's model of autonomy, and can also be found to permeate criminal responsibility theory in a less extreme form. This chapter is concerned with expounding this central issue in the ethics of modelling the moral self, setting up the problem with criminal theory before we move on to analyse *Watchmen* in subsequent chapters in an effort to aesthetically reconfigure moral identity into a more ethical form.

This chapter is made up of three sections. In Section 5.2 the general split between abstract autonomy and a contextual, living self is introduced in the philosophy of Immanuel Kant. The following section (Section 5.3) examines criminal responsibility theory to show that it generally adheres to a model of rational choice that commits the same abstraction as Kantian abstract autonomy, although not to the same extremes. Attempts to go beyond rational choice in both Kantian philosophy (through a wider

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[1] Moore and Gibbons, *Watchmen*: Chapter I, p. 1.

reading of his thought that includes aesthetic experience in the development of moral autonomy) and the criminal justice work of Alan Norrie are then analysed (Section 5.4). Both of these approaches are argued to be problematic with respect to examining the fluid dimensions of the living self, and thus the 'phenomenological aesthetics' work of Jonathan Wender is considered. Wender's work highlights the irreducibility and excessive nature of the world of lived experience that we must retain awareness of as we attempt to enrich our understanding of embodied, human experience in relation to models of criminal identity.

5.2   Immanuel Kant and criminal justice

Ernest Weinrib, in his essay 'Law as a Kantian Idea of Reason', argues that the philosophy of Immanuel Kant is intricately linked with contemporary legal scholarship. Kant's 'right', Weinrib argues, is grounded in the formal relationship between free willing agents, and this notion of free will, or volition, is the central thread that ties together the entirety of law (as doctrine and institution) as a coherent 'idea of reason'.[2]   Adam Gearey also observes how "Kant's 'idea of reason' provides the controlling concept that allows a rational jurisprudence to account for the origins of civil society without reference to anything extrinsic to reason itself".[3]   Rooting out Kant's influence more broadly, Ian Ward traces many seemingly counterpoised schools of moral, political, and critical legal thought back to Kant's philosophical system.[4] Specifically related to criminal theory, Samuel Pillsbury links the retributive framework of criminal justice to Kant's moral philosophy. He observes that, although Kantian retributive theory is not uncontested, its key dimensions of respect for persons (based on our capacity for free moral choices) and punishment (based on respect for autonomy) ground Western criminal justice systems and inspire their tendency

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[2] See Ernest J. Weinrib, 'Law as a Kantian Idea of Reason' *Columbia Law Review* 87 (1987).

[3] See Gearey, *Law and Aesthetics*: p. 6. Gearey's argument against this abstract ahistorical position, via the poetry of Shelley, is discussed in Section 8.3.

[4] Ian Ward, *Kantianism, Postmodernism, and Critical Legal Thought* (London: Kluwer, 1997).

towards dispassionate, unemotional judgement.[5] Similarly, Alan Norrie claims that the simple penal equation "crime plus responsibility equals punishment" has informed our social control practices for two hundred years,[6] and that both "criminal law theory and the philosophy of punishment possess the same Kantian, retributive emphasis on individual responsibility as the proper basis for legitimate punishment".[7] Such claims suggest a simple correspondence between criminal justice and Kantian moral philosophy, but this is a radical oversimplification.

On a philosophical level, perhaps one of the most notable forms of moral philosophy that an exclusive focus on Kant might overlook is utilitarianism, deriving predominantly from the works of theorists such as Jeremy Bentham. Although we will see that Kant is oriented against utilitarian ideas, such as enacting punishment as a means of deterring future crime, utilitarianism has had a significant impact on Western criminal justice.[8] Bentham believed that individuals are guided by the dual behavioural drives of pleasure and pain, such that an individual will act to minimise the latter and maximise the former; he positioned the legal institution as the prime instrument for influencing people's actions, and thus society, for the better through the use of criminal sanctions that played on these two behavioural dictates.[9] Although Bentham's work is important for criminal justice more broadly, engendering issues relating to the justification of punishment or rehabilitation, and the role of the criminal justice system in society, rational actor models like Bentham's calculus of pleasure and

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[5] Samuel H. Pillsbury, 'Emotional Justice: Moralizing the Passions of Criminal Punishment' *Cornell Law Review* 74 (1989): pp. 658-67.

[6] Alan Norrie, 'The Limits of Justice: Finding Fault in the Criminal Law' *Modern Law Review* 59, no. 4 (1996): p. 540.

[7] Alan Norrie, *Punishment, Responsibility, and Justice: A Relational Critique* (Oxford: Oxford University Press, 2000): p. 3.

[8] Indeed, both retributive ('punishment') and utilitarian ('deterrence', 'rehabilitation') ideals are expressly stated as guiding concerns at the sentencing stage of the English criminal justice process: see section 142(1) of the Criminal Justice Act 2003. See also Andrew Ashworth, *Principles of Criminal Law*, 5th ed. (Oxford: Oxford University Press, 2006): p. 19.

[9] See Morrison, *Jurisprudence*: pp. 186-98. Note also the work of Beccaria, which was focused upon the issue of deterrence (as opposed to retributive punishment): see Norrie, *Crime, Reason, and History*: p. 19. On the oppositional nature of the relationship between this type of utilitarianism and Kant's retributive ideals, see Morrison, *Jurisprudence*: pp. 146-49.

pain are limited with respect to individual responsibility. Kantian philosophy, although with its own limitations in relation to the deterrent, rehabilitative, or otherwise utilitarian functions of criminal justice systems, considers questions of individual responsibility in more detail and is thus highly relevant to theoretical issues relating to autonomy and our understanding of the moral self.

Theory relating to criminal responsibility, although not simply 'Kantian', does have a general underlying concern with the ability of the individual to choose (rationally and independently) what he or she does. The criminally or morally responsible individual is one that is, to a greater or lesser extent, able to freely will his or her actions – to choose what he or she does by generally directing his or her thoughts, behaviours, and beliefs in a rational manner.[10] It is this common reliance upon models of rational choice that makes Kantian philosophy important for moral identity. Kant's moral philosophy is focused on concepts of free will and autonomy – the self's ability to employ non-empirical, non-contingent rationality to direct its actions – and is thus a valuable model for examining the philosophical dimensions of rational choice and the abstraction of the individual in models of criminal identity. Although the notion of abstract autonomy described in this section is a common reading of Kantian moral philosophy, Kant's philosophy can be read to be more subtle than this, as subsequent sections demonstrate. It should be noted that Kant's 'reason' is a priori, abstract, and separate from the contingent world of experience, of senses and feelings. In the next section we will see a broader conception of rationality in criminal responsibility theory that involves the general ability of the individual to direct his or her beliefs, thoughts, behaviours, and emotions; this 'rationality' is not the same as Kant's abstract 'reason'. The term 'pure rationality' or 'reason' will be used to refer to Kant's kind of abstract rationality, whilst 'rationality' generally will refer to the broad conceptions of criminal theory seen in the following section.

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[10] See Section 5.3.

5.2.1 *Kantian abstract autonomy*

Kant was perhaps the first thinker to imbue the person with the ability to self-determine, the ability to choose his or her own actions, and this helps to explain his broad influence.[11] This section is focused on a common reading of Kantian autonomy: the idea of abstract autonomy. Jane Kneller, for example, observes the tendency to see Kantian autonomy as associated with some kind of 'moral hero', isolated on a rock of rational will power, separate from humanity.[12] Similarly, David Torevell argues that emotionally embodied experience was denied in Kant's search for universal morality, and that this invalidation of embodiment and emotions actually reduced individual moral autonomy by disregarding subjective ethical experience.[13] More pertinently, Alan Norrie associates Kant's philosophy with the abstracted responsible agent that he finds in criminal theory. Simply put, abstract autonomy is the idea that the moral agent is able to freely and rationally will his or her own behaviour, irrespective of external (empirical) influence or personal desires, and is thus fully responsible for that behaviour.

Kant argues that all 'rational beings'[14] have autonomy, based upon their inherent ability to use reason, and this acts as the basis of respect for individuals.[15] Kant defines autonomy as being bound by our purely rational will, rather than being constrained by some non-universal interest (such as the desire to be happy).[16] Kant argues that the

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[11] Morrison, *Jurisprudence*: p. 133.

[12] Jane Kneller, 'The Aesthetic Dimension of Kantian Autonomy' in *Feminist Interpretations of Immanuel Kant*, edited by Robin May Schott (University Park, PA: Pennsylvania State University Press, 1997): pp. 174-75.

[13] David Torevell, 'Acting out Affections: Embodiment, Morality and (Post) Modernity' *International Journal of Children's Spirituality* 5, no. 1 (2000).

[14] 'Rational beings' includes more than just humans. Divine beings, such as the Christian 'God', are also rational beings for Kant. (Kant actually argues for the logical certainty of this God's existence as the supreme author of the universe and the moral law: see Immanuel Kant, *Critique of Practical Reason* (Cambridge: Cambridge University Press, 1997): pp. 103-10.) Extra-terrestrial rational beings, such as 'aliens', presumably also fall under this heading, should they prove to exist.

[15] Immanuel Kant, 'Foundations of the Metaphysics of Morals' in *Foundations of the Metaphysics of Morals and What Is Enlightenment?* (Indianapolis: Bobbs-Menil, 1959): pp. 51-58.

[16] ibid: p. 51.

supreme principle of morality can only be found in a priori reason, which is separate from the phenomenal world of empiricism. Empiricism, he claims, can only ever lead to contingency, and thus has no place in uncovering objective moral principles:

> "Empirical principles are not at all suited to serve as the basis of moral laws. For if the basis of the universality by which they [the moral laws] should be valid for all rational beings... is derived from a particular tendency of human nature or the accidental circumstance in which it is found, that universality is lost."[17]

We cannot derive 'good' and 'evil' from experience, as this would make morality contingent upon what we know about the world.[18] Rather, universal reason, which is common to all rational beings, is the only way to establish universal morality.[19]

Acting from the heteronomy of will (following our inclinations and desires, being affected by empirical outcomes and external influences in the world of sense) makes our actions contingent and thus apart from (universal) morality. Our autonomy of will, on the other hand, is independent from empirical influences;[20] it is a 'free will', determined only by the moral law (universal, *a priori* reason),[21] and then only through following one's *duty* to that law.[22] Freedom for Kant is our ability to reason apart from the world of sense and desire (our autonomy), and thus to give ourselves (universal) laws in accordance with reason and to determine our own actions free from any causal chain or empirical influence.[23] Recognising this innate freedom gives us power over

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[17] ibid: pp. 60-61. Note also: "...all moral philosophy rests in its pure part. Applied to man, it borrows nothing from knowledge of him (anthropology) but gives him, as a rational being, a priori laws", (ibid: p. 5). "Nor could one give poorer counsel to morality than to attempt to derive it from examples... Imitation has no place in moral matters, and examples serve only for encouragement", (ibid: p. 25).

[18] See Kant, *Critique of Practical Reason*: pp. 51-54.

[19] Kant, 'Foundations of the Metaphysics of Morals': pp. 22-25. Note also Kant's assertion "*that the concept of good and evil must not be determined before the moral law... but only... after it and by means of it*": Kant, *Critique of Practical Reason*: p. 54. (Emphasis in original.)

[20] Kant, *Critique of Practical Reason*: p. 30.

[21] ibid: p. 26.

[22] ibid: p. 69.

[23] See ibid: pp. 80-82; Kant, 'Foundations of the Metaphysics of Morals': pp. 64-65. See also Christine M. Korsgaard, 'Introduction' in *Groundwork of the Metaphysics of Morals*, edited by Mary Gregor (Cambridge: Cambridge University Press, 1998): p. xxvi.

our inclinations and desires,[24] and thus we always have the ability to follow reason as opposed to mere impulses or external influences.

Kant holds that it is only by what is innate in a person that they can be judged, since all else is shifting and contingent, being linked to the empirical world of sense and experience. In purely rational beings, Kant claims, this innate quality is our autonomy of will, which remains constant and undiminished irrespective of context or empirical influence.[25] It is our ability to choose for ourselves via reason, our 'free will', which is important in determining the morality of our actions, and not the outcomes or objects of action, which are found in the world of experience. (With this point we can see Kant's orientation against the utilitarianism of Bentham.) It is through following abstract reason rather than inclination or desire that we can attain universal morality.[26] We are part of the intelligible world, subject to the universal laws of reason (the moral law), but, Kant notes, we are also beings of sense. Due to our nature, as rational beings, of being both rational and influenced by external factors in the world of sense, and thus to be able to partake in reflection regarding how we should act (that is, to choose our behaviour),[27] we must see the universal moral law as an imperative.[28] Following reason is not to be done for any kind of incentive or outcome, such as the maximisation of happiness or to sate some personal desire; it is our *duty*. Acting out of duty, for Kant, differs from acting due to some other inclination or selfishness, and it is acting out of duty that has moral worth, being linked with the only thing Kant sees as good in itself, a good will.[29] Duty and autonomy are thus intricately linked; as Korsgaard explains, for Kant there "can only be one reason why we must do what duty

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[24] Kant, *Critique of Practical Reason*: p. 132.

[25] Kant, 'Foundations of the Metaphysics of Morals': p. 58.

[26] ibid: pp. 69-77.

[27] Only rational beings, claims Kant, have the ability to *follow* laws (through reflective choice of action, constraint of an imperative, or by our rational will) rather than merely being *governed* by them (as a falling apple, for example, is governed by the laws of nature): ibid: p. 29.

[28] ibid: pp. 72-73.

[29] ibid: pp. 13-20. Note also: "To duty every other motive must give place, because duty is the condition of a will good in itself, whose worth transcends everything" (ibid: p. 20).

demands, and that is that we demand it of ourselves", otherwise our behaviour is contingent on some empirical goal.[30]

Due to the universal character of both morality and reason, Kant claims that we must act in such a way that the 'maxims' derived from our actions may be generalised into universal 'laws' whilst remaining in accordance with reason without contradiction (this is Kant's famous categorical imperative[31]). As rational beings we have the inherent ability to freely choose how we act, and we must be judged purely in relation to our autonomy with no regard to our subjective contexts or the specific empirical influences affecting us. It is this requirement to judge by the standard of abstract autonomy that leads to our embeddedness in the world of sense and desire being overlooked in 'abstract autonomy' readings of the Kantian moral self. Under this reading of Kant's philosophy, punishment is linked to this conception of autonomy or freedom of will. According to Kant, all rational beings are ends in themselves[32] by virtue of their autonomy.[33] Thus they are objective ends, since their autonomous nature gives them absolute worth independent of action or circumstance.[34] All rational beings see themselves as ends; thus for humans, being ends in ourselves is both universal (common to all[35]) and subjective (a personal observation).[36] Kant holds that moral laws are subjectively grounded in the ends of those laws, and that rational beings constitute these ends since all laws relate to rational beings. Due to the fact that *all* rational beings are ends in themselves, our laws relate to every rational being, and are thus objectively grounded in their universality. The will by which we make our laws (Kant's 'moral law', not the substantive law of human institutions) is thus a

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[30] Korsgaard, 'Introduction': p. xxiv.

[31] "Act only according to that maxim by which you can at the same time will that it should be a universal law", Kant, 'Foundations of the Metaphysics of Morals': p. 39. This has a similarity with Gardner's 'undefeated reason' test: see note 89, below.

[32] ibid: pp. 46-47.

[33] ibid: p. 54.

[34] ibid: pp. 46-47.

[35] The universal commonality of a 'rational being' being an end in itself constitutes what Kant terms a 'realm of ends', ibid: p. 52.

[36] ibid: p. 47.

universal law-giver.[37] When we invoke the categorical imperative, asking whether we can will our action to be universalised to all rational beings, the subjective ends of our action resolve to the only objective end that exists: rational beings themselves.[38] Thus, rational beings themselves should always form the basis of our actions: a rational being should never be treated as a mere means.[39] Furthermore, and as noted above, it is our absolute worth as rational beings (as autonomous ends, a universal trait inherent to all rational beings) by which we may be judged. A corollary of this is that punishment must be enacted purely because a criminal is responsible for the act by virtue of their autonomy. To punish, for example, as a way of reducing future crime, or as a symbolic display of power, or as a communication of desired values, would be using a person as a mere means, and thus unacceptable to Kant.[40]

On the abstract autonomy reading of Kant, immoral conduct stems from following our inclinations and desires, succumbing to influences in the world of sense, rather than adhering, through duty, to universal reason. As rational beings, universal moral laws apply to us categorically, thus "that to which inclinations and impulses and hence the entire nature of the world of sense incite [us] cannot in the least impair the laws of [our] volition as an intelligence", and if we indulge our desires, acting according to sense rather than reason, we do so "to the detriment of the [purely] rational laws of [our] will".[41] Acting to our inclinations is 'wrong' for Kant because it goes against the categorical imperative: we are attempting to will our *contingent* action into a *universal* law, but only universal reason can determine universal laws, and merely because we are embedded in the world of sense we have not lost the capacity for reason, and thus

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[37] See ibid: pp. 49-50.

[38] ibid: p. 56.

[39] Rational beings "must not be used merely as means", ibid: p. 46. "For all rational beings stand under the law that each of them should treat himself and all others never merely as means but in every case also as an end in himself", ibid: p. 52. Rational beings "must be made the basis of all maxims of actions and must be treated never as a mere means but as the supreme limiting condition in the use of all means, i.e., as an end at the same time", ibid: p. 56.

[40] See Morrison, *Jurisprudence*: pp. 148-49.

[41] Kant, 'Foundations of the Metaphysics of Morals': p. 77. See also Kant, *Critique of Practical Reason*: pp. 125-35.

for autonomy.[42] Kant can be deployed as claiming, then, that the criminal or immoral individual is someone who is acting in contradiction to reason, someone succumbing to the influences of sense, of their desires and inclinations, someone denying their duty.

5.2.2 Kant and criminal identity

An important point comes with Kant's distinction between sense and reason. Kant recognises that we do not only possess an autonomous, purely rational will (as rational beings in the world of intelligence), but that we are also embedded in the world of sense (as physical, human beings).[43] We live in a world of senses, impulses, and emotions – a world of human feeling; we are influenced by our experiences and inhere with desires and inclinations; and we are also influenced by other, more powerful people.[44] Kant's abstract autonomy suggests that we punish immoral acts because perpetrators are responsible for their actions by virtue of their autonomy. We must follow reason purely out of duty; we must escape our embedded nature and live as if we exist only in the world of intelligence. The legitimacy of punishment stems from our inability to free ourselves from our embeddedness in the worlds of sense, emotion, inclination, and desire; it stems from our failure to adhere solely, through duty, to the demands of reason, based on our innate capacity to freely will our own actions. Therefore, although Kant recognises our embeddedness, he believes we have the inherent capacity to escape it, to deny it in favour of universal morality through the exercise of our (universal) reason. Although this may be a nearly impossible task, the failure to shed our embeddedness is seen as categorically immoral. Under this reading of Kant's philosophy we have an innate freedom of will and are ends in ourselves that must be recognised and respected as such. The price we pay for this freedom and

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[42] Kant, 'Foundations of the Metaphysics of Morals': pp. 37-42.

[43] The fact we live in this human world of sense and inclination also distinguishes our 'imperfect' human will from the 'perfect' divine or holy will, which is inherently good and thus is naturally in accord with reason and needs no imperative-ought to constrain its actions: ibid: pp. 30-31.

[44] For our embeddedness under 'the tutelage of others', see Immanuel Kant, 'What Is Enlightenment?' in *Foundations of the Metaphysics of Morals and What Is Enlightenment?* (Indianapolis: Bobbs-Menil, 1959).

respect, however, is the denial of the moral validity of our embodied, contextual existence: our emotions, our desires, our search for happiness.

There is thus a tension between our selves as abstract and independent, able to will freely and reject contingent impulses, and our selves as embedded in contexts of human feeling, following our subjective inclinations and desires. Within this split, our responsibility for what we do is linked to our (intrinsic) abstract, autonomous selves. This argument, as others who analyse Kantian abstract autonomy observed above, engenders problems of the denigration of embodied, emotional experience in relation to morality. When we undertake a course of behaviour, when we 'choose' what to do, we do so within lived contexts of action and influence, in relation to those people whom our behaviour influences and is influenced by. Our 'choice' to act, or not to act, may not necessarily derive simply from our ability to use reason, but may stem from other factors that impinge upon or exist within our selves as embodied, living humans. The standard of abstract autonomy in the responsible self denies any moral legitimacy in our lived experiences, our contexts of human feeling, working instead by the dictates of a *universal* moral law. This is not to argue that we should judge only by contextual standards, but that judging only by the abstract or universal standards of reason overlooks important dimensions of human existence.

The division seen in Kantian abstract autonomy is an extreme position, separating the self into two distinct aspects, one contingent (and immoral) and one abstract (and moral). The models of self found in criminal responsibility theory, although more nuanced than Kant in relation to the rationality of the individual, adhere generally to a similar division of responsible self and context, and thus can be seen as an emanation of this conflict found in Kantian moral theory. As already made clear, it is the position of this thesis that models of the criminally responsible self should be ethical, or just, in that they should be able to approach more fully the individual as a responsible moral agent, both as a living, embodied being that is not purely rational (or linguistic) and that is embedded in contextual dimensions of experiential reality (that are also not purely linguistic); thus, the non-rational (and non-linguistic) dimensions of self and context and the relationships between them need to be explored. The move towards

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this exploration requires the development of an epistemological concept that can access the non-rational and non-linguistic, but before we can begin this task substantively the models of criminal identity and the division of self and context in criminal theory need to be examined in more detail. It is to this examination that the remainder of this chapter now turns.

5.3 Rational choice

5.3.1 *Abstracting the individual*

The previous section explained a reading of Kantian philosophy that gives a model of the moral self as abstractly autonomous, thus engendering issues of separating the individual from his or her context of lived reality. One prominent author who reads Kant in this manner is Alan Norrie. In *Punishment, Responsibility, and Justice* he puts forward the notion of a 'blaming relation' as a response to the limitations he perceives in the tendency towards Kantian abstract autonomy in criminal theory (what he terms 'Kantian individualism').[45] Norrie's work highlights the relationship between self and context and the assumption of rational choice that runs through criminal justice thinking. Norrie's starting point is the Kantian focus in criminal justice that he claims derives from criminal justice's ideological foundations of, and emphasis on, the abstract juridical individual.[46] Although, as seen above, we can question the claim that criminal justice is broadly Kantian, the importance of Kant's philosophy in understanding responsibility and autonomy shores up Norrie's otherwise problematic starting point. Norrie observes that there may be a moral difference between an act of theft committed by a rich person, and that committed by a poor person.[47] "Famously", Norrie also tells us, "the law of murder cannot distinguish the contract and the mercy killer".[48] These problems are emblematic of Norrie's major concern with moving beyond the reductively (abstract) Kantian focus he perceives in criminal

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[45] See Norrie, *Punishment, Responsibility, and Justice*.

[46] See ibid: p. 3.

[47] ibid: p. 102.

[48] ibid: p. 180.

responsibility: they show how important dimensions of the lived moral context of criminal behaviour are excluded from questions of guilt. A benevolent doctor giving a suffering and dying patient an overdose of morphine to make that patient's end less traumatic is qualitatively different from a hired killer, for example, slitting his or her victim's throat. A starving person taking from those who have plenty may seem more legitimate or less wrong than an affluent person taking from those who have little. In these examples, focus on the abstracted and autonomous actions of the perpetrator cannot see these morally relevant contextual elements. It is this type of deficiency that Norrie perceives in both Kantian moral philosophy and criminal theory, and that he aims to highlight and rectify.

In Norrie's earlier work, *Crime, Reason, and History*, he examines the historical development of criminal doctrine to expose how models of self adopted in the construction and application of criminal categories reflect the interests of those in power, those with property, but in a way that appears legitimate by treating all people as free and equal.

> "Criminal law protects particular social interests but does it through a language that is universal and general, and cast in terms of respect for the individual before it... Fault resides in the individual not in the [social] system... How can law be about oppression, when every individual is the same before it?"[49]

Norrie argues that there are two major tensions underlying criminal categories: one between the individual as abstract and the social reality of a contextualised individual (this is an emanation of the self-context tension that we drew from Kant's abstract autonomy); and a second between the protection of universal individual equality (treating all individuals the same) and the needs of the State to maintain the social order (by protecting certain interests favourable to the powerful).[50] These tensions may be historical, but legal development, Norrie claims, is founded upon and shaped by these two historic tensions in its socio-political and ideological underpinnings.[51] For

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[49] Norrie, *Crime, Reason, and History*: p. 26.

[50] ibid: pp. 27-32.

[51] ibid: pp. 32-33.

example, in the criminal doctrine relating to intention one can see tensions between the abstract individualism required to show *mens rea* and the discretion admitted at the sentencing stage (by which time responsibility has already been established) that tries to temper that abstraction and take 'motive' into account, a discretion which Norrie claims undermines the legitimacy of conviction that processes of abstraction attempt to secure: this tension reflects the wider tension between abstract individualism and the reality of living agents.[52]

Building on this work, Norrie's later volume poses the question as follows:

> "Legal categories presuppose an individual subject in whom responsibility is fixed by mental characteristics relating to the cognitive control of actions. These characteristics establish what seems to be a discrete, fixed, stable individual subject, but what if subjects are not like that? What if identity… [is] located in significant measure beyond the individual in the social realm, and [is] therefore fluid and changing?"[53]

This type of critique, Norrie claims, seems set to undermine the whole edifice of criminal responsibility by locating responsibility outside the individual, and thus removing justification for the attribution of blame and punishment.[54] This, he claims, is the reason why other critical attempts to move beyond Kantian philosophy in questions of responsibility have invariably failed to do so, inevitably returning to Kantian autonomy in some way.[55] What is generally maintained are 'false but necessary' separations between individuals and their social contexts: 'false' because we, as individuals, are not completely separate and divided from the social contexts and communities we exist and act within, and 'necessary' because without such a separation of responsible individuals from their context we cannot securely attach blame to them.[56] Put another way:

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[52] ibid: pp. 36-58.

[53] Norrie, *Punishment, Responsibility, and Justice*: p. 12.

[54] ibid: pp. 38-39.

[55] See ibid: pp. 21-42.

[56] ibid: pp. 38-39.

"It is the existence and particular identity of the [responsible] legal subject that gives the law the basis for its rationalizing and systematizing practices. It follows that the basis must be reasonably fixed and stable for legal logic to be possible. If the core entity to be rationalized were in itself unstable, conflicted or in some other way 'fuzzy', legal reasoning would suffer the same defects."[57]

This goes to Norrie's point that the abstracted, seemingly objective conceptions of moral self underlying criminal codes are actually highly unstable, their seeming certainty being disrupted by the 'fuzziness' of the living individual.[58] The responsible individual is removed from his or her social context of substantive morality and isolated in purely formal[59] (and linguistic) descriptions: an isolation that both enables abstract categories of criminality to be pinned to a responsible subject, as an abstracted and rationally choosing moral agent, and commits an injustice in relation to the broader nature and lived reality of that individual. These processes of abstraction engender judgments that are based on only a limited dimension of the individual, their abstract autonomy, and as such arguably overlook aspects of human existence that are important for questions of responsibility.

5.3.2 *Criminal responsibility theory*

If we turn to criminal responsibility theory more broadly, we can see this type of abstraction in the general approach taken to modelling the moral self in terms of 'rational choice'. (The concepts of 'rationality' and 'choice' understood in this context are not as extreme as the pure reason or abstract autonomy already seen in Kant, but they do involve the same division between self and context.) Arguing that 'rational choice' runs through criminal theory may raise questions as to whether the typical responsible agent in criminal theory is an abstracted rational being in a Kantian sense, autonomously choosing his or her behaviour free from empirical influence. As Jeremy Horder observes, there is little evidence to suggest that criminal theory sustains such

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[57] ibid: p. 68.

[58] ibid: pp. 80-81, 102.

[59] One of Norrie's critiques of Kant is the focus on the abstract form of an act, rather than its substantive moral quality or content: see ibid: pp. 7-8.

an extreme caricature of the responsible agent;[60] however, in some areas of debate it does raise its head.[61] The Kantian ideal of abstract autonomy may not be central to criminal responsibility theory, but the models of the moral self in this area of criminal understanding, as we will see, do have a common adherence to the self's general ability to rationally direct its various dimensions. Such an adherence means that the rational choice element of the self is abstracted to a greater or lesser degree from the indeterminate contexts of the self entire; criminal theory models the self in a way that overlaps with abstract autonomy, and can be seen as a less extreme emanation of the division between abstract autonomy and being embedded in sensuality that we saw in Kant.

Our concerns with the moral self are oriented towards the self-as-responsible, rather than the self-as-liable, and this is an important distinction. Antony Duff highlights the prior nature of responsibility with respect to liability:

> "Liability – to criminal punishment or to moral blame – is grounded in responsibility: I can be liable to punishment or blame for *X* only if I am held responsible for *X*. But responsibility does not entail liability, since I can accept responsibility for *X* but avert liability by offering a suitably exculpatory answer."[62]

Peter Cane distinguishes the two more fully, with legal *liability* being more associated with institutional responses and moral *responsibility* with human conduct in general,[63] such that in certain circumstances one can be liable without being responsible.[64] Cane's distinction is more practical than that of Duff who notes that there can be 'liability' both criminally and morally. Cane's 'liability' is linked with the legal

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[60] Jeremy Horder, *Excusing Crime* (Oxford: Oxford University Press, 2004): pp. 128-30.

[61] Note, for example, simplistic 'rational choice' theories based on an agent's 'cost-benefit' type analysis of their possible actions, which also share much with Bentham's behavioural matrix of pleasure and pain. For a good introduction to these types of theories of criminal action, see Ronald V. Clarke, 'Seven Misconceptions of Situational Crime Prevention' in *Handbook of Crime Prevention and Community Safety*, edited by Nick Tilley (Cullompton: Willan, 2005); Roger Hopkins Burke, *An Introduction to Criminological Theory*, 2nd ed. (Cullompton: Willan, 2005): pp. 40-50.

[62] R. Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart, 2007): pp. 15-16.

[63] Peter Cane, *Responsibility in Law and Morality* (Oxford: Hart, 2002): pp. 1-2.

[64] ibid: p. 1. Note that Cane's example for this non-responsible liability, however, derives from a form of restitution rather than criminal liability per se.

institution, whilst Duff is more interested in the line between being able to be held responsible for what we do generally, and being held responsible for unwanted immoral or illegal acts. Either way, 'responsibility' relates to the wider realm of human behaviour, be it proscribed or lauded, whilst liability is more closely linked with unwanted immoral or illegal behaviour; attributing responsibility to an individual does not necessarily entail a normative or moral judgment, whereas attributing liability does.

In examining how we understand moral identity, how we model the self-as-responsible, our concern is with individuals in general, how they are understood to be responsible for what they do; we need not be concerned with the specific actions or omissions, or particular examples of behaviour, and what moral or criminal value might be attached to them. The substantive contents of legal and moral codes are not important in understanding how individuals are understood to be responsible;[65] models of the moral self need not include consideration of specific acts or omissions, but rather how one is linked with one's behaviour in a way that makes one able to be held responsible for that behaviour, be it good or bad. Understanding responsibility in general is important for criminal liability specifically because how we understand that broader category informs the specific models that are employed in more specifically criminal contexts of judgment.[66] Finding responsibility may not entail a normative or moral judgment, but how the wider self-as-responsible is understood informs more specific understandings of the self-as-liable which *are* interlinked with such judgments.

Victor Tadros observes three major types of theory in criminal responsibility: *character*, *capacity*, and *choice*. Tadros argues that responsibility can only be attached to an agent if his or her actions are appropriately related to that agent 'qua agent' (for example, one's height reflects on one in some way, but not *qua agent*: not in a way

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[65] For an in depth discussion on the substantive content of moral and legal codes, see, for example, Chapters 4, 5, and 6 of Duff, *Answering for Crime*. See also Larry Alexander, 'The Philosophy of Criminal Law' in *Oxford Handbook of Jurisprudence and Philosophy of Law*, edited by J. Coleman and S. Shapiro (Oxford: Oxford University Press, 2004).

[66] See Victor Tadros, *Criminal Responsibility* (Oxford: Oxford University Press, 2005): pp. 1-3, 24-27.

appropriately related to responsibility).[67] He thus holds more closely to character theories, which suggest that criminal responsibility is only attributable if an act fits with the settled character of the agent.[68] Importantly, however, anchoring responsibility in character does not deny any role for either capacity or choice, which may still be relevant factors, but merely holds that they are unable to ground responsibility.[69] Choice theories are strongly linked with questions of capacity, or our ability to do things. Tadros, however, minimises the relevance of our capacity by highlighting that responsibility is concerned with what we actually do, not what we are capable of doing. Thus, he argues, an individual can be responsible for his or her behaviour even if there is only one course of action available, providing that behaviour is done for the individual's own reasons (that it reflects on the individual qua agent):

> "In attributing responsibility to an agent for an action, we are interested not in what an agent had to capacity to do. Nor are we interested in what options that agent had. We are interested in the actual processes of reasoning that were involved in performance of the action. It is those actual processes that connect the action to the agent."[70]

For Tadros, there is a requirement of rationality in the agent in order for that agent to have status as responsible, related to the general coherence and normative accuracy of his or her beliefs about the world.[71] This links to his concern with character, and the agent qua agent: individuals must be rational and coherent, because they cannot be held responsible for actions that derive from jumbled or inaccurate visions of reality.

Linking responsibility back to character as Tadros does may suggest that free choice plays little part in establishing responsibility: individuals can only be responsible for actions running from their true characters, not necessarily for everything they choose to do. However, Tadros places choice in a central role in constituting one's life, suggesting that individuals are responsible for any actions, consequences, or states of

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[67] See generally, but especially Chapter 1 of, Tadros, *Criminal Responsibility*.

[68] ibid: pp. 49-54. See also Horder, *Excusing Crime*: pp. 118-25.

[69] Tadros, *Criminal Responsibility*: p. 54.

[70] ibid: p. 69. There is a fuller discussion on free will and determinism in Section 6.3.

[71] ibid: pp. 55-56.

affairs: individuals can shape and direct their lives and their characters, and thus can be held responsible for them.[72] So, although Tadros grounds responsibility in his 'agent qua agent' reading of character, our characters and our lives (as well as our desires[73] and values[74]) are significantly underpinned by our ability to choose what we do; our ability to control our thoughts in light of normative reasons,[75] and our ability to make plans and to put them into action.[76]

Elsewhere, the underlying focus of responsibility has been argued to be related to what we can *control*. Antony Duff argues that there are two elements to responsibility: control over the object of responsibility, and an 'epistemic condition' concerning our awareness of relevant facts.[77] Regarding control:

> "It seems to be a logical rather than a normative matter that we can be morally responsible (i.e. properly held responsible) only for that over which we had or could have some control... That is why responsibility is tied to agency: we can be held responsible, either retrospectively or prospectively, only for that in relation to which we could exercise some effective agency."[78]

Horder notes, however, that in cases of negligence responsibility may be attributed to an individual even though he or she did not actually choose to manifest the harm in question.[79] Duff's argument is that, even in cases such as these where liability seems to be accepted ostensibly without a control element, it is actually the case that at some point in the past the agent may have been sufficiently in control to have avoided the harm (and in assessing responsibility the question is whether it is reasonable to

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[72] ibid: pp. 97-98.

[73] See ibid: pp. 37-39.

[74] ibid: pp. 38-40.

[75] See ibid: p. 37.

[76] The issue of our participation in the creation of the world and our selves is the concern of Chapters Six and Seven of this thesis.

[77] Duff, *Answering for Crime*: p. 57.

[78] ibid: p. 58.

[79] Horder, *Excusing Crime*: p. 128.

hold that this earlier control existed).[80] Similarly to Tadros, Duff maintains that we are able to be held responsible for our thoughts, emotions, and character traits – to the extent that we can control them. One can direct one's thoughts towards this or that, or avoid thinking things by avoiding certain stimuli; similarly one can control one's emotions by avoiding particular situations, or by not dwelling on particular things; and one can direct the development of one's character to a certain extent, through things like breaking habits or working towards a particular goal.[81]

Questions relating to whether or not we should be held criminally responsible for various activities are the topic of much normative debate,[82] but Duff concludes that what the control requirement effectively amounts to is the requirement of agency. In other words, the requirement that:

> "I was active as an agent in causing the relevant outcome, and that I had the capacity to act in a way that would have prevented it. That capacity to act differently requires the physical capacities for control over one's movements (and the opportunity to exercise those capacities)... [and] the rational capacities... of recognising and responding to reasons for action."[83]

This position differs from Tadros with respect to the relationship between choice, as the capacity to act otherwise, and responsibility: whereas Tadros holds that we can be responsible even if we have no alternatives available, providing we are following our own motivations, Duff maintains that we can only be responsible insofar as we have the capacity to follow an alternative course of behaviour. Both of these positions, however, retain the attribute of rational choice.

5.3.3 Rational choice in criminal responsibility

Duff holds a position which places choice as overtly central to responsibility, whilst Tadros is interested in the actual processes of agency, not merely what one had the

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[80] Duff, *Answering for Crime*: pp. 58-60. This argument is essentially a version of the 'originalism' that comes into free will debates: see Section 6.3.

[81] ibid: pp. 61-62. Self-making is discussed in Chapters Six and Seven of this thesis; see also Section 9.2.

[82] Duff covers many of these issues: see ibid: pp. 62-72.

[83] ibid.

opportunity to do. Tadros's point is not that alternative choices are no part of responsibility, but that even where there is no alternative action available, responsibility can still be found. An individual acts under duress to steal some sweets, for example: the point Tadros is making is that if that individual actually wants to steal the sweets anyway, even if a third party is threatening his or her family in order to make that individual steal the sweets, he or she is fully responsible for the act. Choice as the ability to do otherwise may not exist in this aspect of Tadros's theory, but the individual's ability to will his or her own behaviour is retained, and attracts responsibility, when that individual follows his or her own motivations despite a context of duress. Peter Cane also questions the requirement of choice in ascribing responsibility, but his argument is simpler, claiming that although it is an important factor, it is only one dimension of responsibility: the interests of victims and the pervasive nature of 'automaticity' (daily habits and reflexes) in human behaviour are dimensions where the agent's choice does not operate.[84] In Tadros's and Cane's positions, choice may not ground responsibility as it does in Duff's, but it is still an important and generally relevant factor.

Alongside this concern with choice, there is also a common understanding of the moral self as rational in criminal theory. We have already seen that for Tadros an action must reflect the agent qua agent, and part of this requirement is the agent's rationality – that the agent has the general capacity to form, and act from, coherent and normatively accurate beliefs about the world. For Duff our rationality is related to our ability to recognise and respond to reasons or considerations for (or against) undertaking certain courses of behaviour.

> "It is a matter of rationality, both practical and theoretical – we are responsible agents insofar as we are rational agents. But rationality in this context involves more than purely intellectual capacities: a rational agent is one whose emotions and desires or other conative dispositions, as well as [his or] her beliefs, are responsible to reasons."[85]

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[84] See Cane, *Responsibility in Law and Morality*: pp. 97-102.

[85] Duff, *Answering for Crime*: p. 39.

This is an important point. The rationality of the responsible self in Duff's criminal theory is not the pure or a priori reason that is seen in idealised caricatures such as Kant's abstract autonomy, but is something more nuanced. Although we are emotional, feeling, desiring beings, with urges as well as thoughts, we generally do things for particular motives or aims; rationality guides our responses to our more fluid or indeterminate impulses. We are not taken to be abstract, freely willing individuals, judged only by the standard of a priori reason; rather, as the description of rational belief systems given above by Tadros suggests,[86] responsibility entails a general requirement that we can synthesise our experiences in some generally coherent and normatively accurate manner, and to act in relation to these rational beliefs. In order to be responsible, we need to have 'reasons' (rational motives or aims) that guide our actions, and these 'reasons' need to be up to a certain level of rationality, determined by their coherence and general accuracy in relation to a normative conception of external reality.

John Gardner observes a distinction between internal, subjective, or 'explanatory reasons', and external, objective, or 'guiding reasons', for action. He argues that for an act to be justified an agent's explanatory reasons (rational motives or aims) must be found within the guiding reasons.[87] Our reasons for action must correspond to wider guiding reasons that operate in the context of that action. More specifically, our reasons for action must be undefeated if that action is to be justified; if the reason for action is defeated by some guiding reason, then there is reason *not* to act in that way, and thus the act is not justified.[88] In short, "one must always act for some undefeated reason".[89] Although Gardner's model relies upon our use of practical rationality (as a

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[86] See Tadros, *Criminal Responsibility*: pp. 55-56.

[87] John Gardner, 'Justifications and Reasons' in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007).

[88] See ibid: pp. 100-03.

[89] ibid: p. 102. Similarities can be seen between Gardner's conception of 'undefeated reasons' and Kant's categorical imperative that one must act such that their actions can be universalised without rational contradiction (see Section 5.2): if there is a 'defeating reason' to one's action, then to continue to act would result in a contradiction if one's act was then universalised. Gardner's perspective, however, is more normative than Kant's express universalism, and his 'reasons' are not the 'reason' of Kant's system, but rather the motives and considerations of aims behind a course of behaviour.

tool that enables us to ensure our actions adhere as closely as possible to whatever set of guiding reasons is relevant to our context, for example a criminal code),[90] he also notes that guiding reasons can operate upon traditionally 'irrational' elements of the self such as our emotions.[91]

In its model of the rational self, criminal theory does not describe us as purely 'rational' beings with no feeling, intuition, senses, or impulses, but rather as beings who may possess such 'irrational' aspects, but are primarily guided by our 'rationality', our general ability to rationally shape these aspects by accepting (or rejecting) reasons for acting or thinking in certain ways. This rationality of the responsible agent is related to the general accuracy and coherence of the agent's beliefs about the world and the motives, aims, or considerations behind the behaviour that are derived from these beliefs. It is this general ability of rational choice upon which individual responsibility is to be hung: accordingly, criminal theory holds that "misfortunes should not be blamed on fate, change or other unknown and uncontrollable forces, but on the *acts or omissions of the individual*".[92] This model of rationality also suggests the extent to which 'choice' is embedded in the responsible agent: to the extent that we are 'rational' we are also able to 'choose' what we do (or think, or feel, or believe). This model of 'rational choice' does not suggest that every single aspect of the self is rationally directed, but that the responsible agent has a *general* ability to rationally guide his or her various dimensions. (It should be noted that there are exceptions to this feature of the normal moral self, deriving from the existence of excusatory conditions that may undermine the capacity for rational choice.[93])

This dominant concept of rational choice is more sensitive to the indeterminate dimensions of the self than the extremes of abstract autonomy, or the orthodox criminal categories against which Norrie argues. However, human feeling, although taken into account, is not given a position of legitimacy or great moral significance in

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[90] ibid: pp. 100-01.

[91] See ibid: p. 98.

[92] Douzinas and Gearey, *Critical Jurisprudence*: p. 345. (Emphasis added.)

[93] For a detailed account of excuses, see Horder, *Excusing Crime*.

understanding responsibility, but is made subservient to the legitimate control of the rational will. We have emotions, desires, beliefs, and feelings, and they impact upon how we behave, but it is our general ability to rationally direct those dimensions of ourselves that underlies models of the moral self in criminal theory. As with Kant, it is our ability to employ our rational will in choosing our behaviour that underpins our responsibility. Rational choice is one dimension of the self, abstracted away from the lived realities and indeterminate dimensions of the individual; but this abstraction is not complete as it is with Kantian abstract autonomy, as criminal theory's concept of rational choice is modelled in relation to the control of the non-rational and non-linguistic self. The prioritisation of rational choice over other indeterminate or experiential influences, however, engenders at least a partial abstraction of this type, rendering rational choice models of the moral self incomplete or inaccurate. The understanding of the moral self in criminal theory is unable to comprehend the individual in a full and meaningful way in relation to the self's indeterminate or fluid dimensions of emotions, desires, impulses, and lived experience. This ethical shortcoming means that criminal theory is unable to comprehend meaningfully the links between living people and their embodied behaviour in experiential reality; thus criminal theory models responsibility unjustly in terms of the ethical approach to the other.

5.4 Criminal identity in context

This section examines the contextualisation of the abstract individual in Norrie's work and, when read broadly, Kantian philosophy. If we accept, as Norrie argues we should, that people do not exist in total isolation from their social context, and aspects of our identity and moral responsibility may well be connected to the social world we live in, then a move can be made towards transcending the artificial abstraction of the individual from his or her lived context:

> "The insistence that individuality lies 'between' the two relational spheres of the personal and social allows us to understand what is valuable within liberal

[Kantian] accounts of the individual without endorsing the false separations they create."[94]

For Norrie the two realms of the personal or individual and the communal or social are separate, and we as agents exist in relation to each of them.

"Responsibility lies with individuals *and* with [the] societies of which they are a part, so that, neither individualized nor denied, it is shared. It traverses a space *between* the individual and the social, constituting a blaming relation."[95]

This is the essence of Norrie's thesis, and it is with the shift to blaming beyond the individual that he moves away from the abstract autonomy of Kantian individualism. Norrie characterises Kantian moral philosophy as being associated with an abstract, autonomous model of the individual. He talks of the Kantian "emphasis on individual responsibility"[96] and the separation of choice from context,[97] of which Kantian individualism is emblematic.[98] This notion of abstraction from context he distinguishes from the recognition of the individual as unavoidably existing *within* a social context.[99] This distinction in Norrie's work, however, is problematic on two major levels: firstly, it is a distinction that is found in Kant's own writings and forms the basis of Kant's notion of moral responsibility; secondly, what Norrie claims the individual is abstracted from, the 'social context', is unclear and does not include the indeterminate dimensions of the self that rational choice overlook. Both Norrie's and Kant's models of self and context are problematic, and hence this chapter turns instead to the cultural aesthetics of Jonathan Wender. Wender's work explores the irreducibility of lived reality and thus gives a model of 'astonishment' that enables description of unstructured experiential reality, that which is not rationally or linguistically conceptualised. The reading of Kant will be discussed first, before we move on to consider the second set

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[94] Norrie, *Punishment, Responsibility, and Justice*: p. 202.

[95] ibid: pp. 220-21.

[96] ibid: p. 3.

[97] ibid: p. 35.

[98] ibid: p. 5.

[99] See, for example, ibid: pp. 197-221.

of issues, and finally Wender's aesthetics; this first discussion will also involve the widening of our reading of Kantian philosophy beyond abstract autonomy.

5.4.1 *Contextualising the Kantian self*

Norrie's reading of Kant seems to be based on the assumption that Kant claimed that we are nothing more than abstractly autonomous, rationally choosing individuals, and are thus wholly responsible for our actions. However, Kant says that we are not *only* autonomous, abstract, rational beings, but that we are *also sensual, emotional, and physical beings*, with desires and feelings, and thus susceptible to influence from external forces in the empirical world. The confusion perhaps arises due to Kant's claim of what constitutes universal morality. It is Kant's argument that to base universal morality on contingent knowledge of the empirical world is flawed because only pure a priori reason is common to all rational beings, and thus only such reason can form the basis of a truly universal morality. To the extent that we have the capacity of reason, we are rational beings separated from the world of sense, and it is thus this faculty, which is innate to all rational beings, which we must follow if we are to hope to achieve universally moral actions; we must will our own actions, not follow the inclinations of sense and desire. Further, we can only judge universal morality by what is also universal, or innate in all rational beings: our faculty of reason, more specifically our ability to act on our own will, our autonomy. Thus Kant's claim is not that we are purely abstract, rationally autonomous beings, but that we inherently have the capacity to act *as though* we are, and thus this autonomous nature is the standard by which our actions must be judged in relation to *universal* morality.

This is easily reduced to the practical notion that we can autonomously choose what we do, and are thus responsible for our actions, irrespective of external influences. If we then criticise this 'Kantian' notion of responsibility on the basis that it reduces the self to its purely abstract, rational aspect, however, we are misunderstanding Kant's moral position. The previous section showed how criminal theory maintains a rational choice model of responsibility which does recognise the more indeterminate dimensions of the self, but does so by making them generally

compliant to rationality, and thus modelling a self that is at least partially abstracted, and maintaining the same tension between an abstract self and a self existing in a lived context found in Kant. Norrie's position, then, is problematic in terms of the way it reads the moral self in both criminal justice and Kantian philosophy as simply one of abstract autonomy. However, as the previous section has shown, there is a deficiency in the criminal identity of responsibility theory relating to the abstraction of the moral self. Norrie's position may be problematic, but we can still retain the core of his argument by taking his critical comments about abstract individualism in criminal justice to refer to this particular deficiency of partiality in criminal theory's 'rational choice' models of the responsible agent.

Norrie's critique of the abstracted moral self is based on arguments against the ways in which criminal responsibility abstracts individuals from their relevant contexts of action and influence. In critiquing these processes of abstraction, Norrie tempers abstract autonomy by situating the individual in a relational sphere between the personal and the social. As he states:

> "It is the idea of a subject, a person, an agent, who is both existentially real and whose identity is relationally constituted within social relations, that I oppose to both the Kantian vision of the monadic individual and the structuralist/poststructuralist idea of the produced (governed, disciplined) subject".[100]

Norrie's position, then, is not a simple orientation against rational reduction, but an attempt to configure a criminal responsibility that accepts individuals' socially embedded nature without reducing them to being the products of social structure. Reading this in light of the preceding discussion, the partially abstracted core of rational choice is abstracted in criminal theory from the context of the living, embodied individual, an individual that exists within a wider context of social influences but is neither separate from nor purely determined by those influences.

The problem with Norrie's work, once read in light of the rational choice of criminal theory, is not the conclusion he reaches, but that he overlooks important dimensions

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[100] ibid: p. 199.

of Kantian philosophy in terms of the relationship between self and context, and thus turns away from Kant too quickly. This is especially so given Norrie's own admission that he wants to maintain what is valuable in Kantian philosophy: namely what it can tell us about individual moral agency that structuralist and poststructuralist accounts destroy.[101] Taken more broadly, Kant's philosophy actually paints a more nuanced picture of the self and the world it inhabits than the monadic individual suggested by abstract autonomy. In his *Critique of the Power of Judgment*, rather than describing objective understanding, "Kant described a method of understanding that took account of social and historical context".[102] The fundamentally embedded nature of the self can also be seen in Kant's model of universal morality, and overlooking this contextualised dimension of Kant's self misses much of the potential in his thinking for a project such as Norrie's.

The abstract autonomy reading of Kant suggests a focus on universality and reason, claiming that objective morality is possible through an adherence to pure rationality and a denial of contingent human feeling. Kant's general metaphysics, however, actually paints a different picture. The major split that Kant maintains is that between the *noumenal* ('true' reality, beyond experience) and the *phenomenal* (the world we are able to know through our senses), and with this split Kantian metaphysics describes a world that is subjectively constructed by the experiences and judgments of the self. As Ian Ward puts it:

> "The critical moral philosophy which Kant bequeathed was, then, one based finally upon reflective judgment. No longer was there any object out there, a 'thing in itself', separate from our perception of it. There was simply our perception."[103]

The phenomenal world is that which we can experience, that which we can come to know through our senses, it is a function of how and what it is possible to know; the noumenal, on the other hand, is that which is beyond our knowledge and experience,

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[101] Norrie, *Crime, Reason, and History*: pp. 197-98.

[102] Stacy, *Postmodernism and Law*: p. 24.

[103] Ward, *Kantianism, Postmodernism, and Critical Legal Thought*: p. 16.

the non-contingent world of the 'thing-in-itself'.[104]   Insofar as the world is phenomenal, Ward's reading is sufficient: there is nothing separate from our perception of it, because the phenomenal world is a product of our perception, and our knowledge of it is also a product of perception. In Kantian autonomy, however, although we cannot know anything about the noumenal, not even if it exists, we need to *assume* that it does, and think of ourselves as noumenal beings. Christine Korsgaard explains why:

> "When we view ourselves as members of the sensible or phenomenal world, we regard everything about ourselves, including inner appearances such as our own thoughts and choices, as parts of the sensible world, and therefore as governed by its causal laws. But insofar as we are rational beings, we also regard ourselves as the *authors* of our own thoughts and choices. That is to say, we regard *ourselves* as the first causes or ultimate *sources* of these inner appearances. Insofar as we do so, we necessarily think of ourselves as members of the noumenal world, or... the world of understanding... [In] our capacity as members of the world of understanding, we give laws to ourselves as members of the world of sense. And this is what gives us obligations [or duties]. The conception of ourselves as members of the world of understanding is a conception of ourselves as self-governing, and so as autonomous or moral beings."[105]

Thus we are autonomous only insofar as we are noumenal, because any phenomenal dimensions of ourselves are determined by the causal laws of empirical reality. As we have seen, for Kant it is respect for our capacity of universal reason, our ability to will our own actions, which grounds moral responsibility and punishment; this requires respect for ourselves as noumenal, and hence the assumption that the noumenal self exists.

Although Kant argues that we should assume the noumenal exists, and that it grounds our autonomous will, he does not think that we can ever actually attain true morality. This is a key point of distinction between the abstract autonomy explained above and the more nuanced position seen in a closer reading of Kant's philosophy, and derives from our inherently embedded nature. Kant suggests that it may be impossible to know whether an act is actually done purely for the sake of duty, and

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[104] See Kant, 'Foundations of the Metaphysics of Morals': pp. 69-70; Morrison, *Jurisprudence*: p. 135.

[105] Korsgaard, 'Introduction': pp. xxvii-xxix.

hence is a truly moral act; but he claims that it is highly unlikely a truly moral act has ever been done.[106]   One area of Kant's philosophy that highlights this extreme difficulty in 'freeing ourselves' is his work on the experience of the sublime.   This aesthetic dimension of Kant's philosophy also, as Jane Kneller argues, accepts a positive role for feelings in the assessment of morality.[107]   The sublime is discussed further in Part Four,[108] but for the purposes of the argument here all we need to understand is that the Kantian sublime is associated with the experience of the might and infinity of nature – the night sky, storms, overhanging cliffs, raging seas – and the challenge such things pose to our rational ability to comprehend the world.   At its heart, the Kantian experience of the sublime is a discord, or conflict, between our rational understanding and our sensory experience.   The power of reason operates in this conflicting experience to posit the existence of the noumenal and thus restore order to our understanding of the world;[109] and this involves our ability to listen to our feelings in relation to the world and our experience of it, not simply denying them in favour of abstract reason.

   The locations in nature where Kant perceives the operation of the sublime highlight the extremes that we have to go to in order to begin to understand that there is a pure noumenal realm beyond what we can experience, and hence also to access our capacity for moral autonomy.   Kant states that:

> "...the subject's own incapacity [for rational conceptualisation in the face of the sublime] reveals the consciousness of an unlimited capacity of the very same subject, and the mind can aesthetically judge the latter only through the former".

The experience of the sublime, he is claiming, reveals to the subject his or her free, 'unlimited' noumenal dimension (that is, the subject's capacity to use universal reason, and thus to be autonomous), and this capacity can only be recognised through the

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[106] Kant, 'Foundations of the Metaphysics of Morals': pp. 23-24. See also, regarding our (in)ability to free ourselves from being determined by the will of another, Kant, 'What Is Enlightenment?': p. 86.

[107] See Kneller, 'The Aesthetic Dimension of Kantian Autonomy'.

[108] See Sections 8.5 and 9.4.

[109] See Immanuel Kant, *Critique of the Power of Judgment*, trans. Paul Guyer and Eric Matthews (Cambridge: Cambridge University Press, 2000): pp. 128-51.

subject experiencing the limitations of conceptual understanding in the face of the sublime. Just as the re-ordering of the world by reason in the experience of the sublime involves positing the existence of the noumenal in general, in relation to the self specifically it involves recognising the existence of its noumenal dimension. Thus under Kant's system the experience of the sublime is concomitant with our ability to be truly moral.[110] The interrelationship between feelings and rationality, and our ability to listen to our feelings in our experience of the world around us, is thus important in becoming moral beings, even in the extremely narrow sense of Kant's universal morality; we must experience the *feeling* of the sublime in order to access our *rational* moral autonomy. Although our access to morality is drastically limited by the extremes we have to witness even to posit the existence of the noumenal,[111] it is still the case, as Kneller argues, that Kant's "aesthetic theory opened up the possibility of feelings that play a positive role in the development of moral subjectivity".[112]

For Kant then, against what the abstract autonomy reading may suggest, our nature as humans embedded in the world sense and experience is not something that we must ignore in our assessment of moral behaviour. It is a part of how we can move towards universal morality, through the (aesthetic) experience of the sublime. Furthermore, in suggesting that truly moral actions may be impossible, Kant opens the door for legitimate equivocation around whether the narrow standard of universal morality (achieved via purely autonomous action) is an acceptable standard for non-universal criminal responsibility. Ironically, this is essentially Norrie's *critique* of Kantian autonomy: that we must situate the moral self within a context of action and experience in order to temper the strictness of abstract individualism. Norrie's arguments in relation to moral identity in criminal theory on this front are still potentially strong, as we saw above. Importantly, with respect to changing the way

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[110] See also Janice Richardson, 'The Law and the Sublime: Rethinking the Self and Its Boundaries' *Law and Critique* 18 (2007): pp. 233-34.

[111] Kant also limits access to particular types of people, his most notable exclusion being women. See generally, but especially Chapters 4 and 5 of, Battersby, *The Sublime, Terror, and Human Difference*.

[112] Kneller, 'The Aesthetic Dimension of Kantian Autonomy': p. 184. See also Barron, '(Legal) Reason and Its "Others"': pp. 1061-63.

criminal theory approaches the self, they are also couched in doctrinal theory whilst taking a criminological and sociological approach.[113]   As a critique of Kantian autonomy, however, Norrie's work arguably lacks an engagement with the aesthetic dimensions of Kant's moral philosophy that would have accessed *more* of what is valuable in Kantian philosophy: namely, understanding not only of autonomous moral agency, but of how such autonomy operates in emotionally and socially embedded humans.

5.4.2 *Self and context*

If there may be validity in the contextual nature of individuals, or that elements of their context may attract a degree of responsibility for their actions, then this raises questions related to what this 'context' entails and how individuals relate to it. We have already seen that Kant talks about our context in terms of 'empirical influence', and 'sense and impulse': essentially what we experience through our (phenomenal) senses and which exists beyond the boundaries of the self, the broadly conceived empirical world that we conceptualise through experience and are embedded within. Norrie takes a less metaphysical approach to self and context, adopting instead a social psychological perspective.   Working towards his overall position of developing a 'blaming relation', Norrie taps into the enduring debate in social psychology between individualists and constructivists,[114] attempting to navigate a middle-way that neither collapses the self into monadic individual autonomy nor evaporates it as a mere social construction. Norrie finds his middle-way in the work of Rom Harré, which describes the self as a secondary structure, symbiotic with the primary structure of the social, generated by social 'conversations' or interactions in the primary social structure but not simply reducible to its effects. Harré's self is synthesised out of social relations and the role-playing required for public personhood, an emerging node of beliefs and synthesised experiences condensing within the broader structures of society. As such,

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[113] See Alistair Henry, 'Alan Norrie, *Punishment, Responsibility, and Justice: A Relational Critique*' *Edinburgh Law Review* 6 (2002): p. 135.

[114] Norrie, *Punishment, Responsibility, and Justice*: pp. 202-05.

it is neither the monadic self of abstract autonomy, nor the disappearing self constituted by social structure alone.[115]

This dual nature of the individual, as influenced by the self's social contexts but also the particular way in which experiences of those contexts are synthesised and build up a unique individual, feeds into Norrie's blaming relation:

> "A fully moral account of... wrongdoing... would have to recognize both that the social and structural factors operating behind the back of the criminal were effective in causing crime, and that the criminal was also its causal agent. Structural effects work through individuals while individuals are themselves agents."[116]

Again, the problem with Norrie's work is less to do with the particular conclusions he makes than with how he gets to them. What initially seems to be a detailed approach to our social context actually fails to give much indication as to what this 'context' might be. Norrie talks broadly of things that are "beyond the individual",[117] of "social relations",[118] "social structure, institutions, [and] culture",[119] but is never very specific as to what this 'external' realm includes, other than being "what is usually regarded as lying beyond [the individual]".[120] Harré's understanding gives some more specificity, in its descriptions of the social 'conversations' that take place within the primary social structure between the various groups, institutions, and activities of public role-playing that constitute it. Even this approach, however, arguably lacks a degree of sensitivity to the complexity of the external world and its boundaries with the self.

Nicola Lacey highlights a critical issue in distinguishing self from context when she notes the inevitability of the criminal justice system having "to draw lines around the contextual factors it is willing to take into account if it is to function, as it must if it is to exist at all, as a system which enunciates normative judgments about socially

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[115] ibid: pp. 206-13, especially 09.

[116] ibid: p. 220.

[117] ibid: p. 12.

[118] ibid: p. 79.

[119] ibid: p. 199.

[120] ibid: p. 200.

acceptable conduct".[121]   Although she does not give much detail on this point, her overall critique being directed at Norrie's earlier *Crime, Reason, and History* which is not concerned with developing the details of a contextualised self in terms of relational blaming, it is worth expanding Lacey's aside in light of Norrie's later work. Suppose, for example, that we take 'social context' to be a very broad conception of the world around us, traditionally seen as separate from us as individuals but that potentially influences our behaviour. Here the question is raised whether the entirety of this broad 'social context' is related to the individual in the same way. The world around us is not monolithic, and there are multiple layers of experience (or 'context') which could influence us, from the amorphous clouds of culture down to the physically embodied world. Our religion, our cultural history, our sub-cultural identification, our national identity, our social and communal relations, the social 'conversations' that take place around us, our family ties, our inter-personal relationships, our physical and geographic location – all these things, and undoubtedly more besides, affect the way we feel, behave, and interact, and will do so in different ways and amounts (and with more or less of our conscious awareness).   Norrie's focus on our psychological relationship with social relations is merely one dimension of the interaction of self and context.

The moral relevance of these myriad influences also varies. For example, the weather can affect directly the way an individual behaves (whether one wears a coat or not, whether one goes to the beach or not), and although the weather may be a factor associated with patterns of criminal activity,[122] it is not generally seen as a moral consideration, nor is it generally seen as a *social* phenomenon. This questions the distance of influence that becomes relevant to questions of responsibility. Under a wide notion of social context we might have to take everything outside an individual into account when assessing the morality of his or her behaviour, which is a practical

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[121] Nicola Lacey, 'Abstraction in Context' *Oxford Journal of Legal Studies* 14, no. 2 (1994): p. 266.

[122] See, for example, Ellen G. Cohn, 'Weather and Crime' *The British Journal of Criminology* 30 (1990); Simon Field, 'The Effect of Temperature on Crime' *The British Journal of Criminology* 32 (1992); John R. Hipp, Daniel J. Bauer, Patrick J. Curran, and Kenneth A. Bollen, 'Crimes of Oppotunity or Crimes of Emotion? Testing Two Explanations of Seasonal Change in Crime' *Social Forces* 82, no. 4 (2004).

impossibility, and arguably stretches the notion of 'social' further than it can handle. With anything less than this, however, we are surely maintaining some form of 'false separation' between ourselves and the influential world around us, which Norrie claims his transcending of Kantian individualism does not entail. If we take 'social context' to be narrower we maintain false separations by excluding those factors that, although they may influence our behaviour, we deem to be irrelevant to responsibility. Thus, again, we have the question regarding where we draw the line between what is and is not relevant to questions of responsibility.

This issue of delineation between self and context taps into important issues around causation, a fundamental dimension of criminal responsibility. As Andrew Ashworth observes, noting, like Lacey above, the necessity of an artificial separation:

> "...the approach of the criminal law is to affix causal responsibility to the last individual whose voluntary behaviour impinged on the situation... [Although] it would be both artificial and undesirable to think of social life in terms of [autonomous] individuals pursuing their own ends in isolation from one another... [the] traditional approach in criminal law is to ignore [contextual] factors... and to focus on the individual. It is not clear how a system of criminal law could function otherwise".[123]

Ashworth's discussion of causation paints a general picture of criminal doctrine that, through its reliance on the principle of individual autonomy, blocks consideration of contributing factors beyond an individual's freely willed causative behaviour[124] (unless that factor intervenes, without being reasonably foreseen, after such behaviour[125]).

Although, as Cane observes, *casual* responsibility does not necessarily correspond with *criminal* responsibility (because crimes such as attempts or possession do not require any particular outcome),[126] causation issues represent an important dimension

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[123] Ashworth, *Principles of Criminal Law*: pp. 123-24.

[124] ibid: pp. 122-27.

[125] If that intervening factor is the act of a third party (rather than, say, an 'act of God'), the question of when that 'intervention' becomes sufficient to relieve a defendant of causal responsibility becomes a complex issue. Ashworth identifies three main types of third party intervention for which specific case-law has been developed: i) non-voluntary act of a third party; ii) the conduct of doctors; and, iii) the conduct of the victim. See ibid: pp. 127-33.

[126] Cane, *Responsibility in Law and Morality*: pp. 114-16.

of the relationship between self and context. Norrie himself makes the link clear in terms of 'involuntariness', where behaviour is determined by some prior cause and is thus not free enough to attract causal responsibility, explaining the justification for separating out contextual factors in terms of the adherence to individual autonomy.

> "The division between [narrow] physical and [wide] moral involuntariness, like that between intention and motive, is necessary in a world in which defences to crime based upon moral involuntariness or motive could all too readily be made on the basis of social environment or background, to the gross detriment of a system based upon the attribution of fault to *individuals*."[127]

Causation, then, is an area (like understandings of the moral self more broadly) where the extent to which the world we live in can be said to influence or be a part of our action (or our identities) engenders problems of hiving off that which is relevant to responsibility.

To add to this complexity in determining the relevance of contextual factors to responsibility, the external boundary of the individual is also unclear, especially if we are thinking in terms of what influences our behaviour beyond our autonomous will. It may or may not be the case that some things that are physically external to ourselves can come to be seen as a part of our self-identity, of who we are (such as a spouse, a partner, or a sibling, or our clothes, or even the car we are driving[128]), but things within the body can certainly alter the way we behave: for example, chemical imbalances in the brain, seizures, or physical and mental disability. Metaphysically, we may also not simply be delineated from that which we are not – the boundaries and relationships

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[127] Norrie, *Crime, Reason, and History*: p. 116. (Emphasis in original.)

[128] In relation to cars, see, for example, Deborah Lupton, 'Monsters in Metal Cocoons: "Road Rage" and Cyborg Bodies' *Body and Society* 5, no. 1 (1999). Lupton argues that the combination of car and driver produces a type of 'cyborg body' in the experience of driving. Note also that the limits or boundaries of our own bodies may not be wholly clear cut. For example: transplants, plastic surgery, medical implants, and virtual reality all problematise exactly where our bodies end. See Chris Shilling, *The Body and Social Theory*, 2nd ed. (London: Sage, 2003): pp. 3-6. More fundamentally, perhaps, pregnancy and childbirth raise significant challenges to the boundaries of the self: see Section 9.2 and Christine Battersby, *The Phenomenal Woman: Feminist Metaphysics and the Patterns of Identity* (Cambridge: Polity Press, 1998).

between our selves, the external world, and others, may not be clear cut.[129] We are not simply autonomous beings situated in a particular context of action and influence. Kant himself observes our emotional nature, but we also have subtler and less knowable aspects, such as the psyche, or the subconscious mind.[130] Moreover, Kant's metaphysical model of the transcendental self posits a self that is, at heart, stable and unchanging.[131] Although Norrie is careful to highlight the unstable and shifting nature of the responsible agent when located as a relational entity between the contexts of the individual and the social, his approach to the 'social' as emblematic of context in general remains epistemologically limited in terms of its ability to encounter the depth and complexity of that context, how it relates to the self, including the self's indeterminate dimensions, and the uncertain boundary between the two.

Despite this, Norrie's model of a blaming relation is important. In many ways, his work follows the major concern of this thesis to develop a way of understanding the moral self that tempers abstract autonomy and the adherence to the primacy of rational choice by reconfiguring how we think about identity in criminal theory; but, as others have also observed, his work does not go far enough. As Bowring notes, for example, "in the end [Norrie's work] is haunted by the impossibility of thinking beyond the present order of criminal law".[132] As mentioned above, Norrie's argument is couched to a large extent in doctrinal theory. This is important for arguing against a blinkered approach that looks only at doctrine by exposing it to the more 'contextual' approaches of social psychology and criminology, but it also has the limiting effect of keeping Norrie firmly within a criminal theory episteme. This limitation can be seen in his lack of engagement with Kant's aesthetic philosophy: Norrie remains concerned with the areas of Kantian philosophy that are seen as relevant to the traditional

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[129] This softness of the self/other boundary is explored more fully in Part Four, in relation to Christine Battersby's 'metaphysics of becoming'. See, particularly, Sections 9.2 and 9.3.

[130] For a detailed discussion of the role of human psyche in the understanding of human nature, through a law and literature lens, see Chapter Seven of Williams, *Empty Justice*. Regarding the uncertainty in knowing this domain of ourselves, see pp. 170-73 of Williams's work.

[131] The transcendental self is introduced in more detail in Section 6.3.

[132] Bill Bowring, '*Punishment, Responsibility, and Justice: A Relational Critique* by Alan Norrie' *Journal of Law and Society* 29 (2002): p. 524.

abstract autonomy he is arguing against. His lack of detail or considerations of alternative perspectives in understanding 'social context' is also symptomatic of this narrow epistemic viewpoint, which remains within the rational disciplinary frameworks of psychology and sociology. In this thesis, the aim is to take Norrie's move beyond individual autonomy much further by adopting a broader epistemological approach, configured through an aesthetic lens, in order to gain a fuller and more sensitive understanding of the moral self that can encounter the self's indeterminate and fluid, non-rational and non-linguistic, dimensions. Such a project is important if we are to develop models of criminal responsibility that can ethically link embodied individuals with their lived behaviour.

5.4.3 *The return to astonishment*

The fluid and indeterminate dimensions of human reality cannot be ignored or subsumed under 'rational choice' if we are to develop models of the moral self capable of ethically considering the unique 'alterity' of living individuals. This thesis adopts a broadly aesthetic approach to these living dimensions on a theoretical level. Cultural criminology, however, is an area of research that works to empirically access the lived realities of human agents without relying exclusively, or even heavily, upon the orthodox approaches of the social sciences. The authors of *Cultural Criminology: An Invitation* argue that in order to better understand crime in our late modern world, we need to move beyond narrow notions of crime and criminal justice, and to broaden our focus to include the symbolic, emotional, and experiential aspects of crime and its consequences.[133] Cultural criminology's focus of enquiry is aimed "at precisely those points where norms are imposed and threatened, laws enacted and broken, [and] rules negotiated and renegotiated".[134] Cultural criminology is thus open, fluid, dynamic, and broadly phenomenological; and its theoretical underpinnings are key in considering how we understand the embodied world of human feeling.

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[133] Jeff Ferrell, Keith Hayward, and Jock Young, *Cultural Criminology: An Invitation* (London: Sage, 2008): p. 2.

[134] ibid: p. 4.

The priorities of cultural criminology are experiential existence, meaningful action, and emotional reality, as opposed to orthodox or positivist criminology which is preoccupied with statistics and the attempted scientific study of human behaviour that involves damaging abstractions (similar to those engendered by an adherence to rational choice models of criminal identity) from the sensuality of criminal experience.[135] This distrust within cultural criminology of statistics as an appropriate and capable tool for understanding the complex dynamics, experiences, and 'meanings' of crime fuels a "healthy disrespect"[136] for orthodox knowledge, an abandonment of "the old social scientific hierarchy of content over form", (of word over image[137]) and an almost exclusive shift towards qualitative and ethnographic methods of research.[138] The focus on the 'cultural' aspects of crime and criminal action is emblematic of this shift, but it entails more than the move towards embodied experience:

> "Certainly, the 'cultural' in cultural criminology denotes in one sense a particular analytic focus: an approach that addresses class and crime as lived experience, a model that highlights meaning and representation in the construction of transgression... But the 'cultural' in cultural criminology denotes something else, too: the conviction that it is shared human agency and symbolic action that shape the world."[139]

For cultural criminology, then, it is the activities of human actors, as embodied moral agents, that shape the world, negotiating codes and transgressions in a context of lived

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[135] For more detailed discussion of criminological and cultural criminological method, see ibid: pp. 158-94. See also, for a damning attack on the prevalence of statistics in criminal and social research, Jock Young, 'Voodoo Criminology and the Numbers Game' in *Cultural Criminology Unleashed*, edited by Jeff Ferrell, Keith Hayward, Wayne Morrison, and Mike Presdee (London: GlassHouse, 2004). For an extended analysis of the sensuality and 'seduction' of criminality, see Jack Katz, *Seductions of Crime: Moral and Sensual Attractions in Doing Evil* (New York: Basic, 1988). For a detailed introduction to the more orthodox methods of criminology, see Clive Coleman and Jenny Moynihan, *Understanding Crime Data: Haunted by the Dark Figure* (Maidenhead: Open University Press, 1996).

[136] Ferrell, Hayward, and Young, *Cultural Criminology*: p. 161.

[137] ibid: p. 175. For an analysis of the importance of studying the visual dimensions of crime in cultural criminology, see Keith Hayward, 'Opening the Lens: Cultural Criminology and the Image' in *Framing Crime: Cultural Criminology and the Image*, edited by Keith J. Hayward and Mike Presdee (Abingdon: GlassHouse, 2010). Regarding the general denigration of the visual in criminology and sociology, note p. 5 of Hayward's work.

[138] See Ferrell, Hayward, and Young, *Cultural Criminology*: pp. 174-94.

[139] ibid: p. 20.

symbolic meaning. We act in particular cultural settings, where our actions have specific sets of meanings integrally linked with our cultural framework and the world around us, and if we are to hope to understand human behaviour – its causes, its effects, its moral value – then a focus on this cultural context of action and experience is important and necessary. The meaning of action, of crime, cannot be found in endless tables of statistics or abstract models of rational choice, but in the dynamic world of transgression and cultural navigation.

This kind of open-textured approach to the lived dimensions of human action is emblematised by the cultural criminological work of Jonathan Wender. In his theoretical essay on the 'Return to Astonishment', although not directly concerned with criminal responsibility, he tackles issues similar to Norrie relating to the abstraction from context in his attempt to promote what he terms a "phenomenological aesthetics of encounter".[140] Whilst Norrie argues that responsibility should be shared between individuals and those aspects of their social context which may have affected or caused their behaviour, with Wender we take a step further into the complex and shifting worlds of lived reality. What Wender argues in his work is not the notion that we may be affected by aspects of some vague one- or two-dimensional 'social context', but that it is in the concrete, ontological phenomena of a (criminal) act that meaning is made, and that we must be sensitive to its aesthetic dimensions in order to appreciate this. It is through the abstraction of criminal justice processes that the symbolic and contextual meanings embedded within and around a criminal act are negated, denied, and lost.

Wender's point, derived from his reading of Sophocles's *Antigone*, is not about capturing more of the self and its context in order to answer the question of where to locate responsibility, as though blame can then be pinned in the 'correct' place, but rather to accept that astonishing reality *cannot be completely understood, captured, or categorised*. It is in astonishing reality, in the phenomenological aesthetics of an

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[140] Jonathan Wender, 'Phenomenology, Cultural Criminology, and the Return to Astonishment' in *Cultural Criminology Unleashed*, edited by Jeff Ferrell, Keith Hayward, Wayne Morrison, and Jock Young (London: Glasshouse, 2004): p. 49. (Emphasis removed.)

encounter, that a person partakes in expressive, meaningful activity; behaviour is embedded in lived reality and thus richly significant. It is in astonishing reality that the "fullness and mystery of human existence"[141] is to be, for want of a better word, 'found'. Abstract descriptions and categories will not be able to capture this fullness and mystery; rather, it is what abstraction denies, and to what we need to return.[142] Recognising these lived dimensions of human action does not mean an action is perceived to be 'good' or 'wonderful', but simply that it is *astonishing* in that it exceeds rational explanation; it is beyond conceptualisation or linguistic description. Wender gives a particularly horrific example from his experience as a police officer:

> "...in striving to comprehend the wicked act of one human being's trampling on the head of another, bureaucrats and criminologists cannot ignore the kind of ontological truth that is revealed by a work such as the *Antigone*... the enduring value of Sophocles' insights lies in the moral and ontological perspective that they create by revealing what is unquestioningly taken for granted when we conceive of trampling on someone's head as a straightforward 'matter of fact'... [The] actual scene of the crime is always already more than the bureaucrat or social scientist will ever see. To 'unleash'... thought would be to free it to engage this otherwise unseen reality."[143]

Much of Wender's arguments relate to the abstraction of particular facts and evidence from this 'unseen reality' of astonishment in substantive criminal justice practices, but his thesis highlights an important dimension of the deficiency in both abstract autonomy and rational choice as models of the moral self. In examining only part of the self, be it purely or partially abstract, and in trying to press it into linguistic concepts, the astonishing reality of human behaviour and action is largely overlooked. This astonishing reality is always already more than criminal categories or evidence bags or linguistically and rationally based theoretical models will ever be able to hold.

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[141] ibid: p. 50.

[142] See ibid: pp. 58-59.

[143] ibid: p. 58.

5.5   Conclusion

From the aesthetic perspective adopted in this thesis, the predominant rational choice model of moral identity in criminal theory has been opened to critique.   The astonishing dimensions of criminal action, of human existence, and of the moral self, are generally denigrated or effaced in the adherence to rational choice.   The moral self of criminal theory, in maintaining its kernel of rational choice, limits its ability to encounter non-rational and non-linguistic dimensions of the self (and the world), and thus engenders injustice in relation to our ability to attribute responsibility to living, embodied individuals that exist and follow courses of behaviour in the astonishing world of human feeling.   Responsibility can only be understood in a partially abstracted manner under criminal theory; it cannot penetrate the rich complexity of lived reality or the indeterminate dimensions of the moral self.   We thus need a different epistemological concept that can enrich our engagement with this non-rational and non-linguistic 'beyond', and enable the ethical shortcomings of rational choice to be mitigated.   The comics form, as argued in Chapter Four, models interaction between the rational, non-rational, linguistic, and non-linguistic, and as such can assist in developing such a concept.   In approaching this development, we need to understand in more detail how models of the moral self and the world it inhabits are constructed, or made; how they themselves derive from astonishing human and cultural settings and the complex interactions between the self and the world(s) it inhabits.   We need also to examine how recognising the specifically human origins of knowledge influences the making of models of criminal identity.   The next chapter begins this inquiry via substantive analysis of the graphic novel *Watchmen*.

CHAPTER SIX

Spectrality and Self-Making

> "A world grows up around me. Am I shaping it, or do its predetermined contours guide my hand? ...
>   Which of us is responsible?
>   Who makes the world?"[1]

6.1 Introduction

This chapter puts forward an indicative model of the self as a nexus of drives and influences. In the previous chapter we saw the major problem with the moral self of criminal responsibility theory: it is unable to penetrate the astonishing dimensions of human experience which are important for understanding responsibility, adhering instead to limited models of rational choice. Understandings of the self, and the world, derive from particular humans in embodied reality; they are constructed, constituted, or 'made' by living individuals. These understandings that we 'make' are haunted both by the humanity that created them and the excessive nature of what they try to capture (these two types of haunting are what is contained in the concept of 'spectrality'). If we are to approach the astonishing dimensions of the self with respect to responsibility, then we must understand our role in the constitution, or 'making', of moral identity. The current chapter examines our role in the making of the world and the self, in order to uncover the astonishing dimensions of the self beyond the models of 'rational choice'. The overall focus of this chapter is on the spectrality behind the making of the world and self in general, rather than the world and self made more specifically in criminal theory, to the end of producing a rudimentary model of the self that indicates the depth and importance of individuals' astonishing dimensions that 'rational choice' denigrates or effaces. A more specific consideration of criminal theory in this context is the focus of the following chapter.

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[1] Moore and Gibbons, *Watchmen*: Chapter IV, p. 27.

In Section 6.2 the spectral criminal in the work of Peter Hutchings is associated with the *Watchmen* character of Rorschach, through whom the two dimensions of spectrality are developed. Analysis of Rorschach shows, substantively, how astonishing individuality remains excessive to criminal categories and thus haunts attempts to 'capture' humanity. Epistemologically, analysis of Rorschach shows that rationality itself is a human tool, derived from a particular cultural position, not a natural or a priori object. By juxtaposing Rorschach's attempt to be abstract with the spectrality of astonishing human feeling, *Watchmen* helps expose how reason remains haunted by this astonishing contingency. Applying spectrality to rational choice in criminal theory, it is argued that rational choice models are both unable to capture the astonishing reality of the moral self and are flawed in their division between rationality and human feeling; they remain haunted by astonishing reality, unable to encounter it directly. Spectrality thus suggests the need to move beyond the rational as we approach understandings of the moral self. In making this move, we need to understand how we derive rational structures from our embodied existence: we need to understand our role in the making of the world qua knowledge of the world (as opposed to making the world physically through manipulating physical structures or the landscape, for example). Accordingly, Section 6.3 examines our role in world-making, highlighting the link between our participation in making the world, through our synthesis of experiences, and the nature of free will. If we do not make the world, and our selves are merely determined by its natural laws, then we lose our capacity for free will; thus our participation in world-making suggests that we retain free will insofar as we make the world. Our experience from which the world is derived is not wholly rational or linguistic, but is also astonishing, and thus our free will is not wholly or necessarily rational or linguistic, but is also astonishing.

Our partial participation in world-making raises the question as to how and to what extent we make the self. Section 6.4 analyses this question, focusing upon the (in)stability of the self over time. It is argued that neither the body, nor the mind, nor our memories, are solely able to secure identity over time, and that through our ethical relation to ourselves we are actually able to shift and change over time towards

particular ethical goals. These partial elements of the self, which cannot constitute identity alone, are put together alongside the concept of the self as a collection of drives and impulses that exist beyond the rational will (found in Nietzsche's philosophy) and the influences of the world via disciplinary knowledge, to produce a model of the self as a connected group or nexus of drives and influences that is richly indicative of that which is excessive to 'rational choice' (Section 6.5). This model of the self embeds the astonishing dimensions of spectrality into the individual, suggesting an understanding of the self that may help in moving beyond the rational and linguistic with respect to criminal responsibility theory.

6.2 Spectrality and the moral self

6.2.1 *The criminal spectre*

Peter Hutchings uncovers the spectral nature of the criminal that permeates the aesthetic and legal structures of the nineteenth and twentieth centuries.[2] For Hutchings, the criminal is not:

> "...some shadowy counterpart to the law-abiding citizen but *as spectre* the very form of [criminal] law and the shape it seeks to control, a spectre jointly produced through the discourses of [criminal] law, literature, psychiatry, aesthetics and criminology".[3]

For example, in *Dracula* the spectral vampire becomes conflated with criminality, pursued and eventually destroyed by the guardians of civilised society – a doctor, a lawyer, a secretary, a psychiatrist, an aristocrat, and an adventurer.[4] It is the "discursive powers" of such disciplines as anthropology, criminology, law, and forensic medicine that help to 'conjure up' the spectral criminal.[5] The Foucaultian shift in

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[2] See Peter J. Hutchings, *The Criminal Spectre in Law, Literature, and Aesthetics: Incriminating Subjects* (London: Routledge, 2001).

[3] ibid: p. 2. (Emphasis in original.)

[4] See ibid: pp. 14-15.

[5] See ibid: p. 14.

dealing with criminality,[6] Hutchings argues, is important in the 'spectralisation' of the criminal. This involves the disciplinary construction of generalised categories that then come to haunt the social and political imagination,[7] but also the suppression of public punishment. The removal of the spectacle of the gallows from public view, for example, arguably led to an increase in gallows literature (namely crime and detective novels) as a metaphorical alternative.[8] This helps explain why crime narratives are haunted by the archetypal offence of murder:[9]

> "As crime and its punishment are increasingly conceived in terms of subjectivity, murder becomes the archetypal crime because its story – full of personal histories and intentions – is the story of the subject, the very stuff of the novel".[10]

Hutchings makes the important association between these spectral shifts in criminal understanding of the subject and processes of 'othering'. Focused on the nineteenth-century, Hutchings notes this spectral otherness not only of the criminal, but also in relation to 'madness', women, and the 'genius'. Hutchings notes that madness, or insanity, falls outside traditional understandings of human volition: "Motive, a key factor in establishing criminal intent... presumes an ordered, purposive subject as opposed to the peculiar, random order of violence".[11] Discussing Edgar Allen Poe's *The Murders in the Rue Morgue*, Hutchings notes a conflation of non-humanity and madness: "the only alternative to the dichotomy sane/insane is human/animal".[12] A similar process occurred with respect to women and the 'genius'. Like the criminal,

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[6] See, for example, Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (London: Penguin, 1977). See also Sections 6.5, 7.2, and 7.5.

[7] Hutchings, *The Criminal Spectre in Law, Literature, and Aesthetics*: p. 27.

[8] ibid: p. 31.

[9] Even in substantive legal theory, the crime of murder is seen as archetypal. Lyndsay Farmer, for example, observes its influence as archetype in the development of various criminal doctrines: see Lindsay Farmer, 'Bringing Cinderella to the Ball: Teaching Criminal Law in Context' *Modern Law Review* 58, no. 5 (1995): pp. 765-66.

[10] Hutchings, *The Criminal Spectre in Law, Literature, and Aesthetics*: p. 45.

[11] ibid: p. 58. Compare to Alan Norrie's argument that stable legal categories presuppose a stable, responsible subject: see Chapter Five, note 57.

[12] ibid: p. 62.

the insane, and the animalistic, women resisted definition,[13] and thus fell outside the rational categories of Enlightenment thought. In the rational nineteenth century, the exceptionally creative and intellectually powerful 'genius' – a term etymologically associated with creation and the magical 'jinn' or 'genie' – became a form of spectre, "a spirit for a non-spiritual age".[14] Hutchings thus exposes a connection between those things that exist beyond the reasoned understanding of the world that was so prominent during the Enlightenment: the animal, the brutal, the monstrous, the mad, the insane, the female, the genius, and the non-human all serve to destabilise rational categories of legal, medical, and forensic psychological knowledge, and thus become *spectral*.

With each of these examples, there is a shared trait of being unidentifiable, and thus beyond reason, 'other'. In a world where individual subjectivity has become the paradigmatic object of disciplinary power, this otherness, for Hutchings, is emblematic of the criminal spectre:

> "The absolutely individual is absolutely illegible and *unidentifiable*. As itself, and nothing else, the individual is both incomprehensible and, ultimately, non-identical... [thus demonstrating] the impossibility of identifying the criminal but... rather than [being] a disproof, illegibility and ineffability become the very signs and proofs of criminality... dissociated from any action and become... an aspect of nature."[15]

The criminal spectre, then, contains all those unsettling aspects of humanity that destabilise and strain the limits of our knowable and rational categories.

There is a general 'otherness', a spectral quality, to the character of Rorschach in the graphic novel *Watchmen* that reflects this criminal spectre observed by Hutchings. Rorschach is a masked vigilante (his 'real' or 'official' name is Walter Kovacs), with a mask of shifting black and white shapes and the hat and trench-coat of a classic noir detective; he is hard-boiled and violent, and has a strong sense of retributive justice.

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[13] ibid: p. 88.

[14] ibid: p. 167.

[15] ibid: pp. 174-75. (Emphasis in original.)

More specifically relating to his spectral quality, Rorschach is outside traditional, orthodox society, as we see in Chapter I of the graphic novel by the moral ease with which he breaks into both the house of a friend and a military compound. He sees himself as 'above' society, looking down on it, through the veneer to the ugly truth – the violence and social decay beneath the surface.[16] Rorschach also talks of the city itself as being a "fierce and complicated" animal, and that he must track it by reading its droppings and parasites,[17] and thus he becomes part of a natural order, surviving and hunting in the urban landscape. Rorschach is thus 'other' to civilised society; but he is more than merely animalistic in his otherness.

We see references to Rorschach's spectral nature, which gives him a kind of ghostly immanence, from the other characters in *Watchmen*. Fellow costumed hero Laurie Juspeczyk states that "he gave me the creeps",[18] and that "on the news he sounded frightening";[19] a detective gets shivers when he unknowingly passes Walter Kovacs (Rorschach's unmasked alter-ego) in the street;[20] during the interviews with Dr Long a particularly grisly answer given by Rorschach feeds back into the previous panel, suggesting Long's fearful precognition deriving from Rorschach's violent nature;[21] there is the eerie 'staring' that discomforts Long so much,[22] and the otherworldly feel of retired villain Edward Jacobi's house as he searches it for the intruding Rorschach, only to find him not hiding in the refrigerator as on a previous occasion (itself a ghastly occurrence, reminiscent of monsters under the bed),[23] but instead finding a note in the appliance reading 'behind you', and turning to discover Rorschach waiting patiently for

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[16] For symbolic representation of this, depicting Rorschach sitting on the rooftops of the city that he sees as 'beneath' him, see Moore and Gibbons, *Watchmen*: Chapter I, p. 14.

[17] ibid: Chapter V, p. 11.

[18] ibid: Chapter IX, p. 15.

[19] ibid: Chapter VI, p. 8. (Emphasis removed.)

[20] ibid: Chapter I, p. 4.

[21] ibid: Chapter VI, p. 17.

[22] ibid: Chapter VI, p. 2.

[23] See ibid: Chapter II, p. 20.

him.[24]   During a prison riot, readers experience Rorschach's disembodied voice, inexorable violence, and patient stalking of a convict through the dark and shifting atmosphere of the prison.[25]   Even Rorschach's closest friend, Dan Drieberg, is uncomfortable having him in his home and takes him as quickly as possible down to his basement lair whilst implying he should be leaving.[26]   Rorschach is thus an animalistic and spectral pariah on the fringes of society, outside the 'normal' world, navigating a natural order of violence, and going against the written word of the law as a masked vigilante. He is not merely a deviant, but symbolic of the criminal spectre.

6.2.2 Rorschach and spectrality

Mid-way through the narrative of *Watchmen*, Rorschach is arrested for vigilantism and incarcerated.[27]   Through his capture and imprisonment, Rorschach is placed in a particular category; he is labelled a 'criminal', and possibly 'insane' (Rorschach is assessed by forensic psychologist Dr Long to determine this 'insanity').   In effect, Rorschach is reduced to a 'mere' criminal; he is stripped of his identity (his costume, his personal effects, his 'face'[28]) and dressed in the same clothing as all the other inmates, the other criminals alongside whom he has been categorised.   Desmond Manderson has observed the dehumanisation in processes of incarceration and execution:[29]

> "The body and the emotions of the condemned man must be restrained. Otherwise he may turn out to be more human than we want [and thus break down the] barriers of isolation and objectification which the system has so carefully manufactured".[30]

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[24] ibid: Chapter V, pp. 2-3.

[25] ibid: Chapter VIII, pp. 17-20.

[26] ibid: Chapter I, pp. 11-13.

[27] See ibid: Chapters V-VI.

[28] See ibid: Chapter V, p. 28.

[29] See generally Manderson, *Songs without Music*: pp. 95-128.

[30] ibid: p. 124.

Manderson's argument clarifies that it is the astonishing dimensions of humanity – the living, embodied individual – that are hidden and suppressed in order to display only the legitimate object of penal justice: namely, the condemned man, the (purely) criminal *other*. Richard Sherwin explains this tendency towards the abstraction of the criminal, of the 'deviant other' of civilised society, in terms of our desire to repress that which we fear within ourselves, the possibility of 'irrational' violence irrupting from within that we project outwards onto 'the other' and denigrate as 'criminal', and thus (appear to) control.[31] Rorschach, however, cannot be held in such a manner.[32] Attempts to reduce him to a mere imprisoned criminal, to deny all the spectral aspects of his being and what it might suggest about ourselves, does not succeed. Rorschach's unique identity persists, breaking him free from both the conceptual and actual prison; his humanity remains excessive to attempts to contain or control it.

If we recall Wender's work from the previous chapter, this suggests that it is not just the astonishing scene of the crime ('the encounter') that is always already more than official categories can contain, but the actual criminal individual. Thus the criminal itself must remain a spectre. Hutchings suggests that the individuality of any actual person will always exceed the category of 'criminal', and thus, as concept, the criminal is spectral, insubstantial, a phantom that cannot be 'pinned down'. With Sherwin we see that the criminal other is the product of our own fears of what might be within ourselves: if we do not confront it as 'internal' but keep projecting it outward into otherness, it will remain an imaginary figure that will haunt us, as repressed urges and fears of urges, that we cannot destroy;[33] it is our own fears of the (deviant) other within, of the astonishing humanity of the criminal and what this might mean for us as fellow humans, that infuses it with spectrality. This is one layer or dimension of

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[31] See Sherwin, *When Law Goes Pop*: pp. 172-85.

[32] Note the unsettling influence he has on Dr Long: Moore and Gibbons, *Watchmen*: Chapter VI, especially pp. 26-28. Note also the violence that he instils within the prison: Moore and Gibbons, *Watchmen*: Chapter VI, pp. 14-17. Finally, note his actual escape from prison: Moore and Gibbons, *Watchmen*: Chapter VIII, pp. 18-21.

[33] Sherwin, *When Law Goes Pop*: pp. 184-85.

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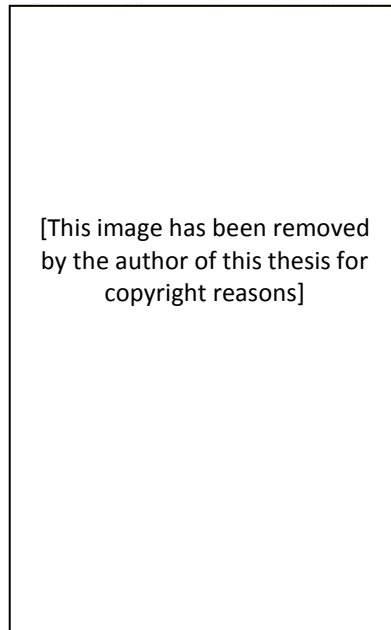
Figure 6.1: Moore and Gibbons, *Watchmen*: Chapter V, p. 11.

spectrality: the excessive, haunting, and astonishing nature of the criminal self with respect to attempts to define, categorise, and control it.

This excessive dimension of spectrality can be seen more clearly in the comics form and content of Figure 6.1. Substantively (diegetically), this panel shows Rorschach holding his mask, describing how his costume covers up his true identity, making him unknowable. Whilst wearing his costume, he is Rorschach (as opposed to Kovacs). On one level, this raises questions about the stability of identity: to what extent do our identities shift and change through our lives, and in different contexts. More directly concerned with the concept of spectrality, Rorschach's mask exposes how identity is masked in the abstraction of criminal identity. Rorschach gets his name from the shifting black and white shapes that make up his mask. The Rorschach ink-blot is a tool used in clinical psychology, whereby the blotchy images inspire fantasy and projection in the subject which a practitioner can then interpret, and thus gain some insight into the subject's mental state.[34] It has been suggested that the police uniform can be seen

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[34] Although there have been findings to suggest links between certain test responses and a variety of psychoses (such as schizophrenia, psychopathy, and post-traumatic stress disorder), there is now much debate over the usefulness and validity of the Rorschach test: see, for example, John Hunsley and Gina di Giulio, 'Norms, Norming, and Clinical Assessment' *Clinical Psychology: Science and Practice* 8, no. 3 (2001); Irving B Weiner, 'Using the Rorschach Properly in Practice and Research' *Journal of Clinical*

as a type of Rorschach blot: it inspires fantasy and projection in people who encounter it, and in this way it conveys various associated meanings and enables officers to communicate their authority without resorting to the techniques of 'normal' conversation.[35] Similarly, the business suit can be seen to efface the embodied human, making the individual more uniform, and thus enabling more 'rational' engagement in business and government.[36] Rorschach claims that it is *without* his mask that 'nobody knows who he is', but the visual associations and the juxtaposition of text and image in Figure 6.1 undermine this belief. The visual depiction of the mask highlights the association between the costume and the ink-blot; it is when he *puts on* his mask that Rorschach becomes unidentifiable. By masking his fleshly self, his human form, with the visual indeterminacy of the Rorschach, Walter Kovacs frees himself from his contingent, embodied life. He becomes abstract and unidentifiable; his unique humanity is hidden beneath a shifting and spectral costume capable of manifold interpretations. Similarly, by masking the embodied, astonishing human with abstract models of the self-as-responsible, the unique human difference of the individual is also masked by the understandings of moral identity based upon rational choice that we saw in the previous chapter.

In donning his costume, Rorschach also claims to enter a 'rational' order, free from feelings and desires (see Figure 6.3). It is with this claim that *Watchmen* challenges Kantian metaphysics. Rorschach's spectrality, suggesting the excessive nature of the astonishing self as against criminal categories, is linked with a more general haunting of *Watchmen*, and it is this spectre of human feeling that haunts rationality. Human feeling, as we have seen, is not excluded from Kant's metaphysics, or the rationality of the moral self in criminal theory. However, these models both rely upon the dominant legitimacy of rationality in order to understand responsibility.   What *Watchmen*

Psychology 56, no. 3 (2000); James M. Wood, Scott O. Lilienfeld, Howard N. Garb, and M. Teresa Nezworski, 'The Rorschach Test in Clinical Diagnosis: A Critical Review, with a Backward Look at Garfield (1947)' *Journal of Clinical Psychology* 56, no. 3 (2000). Dr Long also uses this tool to analyse Rorschach: see generally Moore and Gibbons, *Watchmen*: Chapter VI.

[35] See Phillip Shon, 'Rorschach-in-Action: Some Further Observations on the Semiotic Summons in Police-Citizen Encounters' *International Journal for the Semiotics of Law* 16 (2003).

[36] See Richard Collier, *Masculinities, Crime, and Criminology* (London: Sage, 1998): pp. 45-46.

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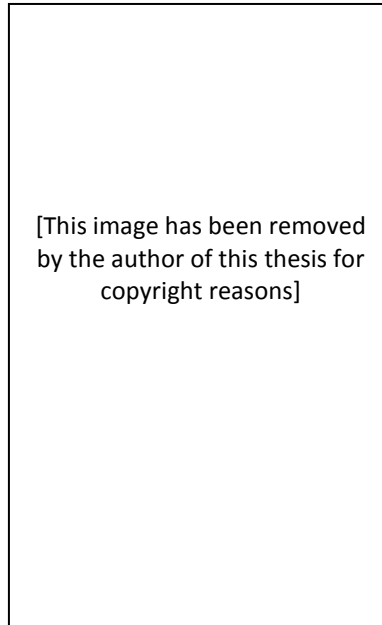
Figure 6.2: Moore and Gibbons, *Watchmen*: Chapter V, p. 11.

exposes, however, is not simply that our rationality cannot fully escape our feelings (although this is one challenge to attempts to be 'objective' and 'rational' that can be read from it). Rather, it is a more fundamental critique of the division itself between sense and reason. The haunting of rationality by human feeling is the second layer, or dimension, of spectrality: simply put, rationality is haunted both by the excessive or astonishing nature of what it (substantively) tries to capture or categorise, and its (epistemological) origins in embodied, emotional humanity.

Watchmen is haunted by an image of desire, passion, lust, fear, love, and death: a nexus of human feelings. This image is shown in Figure 6.2: it is the image of two silhouetted lovers embracing. These shadowy figures, captured in graffiti on various walls of *Watchmen*'s New York City, recur at multiple points throughout the panels of the graphic novel.[37] There are also visual links between these lovers and the shadows cast by other embracing couples. We see the shadows cast by Rorschach's prostitute mother and her client,[38] by the forensic psychologist Dr Long and his wife as they go to

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[37] See Moore and Gibbons, *Watchmen*: Chapter V, pp. 11, 18, 23; Chapter VI, pp. 16, 27; Chapter VIII, p. 3; Chapter X, p. 22; Chapter XI, pp. 6, 9, 24, 27; Chapter XII, pp. 5, 7.

[38] ibid: Chapter VI, pp. 3, 4.

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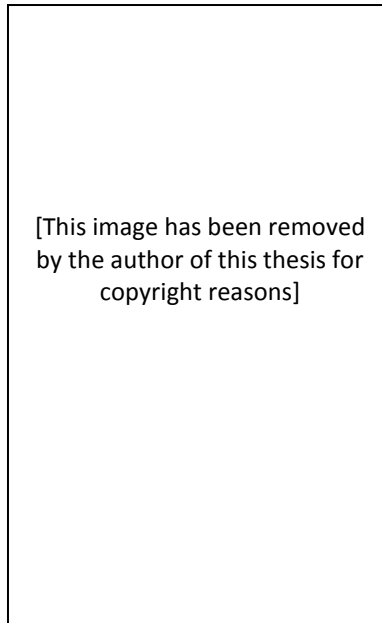
Figure 6.3: Moore and Gibbons, *Watchmen*: Chapter V, p. 18.

bed together,[39] and by Dan Drieberg and Laurie Juspeczyk as they try to make love in Drieberg's house,[40] and as they console each other after Veidt's terrorist attack.[41] Dr Long also observes the similarities between this graffiti image and the 'shadows' left behind of people caught in the atomic blast at Hiroshima.[42] This theme of atomic destruction is picked up again by Dan Drieberg, as he dreams of himself and Laurie Juspeczyk embracing and being taken apart by an atomic explosion.[43] These 'Hiroshima lovers', as Long calls them, are thus deployed in such a way that they become a complex nexus of human feelings: they are loaded with the 'dirty' lust of the sex trade, the tenderness and passion of genuine lovemaking, the symbiosis of weakness and reassurance of a consoling embrace, memories of human tragedy, the fear of loss, and powerlessness in the face of death.

Rorschach has been associated with Kantian abstract autonomy and retributivism by Jacob Held, arguing that although Rorschach is not very good at dishing out

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[39] ibid: Chapter VI, p. 9.

[40] ibid: Chapter VII, p. 15. For more on this, see Section 9.3.

[41] ibid: Chapter XII, p. 22.

[42] ibid: Chapter VI, pp. 16, 27.

[43] This is discussed at length in Section 9.3.

proportional punishment (he uses torture and excessive violence, for example, on those he deems not to be innocent), his general adherence to codes of honour, respect, and duty in his quest for justice allies him with Kant's ideals;[44] but Held's focus on Rorschach's retributivism overlooks a haunting of Kantian abstraction that his narrative articulates. In Figure 6.3 the themes of Kantian philosophy, spectrality, and the abstraction of identity collide in the interaction between the various comics dimensions of *Watchmen*. The text communicates Rorschach's claim that with his costume on he is free from 'fear or weakness or lust'. By engaging with the visual, we can see not only Rorschach putting on his costume,[45] but in the background we can see an advert for a perfume. This perfume, called Nostalgia, is associated with emotional memories and feelings of desire in its advertising[46] and employs the tag line 'Oh how the ghost of you clings'. This phrase, embedded in the visual dimension of Figure 6.3, suggests how human feeling 'clings' like the scent of a perfume, and is, as a 'ghost', haunting. The connotations of loss (of an idealised past), sexual intimacy, lust, and desire also associate 'Nostalgia' with the shadowy lovers of Figure 6.2. In Figure 6.3, then, Rorschach is making himself abstract and rational, but the astonishing ghost of human feeling remains, a clinging and emotionally laden spectre, haunting the background of the panel.

6.2.3 *Spectrality and Kantian moral theory*

Moral theory can be seen to derive from living humans. For Douzinas and Gearey, 'injustice' (as a general idea, not the specific injustice of ethical concern with the other that drives this thesis) is something that we feel; it is emotional, passionate, and experiential; it is located in the astonishing world, rather than in rational and theoretical structures. Attempts to define 'justice', to uncover or describe what a just system of law *should* be like, on the other hand, *are* generally rational, conceptual, and

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[44] See Held, 'Can We Steer This Rudderless World?'.

[45] The discord between Rorschach describing his gloves as 'spotless' and the visual image of them as dirty raises awareness to the juxtaposition between text and image in this panel, and also highlights the symbolic dimensions of his costume as 'pure' and unencumbered by the 'dirt' of embodied contingency.

[46] Note that the Nostalgia adverts run throughout *Watchmen*, but see especially the additional pages between Chapters X and XI.

structured; but 'injustice' remains excessive to such attempts to order the world. Moreover, Douzinas and Gearey hold that without the emotional experience of injustice, our 'sense' of the 'wrongness' of something, attempts to produce theories and models of how to achieve justice in society and law would be useless as they would merely be an intellectual exercise.[47] From this perspective, it is lived reality, our emotional sense of injustice and harm, which inspires the creation of 'just' social and philosophical systems. Emotionally embodied experience thus underpins the impetus towards justice, and the development of theories of justice and morality. If we relate this idea to Kant, we can see in the work of Jean Rumsey the cultural, temporal, and sexual contingency that structures Kant's moral philosophy – including his understanding of 'reason'.[48]

Rumsey argues that, given that feminists are predominantly concerned with embodied, culturally embedded agents, expecting Kant to "rise magically above his own society, holding views on women that were radically different from those of his neighboring Königsbergers" is not salient.[49] Perhaps, she suggests, we can just bracket away Kant's specific comments on women and apply his philosophy to people in general. However, as Christine Battersby also argues,[50] Kant's exclusion of women from moral personhood is both integral and detrimental to his theory of the moral self. Kant's autonomy is predicated upon an understanding of 'normal agency' that takes the imperatives of masculinity in Kant's own time and culture as primary.[51] Kant's adherence to an isolated, autonomous conception of moral behaviour, as an ideal, overlooks or denigrates the social aspects of human living.[52] Human feeling may have a role to play in the development of moral autonomy, as discussed in the previous

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[47] Douzinas and Gearey, *Critical Jurisprudence*: pp. 28-32.

[48] See Jean P Rumsey, 'Re-Visions of Agency in Kant's Moral Theory' in *Feminist Interpretations of Immanuel Kant*, edited by Robin May Schott (University Park, PA: Pennsylvania State University Press, 1997).

[49] ibid: p. 126.

[50] Battersby, *The Sublime, Terror, and Human Difference*.

[51] Rumsey, 'Re-Visions of Agency in Kant's Moral Theory': p. 126.

[52] ibid: pp. 126-30.

chapter, but it is the drive for (masculine) independence that permeates humanity for Kant, according to Rumsey, and that frames Kant's idealised notion of the autonomous moral self:

> "Kant... leaves behind the perceived dependency, emotionalism, complaisance, and limited rationality of the female. He... models the moral agent on the male-identified qualities of his patriarchal world: autonomy, rationality, independence, detachment, courage, and strength."[53]

Kant's model of abstract reason, of independent rationality with the strength and power to deny contingent influences, that underpins his understanding of universal morality and autonomy, an emanation of which can be seen in criminal theory's model of the rationally choosing agent, can thus be seen to derive not from some a priori source of universal truth, nor even from purely logical deduction, but from the contingent imperatives of Kant's own human and cultural situation and his own lived 'sense' of injustice.

Like the shadowy lovers haunting the city with a complex nexus of human feelings, the astonishing spectre haunting the background of Figure 6.3 similarly haunts the creation of abstract reason. When Kant divides sense and experience from a priori reason, even though he does not model the self as completely devoid of sensuality, he still makes an error. The division is not an objective discovery, or a logical certainty, but in Kant's own terms is phenomenal, empirical: it is a move made by Kant, as an embodied human male, in his desire to construct a coherent and 'rational' system of philosophy in line with the masculine imperatives of strength, power, independence, and rationality that he perceived in the culture in which he lived. As such, it remains haunted by the spectre of his embedded cultural and human location, the astonishing spectre of his masculine humanity.[54]

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[53] ibid: p. 132.

[54] Recognition of the specifically 'masculine' imperatives that shape Kant's autonomy is key when we come to expose, and reconfigure, the epistemological foundations of rational choice: see Chapter Eight, especially Sections 8.4 and 8.5.

It is not that we can simply map the impossibility of attaining true abstract autonomy (and our delusion in thinking we can) onto Figure 6.3, but that the panel shows, in both its form and content (derived from its links with *Watchmen* as a whole and its associations with the denial of contingency in Kantian philosophy), that the idea of abstract rationality is undermined by its very status as an idea – moreover, *an idea that is thought by living humans*. It is not that we simply cannot escape our embedded contexts, but that the notion of an abstract rationality 'beyond' human feeling is a product of the human feeling it seeks to deny. Reason is a human tool, a product from particular human and cultural (homo-cultural) contexts, developed by embodied people against a backdrop of spectrality. It is simply a way of approaching the world and the self; its occurrence is not natural, universal, or a priori. In short, rationality remains haunted by the astonishing humanity that created it, or 'made' it, just as it is haunted by the astonishing reality of the individual it cannot fully capture.

Spectrality thus involves two layers or dimensions that challenge rational choice models of the moral self with respect to their abstraction, one substantive and one epistemological: firstly (substantively), embodied difference or individuality is seen to haunt the abstract masking that takes place in attempts to create and apply settled categories of criminal identity; secondly (epistemologically), the spectrality of human feeling, of astonishing reality, is seen to haunt human and cultural structures of rationality, specifically challenging Kant's division between sense and reason. Spectrality is thus a concept that is emblematic of that which is substantively excluded from rational understandings of the moral self and how that exclusion arises epistemologically. The interaction of rational, non-rational, linguistic, and non-linguistic in *Watchmen* – the interactions and juxtapositions of text an image, of non-rational images of spectral humanity, and the rationality of visual association and linguistic operation – has helped to build up this idea spectrality, an idea that signals the move beyond the rational choice of criminal theory. The 'rationality' of criminal theory is not the abstract reason of Kant, but it claims the same priority in the attribution of responsibility: rational choice involves the general ability of the self to direct its various aspects in a rational manner, with human feeling situated as

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subordinate to the primacy of this 'legitimate' rationality. This rationality, however, like Kant's reason, is infused with spectrality. The astonishing dimensions of the self that rational choice models claim to direct haunt understanding not only through their excessive nature in relation to attempts to model the moral self, but also in the way that the very concept of rational choice derives from astonishing homo-cultural contexts.

6.3 Who makes the phenomenal world?

Spectrality, by highlighting the homo-cultural origins and limitations of our rational attempts to structure and understand the world and self, suggests the need to move beyond the rational as we attempt to ethically model the lived individual in responsibility theory. In making this move beyond the rational, and beyond the linguistic, we need to examine how we derive rational structures of knowledge from our lived experiences, our homo-cultural contexts. That is, we need to ask how and to what extent we 'make' the world (qua knowledge of the world). In *Watchmen*, the character of Osterman/Manhattan ponders the question 'who makes the world?' Before we analyse his narrative, however, he needs some introduction. Nuclear scientist Jon Osterman suffers an accident which raises fundamental questions about the stability of identity: he undergoes a significant change, physically, psychologically, and philosophically. He shifts from being 'merely' human – a research scientist falling in love and enjoying his work – into a god-like being who is able to manipulate the matter of the universe and see all of time and space. His body changes, as do his understandings of people and the workings of the universe. Ostensibly, 'who he is' becomes uncertain – is he still 'Jon Osterman', or is he now something or someone else called 'Dr Manhattan'? Although this particular issue is considered later in this chapter, the uncertainty in this character's identity has been introduced now because it explains the dual name used throughout this thesis: 'Osterman/Manhattan'. Osterman/Manhattan's basic nature as a being who can manipulate matter and 'know' the whole universe is also important throughout the following analysis.

Who makes the world? As already seen, Kant divides the world into the noumenal and the phenomenal. Kant also divides the self, but into *three* parts: the noumenal self, the phenomenal self, and the transcendental self. The phenomenal self is essentially our selves as we experience them through our senses; the noumenal self is our true or objective self which we cannot access, or the 'self-in-itself'. The transcendental self, as Christine Battersby describes it:

> "...provides the grounding for the fleeting impressions of the phenomenal world – and also for the phenomenal self. This 'I' supplies the necessary framework of rules and imaginative schemata that we use to unify experience into a coherent (single) self and its correlate world."[55]

It is thus not noumenal, but also not fully phenomenal, rather it 'transcends' the two. This transcendental self is a consciousness that is unitary and persists through time:

> "If the world appears as an ordered whole to me (as it does) then Kant's argument is that this can only occur if I refer these experiences to a single consciousness (the transcendental self) that persists through time and that lasts from birth to death. Also, as an analogue to this transcendental ego I need to refer the synthesised space-time data onto an external reality that would anchor it".[56]

This external world is the transcendental object, and it exists in a mutually supportive relationship with the transcendental self; it is not the phenomenal, but rather the idea of *something* in general onto which the specific constructions of the transcendental self are mapped. For Kant, then, the world is not merely 'out there' to be discovered, but exists in our experience, in our 'empirical imagination', as a construction of the self. Here knowledge of the world is intertwined with the empirical world, and the distinction between our knowledge of the world and the empirical world itself becomes irrelevant: the phenomenal world is the same as the world qua knowledge of the world, it is a function of what and how it is possible to know. For Kant, then, the answer is that we make the world ourselves, through the synthesis of experience under the transcendental self – at least insofar as the world is phenomenal.

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[55] Battersby, *The Phenomenal Woman*: p. 63.

[56] ibid: p. 68.

Alan Moore himself can be seen to have a similar understanding of the making of the world taking place within human imagination. In *The Mindscape of Alan Moore*,[57] Moore observes that, on a physical level, all we really see is our own perceptions of things, not things-in-themselves; hence we more truly exist in a world of imagination, or intellectual construction, rather than a factual world of 'true reality'. Moore terms this world of consciousness the 'idea space', where different thoughts, philosophies, ideologies, religions, and so forth, can be seen as perhaps 'continents' or 'landmasses' upon which people live. For Moore, the world is purely a construction of ideas, of 'imaginary things' that humanity has built up through its shared history. Although Moore's personal metaphysics may not have the same philosophical detail and rigour as Kant's, there are overt similarities between this world and the phenomenal world of Kant, both being constructed through human perception and knowledge-making. Through Osterman/Manhattan we can see Moore's critical stance in relation to mistaking the *physical* world for 'reality', rather than taking the imaginary world that we actually perceive as real (as he states, "all we see is our perceptions, we mistake that for reality"[58]). Kant's metaphysics claims the phenomenal world is synthesised or constructed by our transcendental selves. Osterman/Manhattan's perspective, however, denies us any role in the creation of the world; he comes to the conclusion that the world "simply is", a "maker-less mechanism"[59] – there is nothing beyond that which he can experience through his (scientific) senses, nothing beyond the phenomenal. But for Osterman/Manhattan, we experience *true* reality, not a construct filtered through the perceptions of the self.

We can see the influences of Moore's personal and homo-culturally located philosophy in Osterman/Manhattan's model of reality. Playing on the 'mistake' that Moore believes we make when we take mere perception to be objective reality, the space-time world of Osterman/Manhattan is reified into an objective truth, and by denying the noumenal Osterman/Manhattan reduces individuals and their behaviour

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[57] Vylenz, 'The Mindscape of Alan Moore'.

[58] Vylenz, 'The Mindscape of Alan Moore'.

[59] Moore and Gibbons, *Watchmen*: Chapter IV, p. 28.

to merely being products of the predictable universe. This can be contrasted with Kant's space-time world, which is merely "the necessary framework through which we view experience",[60] and within which Kant's tripartite self retains for us both a role in the making of the world (via the synthetic activities of the transcendental self) and the activities of the self (via the autonomous will of the noumenal self). The split between us as mere products of a predictable universe and as subjective constructs of the transcendental self mirrors the split between the roles of nature and nurture in the making of the self. We may be products of nature, mere results of a natural and predictable mechanism, or of nurture, constituted through our synthetic interaction with the world around us.[61] Osterman/Manhattan's model of the universal mechanism, however, arguably poses a more fundamental question than that of nature and nurture: the question of free will.

6.3.1 *Osterman/Manhattan and the free will debate*

It is important to clarify that Osterman/Manhattan's understanding of the universe as a knowable system extends into time as well as space. As he states: "Time is simultaneous, an intricately structured jewel that humans insist on viewing one edge at a time, when the whole design is visible in every facet".[62] All time, for Osterman/Manhattan, is occurring at once; he sees every event in the stream of time, the past, the present, and the future. People and objects travel along set paths, temporally preordained; they unerringly follow these set laws of motion and behaviour and are thus fully predictable. Before he begins his creation on Mars, for instance, Osterman/Manhattan observes that "the secret shape of [his] creation is concealed [beneath him], buried in the sand's future".[63] We also see Osterman/Manhattan's temporal perspective in the narrative style of Chapter IV: his story constantly moves

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[60] Battersby, *The Phenomenal Woman*: p. 61.

[61] For more on nature and nurture in the making of the self, see Williams, *Empty Justice*: pp. 173-81.

[62] Moore and Gibbons, *Watchmen*: Chapter IX, p. 6. (Emphasis removed.) Also note the similarities between this temporal model and the 'crystalline structure' of *Watchmen* in general (see Chapter Three, n. 113).

[63] ibid: Chapter IV, p. 26.

through multiple times and events from his life, enabling connections between past events and future occurrences. Ultimately this unique perspective results in the inability to answer the question of who makes the world with respect to the responsibility for events that occur: he can see causal chains stretching indefinitely in many directions, and cannot pinpoint any ultimate influence.[64]

In his analysis of Osterman/Manhattan's apparent predestination, Arthur Ward observes that "the problem of reconciling human free will with the presence of an all-knowing being (such as God) is a centuries-old question".[65] The debates around predestination and free will generally focus on two issues: 'determinism' (whether predestination is true, whether our actions are 'determined' by some external force), and 'compatibility' (whether free will is compatible or incompatible with determinism).[66] In Figure 6.4 we can see the predestination problem displayed in terms of Osterman/Manhattan's universal mechanism.[67] The basic issue of predestination that links free will and world-making is that if we are merely part of a universal mechanism, mere products of natural laws following set paths, then our free

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[64] See ibid: Chapter IV, pp. 1-28. A similar narrative/temporal perspective can be seen in Chapter IX, where Osterman/Manhattan tries to explain his view of the universe to Laurie Juspeczyk by encouraging her to consider her own past.

[65] Ward, 'Free Will and Foreknowledge': p. 126. Note also that there are suggestions from some people in *Watchmen* that Osterman/Manhattan might *actually be* God: see Professor Glass's paper 'Dr Manhattan: Super-powers and the superpowers' located in-between Chapters IV and V of Moore and Gibbons, *Watchmen*. Ironically, perhaps, Osterman/Manhattan asserts that there is no God (and if there is, then it certainly is not Osterman/Manhattan): Moore and Gibbons, *Watchmen*: Chapter IV, p. 11.

[66] See Robert Kane, 'Introduction: The Contours of Contemporary Free Will Debates' in *The Oxford Handbook of Free Will*, edited by Robert Kane (Oxford: Oxford University Press, 2002): pp. 4-6.

[67] Note the reference in Osterman/Manhattan's speech-text in this Figure to the 'Nodus Gordii' mountains. Translated, this name means 'Gordian Knot' – the 'unsolvable' knot that Alexander the Great simply cut apart with his sword, thus displaying eminent lateral thinking. In Chapter Eight we will see associations between the character of Adrian Veidt and Alexander the Great; although not discussed there, the Gordian Knot is one dimension of this association, representing the 'lateral thinking' undertaken by Veidt in his plan to create world peace through the destruction of half of New York City by a seemingly alien force which he believes will unite the world against a common enemy. A painting of the Gordian Knot can be seen in Veidt's Arctic retreat: Moore and Gibbons, *Watchmen*: Chapter XI, pp. 4, 15, and (with a visual reference to Veidt's destructive plan) 27. See also Gibbons, Kidd, and Essl, *Watching the Watchmen*: pp. 218-19. Interestingly, the Nodus Gordii mountains are actually to be found on Mars: see Gibbons, Kidd, and Essl, *Watching the Watchmen*: p. 204.

will is undermined and we lose our status as moral agents – along with any role in nurturing the world.

If we look first to the text in Figure 6.4, we can see Osterman/Manhattan observing that "we're all puppets", but that he is "a puppet who can see the *strings*", a view which leaves no room for free will. Osterman/Manhattan's view of the complete lack of free choice resembles classical 'hard' determinism, which Robert Kane defines as consisting of three elements:

> "(1) free will (in the strong sense required for ultimate responsibility and desert) is not compatible with determinism ['incompatibilism']; (2) there is no free will in this strong sense because (3) all events are determined by natural causes (that is, determinism is true)".[68]

This position raises significant issues for notions of moral or criminal responsibility, seemingly undermining such concepts along with our ability to make the world. As such, Kane notes, it is not a position held unconditionally by many contemporary theorists; those who hold with 'hard' determinism today tend to subscribe to views which generally refuse to accept *universal* determinism.[69] Ted Honderich, for example, holds that answering 'why' something happens requires finding its cause (not merely an increased probability that it might occur), and that all events have causes, which we know from our experiences of other people, and of physical science.[70] Responsibility, however, involves finding some 'original' cause for an act somewhere in our past that we are, or were, in control of, and which Honderich claims is necessary for 'true' free will. It is this stricter notion of 'originalism' that Honderich rejects as incompatible with determinism, rather than softer ideas of merely explaining 'why' something happened.[71] As we have already noted, Osterman/Manhattan sees causative chains running indefinitely in many directions and is thus unable to pinpoint an ultimate (or

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[68] Kane, 'Introduction': pp. 27-28.

[69] ibid. Melanie Williams also notes this phenomenon, in a number of disciplinary fields including science and law: Williams, *Empty Justice*: p. 174.

[70] Ted Honderich, 'Determinism as True, Both Compatibilism and Incompatibilism as False, and the Real Problem' in *The Oxford Handbook of Free Will*, edited by Robert Kane (Oxford: Oxford University Press, 2002): pp. 461-62.

[71] See ibid.

'original') cause for any event. Osterman/Manhattan's determinism, then, matches Honderich's insofar as it rejects originalism, but Osterman/Manhattan rejects *any* causes. Events merely occur, and are set to occur in only one possible way, and thus his determinism is 'harder' than Honderich's, and harder even than the classical determinism described by Kane. For Osterman/Manhattan, there is no free will whatsoever, not merely a lack of the level needed for attributing moral responsibility; his is an 'extra hard' determinism.

Arthur Ward's solution to Osterman/Manhattan's ability seemingly to know the future is that, if we are to preserve free will, Osterman/Manhattan must be mistaken about the extent of his powers.[72] This is due to certain inconsistencies in the narrative (Osterman/Manhattan 'thinking' he is close to a discovery,[73] being 'surprised' by certain information he must already know,[74] and being unable to see Veidt's drastic plan to destroy half of New York City[75]), and the fact we only know about Osterman/Manhattan's predestination through his own claims.[76] Ward dismisses Osterman/Manhattan's explanation that even his own actions are preordained as 'nonsensical' due to these supposedly 'inconsistent' events. Regarding Osterman/Manhattan's moments of surprise, for example, Ward thinks his explanation is ridiculous because Osterman/Manhattan is supposedly claiming that, "for some reason, he responded with surprise without *being* surprised".[77] However, if Osterman/Manhattan's responses *are* preordained, then he *would* be surprised if he was preordained to be so, regardless of the insight his perspective might afford him. Ward claims these 'limitations' mean that we do not have to accept Osterman/Manhattan's fatalism,[78] but the fact that Osterman/Manhattan acts in these

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[72] See Ward, 'Free Will and Foreknowledge'.

[73] See Moore and Gibbons, *Watchmen*: Chapter I, p. 23; Ward, 'Free Will and Foreknowledge': p. 132.

[74] See Moore and Gibbons, *Watchmen*: Chapter III, p. 14; Ward, 'Free Will and Foreknowledge': p. 132.

[75] See Moore and Gibbons, *Watchmen*; Ward, 'Free Will and Foreknowledge': pp. 132-33.

[76] Ward, 'Free Will and Foreknowledge': p. 132.

[77] ibid: p. 133.

[78] ibid: p. 134.

ways which seem to betray elements of choice and surprise do not so much undermine his *foresight* as show the extent to which his *free will* is undermined: even though Osterman/Manhattan knows in advance what he will think or do, he is powerless to change it. Thus, although Osterman/Manhattan's view of the universe raises fundamental questions about free will and choice relating to our ability to determine our own actions and the world which results from them, his unique view of time in many ways occludes the questioning of free will. He can see all of time and space, and knows all that will happen and has already happened. In relation to criminal responsibility this extra hard determinism is both highly problematic and profoundly unhelpful since it renders irrelevant any examination of choice, responsibility, and autonomy. This may go some way to explain why Ward, and others, try so hard to retain free will in discussions of determinism. If we move beyond the linguistic and explore the textual-visual interactions of Figure 6.4, however, a more subtle questioning of free will and determinism in relation to world-making is present.

6.3.2 *The universal mechanism, quantum physics, and free will*

Classical relativistic physics (that of Newton and Einstein), David Hodgson tells us, holds that:

> "...the state of the universe at any time is wholly and unequivocally determined
> by the state of the universe at prior times and the physical laws of nature".[79]

The mechanism of the universe implied by classical physics, which is a central aspect of Osterman/Manhattan's world, can be seen in the visual element of Figure 6.4, represented by the giant cogs of the watch-like structure through which Juspeczyk and Osterman/Manhattan are walking. This deceptively 'normal' depiction of the two characters actually raises many issues central to free will. The question posed by the panel is this: are Juspeczyk and Osterman/Manhattan *part of* the mechanism, like a cog in a watch, or merely living (acting, choosing) *within* that mechanism? More broadly, as we live our lives are we part of the universal mechanism, or merely living in

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[79] David Hodgson, 'Quantum Phsyics, Consciousness, and Free Will' in *The Oxford Handbook of Free Will*, edited by Robert Kane (Oxford: Oxford University Press, 2002): p. 85.

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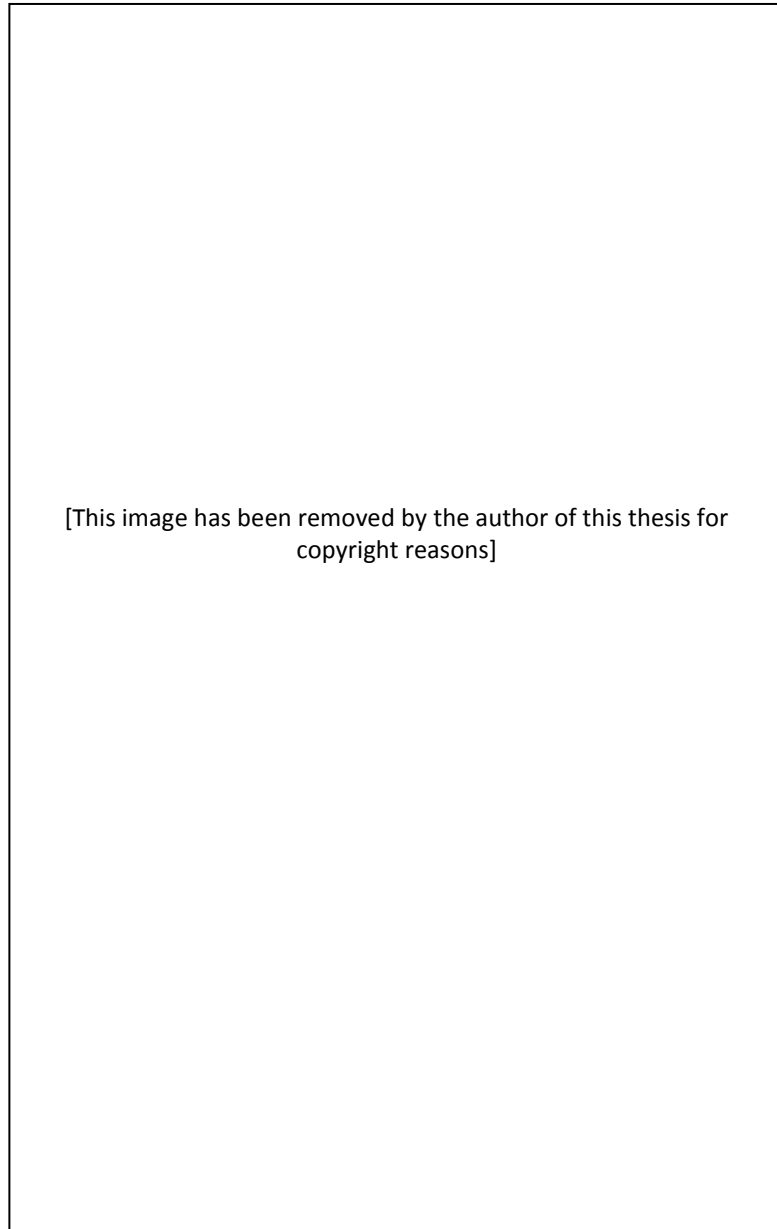
Figure 6.4: Moore and Gibbons, *Watchmen*: Chapter IX, p. 5.

it? Juspeczyk's speech-text reinforces this visual pondering: Osterman/Manhattan informs her of her future, and she questions what would happen if she chose a different path.

As a nuclear physicist, quantum mechanics is a discipline which underlies much of Osterman/Manhattan's understanding of the universe; it also raises significant issues of free will in relation to questions of determinism. The development of quantum physics:

"...seemed to indicate that the world was not deterministic; that the past plus laws of nature did not determine outcomes unequivocally but rather left open a spectrum of alternative outcomes, with varying probabilities".[80]

Perhaps the most significant aspect of quantum theory's indeterminacy is that relating to measurement; this is where we find Heisenberg's uncertainty principle and Schrodinger's cat. The uncertainty principle, simply put, holds that it is not possible to know both the position and the 'energy state' of a quantum system (such as an atomic particle),[81] and quite clearly shows the indeterminacy in our ability to accurately measure the physical world. Schrodinger's cat is more of a thought experiment, and shows something of the absurdity of quantum physics. Simply described, a cat is hidden in a box in which is also placed some device which has a 50% chance of killing that cat. Until the box is opened and the 'state' of the cat is observed, so the nature of quantum theory goes, the cat is in a 'superposition' of being both alive and dead, and will remain so until the box is opened and it is 'reduced' into one state or the other, each having a particular probability of 'occurring'.[82] Hodgson terms this 'observer-participation': in observing the system (be it a particle or a cat, or collection of particles constituting, say, a table) the observer participates in that system adopting one of its possible states. This fundamentally undermines the notion of an objective and solid physical reality as described by classical physics.[83]

Ted Honderich maintains that this quantum indeterminism does not translate into indeterminism on the macro level of actions and choices.[84] Hodgson notes, however, that John Eccles's work relating to the physiology and probabilistic operation of neurons has been influential in suggesting how quantum theory might be

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[80] ibid: p. 86.

[81] ibid: p. 89.

[82] See ibid: pp. 91-94.

[83] Comedian Alan Davies hosts an entertaining introduction to quantum mechanics and the way in which it undermines our standard notions of measurement and physical reality: see BBC, 'Horizon: How Long Is a Piece of String?' (United Kingdom: 2009).

[84] See Honderich, 'Determinism as True, Both Compatibilism and Incompatibilism as False, and the Real Problem': pp. 463-65.

fundamentally relevant to our ability to freely determine our own actions.[85]   On a more theoretical level, we have already seen that for Kant it is our own selves that create the phenomenal world of empiricism through the transcendental self's synthesis of space-time data.   There is an analogy here with the quantum science notion of observer-participation: in both Kant's formulation and quantum physics, it is by experiencing the world that it takes shape, or becomes known, or, more broadly, becomes 'real' for us – that it is made.   It might be the case, then, that we are part of the system in the sense that we interact with and determine the state of matter and the construction of the world as we experience it.

Osterman/Manhattan's view of the universal mechanism, as noted, fits with both classical 'hard' determinism and classical relativistic physics: the universe is predictable, and we can know what is going to happen from past states and natural laws.   Osterman/Manhattan, however, understands the world from the subatomic perspective of quantum physics: we know this from his references to subatomic particles, atoms, and 'supersymmetry' theory.[86]   As we have just seen, however, the quantum world, and on a metaphysical level Kant's phenomenal world, depends upon the observer's perception, which for Osterman/Manhattan is wholly irrelevant because, as he states, the universe "simply is, has been, will always be",[87] it is an objectively reified reality.   Here Osterman/Manhattan's view of time is significant: he can see all of time, all events, simultaneously, and thus the 'outcome' of any observation, the state of all particles and systems (be they subatomic or galactic), is known to him.   The indeterminacy of quantum physics is no longer a problem for him as all events are predetermined.   These are the 'strings' that Osterman/Manhattan can see.   This brings us back to Ward, who notes the similarity between Osterman/Manhattan and the 'all knowing' God of classical free will debates.   There is an implication here that Osterman/Manhattan is truly and universally objective, but

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[85] See Hodgson, 'Quantum Phsyics, Consciousness, and Free Will'.

[86] Osterman/Manhattan talks about discovering a 'gluino', one of the elementary particles of quantum physics posited by 'supersymmetry' theory. For a brief description of this theory, see 'Supersymmetry' http://science.jrank.org/pages/19898/supersymmetry.html, accessed on 09 March 2011.

[87] Moore and Gibbons, *Watchmen*: Chapter IV, p. 28.

his exceedingly broad perspective, as the next chapter suggests, makes understanding meaningful human existence and morality very difficult.[88]

The distinction raised by Figure 6.4 implies that if we are part of the mechanism then we lose our ability to freely determine our own actions or to participate in the making of the world. The engagement with quantum indeterminacy, however, suggests that we are part of the mechanism: ironically, this is because we *do* participate in the determination of the physical world. This navigates the fine line between the two sides of the distinction raised by *Watchmen*: we are part of the mechanism on an integral level, part of the 'nature' of the universe, but we are also seemingly independent from it, and thus able to 'nurture' the world and our selves. Our participation in the synthesis and reduction of the world into stable or knowable forms means that, on a fundamental level, it is we humans who 'make the world'. The idea that we have to observe reality in order for it to take on any kind of 'real' form suggests that we are also at least partially separate from it, and thus at least partially able to self-determine, or to 'nurture' our selves. In other words, to the extent that we are separate from the world, to the extent that we make the world, we retain free will.

This may initially suggest simply that we have the capacity for free will, and thus to choose what we do, and are thus responsible for our actions in the manner of Kant's abstract autonomy: we retain the ability to act under our own will, and thus the duty to do so in the name of universal reason, regardless of empirical influence. However, the partiality of our world-making participation and its links with free will suggest a more nuanced understanding of the world and our place in it. The dimension of free choice suggested by our making of the world is only part of the moral self. Moreover, if we make the world not only through rational knowledge structures but also through our synthesis of experience in general, then we make the world as partially rational but also as significantly physical, cultural, embodied, emotional, lived, and changing – depending upon our particular experiences and how we synthesise them. We do not only synthesise in rational ways. Free will, then, is not necessarily a rational concept: it

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[88] See Section 7.5.

is at least partially made up of spectrality, derived from our astonishing experiences of the world; it is something we *live*, in embodied contexts, not merely an abstracted 'rational choice'. In considering the moral self, these lived, 'non-rational' dimensions of our free will need to be examined as ethically as possible. However, if we only retain free will insofar as we make the world, how and to what extent does 'the world' make us? Put another way, how and to what extent are we able to make the self?

6.4   Who makes the self?

6.4.1 *Osterman/Manhattan's radical shift in identity*

This section argues that it is our own relation to our selves that plays an important part in the making of the self, thus highlighting the non-stability of the self and the profound extent to which we are able to self-determine. This notion is essentially a Foucaultian one, but it is reached through examining whether, and how, we can determine a self that is stable over time – an idea that Osterman/Manhattan seriously questions. This feeds into a model of the self as a nexus of drives and influences that is put forward in the following section. We have already seen that for Kant there is an underlying core of the self which persists over time, from birth to death. More overtly than Rorschach, however, Osterman/Manhattan's nuclear accident, through which he changes from the merely human 'Jon Osterman' to the powerful omniscient being 'Dr Manhattan', suggests that identity may shift over time.

If we look at Figure 6.5, we can see the general shift that Osterman/Manhattan undergoes. As the textual narration makes clear, he shifts from his childhood life in Brooklyn to finding himself alone on Mars at the age of fifty-six. During research into the 'intrinsic fields' which hold matter together, Osterman was accidentally disintegrated. Everyone assumed Osterman's death, but some non-physical part of him survived and he managed to rebuild himself. Having done this, Osterman was now able to interact with the world on a highly physical and scientific level; able to manipulate atoms and subatomic particles; able to teleport, to manufacture physical matter, and to see all of time. The US government, 'adopting' him, subsequently

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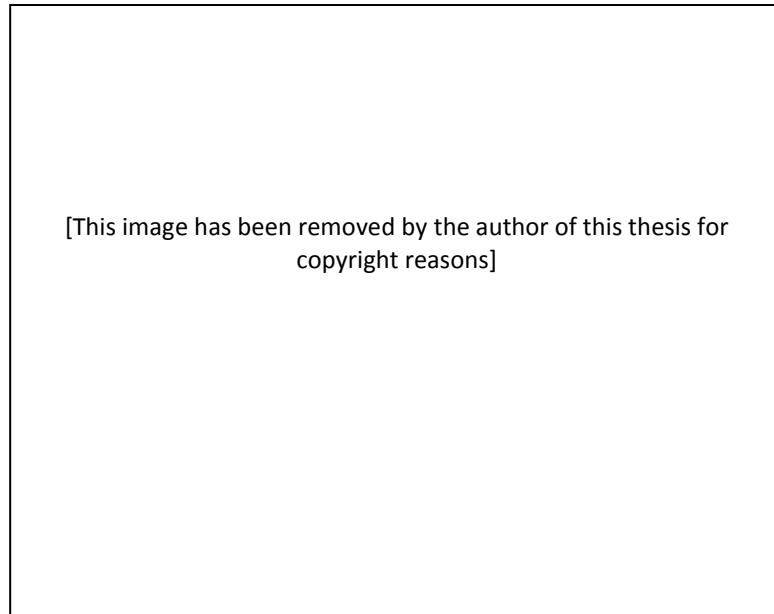
Figure 6.5: Moore and Gibbons, *Watchmen*: Chapter IV, p. 2.

dubbed him 'Dr Manhattan'.[89] Coupled with this shift in identity, Figure 6.5 also shows the shift in Osterman/Manhattan's understanding of the universe. In the first panel Osterman, the young watchmaker's son, is learning how the mechanism of a pocket-watch works. In the second panel, the adult Osterman/Manhattan is, as subsequent panels make clear, "watching the stars, admiring their complex trajectories... [and] trying to give a name to the force that set them in motion"[90] – he is learning how the vast mechanism of the universe works. There is a visual link between the panels that deepens this connection. The image of bright cogs on black velvet links with the image of bright stars against the black of space: both are parts of the machine, parts of the mechanism that Osterman/Manhattan is trying to understand.

The recurring deployment of the image of the cogs on velvet, as seen in Figure 6.6, helps to enrich our understanding of Osterman/Manhattan's comprehension of the universe as a machine. These three images are displayed here in the order that they

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[89] See Moore and Gibbons, *Watchmen*: Chapter IV, pp. 12-13. The name 'Dr Manhattan' was purposefully chosen due to its associations with the Manhattan Project that developed the atomic bomb in World War II, an association designed to strike fear into America's enemies. This naming also taps into the general theme of powerlessness in the face of mass destruction that permeates *Watchmen*, including the looming nuclear war with Russia, the references to the 'Hiroshima Lovers', and the nature of Veidt's ultimate plan.

[90] ibid: Chapter IV, p. 2.

appear in *Watchmen*, although in the graphic novel they are distributed over six pages, deployed at strategic points within this section of the narrative. With these three panels we can also see how, epistemologically, the interrelation of text and image can alter perceived meaning by challenging, augmenting, or enriching text by embedding it in a visual context (and vice versa). In the first panel, the embedded text makes it clear that the narrative is currently located in the Brooklyn of Osterman's human childhood where Osterman is (diegetically) sitting and practicing with the cogs on velvet. Here, the cogs merely represent parts of a watch mechanism. The second panel occurs during Osterman/Manhattan's retelling of the beginning of a love affair: he and a woman called Janey Slater are falling for each other, the events surrounding them 'meshing together' with the 'soft precision' of a watch mechanism, their union unavoidable, inexorable, part of the mechanism of the universe. Here the cogs represent not only the parts of a broken watch (Osterman has promised to fix Slater's wristwatch) but also the general idea of life as a predictable system. In the third panel the narrative has moved past Osterman's accident: he is trying to reassemble himself, and the image of the cogs now has very little to do directly with watches. In the panels leading up to this final deployment, various elements of the human body are shown as Osterman gradually rebuilds himself: a nervous system, a circulatory system, a partially muscled skeleton: parts of the machine of the human. The cogs now represent Osterman/Manhattan's understanding of the human body as machine, and his ability to manipulate that machine. The general shift that tracing the deployment of this image of cogs on velvet highlights is one from the young, human Osterman trying merely to understand a pocket watch, unaware that he himself is part of the universal mechanism, to the post-accidental Osterman/Manhattan being able to 'see the strings' of the universe and manipulate the mechanism of the human, and eventually observe 'the complex trajectories' of the stars in an effort to understand the force that makes the universe itself 'tick'. Importantly, they also suggest continuity between the young human Osterman and his 'alien' adult form.

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Figure 6.6: Moore and Gibbons, *Watchmen*: Chapter IV, pp. 3-9.

6.4.2 Synthesis of the self and the comics form

Scott McCloud, as we saw in Chapter Three, argues that one of the main operational aspects of comics is a process known as 'closure'.[91] This is actually a process that we utilise throughout our everyday lives and is employed by various media (including television and cinema). Whenever we observe only part or parts of something but perceive the whole, whenever we synthesise multiple elements into a coherent unity, we are committing 'closure'.[92] Kant's transcendental self arguably commits something akin to closure as it 'creates' the phenomenal world through its synthesis of our sensual experiences, unifying diverse sense-data into a coherent world. In the art of comics, however, closure is a more technical term. It takes place between the panels, in the space that can be termed the 'gutter'. As McCloud describes it:

> "Here in the limbo of the gutter, human imagination takes two separate images and transforms them into a single idea".[93]

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[91] See Section 4.3.

[92] See McCloud, *Understanding Comics*: pp. 62-65.

[93] ibid: p. 66. (Emphasis removed.)

In Figure 6.5, the process of closure as employed by the comics form means that if we are to 'make sense' of the two images as a continuing narrative then we, as readers, have to understand both the human child and the alien adult as being the same individual. We have to synthesise these two diverse beings into a single 'person' who exists through time.

Descartes posited the well-known formulation 'I think, therefore I am',[94] claiming that our consciousness is the only thing that we can take as certain to exist and thus as the foundation of our selves.[95] James DiGiovanna observes that this formulation assumes a stable and unchanging mind:

> "...that is consistent across time, even as its content changes... Descartes didn't identify himself with his thoughts, but rather thought of himself as a being who produced or entertained those thoughts".[96]

This may share initial similarities with the stability of Kant's transcendental self, but as Battersby notes, the Kantian self is not in existence because it thinks, but rather because it is able to synthesise experiential space-time data and distinguish itself from that which it is not.[97] Opposed to Descartes, David Hume argues that it is the *contents* of the mind, specifically our memories, that make up our identities. For Hume, as Wayne Morrison explains:

> "The memory allows the imagination to shape a series of somewhat related perceptions into a unity to create a fiction of the self, through which order can be made of otherwise chaotic presentations. The fiction of the self is a product of memory, via the faculty of recall and reflection on our past perceptions, which represents them as linked together in a network of relations."[98]

Between Descartes and Hume, then, we have a split between form and content: for Descartes, our identity is located in the form of our minds, our ability to think, whilst

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[94] This famous phrase comes from his *Discourse on Method*; see René Descartes, *Discourse on Method and the Meditations*, trans. F. E. Sutcliffe (London: Penguin, 1968): p. 53.

[95] See Barron, '(Legal) Reason and Its "Others"': pp. 1036-37; Morrison, *Jurisprudence*: pp. 82-83.

[96] DiGiovanna, 'Dr. Manhattan, I Presume?': pp. 104-05.

[97] Battersby, *The Phenomenal Woman*: p. 67.

[98] Morrison, *Jurisprudence*: p. 116. This model of self as narrative comes from Hume's *Treatise*; see David Hume, *A Treatise on Human Nature* (London: Penguin, 1969).

for Hume we are the contents of our minds, our memories and reflections. This also roughly maps onto the nature/nurture distinction: for Descartes, we are defined by our nature as thinking beings; for Hume, we are defined by the (recollection of) experiences that nurture us.

The distances of both time and space that are traversed between the two panels in Figure 6.5 are large, and the size of the leap that the reader must undergo reinforces the radical shift in self that Osterman/Manhattan has experienced. The Humean notion of 'memory' as something that is able to synthesise the diverse experiences of life into a coherent self, or more specifically a 'fiction' of the self, shares many similarities with the process of narrative closure as described by McCloud. At the heart of the operation of comics, as a narrative art form that employs multiple sequential images (embedded with text) that need to be synthesised into a coherent narrative flow, is thus an element of how, according to Hume, we understand more generally the narratives of our lives, and of our selves. From a phenomenological perspective, however, understanding memory as the process by which we unify the self over time is not unproblematic – particularly in relation to closure.

> "Our experience typically exhibits a combination of change and stability, and for the most part the change occurs in a continuous fashion… localized discontinuities – whether in thought, sensation, or perception – take place against the backdrop of a largely continuous expanse of bodily and emotional feeling. So for example, as my eyes leap hither and thither around the room, my mild sense of boredom remains, and my bodily feelings – of being *upright*, of feeling my hands in my pockets and the floor pushing up against my feet – remain largely constant, and constantly *present* in my experience".[99]

Barry Dainton argues that because of this smoothness of temporal experience, we cannot understand temporal change as a chain of disjointed 'snapshots' that need to be synthesised; no matter how tightly packed, a succession of isolated 'moments' can never be anything more than a series of "static phenomenal images",[100] and lived reality doesn't fit this model. Even in early phenomenological writings, Dan Zahavi

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[99] Barry Dainton, *The Phenomenal Self* (Oxford: Oxford University Press, 2008): p. 51. (Emphasis in original.)

[100] ibid: p. 54.

tells us, temporal experience has been understood as more than a knife-edged 'now'; time was modelled by Husserl, for example, as being made up of 'duration blocks' that incorporated the now, the receding past, and a projection of the immediate future, all three elements of which were always present as a unified whole.[101] Dainton's problem with this kind of model, although it does enable us to perceive the temporal-changing nature of life, is that these 'duration blocks' artificially divide experience into segments, when it is actually *continuously* flowing.

What this means in terms of selfhood and memory is that Hume's approach of a 'self-narrative' may not be able to understand the phenomenally living self, but rather reflectively constructs a model of the self through processes of intentional recall. For Dainton we do not need recourse to memory in order to unify change over time (at least, not on the scale of the experience of duration), as the 'present' (for want of a better word) consists of brief temporal 'spreads', the various elements of which (receding past, present, anticipation of the future) we are directly (without reflection) co-conscious.[102] Although understanding change over the course of an entire life may require something more akin to Hume's model, Dainton's more localised phenomenology shows an obvious yet profound limitation in comics' ability to articulate narrative life. By dividing experience up into ostensibly arbitrary blocks, or panels, the comics form distorts that experience and radically omits its continuously flowing nature as a 'stream'. Figure 6.5 highlights this process by forcing us to bring together two radically different presentations, and does so with respect to a central issue in debates on selfhood, concurrently highlighting difficulties in stabilising the self diachronically.

Against the idea that we can construct ourselves through the closure of reflection and recall, our experience of existence is not necessarily related to the self as a conceptual structure. Dainton, as just seen, does not hold that our experience of duration requires the synthesis of past, present, and anticipated future, but rather that

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[101] Dan Zahavi, *Subjectivity and Selfhood: Investigating First-Person Perspective* (London: MIT Press, 2005): pp. 55-57.

[102] See Dainton, *The Phenomenal Self*: pp. 73-74.

the different aspects of its durational character appear together, co-consciously, as a unified and flowing whole. Moreover, he rejects the idea of an all-embracing 'awareness' that enables us to be conscious of our experiences and existence; such a concept, because it is separate from the flow of life and sensory data, would have no characteristics beyond its abstractness.[103] Zahavi similarly opposes the self seen from a phenomenological viewpoint to the idea of a stable, independent and unifying self.

> "To be conscious of one*self*... is not to capture a pure self that exists in separation from the stream of consciousness, but rather entails just being conscious of an experience in its first-personal mode of givenness; it is a question of having first-personal access to one's own experiential life... [Hence] the self is conceived neither as an ineffable transcendental precondition [like Kant's transcendental self], nor as a mere social construct that evolves through time; it is taken to be an integral part of our conscious life with an immediate experiential reality."[104]

With respect to closure, however, the implication is that, as with the Kantian transcendental self, in our experience of reality we see only parts of things, we do not see their entirety, and yet the self is able to synthesise our experiences and reality generally 'from outside' into seemingly coherent wholes. It is this kind of relationship that comics exploits in order to solicit our participation, as a reader separate from the work, in the making of a narrative or diegesis. Although this implied externality of selfhood may go against the experiential focus of phenomenology, and also seem to place a blockage in our ability to engage meaningfully with the diegetic experiences and worlds of a comics work, the closure process in comics actually uses its limitations to foster intimacy between narrative and reader. As already seen, there may be limitations to comics articulation of life, with respect to the flowing stream of experience, but this very limitation potentially gives the reader a deeper investment in the narrative being articulated because they need to construct it, qua experience, *in their own imaginations*.

From a broader perspective of understanding a changing self over a life-time, the interaction of form and content derived from Figure 6.5 may pose a solution to the

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[103] ibid: pp. 39-49.

[104] Zahavi, *Subjectivity and Selfhood*: p. 106. (Emphasis in original.)

divide between Descartes and Hume: perhaps we are not merely form or content (not merely a product of nature or nurture), but rather a combination of the two. The existence of our minds is meaningless unless they have content, and vice versa we cannot have any psychic content unless we have a mind in which to 'contain' it.[105] Christine Battersby notes that in much Western philosophy there is a general understanding that our physical bodies are containers for our selves.[106] DiGiovanna points out, however, that using the body as a basis for determining identity is problematic not only for Osterman/Manhattan who rebuilds his body and changes his physical state, but also for the rest of us as we grow through our lives: "Most of the cells in our bodies will die and be replaced many times during our lives".[107] Simply put, a person does not have the same body today that he or she had, say, fifteen years ago, and this problematises the use of the physical body to ground identity and self. Osterman/Manhattan exaggerates this phenomenon, and this leads DiGiovanna to conclude, with Hume, that for Osterman/Manhattan it is the contents of his mind – his memories and ability to recall his experiences – that determines who he is. Accordingly, because of Osterman/Manhattan's unique view of all time as simultaneous, he can see his entire lifespan at once, and thus can see his entire self.[108] For us mere humans, however, sole reliance on the contents of our minds may not be sufficient – through growing old or suffering injury, for example, we may forget events from our lives, or our minds may become impaired in some other way, and thus we would arguably cease to be ourselves.[109] Linked with Hume's self-as-memory, Christopher Drohan observes how Osterman/Manhattan's experience of time reflects much of Henri Bergson's assertion that perception is not just mental but is linked with

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[105] Regarding nature and nurture, Melanie Williams concludes that our current knowledge suggests a picture of "biologically determined *tendencies*", thus also navigating a mid-way between the two: see Williams, *Empty Justice*: pp. 173-81. (Quotation at p. 181. Emphasis in original.)

[106] Battersby, *The Phenomenal Woman*: pp. 40-43. Note that Battersby argues strongly against this position: see pp. 43-57.

[107] DiGiovanna, 'Dr. Manhattan, I Presume?': p. 109.

[108] See ibid: p. 114. Note, however, that this 'objective' viewpoint effaces the astonishing experiential details of lived reality: see Section 7.5.

[109] ibid: pp. 112-14.

our bodily actions and how we interact with the physical world.[110]   More generally, then, even if our selves are determined by our memories, these memories have a physical aspect related to the embodied nature of our phenomenal experience. Thus we can attain the union of form and content suggested by Figure 6.5: we are neither merely our forms (bodies, minds, transcendental awareness), nor our contents (memories, specific experiences), but thinking, remembering, *embodied* beings that experience and exist through time.

6.5   The self as a nexus of drives and influences

6.5.1 *The art of one's self*

Following the previous section, it can be suggested that the self does not consist of mere body, or mere mind, or mere memories or thoughts, or the mere ability to experience or be self-conscious, but rather a nexus or matrix of these various elements, none sufficient to secure identity over time. We also have the implication of our participation in our own 'making' through our construction of a 'fiction of the self'. As mentioned above, Osterman/Manhattan constitutes himself: he reassembles himself after being disintegrated. If we look at Paul Rabinow's summary of Foucault's ethics, we see a more profound similarity with this notion of rebuilding the self after disintegration than Hume's self-narrative. Foucault's ethics, Rabinow summarises, is probably best understood as a 'disassembling' of the self, by oneself, an activity that suggests:

> "...an unplanned, if reflective, avoidance or alteration of historically constituted obstacles, and patient disentanglement from [and reformulation of] the encumbrances of contingency... [that] make us what we are".

This disassembly of the self, in the case of Osterman/Manhattan, leads to a reformulated self that is strongly embedded in *Jon Osterman's* view of the world, yet 'disentangled' from his spatiotemporal contingency. Osterman's goal, as a research

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[110] See Christopher M. Drohan, 'A Timely Encounter: Dr Manhattan and Henri Bergson' in *Watchmen and Philosophy: A Rorschach Test*, edited by Mark D. White (Hoboken, NJ: John Wiley, 2009).

scientist, was to be rational and scientific, and this translated into the work done upon himself which transformed him into a highly rational and scientific being, abstracted from human reality. He transcended his limited human perspective and became scientifically omniscient. (Rorschach's more subtle identity shift can be seen to operate in a similar way: 'Kovacs' adopts the shifting and spectral Rorschach mask that enables him to free himself from his embodied contingency, and reformulates himself under the [masculine] ideal of disinterested rationality.)

Exploring the ethical relation of the self to itself in Greco-Roman culture, Michel Foucault describes a conception of identity that focuses upon the 'aesthetics of existence', or the "art of oneself".[111] He is thus interested in the self as an aesthetic piece of art:

> "What strikes me is the fact that, in our society, art has become something that is related only to objects and not to individuals or to life. That art is something which is specialized, or done by experts who are artists. But couldn't everyone's life become a work of art? Why should the lamp or the house be an art object but not our life?"[112]

This notion of the self as an artwork is key in understanding Foucault's ethics. As Marli Huijer tells us:

> "In Foucault's perspective, ethics is conceived of neither as a coherent set of moral prescriptions nor as a study of moral behaviours. Instead, he viewed ethics as an ethical attitude aimed at transforming the relationship with oneself into a work of art."[113]

Golder and Fitzpatrick similarly describe Foucault's ethics in terms of the self's relation to itself, as opposed to some 'other' or some universal moral code. Foucault's ethics, they note, is:

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[111] Michel Foucault, 'Self Writing' in *Ethics: Subjectivity and Truth (Essential Works of Foucault 1954-1984, Vol 1)*, edited by Paul Rabinow (London: Penguin, 1997): p. 207.

[112] Michel Foucault, 'On the Genealogy of Ethics: An Overview of Work in Progress' in *Ethics: Subjectivity and Truth (Essential Works of Foucault 1954-1984, Vol 1)*, edited by Paul Rabinow (London: Penguin, 1997): p. 261.

[113] Marli Huijer, 'The Aesthetics of Existence in the Work of Michel Foucault' *Philosophy & Social Criticism* 25, no. 2 (1999): p. 61.

"...the self's relationship to itself, as practised through... [self-forming activities or] technologies which aim to elaborate, improve and re-form the self along certain lines in order to attain a certain state of being".[114]

Foucault himself delineates four interrelated elements in describing his ethics: i) the ethical substance, or part of the self which requires attention or alteration; ii) the mode of subjectivation, or how the self constructs itself in relation to some moral code (as Foucault terms it, "the way people are invited or incited to recognize their moral obligations"[115]); iii) the ethical work or self-forming activity to be done upon the self in order to effect a transformation; and, iv) the 'telos', or position of our action within a trajectory of development towards a particular (ethical) goal.[116] Foucault's ethics thus concerns the self's relation to itself, asking how it understands the self, and examining the work done upon the self as part of an on-going project of development. This is a powerful, life-shaping force for Foucault, "a very strong structure of existence, without any relation with the juridical power per se, [or] with an authoritarian system, [or] with a disciplinary structure",[117] which moulds the self as a subject of the self.

An important dimension of this self-shaping is that it forms a field of influence upon the self that is outside the subjectivation of the self under disciplinary power or knowledge.   Foucault's work is commonly read in relation to his concept 'power/knowledge', developed in the middle-period of his work, which describes the processes by which individuals are constituted by the ability of particular disciplines of human understanding to construct or create knowledge about that individual. Thus, as a subject of medical knowledge, the individual becomes a physical being made up of bones, veins, organs, diagnoses, and so on; as a subject of 'criminal' knowledge, individuals become nodes of unwanted behaviour that need to be 'disciplined' towards standards of normalcy. Foucault's philosophy of power and knowledge has thus been criticised for painting a picture of the individual that vanishes it into disciplinary

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[114] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Abingdon: Routledge, 2009): p. 113.

[115] Foucault, 'On the Genealogy of Ethics': p. 264.

[116] ibid: pp. 263-65.

[117] ibid: p. 260.

knowledge, burying the living human beneath layers of power and influence.[118] Importantly, though, as spectrality suggests, it is we humans who make this disciplinary knowledge. Moreover, Foucault's later ethical work gives a fuller picture of the individual; it is the ethical aspect of 'subjecthood' that allows the self to 'break free' from the deterministic view associated with power/knowledge. We are not solely constituted by disciplinary power, but also by our own ethical relation to ourselves. With Foucault, then, it is very clearly ourselves who 'make' the self – be it via disciplinary forces (making the selves of others as disciplinary subjects), or via our own relation to our selves (making our own self as an on-going aesthetic project). This model accepts a self that can shift and change over time, understanding that change as a result both of the operation of disciplinary power upon us, and the operation of our own ethics.

The idea of the self as a product of our own efforts has also been put forward in a psychological context, by cultural psychologist Jerome Bruner. Bruner's approach puts narrative at the centre of our ability to understand and navigate the social and cultural worlds we live in. As we saw in Chapter Two, Bruner sees narrative as a means of coping the unexpected and that which deviates from the norm, and our culture (including the narratives and rules of law) is a repository of these coping narratives, the 'stock unexpected', which we can utilise in living our lives.[119] In relation to selfhood, Bruner suggests that we construct our selves through attempts to tell stories about ourselves, to produce an 'autobiography'.[120] He denies the existence of an essential self, 'there' to be discovered or talked about:

> "Rather, we constantly construct and reconstruct our selves to meet the needs of the situations we encounter, and we do so with guidance of our memories of the past and our hopes and fears for the future… Self-making is a narrative art."[121]

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[118] A fuller discussion of this aspect of Foucault's philosophy is undertaken in the next chapter. See Section 7.2. However, the major work to consult in relation to power/knowledge (in criminal justice context) is Foucault, *Discipline and Punish*.

[119] See Section 2.4.

[120] See Jerome Bruner, 'Self-Making and World-Making' *Journal of Aesthetic Education* 25, no. 1 (1991).

[121] Bruner, *Making Stories*: pp. 64-65.

Like Foucaultian ethics, Bruner's approach sees the self as a personal artwork – but he specifies it as a distinctly *narrative* artwork, thus embedding it within the use of language. In life we think of verbalised events, not 'pure' events that need to be codified in words, and this includes selfhood as "a kind of meta-event that gives coherence and continuity to the scramble of experience"; and our use of words is shaped by the demands of narrative.[122] Indeed, he argues that the general characteristics that can be seen in attempts to model the self map neatly onto the requirements of telling a good story.[123] Narrating the self, like narrating the vicissitudes of life more generally, is an attempt to gain coherence and understanding. Specifically with respect to the self, this coherence is gained through navigating (narrating) the tensions between the internal and external forces that affect our lives: the (external) cultural knowledge in relation to which we must define ourselves as part of 'normal' humanity, and the (internal) requirement that the self is marked out as 'individual' through deviation from those norms.[124] Accordingly:

> "The life of mind seems everywhere to be caught in a never ending dialectic between the ordinary and the unexpected, between the quotidian and the exceptional. Narrative seems to be our natural form for rendering the two into a culturally and cognitively manageable form."[125]

Although more focused upon how we present ourselves to others in processes of social interaction, Erving Goffman's work shares some aspects with Bruner's profoundly narrative approach. For Goffman, the self is a presentation or performance that takes place through every day interactions, and in this there is a dialectic at work between fitting with accepted norms and standards (of morality, activity, and so on), and concomitantly *appearing* to do so.[126]

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[122] ibid: p. 73. See also Bruner, 'Self-Making and World-Making': p. 70.

[123] See Bruner, *Making Stories*: pp. 70-72.

[124] Jerome Bruner, 'Culture and Mind: Their Fruitful Incommensurability' *ETHOS* 36, no. 1 (2008); Bruner, 'Self-Making and World-Making': pp. 71-72.

[125] Bruner, 'Culture and Mind': p. 37.

[126] See Erving Goffman, *The Presentation of Self in Everyday Life* (London: Penguin, 1990).

"…the performed self [is] seen as some kind of image, usually creditable, which the individual on stage and in character effectively attempts to induce others to hold in regard to him. While this image is entertained *concerning* the individual, so that a self is imputed to him, this self itself does not derive from its possessor, but from the whole scene of his action, being generated by that attribute of local events which renders them interpretable by witnesses."[127]

The self can only be understood as part of a social interplay, as interlinked with its performed characters and activities; the psychobiological dimensions of the self *qua performer* does not exist outside or apart from social presentations as some kind of essential self, but arises "out of intimate interaction with the contingencies of staging performances".[128] We present our selves to the social world of the everyday and are supported in these presentations by intimate others who we allow 'back-stage', and the self is constituted by the whole process of 'staging' and its apparatus – our supporters, the witnesses of our performances, the physical 'props' we use, and the settings in which we act.[129] As with Bruner (and more generally Foucault), with Goffman the self is a product of our own efforts, but these efforts are not narrative or ethical, but performative.

We can determine ourselves, as already mentioned, neither wholly by our bodies, nor our minds, nor our memories; but neither can we purely be seen as Foucaultian disciplinary subjects, nor purely ethical subjects of our selves; and neither can our attempts at self-narration and social presentation completely capture who we are. The nexus mentioned above can thus be widened to include the forces acting upon us via knowledge and our own ethical and social drives, and our performative and narrative attempts at navigating the socio-cultural world, alongside the other various dimensions of our selves already considered (body, mind, and memories). Many of these dimensions of the self are to a greater or lesser extent made by us – through ethical work, or the construction of self-narratives, or even by undertaking 'body

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[127] ibid: p. 244.

[128] ibid: p. 246.

[129] ibid: p. 245.

projects' that can shape to an extent our 'natural' dimensions as physical beings;[130] or by being subject to the constitutive knowledge of others. Here, then, we have the capacity to nurture our selves: to shape the self through our knowledge of it (as self-knowledge and as knowledge of others), through our ability to tell stories about it, to present it in certain ways, and through what we desire it to be. As has already been suggested (and will be discussed in more detail below), however, such attempts at constructing a self through recall, reflection, and language, may fail to explain selfhood in the context of the flow of phenomenal experience, where memory and narration are reflective processes that actually act as a barrier between lived reality and human constructs of knowledge.

6.5.2 *Anchoring the nexus in lived experience*

The philosophy of Friedrich Nietzsche can add to this idea of the self as a nexus. As we saw in Chapter Four, Nietzsche's concept of the will to power is linked with our creation of the world through our evaluative and aesthetic encounters with the complex surface of reality.[131] This will to power is not simply part of the rational 'free' will of Kant, but is one indeterminate and shifting 'drive' of the self. For Nietzsche, there are multiple and powerful impulses, or drives, beyond the rationally choosing model of the individual, of which the self is constituted. With Nietzsche, the self is modelled as a loose collection of impulses and drives that shift and interact, pushing the individual in various directions; these drives are beyond rationality and the linguistic – they are quintessentially spectral.[132] Such a conception of selfhood may seem too abstract or indeterminate to be useful in understanding criminal action and responsibility, or too disjointed to be a realistic model of what one's lived reality may actually be like. Navigating away from both the abstract autonomy of Kant and the messy flux of Nietzsche, the phenomenology of Heidegger aligns the idea of self with the lived stream of experience. As Dan Zahavi explains, for Heidegger:

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[130] See Shilling, *The Body and Social Theory*: pp. 4-7.

[131] See Section 4.4.

[132] This reading of Nietzsche's self is examined in more detail in Section 9.4.

> "In factic life-experience, I neither experience myself as a conglomerate of acts and processes nor as a detached I-object; instead I experience myself factically in what I do and suffer, in what confronts me and what I accomplish, and in my concerns and disregards… Self-acquaintance is indeed only to be found in our immersion in the world, that is, self-acquaintance is always the self-acquaintance of the world-immersed self… Thus, if we wish to study the self, we should look not inside consciousness in the hope of finding some elusive I, but rather at our worldly experience; therein will we find the situated self".[133]

This kind of phenomenology is particularly important in the context of this thesis because it engages with our ability to model or reflect upon what the self might be, in relation to lived experience. Zahavi argues that what makes experience possible is first person subjectivity,[134] and as we saw in the previous section, this first-personal givenness of experience is self-unifying, requiring no external 'self' or 'I' to synthesise sensory data. Similarly, Barry Dainton claims that we do not need an objective 'awareness' in order to be self-conscious: such a structure would have no characteristics, and adds nothing to our ability to understand consciousness.[135] Indeed, such external or unifying structures would require some kind of reflective process to take place, thus objectifying reality and the self and taking understanding away from the pre-reflective (that is, pre-synthesised, or non-rational and non-linguistic) experience of living humans. The issue with which this area of phenomenology is concerned is how (or if) we can access the living self without distorting or effacing its integral subjectivity.[136]

If we recall the discussion on the indeterminacy of meaning from Chapter Two, a fundamental problem can be seen in attempts to examine lived reality (beyond that implied by the limitations of rational choice). When we construct texts or descriptions of things, our articulations necessarily need to be interpreted and thus arguably fall prey to the problems of discovering a 'truth' that exists beyond the interpretive act. In a phenomenological context, it can be similarly said that each attempt at a

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[133] Zahavi, *Subjectivity and Selfhood*: p. 82.

[134] See, generally, ibid.

[135] Dainton, *The Phenomenal Self*: pp. 39-49.

[136] Zahavi, *Subjectivity and Selfhood*: p. 73.

phenomenological description or model requires us to use language or general concepts that, by being reflective, block access to pre-reflective experience.[137] Heidegger attempted a way around this problem by conceiving of life not as a traditional epistemological 'subject' or 'object' – human knowledge structures that deform life – but as something imbued with meaning and that has a spontaneous and immediate self-understanding:[138] "Life is comprehensible because it always spontaneously expresses itself, and because experiencing is, itself, a preliminary form of understanding or what might be called a pre-understanding".[139] Approached in this way, although we still modify life when we try to examine or talk about it, this modification can be minimised by articulating in a way that runs from life itself rather than being an external imposition.[140]

The first personal subjectivity of the self is part of this pre-reflective structure of life and, as noted above, is always in-the-world. We cannot understand the living self as separate or abstracted from the world it inhabits. If we only retain free will insofar as we are separate from the world rather than determined by it, then this may suggest that we lack such freedom. However, the relationship between being made by the world and free will is different to that of world-immersion and free will. As we have already seen, free will is at least partially a lived phenomenon – it is something we retain as part of our living beings as we shape and manipulate the world around us through processes of experience. Being immersed in the world is not the same as being part of the universal mechanism; it is simply that we cannot be understood as existing in the abstract, with no relation to the world. Indeed, as the discussion on quantum physics shows, we are integrally linked with the form of the physical universe through our participation in its presentation of reality. There is a symbiosis between the world and the self that, if we are to properly understand either, cannot be split. Even if we still accept that more abstract forms of knowledge may also have something

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[137] ibid: pp. 73-76.

[138] ibid: pp. 78-79.

[139] ibid: p. 79.

[140] ibid: p. 81.

to say about what the self is and how it experiences (such as Kant's abstract model), we must also hold that the self is – at least partially – anchored to reality as a living, experiencing being.

Reading all this through Foucault's ethics, the fluidity of spectral drives and the concrete living self can be seen as parts of what influences the making of the self via operation of the will to power: we evaluate our selves as we encounter our 'ethical substance' and move towards our ethical goal as living beings-in-the-world. Our selves are thus determined wholly neither by our bodies (thus neither by the physical laws of the world, nor of biology), nor our minds, nor our memories, nor our ethical or disciplinary subjecthood, nor our self-narration, nor our spectral drives and impulses, nor simply our existence as worldly humans. All of these dimensions, however, impinge in some way upon the self, and how it develops, how it is presented to others, but always in a partial manner. We are limited by our biology, for example, but it alone does not determine who we are or what we do; we are influenced by the operations of disciplinary forces, for example, but they alone do not determine who we are or what we do; we are influenced by how we think and tell about our life experience, but this is restless and cannot alone tell us what or who we are; we have indeterminate and spectral drives and impulses, too, but they alone do not determine who we are or what we do. In short, the self is the product or intersection of these interconnected factors and forces, a nexus of manifold drives and influences, and – importantly – is always to be found at least partially in its lived context of worldly immersion.

6.6   Conclusion

This idea of the self as a nexus of drives and influences, changing and developing over time, and always at least partly immersed in lived reality, could be examined and developed much further, but such an activity is beyond the scope of the current project. Importantly, however, it indicates that the self is in large part indeterminate, shifting, unable to be 'pinned down' in a rational sense; in the very nature of the self is embedded the spectrality outlined at the outset of this chapter, in terms of the drives

derived from Nietzsche and the indeterminate nature of the self over time, and in relation to attempts to rationally capture the self and its living dimensions. The self is never a general model, an objective category, or a stable truth. It is, rather, a spectral entity that cannot be truly seen or captured in its completeness; it exists both within and outside our ability to conceptualise it, our knowledge always being in some way partial or distorting. The excessive dimensions of the self thus haunt our attempts to stabilise it in rational knowledge structures, including the rational choice models of criminal theory and Kantian philosophy. It is these spectral dimensions that we need to approach in understanding the moral self if we are to move towards the ethical attribution of responsibility, including the lived nature of free will itself as an integral part of how we experience and construct the world(s) we inhabit. If we are to enrich our understanding of these spectral dimensions, these non-rational and non-linguistic arms of the self, even partially, then we must approach them in specificity, not generality, and importantly via a *different way of knowing*. This way of knowing must enable engagement beyond the traditional boundaries of rational thought – thought that both denies, and is imbued with, the spectrality of the self – and must not tend towards generalisations that efface unique difference or mistake perception for objective reality by ignoring the inherently distorting effect of human knowledge. The epistemological perspective that grounds the making of the moral self in criminal theory needs to be examined before we can attempt to move beyond its rational limits; this is the work of the following chapter.

CHAPTER SEVEN

Making Criminal Identity

"I've walked across the sun. I've seen events so tiny and so fast they hardly can
be said to have occurred at *all*, but *you*... you are a *man*.
  ...And the world's *smartest* man means no more to me than does its smartest
termite."[1]

7.1   Introduction

This chapter examines the epistemological foundations that underpin criminal identity,
setting up the move beyond their rational limits. As the work of the previous two
chapters suggests, the construction or 'making' of models of criminal identity takes
place within particular homo-cultural contexts, and the denial or rejection of these
astonishing contextual factors engenders models of the moral self that fail to ethically
comprehend the responsibility-linkages between individuals and their behaviour.
What this chapter exposes is the perspectivism inherent in the epistemological
foundations that ground the making of criminal identity, a perspectivism that remains
limited through its adherence to rational ways of knowing. These ways of knowing will
be seen to set up a 'rational surface' that blocks access to the non-rational and non-
linguistic dimensions of the complex surface of reality seen with Nietzsche's
metaphysics in Chapter Four. The inability of rational choice models to encounter the
astonishing dimensions of living individuals is argued to be symptomatic of their
epistemological adherence to the rational surface. Thus, in making the move into the
indeterminate world 'beyond' the rational surface, and thus enabling development of
an approach to understanding the moral self in criminal theory that goes beyond the
confines of rational choice, a different epistemological perspective is needed:
developing this perspective is the work of Part Four of this thesis.

  The chapter opens by introducing the disciplinary philosophy of Michel Foucault
(Section 7.2). Although Foucault himself is generally read as excluding legal knowledge

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[1] Moore and Gibbons, *Watchmen*: Chapter XII, p. 18. (Ellipses and emphasis in original.)

from the production of disciplinary subjects, his philosophy is important in understanding how individuals are 'subjectivated' by the knowledge produced by various disciplines. It is argued in this section that criminal theory, as an element of legal knowledge more generally, is not 'silent' in the subjectivation of individuals, and is actually involved in the production of a criminally responsible subject. It was seen in the previous chapter that the making of the world and the making of the self are interrelated. Accordingly, the second section (Section 7.3) again examines the question 'who makes the world', this time of criminal theory, observing how this 'criminal world' is generally constructed through homo-cultural products that are seen to be rational, such as science and legal knowledge, but which derive from the work of living, embodied humans. It is then argued (Section 7.4) that the general assumption of rational choice in criminal responsibility theory is symptomatic of this rational approach to knowledge. Our approach to understanding the self, like our understanding of the world, is interlinked with what we are able know about it, what and how we are able to experience in relation to it; a rational self is symptomatic of a rational approach to the world, and stems from experiences of the self and aesthetic desires for an ideally rational self in general. The chapter then turns (Section 7.5) to consider Osterman/Manhattan's rational construction of human value from his 'objective' viewpoint, a construction which the dual textual and visual form of *Watchmen* highlights as limited by its inability to comprehend more detailed perspectives of lived reality. This perspectivism is linked with the Nietzschean aesthetics described in Chapter Four, and highlights the way in which the assumption of rational choice in modelling the moral self limits understanding of the self's non-rational and non-linguistic dimensions. If we are to engage more ethically with these astonishing dimensions, we need to develop an epistemological perspective that is able to move beyond the limits of the rational surface in the making of criminal identity. Note that much of the discussion in this chapter refers to legal knowledge (namely, the doctrines and institutions of law, as well as their theoretical underpinnings, such as criminal theory); the focus, however, is not comprehensively to

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consider law in its entirety, but rather to examine legal knowledge's general relevance in the constitution of the criminally responsible subject.

7.2   Foucault's disciplinary subject

7.2.1 *Sovereignty, law, and disciplinary power*

Despite the 'expulsion' of law generally seen in Foucault's work, this section argues that legal knowledge is not silent in processes of subjectivation, instead playing a key role in the constitution, or making, of the criminal subject.   Perhaps Foucault's best known work relating to the disciplinarily constituted subject with respect to criminal justice is *Discipline and Punish*.[2]   Exploring the mechanisms and socio-cultural shifts that have taken place from the eighteenth century, Foucault's historical analyses show how the penal system of today arose in the particular form it has taken.   It should be noted, as Hunt and Wickham point out,[3] that Foucault's general project was not to uncover the specific *causes* of institutional forms like the prison, but rather to examine the 'conditions of possibility' that allow a particular outcome to occur:[4] the socio-cultural settings and epistemological underpinnings of which institutional forms are symptomatic.   Similarly, the aim of this chapter is not to uncover the causes of models of criminal identity, but rather the dimensions of legal knowledge of which they are symptomatic; this will expose how we need to alter our understanding in order to overcome the problematic limits of rational choice.

Foucault's analyses thus tend to start from the position of looking at the 'how' of power, asking by what means it is exercised, rather than jumping straight to the cause-focused question of 'why' a particular form exists.[5]   His methodology is to examine the 'capillaries' of power, not its central 'source'; he argues that we should not start from the centre of power and try to discover its extremities, but rather we should begin

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[2] Foucault, *Discipline and Punish*.

[3] Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto, 1994).

[4] ibid: p. 6.

[5] See Michel Foucault, 'The Subject and Power' *Critical Inquiry* 8, no. 4 (1982): pp. 785-86.

with those extremities – the molecular, infinitesimal mechanisms of power, each with their own trajectories and histories – and 'ascend' to see how mechanisms of power come to be "invested, colonised, utilised, involuted, transformed, displaced, extended etc., by ever more general mechanisms".[6] Thus, the micro operations of power across multiple disciplines oriented towards knowledge of the individual can be analysed as sharing commonalities in the way that power constitutes the disciplinary self.

This 'extremities' approach shows us something of how Foucault understands power in modern society. He studies the day-to-day operations of power, the mundane and 'subjugated knowledges' of those people 'on the ground', working 'up' to find common modalities and attitudes of power.[7] From this analytical perspective, Foucault argues that power as such does not exist. Power does not emanate from a source, it is not 'out there' to be attained and wielded, it cannot be 'held' or 'owned'; rather, it is to do with the interrelationships of people and groups, it is exercised via a net-like organisation through which individuals flow, both targets and elements of its articulation, and relates to processes of being able to alter the actions of others.[8] Foucault links this flowing network of power relations to the production of 'true' knowledge in the operation of certain disciplinary discourses (such as the mainstream physical and social sciences): we become subjects of this disciplinary 'truth', which he claims bears the specific effects of power, and by the function of which we are classified, condemned, judged, and labelled in various ways.[9]

The major shift in power that Foucault identifies through *Discipline and Punish* is that from a sovereign, top-down notion of power (power that can be 'held' and is distributed through a hierarchy) to the more fluid networks of power just described. This shift in power has a concurrent shift in the practices surrounding the criminal: over the course of Foucault's work we see a change from the public displays of

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[6] Michel Foucault, 'Two Lectures' in *Power/Knowledge: Selected Interviews and Other Writings 1972-1977 by Michel Foucault*, edited by Colin Gordon (Harlow: Longman-Pearson, 1980): p. 99.

[7] ibid.

[8] Foucault, 'The Subject and Power': p. 788; Foucault, 'Two Lectures': pp. 97-98.

[9] Foucault, 'Two Lectures': p. 94.

sovereign power with the spectacle of the scaffold (epitomised by Foucault's opening vignette of torture and execution[10]) to the hidden operation of disciplinary techniques – stemming from the development of a 'true' (scientific) knowledge about 'the criminal' – that work to normalise deviant individuals out of sight of the public. For Foucault, this change in the operation of penal power is linked with the rise of disciplines such as penology, psychology, and criminology; the criminal law, meanwhile, remains entrenched within the hierarchical operation of sovereign power. This conflation of legal knowledge and sovereign power is clearly stated in the following passage from the second of Foucault's 'Two Lectures', invoking the image of the 'king' as emblematic of sovereignty:

> "When it comes to the general organisation of the legal system in the West, it is essentially with the King, his rights, his power and its eventual limitations, that one is dealing... it is of royal power that we are speaking in every case when we speak of these grandiose edifices of legal thought and knowledge."[11]

Hunt and Wickham also observe the general link in Foucault's thought between sovereign power and law, highlighting the 'negative' and prohibitive nature of legal regulation that this model of power implies.[12] In their more recent study of Foucaultian philosophy and legal theory, Ben Golder and Peter Fitzpatrick explain this 'standard' reading of Foucault: it is claimed that Foucault expels legal knowledge from his consideration as an anachronism, associated with a negative and receding sovereign power that is being subsumed by modern disciplinary power.[13] This conflation of law and sovereignty means, as Hunt and Wickham understand it, that Foucault adheres to the unsophisticated jurisprudential view that law consists merely of rules with associated sanctions.

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[10] See Foucault, *Discipline and Punish*: pp. 3-6.

[11] Foucault, 'Two Lectures': pp. 94-95.

[12] Hunt and Wickham, *Foucault and Law*: pp. 39-42. See also Gary Wickham, 'Foucault and Law' in *An Introduction to Law and Social Theory*, edited by Reza Banakar and Max Travers (Oxford: Hart, 2002); and, for an examination of the problems of reducing law to mere sovereignty in contemporary society, Gary Wickham, 'Foucault, Law, and Power: A Reassessment' *Journal of Law and Society* 33, no. 4 (2006).

[13] Golder and Fitzpatrick, *Foucault's Law*: pp. 12-25.

Hunt and Wickham also note, however, that Foucault was not attempting to develop a full theory of law, but was using this view of legal knowledge illustratively.[14] Applying Foucault's views on the constitutive nature of disciplinary truth, they begin to expose a more nuanced vision of legal knowledge within his philosophy. Although their central concern is to develop a Foucault-inspired sociology of law-as-governance, they hint at legal knowledge being more than merely an example of sovereign power:

> "...law also involves a distinctive production of truth. Not only do the procedures of law (trial, cross-examination, etc.) provide authorised means by which the truth is discovered, but once enunciated law provides the guarantee of this truth... Indeed in modernity law, along with science, provides the privileged source of truth."[15]

In short, legal knowledge has a significant role to play in the constitution, or making, of the subject – and this is particularly so with respect to the *criminally responsible* subject.

7.2.2 *Making the criminal*

Turning back to Foucault's analysis of the mechanics of disciplinary power in general, it can be seen that for Foucault our identities are not stable and predetermined. The stable nature of Kant's transcendental self was mentioned in the previous chapter, and it was argued that our selves might not be the unchanging foundations that Kant claims, but rather a shifting and interconnected collection of drives and influences. Indeed, for Foucault, as Marli Huijer tells us, the individual "is not a fixed reality... but a historical, cultural and linguistic construction (or fiction)".[16] As is betrayed by his general project of exploring how individuals become 'subjectivated', for Foucault we are not persons but *subjects*: we are constituted through the complex interrelation of knowledge and power, and through our ethical relation to ourselves; we are not the stable, a priori beings claimed by Kant.

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[14] Hunt and Wickham, *Foucault and Law*: p. 41.

[15] ibid: pp. 41-42.

[16] Huijer, 'The Aesthetics of Existence in the Work of Michel Foucault'.

As part of his general concern for examining how the person becomes a subject (of knowledge, of categories, of themselves),[17] *Discipline and Punish* examines the processes and mechanisms of power which subject the person to socio-scientific penal knowledges (criminology, psychology, penology). *Discipline and Punish*, as Foucault tells us, is focused on our subjectivation to knowledge and the associated processes and practices of normalisation, while his later work tackles more directly the question of the ethical relation to the self.[18] Foucault's own summary of *Discipline and Punish* is useful in understanding this general claim of our subjectivated nature in relation to disciplinary knowledge.

> "...the analysis [in *Discipline and Punish*] does not revolve around the general principle of the law or the myth of [sovereign] power, but concerns itself with the complex and multiple practices of a 'governmentality'... Starting from an analysis of these forms of 'government', one can see how criminality was constituted as an object of knowledge [*savoir*], and how a certain 'consciousness' of criminality could be formed".[19]

Understanding of the criminal, for Foucault, is thus constituted through the operation of the disciplinary knowledges associated with the study and attempted governance of human deviance. Importantly, as already noted, Foucault's own analysis reduces the importance that criminal law, and thus also its associated theory, has in this governance of individuals. In Foucault's analysis, it is the development of detailed techniques of power that enables the knowledges of the person to be applied to the normalisation (or 'discipline') of the individual who does not conform. For Foucault, these techniques of power involve a focus upon the body and the organisation of its movements – a political technology of the body – that renders that body 'docile', enabling it to be "subjected, used, transformed and improved".[20]

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[17] See Foucault, 'The Subject and Power': pp. 777-78.

[18] See Michel Foucault, 'Preface to *the History of Sexuality*, Volume Two' in *Ethics: Subjectivity and Truth (Essential Works of Foucault 1954-1984, Vol 1)*, edited by Paul Rabinow (London: Penguin, 1997). See also Section 6.5.

[19] ibid: pp. 203-04. (Insertion of '[*savoir*]' in original.)

[20] Foucault, *Discipline and Punish*: p. 136.

This technique of power, however, is not exclusively penal. Over the eighteenth and nineteenth centuries, Foucault observes the body "entering a machinery of power that explores it, breaks it down and rearranges it".[21] This is most overt in the rehabilitative practices of the prison, but Foucault also notes a general permeation of modern society with this disciplinary ethos. The factory, the school, the hospital – all these institutions employ the detailed techniques of power, such as tables of intellectual achievement in the form of grades and classes, the detailed management of time through the delineations of the hours of shift-work or the length of a school class, or a patient's medical file that enables them to be tracked and tabulated.[22] Janice Richardson, describing this aspect of Foucault in relation to the question of identity, notes that:

> "Foucault starts by asking how we come to view ourselves as individuals. He illustrates some of the ways in which we become 'individuated', not only through our daily habits but also by comparing ourselves with others through both educational and medical examination and the employment of statistical analysis such that everyone can be viewed as a case file."[23]

This view of Foucault is overtly reductive of the individual: as mere products of power, we become the contents of our various case files. This is perhaps an especially poignant view in relation to criminality, where the criminal case file, or 'rap sheet', has a strong influence in the evaluation of someone's criminal or law-abiding nature.[24]

Through recognition of the legal discipline's complexities and its theoretical approach to understanding the responsible subject,[25] however, we can see that individuals are also subject to legal knowledges that are not simply an emanation of

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[21] ibid: p. 138.

[22] See, generally, ibid: pp. 135-69.

[23] Janice Richardson, *The Classical Social Contractarians: Critical Perspectives from Contemporary Feminist Philosophy and Law* (Farnham: Ashgate, 2009): p. 36.

[24] Note, for example, the general requirement in the UK for employees to disclose their criminal history in the form of a Criminal Records Bureau (CRB) check. For general information on CRB checks, see 'Home Page' http://www.crb.homeoffice.gov.uk/, accessed on 10 February 2011. Note also the existence of 'sex offender lists' that are used to assist in the (risk) management of particular types of people dependent upon their case history.

[25] See, for example, the discussion on criminal theory in Chapter Five.

'negative' sovereign power. These legal knowledges, due to the pre-eminence of law as a truth-producer alongside the science that underpins Foucault's penal disciplines, play an important role in constituting the subject. More specifically in relation to criminal responsibility, it is the area of criminal theory, as a particular aspect of legal knowledge, which constitutes the moral self as a theoretical model that underpins assessments of criminal responsibility. Under criminal theory, individuals are produced through a particular theoretical and epistemological lens – individuals that are symptomatic of the ways in which criminal theory understands, or synthesises, the world and the moral agents within it. If we are to reconfigure criminal identity in a way that is more able to comprehend the links between living individuals and their emotionally embodied behaviour, we thus need to examine in more detail how criminal theory makes the world through its epistemological constructs, and more specifically of what its models of the moral self are symptomatic.

7.3 Who makes the world of criminal theory?

This section argues that in making the world of criminal theory we are engaged at some level in an aesthetic shaping, not the objective or purely rational 'discovery of truth'. We have seen in the previous chapter how we participate in the interconnected making of the phenomenal world and our selves in general; but who makes the world of criminal theory? In our participation in the construction of the physical world through science and social science, and of criminal-oriented understandings of the world, it will be seen that we, as living humans, make the world of criminal theory from particular homo-cultural contexts. In making the criminal world, as with the ethical (as opposed to disciplinary) making of the Foucaultian self, our activity is profoundly artistic, guided by aesthetic ideals rather than purely rational or moral principles. This spectral dimension to the creation of knowledge (that it derives from particular homo-cultural contexts) engenders significant limitations in our ability to know about the world in its entirety. As we will see, our perspectivism means that the perspectives of others, or other ways of knowing, are effaced in favour of our own or those generally deemed most important, or most accurate (for instance, the

hard sciences or the rational use of language). In consideration of the limits of rational and linguistic knowledge in later sections, the effacement of things beyond the horizons of the particular rational perspective of criminal theory plays a pivotal role.

Law and science, as already noted, have a privileged place in the production of what is seen as 'truth' in modernity. Both, however, are homo-cultural products rather than objective descriptions of true reality. Lindsay Farmer has observed an intricate link with respect to criminal theory, claiming that criminal-legal understandings are fundamentally imbued with a conception of the world that derives from classical concepts of time and physical space. At their most basic, for example, questions of jurisdiction are about material or geographic space.[26] More specifically related to the understanding of criminal categories, however, Farmer claims the following:

> "In basic terms, the definition of any crime will normally contain three elements: an account of the object to be protected; an account of modes of commission, or the ways that this object may be interfered with or harmed; and an account of the relevant forms of agency... Both the objects of the criminal law (property, person, and so on) and the means of wrongdoing (how the wrong may be inflicted or caused) are relational; that is to say, they depend on social understandings of the proper extent of either objects or actions in time and space... (where does my body or life begin and end? what is the nature and extent of my property? and so on)".[27]

As Farmer notes, this concern with space and time is not only related to understanding the particular objects to be protected and the harms done to them, but is also a central element in understanding moral agency in terms of "how a person might act through time and space, for example in attempting to bring about a certain future outcome in a certain place".[28]

Although he identifies a general widening of the scope of criminality in response to an increased concern with risk, Farmer's overall argument is that concepts of time and

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[26] Lindsay Farmer, 'Time and Space in Criminal Law' *New Criminal Law Journal* 13, no. 2 (2010): pp. 337-38.

[27] ibid: pp. 338-39.

[28] ibid: p. 339.

space still ground criminal categories,[29] including conceiving of individuals as unavoidably embedded in both temporal and spatial contexts. As Farmer states:

> "Judgements of wrongfulness cannot be made in abstract terms but always depend on some account of particular ways of acting against another person or thing".[30]

Although in this way judgments are always made in relation to specific cases, this does not mean that the lived and embodied contexts of action are being accessed: the general understanding of the responsible individual that underpins these judgments in criminal theory, as argued in Chapter Five, still retains the abstract characteristics of rational choice. Moreover, the 'stable' concepts of space and time upon which criminality depend so strongly do not represent a true and objective reality that is independently discoverable. We have already discussed our participation in the making of the world as understood through the non-classical science of quantum physics,[31] but more generally there is a form of spectrality that operates in relation to seemingly 'neutral' descriptions of the physical world. As Farmer observes, space and time are "more than the backdrop against which social life or social conflicts are played out; rather, space and time are *produced by* and *embedded in* social practices":[32] they are homo-cultural products.

7.3.1 Law and science as homo-cultural products

In *Watchmen* we can see the opposite observation to that made by Farmer. As was noted in the previous chapter, Osterman/Manhattan cannot pinpoint any ultimate influence in the making of the world. Unable to clearly determine the responsible agent, Osterman/Manhattan takes a strongly positivist stance: "Perhaps the world is not made. Perhaps nothing is made. Perhaps it simply is, has been, will always be

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[29] See ibid: pp. 348-52.

[30] ibid: p. 338.

[31] See Section 6.3.

[32] Farmer, 'Time and Space in Criminal Law': p. 342. (Emphasis added.)

there... / A clock without a craftsman."[33] For Osterman/Manhattan the world is not a product of human action or the construction of knowledge from homo-cultural contexts, it does not derive from us in any way, but rather it merely *is*; "a maker-less mechanism",[34] the world exists 'out there' as something natural that we can come to know, as a reified object of study. This view shares many similarities with traditional positivist conceptions of physical reality as objective and discoverable. Against this view it may instantly seem odd to suggest, as Farmer does, that the physical world we inhabit is a product of particular practices rather than an empirical certainty. Although we have already seen the indeterminacy of physical matter in quantum theory, it is the non-objective nature of the scientific understanding of reality in general with which Farmer is engaging. Others have made similar inquiries; for example, although to a degree it does reflect some aspect of how we relate to the physical world, Richard Levins observes the biased nature of the physical sciences:

> "As a product of human activity, science reflects the conditions of its production and the viewpoints of its producers or owners... The pattern of knowledge and ignorance in science is not dictated by nature [alone] but is [also] structured by interest and belief."[35]

Bernd Baldus, in a more direct fashion, makes a similar point relating to positivist research in general: "Data only say what researchers ask them to say. And what they ask depends on their theoretical intent."[36]

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[33] Moore and Gibbons, *Watchmen*: Chapter IV, p. 28. (Ellipsis in original.) The clock metaphor used by Moore and Gibbons in relation to the mechanism of the universe has an interesting allusion beyond the concerns with selfhood and responsibility in this thesis – namely the corresponding metaphor of the 'watch-like' structure of the world adopted by evolutionary biologist Richard Dawkins in his work *The Blind Watchmaker*. Whilst Osterman/Manhattan observes that the universe simply 'is', Dawkins's thesis puts forward an evolutionary model based not upon an intelligently designed or objective world, but upon random mutations that are guided, or shaped, by the choices of 'natural selection' towards the production of increasingly complex and useful or well-adapted life-forms. The 'blindness' of Dawkins's watchmaker reflects the chaotic underpinnings of a seemingly ordered and 'designed' structure of nature that is patterned through generations of selective breeding. See Richard Dawkins, *The Blind Watchmaker: Why the Evidence of Evolution Reveals a World without Design* (London: Longman, 1986).

[34] Moore and Gibbons, *Watchmen*: Chapter IV, p. 28.

[35] Richard Levins, 'Ten Propositions on Science and Antiscience' *Social Text* 46/47, no. 1/2 (1996): pp. 103-04.

[36] Bernd Baldus, 'Positivism's Twilight?' *Canadian Journal of Sociology* 15, no. 2 (1990): p. 161.

The same perspectivism can also be seen in relation to the positivist scientific study of humanity that we see in social sciences such as psychology, criminology, and sociology.[37] Mary Poovey, in her historical study of the development of what she calls 'the modern fact'[38] notes a problem with the general assumption that numbers are transparent truths. Poovey observes that the epistemological unit preferred by orthodox social science – the modern fact – is fundamentally associated with numerical representation. Numbers, she observes, appear 'objective' and 'natural', and are thus deemed ideal for transparently representing the 'truths' of material reality. Particular uses of numbers, however, can also be seen as the products of human systems of knowledge rather than deriving solely from natural reality:[39]

> "In most texts that purport to describe the material world, even the numbers are interpretive, for they embody theoretical assumptions about what should be counted, how one should understand material reality, and how quantification contributes to systematic knowledge about the world... [As such, they] constitute examples of... the modern fact."[40]

Thus we can also see that numerical representations such as statistics, although relied heavily upon by 'official' knowledge[41] and often referred to as 'facts', are a constructed form of knowledge which is in large part a product of particular human activities and interests. It can be seen, then, that the scientific or positivist study of the world and of humanity, although quite widely seen as generating an 'objective' or 'true' vision of reality, has an inherent ideological dimension that is associated with the prioritisation of particular modes of collecting and representing information about the world and

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[37] See, for example, ibid; Coleman and Moynihan, *Understanding Crime Data*; Ferrell, Hayward, and Young, *Cultural Criminology*: pp. 158-94; Wayne Morrison, 'Lombroso and the Birth of Criminological Positivism: Scientific Mastery or Cultural Artifice?' in *Cultural Criminology Unleashed*, edited by Jeff Ferrell, Keith Hayward, Wayne Morrison, and Mike Presdee (London: GlassHouse, 2004); Jock Young, 'Voodoo Criminology and the Numbers Game' in *Cultural Criminology Unleashed*, edited by Jeff Ferrell, Keith Hayward, Wayne Morrison, and Mike Presdee (London: GlassHouse, 2004).

[38] Mary Poovey, *A History of the Modern Fact: Problems of Knowledge in the Sciences of Wealth and Society* (London: University of Chicago Press, 1998).

[39] See ibid: p. 4.

[40] ibid: p. xii.

[41] See Coleman and Moynihan, *Understanding Crime Data*: pp. 23-45; Ferrell, Hayward, and Young, *Cultural Criminology*: pp. 158-74; Young, 'Voodoo Criminology'.

how we interact with it.[42] Put another way, factual scientific knowledge derives from particular homo-cultural contexts, produced through the experiences, interests, and expressions of living, embodied, *astonishing* humans trying to make sense of the world within particular socio-cultural settings that impinge upon their activities.

Osterman/Manhattan's belief in the world as external and discoverable coincides with the claim that scientific thought is purely a source of objective facts, that its knowledge is some external thing which we can take as 'true' reality. More generally, this type of understanding corresponds with the process of 'reification' identified by Desmond Manderson as a central feature of the modernist thought that developed through the Enlightenment.[43] Paradigmatic of this modernist thought, for Manderson, is the reification of the four dimensional world of time and space and the concurrent denial of what he calls the 'fifth' (or human) dimension. This 'fifth dimension' relates to our ability and power to influence our understanding of the world through ideas:

> "One of [modernism's] effects has been the effacement of its own fifth-dimensionality – the human and subjective nature of its symbolism – and the presentation of its shadow [in four dimensions] as something unavoidable and objective. The reification of time and space is thus both an aspect and a technique of modernism: an aspect of how it orders the world and a technique for the totalization of that order."[44]

Thus the physical world and the shadows of our fifth-dimensionality[45] are seen as stable, natural, and external, something to be uncovered and explored; but the recognition of this fifth dimension of homo-cultural origins, the recognition of the role of human creativity in the constitution of seemingly stable objects, renders these

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[42] Levins asserts that science has a 'dual nature', both enlightening us about our interactions with the world and being a product of human activity: Levins, 'Ten Propositions on Science and Antiscience': pp. 103-04.

[43] See Manderson, *Songs without Music*: p. 160.

[44] ibid: p. 161. Manderson here uses the metaphor of a four-dimensional shadow; he notes that a three dimensional object casts a two-dimensional shadow, and thus a five-dimensional object would cast a four-dimensional shadow.

[45] Such shadows include things like monuments, ideas, and legal structures: see ibid.

things interpretive, indeterminate, and contested.[46]   This roughly maps onto the epistemological dimension of spectrality: reified knowledge remains haunted by the humanity that created it, by the spectre of astonishing reality that lurks behind and destabilises rational and factual structures.

Manderson even observes the general reification of legal knowledge structures in jurisprudential theories that make claims *against* the general coherence of legal knowledge (such as legal pluralism), and highlights the contested and indeterminate nature of these structures that recognition of their fifth dimension entails.[47] The world described by criminal theory and criminal categories (as part of larger legal structures of knowledge) is thus not an objective reality, but, like science, is a reified human construct, haunted by the humanity that created it. It feeds on the reified structures of law and legal knowledge in general, as well as the positivist study of society and criminality in the social sciences; and, like scientific knowledge, it is made by living, embodied humans embedded in particular socio-cultural perspectives and with particular theoretical intentions.

7.4   Making world and self in criminal theory

This section argues that our belief in ourselves as rational and coherent shapes the way we construct knowledge and theory about the moral self; a coherent model of criminal identity is actually an aesthetic preference stemming from the desire for an ideally coherent self. It was argued in the previous chapter that we are involved in the making of our selves, as one dimension of the complex interaction of drives and influences that constitute the self, and that only relying upon an objective or external self that could unify experience (of manifold sense-data, of change over time) was problematic. Just as world and self are symbiotic in general, Jack Balkin exposes an important way in which the making of our selves is interrelated with the making of the world in criminal theory. He describes a world of theory that should take into account

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[46] ibid. Manderson's specific focus here is on the contested and indeterminate nature of law that recognition of the fifth dimension entails.

[47] See ibid: pp. 169-72.

not only legal categories as something that we can uncover and properly describe, but also the subject who experiences and understands these categories from that subject's own cultural standpoint. Balkin argues that we should recognise the dynamic role that the self, as a subject, plays in constituting legal theory.[48] Balkin highlights the importance of our belief in ourselves as rational beings in the way we understand both the world and the legal system. In a similar way to how Kant models the synthesis of the world under the transcendental self, Balkin argues that the:

> "...coherence of the world around us is demanded by our existence as understanding beings... [and] is a goal of the activity of understanding, a global task in which we always engage".[49]

For Balkin, "the coherence of the world is the coherence of our own beliefs about the world", and we are deeply invested in our self-belief as rational and coherent beings.[50]

Although there are many different ways of understanding legal structures (by different people for different purposes),[51] the most widespread method of understanding that Balkin identifies,[52] 'rational reconstruction', is predicated upon similar notions of invested rationality. Rational reconstruction is a means by which we make judgements of coherence through a 'charitable' attitude that attempts to make sense of the legal knowledge we encounter.[53] Balkin's focus is specifically upon judgments of the coherence of legal structures, and thus he claims the following:

> "Because judgments of coherence and incoherence rest upon the nature of the self, they are also shaped by the self's psychological needs – in particular, by our need to make sense of the world and to see ourselves as rational, well-meaning individuals".[54]

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[48] See Balkin, 'Understanding Legal Understanding': pp. 106-13.

[49] ibid: p. 115.

[50] ibid.

[51] ibid: pp. 127-36.

[52] It is so widespread that it tends to be seen as 'the' method of legal understanding, leading to the erroneous universalisation of a method that is merely one way of understanding amongst many: see ibid: pp. 135-36.

[53] See ibid: pp. 121-24.

[54] ibid: p. 107.

Balkin's point is that the judgements we make about the coherence of the legal system (or particular areas or doctrines within it) depend upon our 'ontological stake' in the coherence of that part of the legal system we are judging. When we understand the world as rational and coherent it is because to see it otherwise would undermine the rational coherence of the self – we have a strong 'ontological stake' in the coherence of and our ability to know about the physical world. Similarly, and more specifically, if the understanding of *criminal theory* as incoherent would undermine our rational sense of self, then we are more likely to synthesise criminal responsibility (from our particular perspective) in a coherent manner (to employ rational reconstruction) and thus produce a rationally coherent model of criminal identity.

As we saw in Chapter Five, there is a common thread which generally adheres to the notion of a rationally choosing agent, with rationality based upon the coherence of our beliefs (or knowledge) about a normative external world. Whilst our general stake in the coherence of an understanding partly depends upon our particular epistemological position and purpose (a lawyer being paid a large sum of money to defend a client, for example, will have a different position and motive from a moral philosopher writing a critical article),[55] we arguably have a strong ontological stake in the empirical world due to our inherent embeddedness or immersion in it. The idea of rationality, and the rationally choosing individual, depends upon the coherence and accuracy of that individual's beliefs in relation to a normative conception of the external world. Thus, Balkin's arguments suggest that our willingness to forfeit an epistemological position in relation to rationality may also depend upon our willingness to accept a more general indeterminacy in the nature of external reality. To be 'rational' secures external reality within knowable concepts, and thus our ontological security is similarly secured; accepting incoherence on any level will undermine this to a greater or lesser extent.

Thus we can see that how coherently we construct knowledge about the world and the self "is ultimately based upon the coherence of the world and that the coherence

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[55] See ibid: pp. 144-51.

of the world is ultimately based upon the coherence of our selves".[56]   In part this suggests that our particular social role or theoretical intention will shape the way we conceive of the moral self in various contexts, but Balkin's point can be taken deeper than this. The spectrality that his argument taps into does not only relate to the socio-cultural contexts from which an understanding is constructed, or made, but to our very nature as astonishing human beings. How models of the moral self are made does not simply relate to the social or institutional context in which this making occurs (although these are influential factors) but also to the astonishing dimensions of humanity and corporeal reality which give rise to these understandings – to the non-rational and non-linguistic world, the pre- or non-synthesised universe outside the rational that we exist within as living beings. It is the coherent synthesis of these unstructured dimensions of reality and experience that rational reconstruction tries to achieve, in both understanding the world and the moral self. Models of both the world and the moral self are thus made symbiotically as rational and coherent: to undermine the rationality of the self is to undermine our ability to structure the world coherently, and thus our ontological security as embodied beings within that world.

From this perspective, it can be seen that the desire for a coherent criminal identity – and a coherent world in which to live – may not be purely rational; indeed, it is arguably an *aesthetic* desire for a coherent and ontologically secure self in general. It is not that a rational self has been 'discovered' through the exercise of rationality, but that such a model of the self has been created, or made, as an ideal inspired by aesthetic desires for order and security. Desmond Manderson, as suggested above, observes the aesthetic element in the reification of legal theory.[57] Similar to Balkin's argument above, modern legal theory, Manderson claims, aspires to coherence and rationality as a denial of multiplicity and uncertainty, but more importantly as an *aesthetic* ideal.[58] The hegemony of the rational, the stable, and the predictable is an

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[56] ibid: p. 169.

[57] Note also the 'aesthetics of authority' associated with statistical tables in Ferrell, Hayward, and Young, *Cultural Criminology*: p. 170 (Plate 6.2).

[58] Manderson, *Songs without Music*: pp. 163-64.

aesthetic preference, but Manderson argues that the 'chaos' of our everyday lives can also be a legitimate aesthetic ideal.[59] Further, Manderson tells us, the aspiration for a particular aesthetic form in legal theory, rather than the recognition of the role of aesthetics in general, works to efface the aesthetic element: the idealised form is seen as reified, external, and decontextualised from its homo-cultural origins.[60] Accordingly, in claiming reified objectivity for the specifically *criminal* world, including the responsible self and the physical world in which it acts, the origin of this reification is lost. Thus Balkin levels a profound critique at the orthodox tendency to efface the self in favour of studying legal structures and theory as external, reified objects:

> "To be an individual is to be the seat of countless conflicting commitments, beliefs, attitudes, impulses, and desires that must be reconciled, balanced, and on occasion repressed as best one can. The morally coherent individual to whom the law is held up is a myth, a myth that projects incoherence, conflict, tension, and hypocrisy away from ourselves and onto an object that can safely be criticized for its failure to live up to what we ourselves could never obtain."[61]

For Balkin, then, our selves are not coherent or unitary, but are uncertain; navigating a complex world, and it is our tendency to try and reduce confusion, to synthesise diverse experiences, that moves us towards the processes of rational reconstruction, of literally 'making sense' of the world, and the criminal self.

Denial of this epistemological spectrality of rational choice engenders a type of perspectivism that effaces the homo-cultural origins of criminal (and other) knowledge. As we saw with Manderson, focus on a particular form of law (such as a

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[59] ibid: p. 183. In the more practical context of criminological research, see also Glenn D. Walters, 'Crime and Chaos: Applying Nonlinear Dynamic Principles to Problems in Criminology' *International Journal of Offender Therapy and Comparative Criminology* 43, no. 2 (1999).

[60] Manderson, *Songs without Music*: pp. 165-68. An example of this 'aesthetic' origin of reified knowledge can also be seen in relation to positivist criminology, specifically related to the development of 'scientific' thought in the study of criminality. Wayne Morrison looks at the origins of positivist criminology in the work of Cesare Lombroso, noting that even today, "at odds with its official image of neutrally presenting facts, positivist criminology is [a] cultural production". In his description of the spectacular collection of embalmed heads, skeletons, and body parts of criminals amassed by Lombroso through his 'scientific' endeavours, Morrison goes so far as to call this early positivist criminology "performance art" rather than science, yet it grew into the hegemonic approach to criminological research that we still have today. See Morrison, 'Lombroso and the Birth of Criminological Positivism'. (Quotations at p. 67.)

[61] Balkin, 'Understanding Legal Understanding': p. 171.

coherent and rational system) as a reified object effaces its origins in the aesthetic preferences of human actors. With Balkin, also, we saw that a focus on the external nature of the world effaces not only the constructed nature of that world, but also the uncertain and embedded nature of the self, and the relationship between our (idealised) view of our selves and the responsibility theory we construct. Our perspectivism, however, means that the worlds we make are inherently limited by the horizons of our experience and theoretical intent; alternative perspectives or knowledge of other arenas of human existence are effaced in favour of, or synthesised within, our own. As with the self-as-nexus, this anchors knowledge about the world to the self, specifically to its ability to experience, its world-immersion, and thus highlights the interconnection of self- and world-making: it is the synthesis of experience that is common to the construction of both world and self, and from which reflective structures of knowledge and understanding are made. Thus, although the self may not be unitary, stable, unchanging, or conceptually comprehendible, and thus able to ground empirical reality as models such as Kant's claim it can, it is still vital, via its ability to synthesise experience and produce knowledge, in the making of the world and the self. The order and security that coherent rationality arguably brings to the living self helps explain the tendency towards rational conceptualisation in the knowledge-making interaction between self and world.

7.4.1 Criminal theory and the linguistic

Before we turn to the issue of human value in the next section, it is important to highlight the linguistic dimension of the making of world and self in criminal theory. One of the most prominent priorities of mainstream criminal theory (and of law and legal theory more generally) is the use of rational, 'clear', language. Approaching from a Weberian stance, for example, Duncan Kennedy demonstrates the traditional adherence to 'logically formal rationality' in legal studies. He also notes the 'disenchantment' that Max Weber associated with the *purely* rational pursuit of answers in terms of logical formal rationality's inability to solve all of the legal system's problems due to that system's general incoherence and denial of the 'irrational'

decisions made by legal actors in practical contexts.[62]   We have already seen in Chapter Five that 'pure' rationality is tempered by the broader rationality that is seen generally to guide our actions, beliefs, and feelings. However, working to demonstrate a similar shortfall in the rational construction of the world, Richard Weisberg in his work *The Failure of the Word* focuses upon the strong association between legal rationality and the use of language as he analyses a number of works of classic literature from a legal perspective.[63]

In his study he highlights an important point about the limits of linguistic rationality. He identifies a recurring juxtaposition in the works he studies between linguistic and non-linguistic characters; between those who are able to describe the world and their motivations and construct them through words, and those who are experiential and emotional; between those who (linguistically) search for the meaning of life, and those with a (non-linguistic) love of life itself.[64] Through his analysis we see various moral agents adhering to a profoundly linguistic understanding of the world in the face of those who are experiential and non-verbal. Due to the deeply ingrained dependence of legal theory upon the use of language, Weisberg links together linguistic and legal modes of understanding.[65]   Weisberg shows the inability of the linguistic view of the world to penetrate or countenance the meanings, motivations, or lived reality of the non-linguistic characters.[66] He thus highlights a significant limitation at the heart of rationality: through its deeply entrenched reliance upon the use of words to understand and construct the world, linguistic rationality fails to properly comprehend the meaningful, emotional, experiential, non-linguistic aspects of human existence. This is the failure of the word, and is a concern that goes beyond the particular focus of this chapter to the epistemological issues relating to the move to

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[62] See Duncan Kennedy, 'The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought' *Hastings Law Journal* 55 (2004).

[63] See Weisberg, *The Failure of the Word*. See also Section 2.5.

[64] See, for example, Weisberg, *The Failure of the Word*: pp. 65-81, 114-23.

[65] See ibid: p. 73.

[66] See ibid: pp. 114-29, 60-76.

the non-linguistic in this thesis as a whole; an issue which will be returned to in the concluding section of this chapter.[67] In terms of the current chapter, however, this 'failure of the word' is an important example of how epistemological priorities, derived from the perspectival experiences of the self, shape and limit the way in which we are able to construct knowledge about the world. Put another way, the aesthetic preferences at work in the type of criminal identity we construct are also at work in the particular form, or medium, that is used to construct them. The imperative towards rational coherence, as Weisberg's analysis shows us, is interlinked with an imperative towards the use of the linguistic as an ideal form within which to construct ordered understandings of the world and the moral self, and this imperative blocks engagement with non-linguistic experience.[68]

7.5 The rational surface

7.5.1 Human value on the rational surface

This section opens with an explanation of Osterman/Manhattan's model of human value, which is a response to the arid conception of the universe (as material and predictable) that characterised his understanding in the previous chapter, before arguing that criminal theory's models of rational choice are symptomatic of the 'rational surface'. This model of value is based upon the unlikelihood of our radically unique and individual existence, and as such remains rational (being derived from scientific understanding and statistical analysis, that is, coherently structured knowledge of the world), and thus remains 'on the rational surface'. Osterman/Manhattan's universe is a very strange one when it comes to morality. Humans are little more than collections of particles, their paths set through space and time, predictable and unwavering. It is a universe where individuals have no free will, no 'life', or 'spirit', nothing beyond the predictable materiality of their bodies. To talk of moral responsibility in such a world makes little sense. In line with this view,

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[67] See Section 7.6.

[68] See also Robin L. West, 'The Literary Lawyer' *Pacific Law Journal* 27 (1996): p. 1209.

Osterman/Manhattan, when posed with the question of the value of human life, states that "human life is brief and mundane" when compared to atoms and the vast mechanism of the physical universe.[69] The depth and meaning in human existence, Osterman/Manhattan says, is minimal when compared to the vastness and variation in the physical world.[70] His knowledge of the universe, and of the human-shaped collections of particles that are part of it, gives rise to an arid conception of the human subject: devoid of anything beyond the physical, of autonomy, choice, dignity, emotion, and meaning. Despite this, Osterman/Manhattan comes to the conclusion that human life does have value, and thus should be preserved: a conclusion he reaches through recognising the uniqueness and rarity of each individual pattern of human-shaped particles, of each individual person.

Osterman/Manhattan's radically positivist view of the world leads to a denial of the value in human life, a rationalisation of humanity that reduces it to shifting particles obeying predictable paths through time and space, too brief and mundane to be scientifically interesting or valuable. One thing that Osterman/Manhattan does find fascinating in his scientific view of the universe, however, is the occurrence of what he calls 'thermodynamic miracles'. He describes these 'miracles' as "events with odds against so astronomical they're effectively impossible, like oxygen spontaneously becoming gold".[71] Like the behaviour of a human being, oxygen turning into gold is merely a shifting arrangement of particles, but it is such an incredibly unlikely pattern of motion within the universal system, and so rare, that it becomes a scientific 'miracle' that even the purely rational Osterman/Manhattan has a yearning desire to witness. It is this longing for rare and unique events that forms the basis of Osterman/Manhattan's reconsideration of inherent human value. The main argument that Osterman/Manhattan accepts can be seen in Figure 7.1, but his exposition begins on the previous page with his appreciation of the thermodynamic miracles just described:

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[69] Moore and Gibbons, *Watchmen*: Chapter IX, p. 17.

[70] See ibid: Chapter IX, pp. 18-19.

[71] ibid: Chapter IX, p. 26.

Figure 7.1: Moore and Gibbons, *Watchmen*: Chapter IX, p. 27.

"I long to observe such a thing [as a thermodynamic miracle]. / And yet in each human coupling a thousand million sperm vie for a single egg. Multiply *those* odds by countless *generations* against the odds of your ancestors being *alive*; *meeting*; siring *this* precise son; *that* exact daughter...

Until your mother loves a man she has every reason to *hate*,[72] and of that union, of the thousand million children competing for fertilization, it was *you*, *only* you, that emerged."[73]

As this argument continues in Figure 7.1, we can see that for Juspeczyk[74] to be born in her particular form and specific time was so improbable as to be 'the crowning unlikelihood', as rare as a thermodynamic miracle, and just as valuable. We also see in subsequent panels that Osterman/Manhattan extends this rarity and concomitant value to each and every person on earth. The immense rarity and uniqueness of each individual human form makes it valuable even against the vast and desolate beauty of the enduring universe; although his or her existence and actions may be wholly

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[72] This man her mother had every reason to hate was Edward Blake (alias, 'The Comedian'), who attempted to rape her: see ibid: Chapter II, pp. 5-8. Importantly, note that Juspeczyk was the fruit not of that unsolicited union, but a subsequent consensual one.

[73] ibid: Chapter IX, pp. 26-27. (Emphasis and ellipsis in original.) Allusions to Richard Dwarkins's *Blind Watchmaker* thesis can again be seen here – it is through the generational filtering of otherwise chaotic forms that biological order 'evolves' without the imposition of design (see note 33).

[74] Although barely perceptible in Figure 7.1, it is Osterman/Manhattan and Laurie Juspeczyk who are standing on the surface of Mars discussing the value of humanity's continued existence: see ibid: Chapter IX, pp. 26-28.

predictable, the ephemerality and radical individuality of each person makes that person inherently special. The shifting arrangement of particles that constitutes a person's life occurs only once in the entirety of the universe: it is a unique and rare pattern of motion, a 'thermodynamic miracle'.[75]

Although Osterman/Manhattan's conclusion may seem to rescue humanity from an over-materialistic nihilism, it is problematic. With Figure 7.1, the unique comics form of *Watchmen* opens up our analysis to important questions relating to our ability to know about moral identity. The complexities of the comics surface, playing on the limitations of text as opposed to image, coupled with the wider links within the narrative of *Watchmen* as a whole (particularly related to Osterman/Manhattan), raises fundamental questions about our knowledge of the world, and the moral self. In Figure 7.1 can be seen the textual exposition of Osterman/Manhattan's concept of human value, based upon radical notions of uniqueness and individuality. This textual theorising is taking place upon the surface of Mars, a surface upon which can be seen a smiley face – literally, a happy surface.[76] The smiley face is a recurring image throughout *Watchmen*, from the cover of the first issue/chapter to the very last panel of the work. In this panel we see it deployed in a way suggestive of a rational surface that is one perspective that can be taken when viewing the complex surface of reality that we saw with Nietzsche's metaphysics in Chapter Four. In Nietzsche's metaphysics the surface of reality is complex, and we are unable to capture it in its entirety; his metaphysics highlights the perspectival nature of different ways of knowing, particularly the rational. The rational surface remains conceptually and linguistically ordered, unable to encounter the non-rational and non-linguistic dimensions of the complex surface. The rational surface represented by the smiley is thus limited; it is just one area of the complexity of the universe that can be seen, outside of which the

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[75] One point that comes from Osterman/Manhattan's argument is that if each and every human life is unique and valuable due to its rarity and unlikelihood, then the same could be said of all other reproducing life forms. See ibid: Chapter XII, p. 18. This extension may have its own connotations for moral theory, but it is not considered here.

[76] It might be interesting to note that there actually *is* a smiley face on Mars, as Dave Gibbons notes in his account of the creation of *Watchmen*: see Gibbons, Kidd, and Essl, *Watching the Watchmen*: pp. 204-05.

indeterminate complexities of reality, specifically the astonishing dimensions of human individuals, remain untapped. This deployment of the smiley face thus sets up what might be termed a *rational surface*: an area of the complex surface of reality that is accessed through the use of coherent and linguistic synthesis, and that is taken to be stable, knowable, and certain. This 'happy' stability reflects a degree of complacency in the reified knowledge of the world towards the challenges its underpinning aesthetic and spectral dimensions bring to that stability.

The universe may be a mechanism, but as Osterman/Manhattan's allusions to quantum mechanics show, it is not a wholly linear or classically predictable one, especially on the smaller scales of human behaviour and subatomic particles. Osterman/Manhattan's basic thesis is that out of this chaotic system of the universe unique events arise in the form of human lives, and this rarity gives our existence value. The indeterminacy of the universe is rationally constructed into an understanding of humanity; a rational surface is set up upon which we are conceived of as unique and valuable beings. This construction of human value, as deriving from extreme improbability, however, reduces our value as human beings to the mere statistical unlikelihood of our being produced. In a similar way, a focus on quantum mechanics, for example, will give rise to an understanding of the world as being a product of various probabilities as we experience the manifold quantum systems that make up physical matter. For Osterman/Manhattan, the value of our lives thus remains purely statistical, purely rational, on the stable surface of scientific knowledge – the *rational surface* represented by the smiley face. Indeed, moving back to the homo-cultural origins of Osterman/Manhattan as an aesthetic creation, we can see from Moore's own thoughts about rationality that he is expressly critical of such attenuation of human meaning and value:

> "While it is arguable that Reason brought many great benefits and was a very necessary stage of our development, unfortunately this lead to materialism, where the physical material world was seen as the be-all and end-all of existence;

where inevitably we were seen as creatures that have no spiritual dimensions, that have no soul, living in a soulless universe of dead matter."[77]

In more philosophical terms, Osterman/Manhattan's denial of anything beyond physical knowledge also denies the Kantian noumenal. This reduces his comprehension of morality and human worth, since, according to Kant, the noumenal is fundamental in determining both moral autonomy and human value. Thus we can see the effacement associated with Osterman/Manhattan's perspective: he can see all of time and space, but he cannot comprehend the details and local meanings of more 'limited' perspectives. Osterman/Manhattan's route to objectivity effaces the unique significance of any particular point in that person's existence in favour of an objective picture of the whole. Although attempting to construct an understanding of the value of *all* of human existence upon the rational surface, Osterman/Manhattan is unable to comprehend the significance and meaning of more detailed perspectives, or perspectives outside the rational surface. The following exchange between Osterman/Manhattan and Laurie Juspeczyk during their discussion on human value makes Osterman/Manhattan's limitations overt:

> Laurie Juspeczyk: "Her *pain*, her *fears*, her whole *life*, y'know? / I mean, *ordinary people*, right? All the things that *happen* to them... / Doesn't *that* move you more than a bunch of *rubble*?"
> Osterman/Manhattan: "No. / I read atoms, Laurie."[78]

Although this exchange takes place before Osterman/Manhattan 'changes his mind' and accepts that humanity does have value, the material and statistical focus of his construction of that value, as we have seen, fails to rectify this earlier denial of astonishing human experience. This is reinforced when Osterman/Manhattan and Juspeczyk return to earth after the change of mind to discover streets filled with dead bodies: Osterman/Manhattan is oblivious to the evidence of death and suffering surrounding him, despite his fresh perspective, whilst Juspeczyk breaks down in

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[77] Vylenz, 'The Mindscape of Alan Moore'. Note that in this documentary Moore also accuses science of attributing human consciousness to mere biological processes.

[78] Moore and Gibbons, *Watchmen*: Chapter IX, pp. 16-17. (Ellipsis in original.)

profound   misery.[79]   Put   phenomenologically,   Osterman/Manhattan's   rational

approach to constructing knowledge distorts the flow of living reality through its

reflective processes; the experiential dimensions of human life are subsumed within a

scientific model of probabilities and quantifiable physical systems. Symbolically, we

thus see how adherence to the rational surface limits access to that which is beyond or

outside that rational surface: the lived details and meanings of human existence – the

astonishing dimensions of the non-rational and the non-linguistic.

Asking 'who makes the world?' is a very different question from that asked by

Foucault, which is essentially 'who makes the subject?' (or, more specifically, 'how' the

subject is made). As we have seen in the previous chapter, the self can be modelled as

a complex nexus of drives and influences: we are made by ourselves as disciplinary

products, as ethical subjects, as physical bodies, and via the synthesis of memory and

experience; and we are made by the partial influences of the external universe, such as

the limitations of biology and the physical world.   From Osterman/Manhattan's

perspective the question of the subject seems for the most part to be irrelevant:

people are merely collections of particles following set spatiotemporal paths through a

stable and knowable universe. This, however, is a result of precisely Foucault's process

of subjectivation described at the beginning of this chapter. By taking seriously an

attempt to reduce humanity to unique patterns of physical matter, *Watchmen* clarifies

the merely partial nature of knowledge's ability to determine who we are: people are

subjects of Osterman/Manhattan's knowledge only insofar as Osterman/Manhattan

produces knowledge about them. Outside this, as Foucault's ethics and the fluidity of

the living self suggest, we are subjectivated or made by other impulses and systems, by

other drives and influences.   It is Osterman/Manhattan's understanding and

knowledge of the entire universe as purely material that produces a humanity that is

made up of purely material subjects. Thus, for Osterman/Manhattan, our lives may

have *value* (due to our radical individuality), but they do not have *meaning*. The

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[79] ibid: Chapter XII, pp. 7-8.

rational surface acts as a block to non-rational, astonishing reality; and in criminal theory there is a similar block built into the models of the moral self.

7.5.2 *Criminal identity and the rational surface*

As we noted at the beginning of the chapter, in the work of Foucault understanding of 'the criminal' is constituted through the operation of the disciplinary knowledge associated with the study and attempted governance of human deviance. Given the preceding discussion on world and self making in criminal theory, it can now be seen that criminal identity is not simply a constructed category related to how we produce knowledge about criminality, but relates to our knowledges of the world generally, and is intertwined with how we conceive of our own (ideal) selves. Our knowledge of the world and our assumptions relating to our selves, it has been argued, rely strongly upon the coherence of rationality and the ontological security it brings to the living self. The world tends to be reified as 'discoverable', as conceptually ordered; and the self is seen as similarly coherent and rational in order to maintain the rational security of external reality and our ontological relationship with it. There is a strong link between the world understood by criminal theory (deriving both from wider understandings in legal knowledge, underpinned by our belief in, or desire for, coherent order) and the moral self that manifests itself in that world, made through the self's synthesis of perspectival experience.   Like Osterman/Manhattan's subjectivation of humanity to his *pure* rationality, in synthesising the world through the rational lenses of language, the social sciences, and classical notions of a stable physical world, criminal theory can be seen to give rise to a criminal self (more accurately, a criminal *subject*) that is understood in terms of this epistemological perspective. The more general assumption of rationality within models of the criminal self can thus be understood as a product of criminal theory's rational comprehension of the world. As already noted, this is not a causative production, but rather a rational subject is *symptomatic* of the way the world is made with respect to criminal theory: it is symptomatic of adherence to the rational surface.

In criminal responsibility theory, the moral self is generally modelled as consisting of the capacity for rational choice: it is our general ability to direct our selves, including our emotions, beliefs, and characters, that grounds us as beings to which criminal responsibility can be attributed. These rational choice models, however, adhere to the rational surface, effacing the indeterminacy of the complex surface, the astonishing humanity, which exists beyond and haunts its boundaries. This focus on rational choice effaces or overlooks astonishing dimensions of living human individuals, encountering them only through the lens of rational language; these dimensions are important for morality in that they are integral parts of what makes up actual embodied behaviour and lurk outside the rational surface, haunting its 'happy' stability. In effacing these important astonishing dimensions in modelling the moral self, criminal theory's rational choice models commit an injustice in the attribution of responsibility: they fail to ethically comprehend the lived reality of human behaviour or the living self, or the links between them. If we are to move beyond the rational surface in the understanding of criminal identity, and thus open the way to mitigating this ethical shortcoming in modelling criminal identity, then the perspective from which these models are made needs to change.

7.6 Conclusion

Osterman/Manhattan's perspectivism shares similarities with the Nietzschean aesthetics that we discussed in Chapter Four. Nietzsche, as we saw, holds that there is nothing 'beneath' or 'beyond' the surface, only an increasing complexity of the surface itself. This means that, although all is surface, we cannot know everything: if our perspective is too wide, we lose sight of the detailed complexities of the surface of reality; if our perspective is more detailed, then we cannot comprehend reality in its entirety. This aesthetic observation is interlinked with the comics form, as we also saw in Chapter Four. The effacement of a more subjective and experiential knowledge in Osterman/Manhattan's unique epistemological viewpoint has radically highlighted the perspectival nature of rationality in relation to unstructured existence. His limited perspective has exposed how the rational surface acts to limit access to the

astonishing reality beyond its horizons; coupled with analysis of the way criminal theory makes the world and the self, a similarly limiting perspective has been found in rational choice models of criminal identity. The comics form and substantive content of *Watchmen* have come together to enable an enriched understanding of Nietzsche's metaphysics of surface with respect to criminal theory's understanding of the moral self, and show that rational choice models of the self are symptomatic of an adherence to the rational surface.

The enriched understanding of Nietzsche's metaphysics with respect to the rational surface highlights the need for a different way of understanding, a new epistemological concept, which can enable a reconfiguration of rational choice models of the moral self in criminal theory. We need to approach knowledge and understanding of the world and the self in a way that does not turn back from the edges of the rational surface, that is able to go beyond its limits and engage more fully with the indeterminate universe, via non-rational and non-linguistic modes of representation, and in a way that does not simply undertake processes of abstraction, generalisation, or exclusion. We need to recognise the spectrality at work in the construction, or making, of the moral self; the astonishing homo-cultural origins of our theoretical concepts. The aim of this thesis is to facilitate such a move in understandings of the moral self in criminal theory in order to open the way towards the production of models of the self that are more able to do comprehend the links between individuals and their behaviour in relation to modelling the self-as-responsible. Thus the particular perspective of this thesis is counter to the exclusionary or abstract nature of the rational surface; rather, it is broadly aesthetic, promoting a more fluid and interactive engagement with the indeterminate 'beyond', the excessive folds and intricacies of the complex surface. An alternative epistemological concept that can help make this move will be developed in Part Four of this thesis.

PART FOUR

ESCAPING THE RATIONAL SURFACE

CHAPTER EIGHT

Maintaining the Rational Surface

"Man goes to doctor. Says he's depressed. Says life seems harsh and cruel.
  Says he feels all alone in a threatening world where what lies ahead is vague and uncertain.
  Doctor says 'Treatment is simple. Great clown Pagliacci is in town tonight. Go and see him. That should pick you up.'
  Man bursts into tears. / Says 'But, doctor...
  ...I am Pagliacci.'"[1]

8.1 Introduction

The models of the moral self in criminal responsibility theory focus upon individuals' capacity for 'rational choice', which supposes that individuals have the general ability to decide, based upon coherent and normatively accurate beliefs about the world, how they will behave, what they will feel, and how their characters will develop. This concept of the responsible self derives from the work of living people, embedded in homo-cultural contexts, and stems from a belief in, or a desire for, an idealised self that is rationally coherent. In producing rational knowledge (about the world and about the self), living humans interact with others and the world they inhabit and synthesise their experiences into conceptual forms. Part Three argued that this rational synthesis is limited in its ability to comprehend the vast and complex nature of both astonishing reality and living, embodied humans; rational knowledge is thus haunted by the 'excessive' nature of the reality it tries to contain or describe. Recalling Nietzsche's metaphysics of surface, which is linked with the comics form, this way of making knowledge can be seen to access the 'complex surface' of reality from one particular perspective. This epistemological viewpoint, as the textual-visual interactions in *Watchmen* suggested, sets up a 'rational surface', of which coherent and normatively accurate conceptual forms (that is, rational knowledge) are symptomatic, and which limits access to the astonishing complexity of unstructured experience. Thus rational choice models of the moral self, as products of the rational

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[1] Moore and Gibbons, *Watchmen*: Chapter II, p. 27. (Ellipses in original.)

surface, are similarly limited in their ability to understand the lived reality of astonishing individuals.

In Section 6.2 it was argued that Kant's split between sense and reason, and his prioritisation of rational autonomy in questions of morality, stemmed from the masculine imperatives of independence, rationality, power, and strength that he experienced in the homo-cultural context from which he produced his philosophical system. Masculinity in this thesis is understood as a conceptual category, containing the imperatives of rational independence and a denial of contingency and weakness; and as such, these traditionally masculine traits can be seen not only to map onto the characteristics of Kantian abstract autonomy, but also those of the rationally choosing actor of criminal responsibility theory – a model of the moral self which, as we saw in Chapter Five, shares the same limitations and priorities as Kant's model of autonomy. In feminist theory, there is a general tendency to claim that much of Western philosophy has been conceived by men from a 'masculine' perspective, typified by the adherence in philosophical models to independence and rationality. Rather than dismissing Kantian theory and rational choice as simply 'masculine' and thence turning directly to feminist alternatives, however, this thesis will instead reconfigure masculinity through a feminist (and aesthetic) lens. In so doing, the non-monolithic nature of masculinity will be highlighted and exploited, and a model of relational masculinity will be produced which, as an epistemological concept, can enable engagement with human reality without the limited structuring of the rational surface. The current chapter works to expose the epistemological masculinity that shapes the limits of the rational surface, whilst the following chapter puts forward the alternative epistemological concept of 'relational masculinity' that can enable engagement without these limitations.

Rather than criticising traditional philosophies for being simply and overly 'masculine', this thesis integrates feminist criticism with research into masculinities to produce a model of 'relational masculinity' that is able to cope with a moral self which changes over time, is made by itself and others, and which exists in symbiosis with otherness. By reconfiguring masculinity, rather than rejecting it in favour of something

different, the approach of this thesis transcends the binary tensions between the masculine and the feminine, producing a concept that exists somewhere between the two. This could be termed a kind of 'masculo-feminist' approach, and the aim is to draw what is beneficial from the gender categories, namely their usefulness as conceptual envelopes containing particular associated characteristics, without perpetuating any lingering essentialist views of embodied individuals based upon their sex or gender. This understanding of 'masculine' and 'feminine' as divorced from the fleshly embodiment of living 'males' and 'females' is taken from Christine Battersby.[2] Indeed, as has already been suggested by the substantive dimension of spectrality, it is lived *individual* difference that infuses the astonishing dimensions of human reality, not the arbitrary differences imposed via membership of a particular category (such as 'male' or 'female'). Thus the discussion of various models of masculinity below does not claim that these models represent general truths about embodied *males*, but rather uses 'masculinity' as a conceptual lens through which to understand epistemological perspectives from which moral identity can be constructed, and opens (specifically via 'relational masculinity' in the following chapter) ways to reconceive them.

The opening section of this chapter (Section 8.2) asks what there is outside the rational surface, observing an indeterminate chaos that potentially brings the challenge of nihilism to the order of the world as made upon the rational surface. It is thus argued that we need a different approach to this chaotic beyond from that which will turn away from it as a nihilistic threat. Before this can take place, however, we need to understand more specifically how the rational surface is maintained against the chaotic 'beyond' in relation to moral identity. Thus the chapter engages with two conceptual models of masculinity linked with rational choice: 'classical masculinity' and 'modern masculinity'. The concept of *classical masculinity* (Section 8.3) is taken to contain the *ideal* attributes associated with abstract autonomy: strength, power, independence, and rationality; it is unthreatened, stable, and perfect. *Modern*

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[2] See Battersby, *The Phenomenal Woman*: p. 9.

masculinity, on the other hand (Section 8.4), is associated with the idea of attaining this classical ideal against the backdrop of spectrality (that is, by living, embodied humans). It maintains the outward image of strength, independence, and power by masking that which threatens it, that which *haunts* it, that which is other: the indeterminate chaos of the astonishing dimensions of human existence.

In modern masculinity we can thus see what is problematic in attempting to achieve and maintain the idealised characteristics of classical masculinity: the masking of the chaotic and astonishing 'beyond', the effacement of spectrality. As an area where Kant encounters the limits of conceptual knowledge, and that is also linked with moral identity, the chapter then turns to consider the experience of the sublime (Section 8.5). Analysis of the Kantian sublime and the modern-masculine characteristics of Kant's autonomous self shows that the experience of the sublime exposes the limits of the rational surface, where the modern-masculine self maintains the order of the world by masking that which threatens its boundaries and sacrificing experience to rationality. Thus it is argued that the characteristics contained in the epistemological concept of modern masculinity operate to turn away from the indeterminacy that threatens from beyond the rational surface, and thus maintains the 'stable' order of that surface. It is the modern masculinity of Kant's sublime that maintains the rational surface, and that we must reconfigure in order to approach the non-rational and non-linguistic dimensions of the moral self. As we have already seen, approaching these indeterminate dimensions outside the rational surface means that increasingly meaningful understandings of both the lived behaviour experienced and undertaken by living individuals in embodied reality and those living individuals themselves can be developed, and hence more ethical links can be made between individuals and their behaviours.

8.2   Outside the rational surface

We saw in the previous chapter the idea of the rational surface as the epistemological perspective of rationality consisting of stable, knowable forms of which rational choice models of the moral self are symptomatic, and the borders of which are haunted by
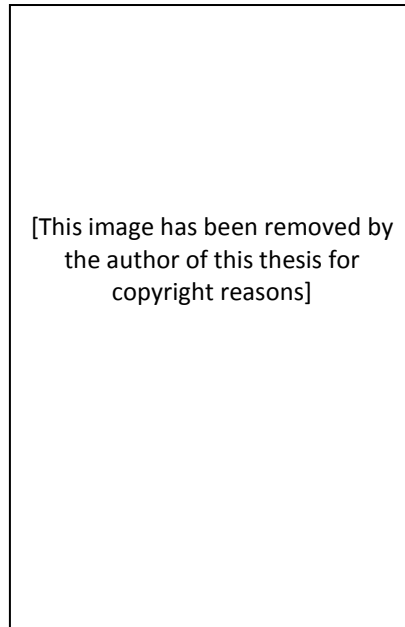
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Figure 8.1: Moore and Gibbons, *Watchmen*: Chapter I, p. 1.

the indeterminacy of the non-rational and non-linguistic which rationality seeks to synthesise into definite forms. The rational surface is deployed in *Watchmen* via the image of the 'smiley face', and appears in multiple configurations. These configurations all relate to, and give subtly different understandings of, the idea of the rational surface of knowledge just described. In this section, the rational surface is examined with respect to the character of Rorschach, who perceives a rational surface of order that is imposed over the chaos of the unstructured universe, and thus acknowledges that which is outside the rational surface. This configuration of the rational surface introduces the idea of the chaos outside conceptual understanding, outside rational forms, which is emblematic of the indeterminacy of the non-rational and non-linguistic dimensions of lived experience that rational choice models of the moral self denigrate, overlook, or abstract away from. It is thus against this 'chaos', by turning away from it or masking it, that the rational surface of moral identity is maintained.

There is a strong current of criminality and ambivalence that flows beneath the civilised surface of *Watchmen*'s New York City, a dark underbelly that Rorschach has encountered and orients himself against. A strong theme running through Rorschach's narrative is that of seeing beneath a 'false' but seemingly pure or certain surface to the
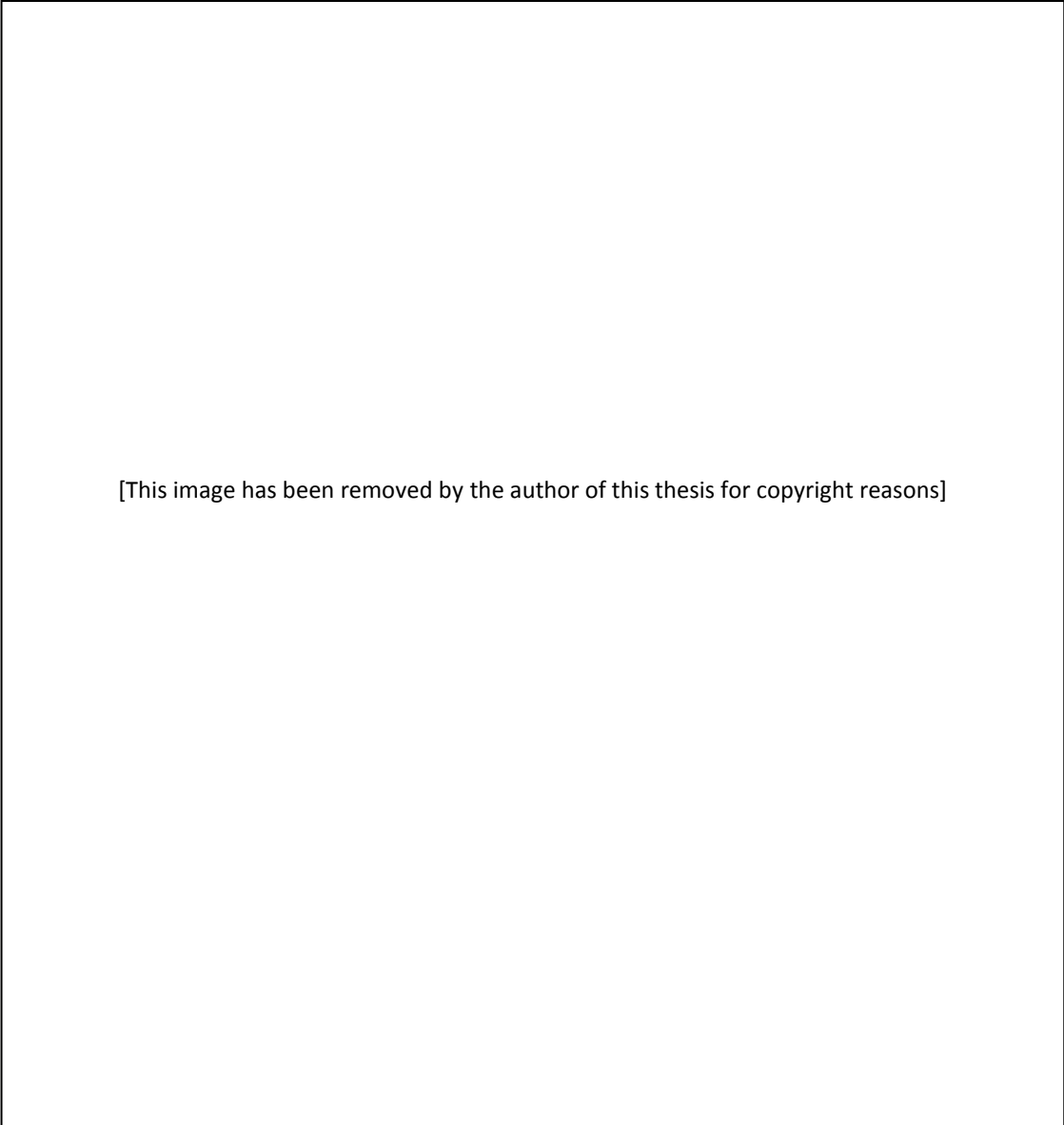
'true' impurity and uncertainty beneath. The theme of seeing 'beneath the surface' begins right from the outset of *Watchmen*, as can be seen in the very first panel of the work in Figure 8.1. In this panel Rorschach claims to have seen the city's 'true face'; this face, however, is not the happy, innocent face of the yellow 'smiley', but is the face of a 'dog carcass' with a 'tire tread on its burst stomach' – it is a face of violence and bloodshed. The smiley floats on the surface of a pool of blood, representing the 'innocent' veneer that Rorschach has seen beyond, down into the depths of spilled blood – the violence and bloodshed that flows beneath, and supports, the 'happily' complacent surface of civilised society. This idea of violence beneath the surface of civilisation is discussed in more detail in relation to the idea of modern masculinity below, but it is emblematic of what Rorschach tells us more generally about epistemological metaphysics.

During interviews with forensic psychologist Dr Long, readers learn how Rorschach came to fully embrace his violent, 'hard boiled', retributive character. One of the cases that Rorschach investigated early in his vigilante career involved the kidnapping and murder of a young girl. Rorschach discovered that the girl had not only been murdered, but that her kidnapper had dismembered her body and fed it to his dogs.[3] Rorschach, outraged by this emanation of the violence that runs beneath the civilised veneer of the city, proceeds with his particular brand of retributive punishment. He kills the two dogs that had eaten the body, waits for the kidnapper to return, and then burns him alive.[4] The first three panels of Figure 8.2 show the building burning as Rorschach watches, before the narrative shifts back to the psychologist's interview room in the last three panels (note that Rorschach's boxed narrative changes to speech bubbles as we 'zoom out' from a close-up of an ink blot card[5]). The text at this

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[3] Moore and Gibbons, *Watchmen*: Chapter VI, pp. 18-21.

[4] ibid: Chapter VI, pp. 22-25.

[5] The use of the ink blots to move in and out of 'flashbacks' throughout Long's interview suggests something of the abstraction or obfuscation that takes place through rationally linguistic description, as against a visual (or non-rational) approach to the world. The astonishing diegesis of the flashback is masked in the visual shift to the simplified and abstract ink blot, thus highlighting the limitations of abstract description or models of knowledge when compared to living reality. This is essentially an emanation of substantive spectrality. See generally ibid: Chapter VI.

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Figure 8.2: Moore and Gibbons, *Watchmen*: Chapter VI, p. 26.

point reflects Rorschach's recognition of the fundamentally chaotic and unstructured nature of the universe 'beneath the surface' of the order imposed upon it by human attempts to rationally 'know'.

Rorschach tells us that 'existence is random', that there is 'no meaning save what we choose to impose' upon the chaos of the universe; 'vague metaphysical forces' do not shape our 'rudderless world',[6] but only our own human actions and choices. The

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[6] Here again we can explicitly see links between *Watchmen* and Moore's personal philosophy. As he states: "The truth of the world is that it is chaotic… Nobody is in control; the world is rudderless": Vylenz, 'The Mindscape of Alan Moore'.

images that accompany this section of narrative serve to enrich our understanding of the epistemological dimension of these metaphysical observations. We see the sprawling, chaotic mass of smoke and fire against the night sky in the third panel, and then the jump in the fourth panel to the visually similar close-up of the Rorschach ink blot. The Rorschach blot is itself a random splattering of ink, onto which viewers impose a kind of order as they engage in fantasy and projection, imagining the pictures and shapes they 'see' within it. In viewing the chaos of the universe, the form and content of *Watchmen* seems to suggest, we are not finding truth but merely partaking in fantasy and projection as we interpret the formless 'blots' of sensory experience. There is no meaning, except that which we impose upon the formlessness of existence; when living, embodied humans 'make' knowledge about the world, derived from their particular homo-cultural contexts, they impose order and form upon that which is otherwise unstructured and chaotic. As a rational surface is set up, the chaos of the complex surface is pushed back, smoothed over, and pressed into stable, knowable forms.

In making this epistemological point, Rorschach highlights fears of the descent into nihilism that a turn to chaos might suggest. In the next chapter we will discuss the positive side of chaos, including its generative potential,[7] but in Figure 8.2 Rorschach taps into the 'dark side' of chaos. He talks of feeling the 'dark planet turn under his feet', and knowing what makes 'cats scream like babies in the night'. We see smoke glowing with firelight, itself not an unpleasant notion, but when Rorschach describes it as 'heavy with human fat', the image takes on a different poignancy, and the isolation and emptiness of the 'cold, suffocating dark' seems more immanent. The 'illusions' of Rorschach's heart are shattered as he faces his existential insecurity; the values and beliefs that he took to be true and certain are frozen, and shattered, by the 'cold breath' of the void. *Watchmen* is here employing dark imagery of death, emptiness, terror, and suffocation, coupled with the overtly 'nasty' nature of Rorschach, the violence and bloodshed 'beneath' the civilised surface, and his brutal and bloody

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[7] See Section 9.5.

vigilante activities, to highlight the undesirable nature of the meaningless chaos of the universe.[8] Rorschach, in this ostensibly nihilistic depiction, realises that he is now 'free to scrawl his own design on the morally blank world'; he is now unshackled from the restrictions of the social norms or morals that might stand in the way of his quest for his own personal vision of justice. He can dictate his own values, and he can judge and punish according solely to his own will.[9] The dark side of chaos highlights what is problematic about this extreme moral subjectivism, in that it implies that, because there is no universal moral structure to be found to underpin our 'morally blank world', a deep nihilism lurks beneath any attempts to construct a system of morality or justice. Through *Watchmen*'s dark imagery, the unstructured chaos of the 'void' beyond the rational surface is thus painted as something horrific and meaningless, something to be feared and suppressed in the name of moral order and rational knowledge.

In attempting to move beyond the rational and linguistic surface, it is towards this 'nihilistic and chaotic otherness' that we are seemingly heading. In making this move, however, we need to reconfigure how this chaotic otherness is perceived if we are to avoid either an existential terror that would cause us to turn away from it or a descent into meaninglessness. If all our knowledge and morality is merely a human structure imposed upon a chaotic universe without any solid foundation, then it arguably becomes indeterminate, relativistic, and loses its power to order the world.[10] Thus, if chaos is perceived this way the instinct will be to pull back from the boundaries of the rational surface and maintain its borders, and thus maintain its 'stability' over the shifting indeterminacy beyond that threatens to undermine its rational and knowable

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[8] A related reading might also see this nihilistic worldview as a kind of warning against extreme retributivism and hard-line morality, especially given the final scene of *Watchmen* where Rorschach's unwillingness to compromise undoes the utopia that Veidt's utilitarian scheme has produced. Indeed, as Drieberg tells Rorschach, "This is too *big* to be *hard-assed* about!": Moore and Gibbons, *Watchmen*: Chapter XII, p.20. (Emphasis in original.)

[9] cf. J. Keeping, 'Superheroes and Supermen: Finding Nietzsche's Übermensch in *Watchmen*' in *Watchmen and Philosophy: A Rorschach Test*, edited by Mark D. White (Hoboken, NJ: John Wiley, 2009): p. 56. Keeping argues that Rorschach's confrontation with the moral void merely causes him to cling more tightly to his conservative values.

[10] See discussion in Section 2.7, especially the quotation at note 175.

structures. In the next chapter we will develop a reconfiguration of our approach beyond the rational surface in the epistemological concept of relational masculinity, including our approach to chaos, but first we need to examine in more detail how the rational surface is maintained against the otherness of this chaotic beyond.

8.3 Classical masculinity

A model of classical masculinity can be derived from the character of Adrian Veidt in the graphic novel *Watchmen*. Through analysis of this model of classical masculinity, the link between the idealised characteristics of masculinity and criminal theory's models of the moral self will be strengthened. This link, which is essentially an adherence to the traits of abstract autonomy, is exploited in the reading of *Watchmen* in this and the next chapter in order to overcome criminal theory's existing model of identity through a reconfiguration of masculinity. The character of Adrian Veidt in the graphic novel *Watchmen* is linked with classicism, and the classical hero. There are two obvious examples of this: his relation to the classical figure of Alexander the Great, and the name of his masked-hero persona, 'Ozymandias'. Visually, the relation is strengthened. He is clothed in trappings of classical power: rich purple robes, and golden adornments including collar, belt, and headband. He is powerful and strong, athletic and beautiful – a classical hero. As John Beynon tells us, the 'heroic man':

> "...is epitomized by the masculinity celebrated in the epic sagas of ancient Greece. He is the courageous man-of-action, the warrior par excellence, displaying physical strength, skill and courage."[11]

Veidt embodies all these traits: renouncing his vast inheritance (and thereby showing the courage required to 'make it on his own'), he pledged to measure his own achievements against Alexander's greatness.[12] He followed Alexander's path of conquest, collecting 'martial wisdom' as he went, communing with the 'immortal' insight of ancient Egypt,[13] and the utopian ideal of a peaceful and unified world which

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[11] John Beynon, *Masculinities and Culture* (Buckingham: Open University Press, 2002): p. 60.

[12] Moore and Gibbons, *Watchmen*: Chapter XI, p.8.

[13] ibid: Chapter XI, pp. 10-11.

Alexander pursued.[14] Veidt is learned (he is claimed to be 'the world's smartest man'[15]), strong, and graceful;[16] he is a man of action, a fighter;[17] a warrior against the evils that beset mankind.[18]

The significance of the pseudonym Ozymandias can be seen in relation to *Watchmen*'s general move to undermine stable notions of heroism. 'Ozymandias' is both the Greek name for the Egyptian pharaoh Rameses II, and also the title of a poem by Percy Bysshe Shelley (which is quoted at the end of Chapter XI of *Watchmen*[19]) about the ancient pharaoh. This poem, as Adam Gearey argues, has important lessons for legal theory – lessons which also relate to the destabilisation of 'the hero'. Gearey reads the poem as an exposition of the concrete origins of power, origins which need to be effaced in order for power to maintain itself. The poem itself makes the aesthetic origins of Ozymandias's power overt both via its content (through its references to the sculptor of a statue of Ozymandias, and that statue's now derelict state as mere stone, half-sunk in the sand) and the poem's own form, as being *about* a traveller's tale, which foregrounds it as something that has been created.[20] Thus, Shelley's poetry reveals the spectral dimensions behind the attainment and maintenance of power: power is seized and defended within the homo-cultural contexts of the living humans who claim that power. In this way, via the exposure of the epistemological spectrality of power, Shelley inverts the tendency to reification observed by Manderson as emblematic of the modernist thought of the Enlightenment.[21]

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[14] ibid: Chapter XI, p. 8.

[15] See, for example, ibid: Chapter I, p. 17.

[16] Note, for example, his gymnastic performance at ibid: Chapter VII, pp. 14-15.

[17] See his proficient defence against an attempted assassination at ibid: Chapter V, pp. 14-15.

[18] ibid: Chapter XI, p. 11. This fighting of evil culminates in Veidt's drastic plan to achieve Alexander's utopian dream: see ibid: Chapter XI, pp. 18-19, 21-22, 24-27.

[19] The poem is reproduced in full in Appendix One of this thesis.

[20] Gearey, *Law and Aesthetics*: p. 20.

[21] See Manderson, *Songs without Music*: p. 160. See also Section 7.3.

As such, Gearey observes that the poem "carries associations of the way in which power clothes itself, dresses itself up and becomes spectacular".[22] Ozymandias creates his power by naming himself as the 'king of kings',[23] and his "claim to an originless and supreme power is mocked by this ability of the poem to... return to origin[s] as a means of showing how the present is produced".[24] The importance of this for the legal discipline – and thus for criminal theory as a dimension of that discipline – is in exposing how, for Gearey, it needs to claim power for itself. Recognition of this spectral 'claiming' both challenges the established order of the legal discipline and opens the possibility for new and different structures of legal knowledge;[25] and, specifically, this includes different models of criminal identity. What Shelley's themes also show us is that, because power must derive from concrete origins in human reality, the perfect ideal of an independent, abstract, and rational disciplinary power becomes unobtainable; in order to secure itself, it needs to efface the spectral origins that underpin the claiming of that power.

These themes can be seen in the character of Veidt in *Watchmen*. Iain Thomson says of Veidt:

> "The hero rises above normal human beings by *saving* them, and, through this secular salvation, he or she lives on in their memory. Ozymandias, the hero who most lucidly realizes all this, unapologetically seeks to put himself in the place previously thought to be occupied by God."[26]

An obvious connection can be seen between this reading of Veidt and the critique of power found in Shelley. As has already been mentioned, Veidt clothes himself in the trappings of power; paraphrasing Gearey, Veidt dresses himself up and becomes spectacular. In Figure 8.3 we can see Veidt displaying himself as spectacular: clothed in gold and regal robes, on a spot-lit stage surrounded by twinkling lights. (The second

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[22] Gearey, *Law and Aesthetics*: p. 17.

[23] ibid: p. 19.

[24] ibid: p. 20.

[25] ibid: p. 22.

[26] Thomson, 'Deconstructing the Hero': p. 109. (Emphasis in original.)

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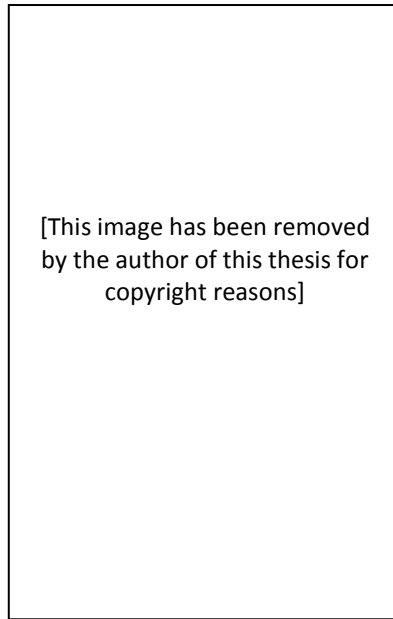
Figure 8.3: Moore and Gibbons,
Watchmen: Chapter VII, p. 14.

speech bubble in this panel relates to an aspect of Dan Drieberg's masculinity and its juxtaposition with Veidt's, which is discussed in the next chapter.[27]) If we note, alongside Figure 8.3, the searching origins of Veidt's power and achievement in his retracing of Alexander's footsteps, the connection with Shelley's themes can be seen: Veidt clothes himself in power, he appears beautiful and strong, but this beauty and strength was chosen, seized, taken by Veidt as he developed or made himself. "The male body", Roger Horrocks tells us of popular culture more generally, "has become objectified as a site of crisis and hysteria, but also as a place of beauty and strength".[28] Accordingly, beyond the destabilising of the established order of legal knowledge as read by Gearey, the emanation of Ozymandias in *Watchmen* questions not only the enshrining of an insecure power, but the reification of the stability and strength of the heroic male body.

The male hero, classically masculine, is seen in Veidt not only as powerful and graceful, beautiful and strong, but also as something that needs to be worked at, and that is unstable and mortal. The emanation of Ozymandias in *Watchmen*, then,

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[27] See Section 9.3.

[28] Roger Horrocks, *Male Myths and Icons: Masculinity in Popular Culture* (London: Macmillan, 1995): p. 170.

reinforces the spectrality uncovered through the work of Shelley. The idealised masculinity of strength, power, independence, and rationality that Shelley's poetry exposed the origins of is seen in Veidt again as something that has had to be 'claimed', taken by Veidt through the ethical work done upon himself in his youth. If we examine the epistemological dimensions of this, then the critique of the concept of classical masculinity in Veidt, in light of Shelley's and Gearey's work, can be seen to undermine the stability and strength of the idea of rational choice. We saw in the previous chapter how criminal identity is symptomatic of adherence to the rational surface, a surface that denies the non-rational and non-linguistic indeterminacy outside of its borders. The power of rational knowledge to 'make' the world as stable and knowable derives from its ability to maintain the rational surface – to deny the substantive spectrality of indeterminacy that haunts its limits. Applying the reading of classical masculinity through Veidt, this power derives from homo-cultural contexts; it is something that has to be claimed, worked at, or taken. This exposure of spectral origins shows the seeming stability of the rational surface to be contested, constructed, and made; it can thus be challenged from alternative perspectives, and accordingly loses its status as objective truth. Rational choice, as we saw, is symptomatic of this rational surface, and thus shares these same insecurities.

Reading *Watchmen* with Shelley's themes in mind, and focusing on the classical heroism displayed and undermined through the character of Veidt, can suggest a way of moving beyond the idealised characteristics of criminal identity. Iain Thomson reads *Watchmen* as a deconstruction of the idea of heroes in general; accordingly his major failing is in treating the 'hero' as a monolithic category.[29] The undermining of the hero, according to Thomson, is achieved through the 'superheroes' of *Watchmen* being loaded with so much power and undertaking such extreme acts that their 'heroism' becomes unrecognisable as such, and they become alienated from their humanity, resulting in nihilistic views of the world.[30] They are heroes, Thomson argues, because they seek to go beyond nihilism, but all the paths offered by *Watchmen* are horrific or

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[29] See Thomson, 'Deconstructing the Hero'.

[30] ibid: pp. 106-09.

hopeless, and thus the work questions our need for heroes at all if all they do is expose horror and despair.[31]   This analysis not only fails to recognise the insight that Osterman/Manhattan's universe gives us into the operation of rational knowledge that we saw in Chapters Six and Seven, it also fails to observe the spectrality exposed via Rorschach that we saw in Chapter Six. Furthermore, there is little to no consideration of Dan Drieberg and Laurie Juspeczyk – two heroes who cannot be said to overtly subscribe to the nihilism Thomson attributes to Rorschach, Osterman/Manhattan, Veidt, and Blake (and thus claims that 'all' the heroes are nihilistic in some way[32]). (Edward Blake, alias 'The Comedian', will be introduced in the following section; Drieberg, and his relation to Juspeczyk, will be discussed in more detail in the following chapter.)

Recognising that masculinity is not a monolithic category enables an important point to be drawn from Thomson's analysis.   He observes what he claims is 'ambivalence' towards the importance of the masculine hero in *Watchmen*.   The graphic novel may show that heroes only give us a path to despair and nihilism, he argues, but it also suggests that we still need them in order to overcome the world and create a better future.[33] *Watchmen* can thus be read as showing us the failure and alienation of the *classically masculine* hero, but a concomitant celebration of, or recognition of the need for, a new hero who can overcome the past, and the heroes of the past. The idealised masculinity of Veidt, Thomson's work suggests, is incapable of moving beyond nihilism due to the extremity of the actions Veidt undertakes (the destruction of New York City) in the name of world peace: like the radically materialist perspective of Osterman/Manhattan, he has become alienated from humanity. There are, however, other models of masculinity to be found through analysis of *Watchmen*; namely, 'modern masculinity' and 'relational masculinity'. It is modern masculinity that can be seen to interact with the abstract autonomy that can be found in Kantian

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[31] ibid: p. 109.

[32] ibid.

[33] ibid: p. 113.

philosophy and generally to shape both the rational surface and the models of rational choice in criminal responsibility theory.

8.4 Modern masculinity

This section introduces the concept of modern masculinity, a model that clings to the rational surface – of strength, power, rationality, and independence – set up over an otherness of violence, loneliness, insecurity, and fear that is emblematic of the indeterminacy of the non-rational and non-linguistic and the spectral threat it poses to rational order. This model is important regarding moral identity because it is linked with abstract autonomy and the way in which Kantian theory maintains the rational order of the phenomenal world through the aesthetic experience of the sublime by turning away from or masking the indeterminate chaos 'beyond' the rational surface of conceptual understanding.[34] It is thus through the epistemological concept of modern masculinity that the rational surface is maintained against the chaos of the unstructured world, against the indeterminacy of the non-rational and the non-linguistic. The first half of this section describes the nature of modern masculinity found in masculinities research, highlighting the disjunction or 'crisis' found in modern masculinity between the ideal imperatives of classical masculinity and the emotional and 'mundane' lives that generally typify adulthood; a crisis emblematic of the denigration of spectrality on the rational surface. The second half of this section considers the character of Edward Blake in *Watchmen* as typifying modern masculinity: he is outwardly strong and heroic, but analysis shows that he is also permeated with weakness, fear, violence, and insecurity, and thus he reconfigures the rational surface as a modern-masculine masking of insecurity with strength. This masking with strength and certainty of that which threatens it is emblematic of the maintenance of the rational surface that masks the spectral indeterminacy beyond its borders in order to perpetuate its hegemonic ability to 'know' and order the world.

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[34] See Section 8.5.

In *The Rites of Man*, Rosalind Miles paints a vivid picture of the making of the male from the foetus through to the violent adult, via various activities that she calls 'manhood training'.[35]   Although her work tends towards broad generalisations in the actual lives of men, as we will discuss shortly, it is still useful for understanding the *conceptual* category of modern masculinity.   Initially cared for almost exclusively by females (such as the mother, nannies, and other female carers), Miles claims that men are eventually separated from this infant 'Eden' in which they are "indulged and adored".[36]   This female bias in the care of infants, she argues, has only recently begun to crumble:[37]

> "For thousands of years, culture, history and tradition have insisted on the removal of the boy child from 'the house of women' and his forcible repatriation to the kingdom of his birthright, the [superior] world of men.   Everywhere, it seems, the making of boys into men takes this as the first of its objectives, the brutal separation and segregation from all female influence, and the establishing of the vital sexual difference from the all-embracing mother of the early years".[38]

From the martial training rituals of ancient Sparta to the more contemporary British tradition of sending young boys away to boarding school, Miles claims that this inculcation into the world of men involves a jarring separation from the finer feelings typically associated with the feminine, feelings which the dictates of masculinity insistently suppress.[39]

Roger Horrocks notes that although both males and females undergo a separation from the mother at some point in their development, males have to endure a second layer of separation as they move away from femininity and into masculinity.[40]   This separation is the first step in Miles's 'manhood training', a scheme which:

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[35] Rosalind Miles, *The Rites of Man: Love, Sex, and Death in the Making of the Male* (London: HarperCollins, 1991).

[36] ibid: p. 46.

[37] ibid: p. 32.

[38] ibid: pp. 47-48.

[39] See ibid: pp. 46-60.

[40] Horrocks, *Male Myths and Icons*: pp. 14-15.

"…is clearly designed to divorce the boy from all that is female [read: feminine] not only in the shape of the mother, but above all from any soft, womanly, human or humane impulses within himself".[41]

Under this generalised banner of manhood training, Miles includes: the skills passed from father to son (such as hunting, standing up for oneself, independence);[42] physical sports education[43] and punishments[44] at school; the bullying, dares, initiation, and 'hazing' rituals imposed upon younger boys and men, both through adolescence and in the adult workplace.[45] Miles also notes the rituals of ascension to manhood throughout history and in many tribal cultures,[46] rituals which modern Western society has no place for, thus rendering "the achievement of masculine status inherently problematic, confused and conflict ridden".[47]

These 'rites of man' are aimed at producing a male that is strong, independent, capable, heroic, and free from the 'softness' and 'emotionality' of the feminine. Men are encouraged to transcend their limitations (a man is powerful and free); to reduce their emotionality, empathy, and communication (a man is rational and independent); and to both suffer and utilise violence (for a man, there is no achievement without pain).[48] For Miles it is these imperatives that breed the crisis underlying modern masculinity. Having spent their nascent years training for an action-packed, heroic life of strength and success, men enter an adult world of "human interchange and emotional demand" where they have to negotiate the "rich, problematical and complex intercourse between male and female".[49] The desire to 'save the world', to protect, to become a hero, are deep urges in this model of masculinity – for the

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[41] Miles, *The Rites of Man*: p. 60.

[42] ibid: pp. 58-60.

[43] ibid: p. 57.

[44] ibid: pp. 65-68.

[45] ibid: pp. 68-73.

[46] ibid: pp. 74-76.

[47] ibid: p. 101.

[48] ibid: pp. 98-99.

[49] ibid: p. 79.

boyhood fantasies of adventure and heroism to become manifest in adult life. Miles highlights the disjunction between this manhood training and the realities of a non-heroic maturity, and argues that this tension and frustration can generally be seen to underlie many of the issues surrounding violent and oppressive male behaviours; it is also emblematic of the 'crisis' in masculinity.

As indicated above, Miles's analysis tends towards claims of general truths, and this is an obvious point of contention with her research; not all boys are raised the same way, or given the same imperatives of masculinity. Even where Miles's 'universal' masculine imperatives do manifest in a child's upbringing, it is not necessarily the case that his adult life is actually 'mundane' and non-heroic. Louise Westmarland, for example, shows how heroic masculinity operates amongst the men who work in the UK police force: they must maintain a self-image and a public image of being 'in control', of dealing with death and violence and the gore that goes with it, of being strong and heroic, and controlling their emotions.[50] However, although not universally or necessarily typical of *living* males, what Miles observes *is* typical of the *conceptual* model of modern masculinity (as opposed to the problematic idea of a universal modern *male*).

This conceptual model can also be seen in productions of popular culture. *Watchmen*, as a work of graphic fiction, is squarely located in the realm of popular culture, but Roger Horrocks examines emanations of masculinity in a variety of other popular media. He observes a similar crisis of modern masculinity to that of Miles, arguing that rather than merely creating or reflecting an existing male hegemony or a reinforcement of patriarchal dominance, the displays of male power and virility in various arenas of popular culture (such as westerns, rock music, and pornography):

> "...also evoke a compensatory power for those who are powerless... [and] not seeking a reinforcement of an established male position of strength, but are

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[50] See Louise Westmarland, *Gender and Policing: Sex, Power, and Police Culture* (Cullompton: Willan, 2001): pp. 165-71.

struggling to build islands amidst a crumbling landscape, where men feel useless and surplus to requirements".[51]

Against the backdrop of the disjunction between initiation into a heroic male order via their manhood training and the supposed 'actual life' of men amidst the 'mundane' and emotional complexities of work and relationships, the widespread existence of fantastic stories and images in popular culture stand, at least in part, as a masculine refuge.

Horrocks's analysis of the western, for example, exposes much of the violence, loneliness, and non-femininity of the modern masculinity concept.[52] The western paints a picture of manhood that shows an unwanted man, an outlaw, a solitary figure or 'lone hero', who although unwanted is required for particular social functions: he is needed to rid a town of criminals, to help set up a peaceful social order; but he cannot live within the peace that he has helped to secure.[53]

> "In the male [read: masculine] psyche there is a terrible wound here, a split between action and community, power and the ability to relate. One can be potent or one can be social – but not both... [Men] are not simply all conquering heroes: a terrible price is paid for their assumption of certain duties... [and a man makes] a kind of living sacrifice of himself."[54]

This modern masculinity, then, is profoundly insecure and conflicted inside its ostensibly classical-heroic exterior. Although generalisations made under this category to 'real' men are vastly problematic, in this thesis the category is purely conceptual: it is the *idea* of trying to attain the ideals emblematic of classical masculinity (strength, power, rationality, independence) 'in real life'. Put another way, it is the idea of trying to attain the ideals of rationality and independence against the backdrop of spectrality;

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[51] Horrocks, *Male Myths and Icons*: p. 174.

[52] See generally ibid: pp. 56-82. Regarding 'non-femininity', note that Battersby has argued, with respect to the artistic 'genius', that historically it is *female bodies*, rather than 'femininity' as a category, that has been generally denigrated: the feminine qualities of the artistic genius were celebrated when possessed by a man. See Christine Battersby, *Gender and Genius: Towards a Feminist Aesthetics* (London: The Women's Press, 1989).

[53] Horrocks, *Male Myths and Icons*: pp. 66-68.

[54] ibid: pp. 69-70.

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Figure 8.4: Moore and Gibbons, *Watchmen*: Chapter IV, p. 19.

it is the idea of making these ideals an imperative for living, embodied, astonishing humans. In this way, the conceptual characteristics of modern masculinity can be seen to map onto the imperatives of rational independence associated with the abstract autonomy and rational choice models of the moral self.

8.4.1 *Modern masculinity and the rational surface*

Analysis of the character of Edward Blake in *Watchmen* can enrich our understanding of the links between the conceptual category of modern masculinity and understandings of the moral self. Blake derives his superhero name, 'The Comedian', from his ironic orientation towards the modern civilised society of the West. As Rorschach describes him:

> "Blake understood. Treated it like a joke, but he understood. He saw the cracks in society, saw the little men in masks trying to hold it together...
> He saw the true face of the twentieth century and chose to become a reflection, a parody of it. / No one else saw the joke. That's why he was lonely."[55]

He reflects a perceived amorality and violence that underlies Western culture. In many ways, this aspect of the Comedian epitomises a major theme of *Watchmen*: the seemingly 'happy' and stable surface that masks the chaos and violence 'beneath'. We

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[55] Moore and Gibbons, *Watchmen*: Chapter II, p. 27. (Ellipsis in original.)

can see this in Figure 8.4, where a maniacal Blake sprays fire and death on the battlefields of Vietnam. He is depicted as lurid and menacing, and Osterman/Manhattan's narrative hints at his deep nihilism. The Comedian faces the worthlessness and expendable nature of human life without flinching, and without feeling, relishing only his own power to destroy, and laughs at the 'joke'. This joke is subtle, and seemingly horrific at first glance (which is perhaps why, as Rorschach notes, 'no one else saw it'). If we look closely, we can see a small pin badge on Blake's costume: a smiley face. As we saw in Chapter Seven, the smiley face is emblematic of the rational surface which is 'happily' stable and knowable, complacent with regards to its spectral dimensions. The surface here, however, is not that which is stable, rational, and knowable, but that which is pure, virtuous, and just. It is the 'face' of Western society, floating on the pool of violence and bloodshed which supports it.

Rorschach introduces this configuration of the 'happy' surface[56] with his diegetic experience of the real-world (non-diegetic) rape and murder of Kitty Genovese, which occurred in New York City in 1964. The *New York Times* report of the time claimed 38 people witnessed the attack and did nothing.[57] More recent analysis of events, however, has suggested that both this number and the amount that the claimed witnesses were actually able to observe may have been exaggerated.[58] We see Rorschach, however, reading the *New York Times* article, which was assumed to be accurate for many years.[59] This event has a great deal of significance for Rorschach, as it is what moves him to take up the life of a masked vigilante, as his account tells us:

> "Almost forty neighbors heard screams. Nobody did anything. Nobody called cops. Some of them even watched. Do you understand?

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[56] See also Section 8.2.

[57] Martin Gansberg, 'Thirty-Eight Who Saw Murder Didn't Call the Police', *New York Times*, March 27th 1964.

[58] See 'On This Day: Kitty Genovese Killed as Neighbors Look On' http://www.findingdulcinea.com/news/on-this-day/March-April-08/On-this-Day--NYC-Woman-Killed-as-Neighbors-Look-On.html, accessed on July 22 2010.

[59] ibid.

Some of them even watched. / I knew what people were, then, behind all the evasions, all the self-deception. Ashamed for humanity, I went home. I took the remains of her unwanted dress...

...and made a face that I could bear to look at in the mirror."[60]

Thus Rorschach distances himself from a humanity that he perceives to be wholly rotten, a race of beings that let such horrific things as the brutal rape and killing of a young woman continue outside their very windows.[61] (This perhaps gives a psychological explanation why Rorschach's mask abstracts him away from his own lived humanity: desires and impulses are seen as monolithically bad since they incite us to the 'irrational' immorality of lechery and violent murder of which Genovese is emblematic.)

Others have also made observations of the ubiquity of human violence 'beneath the surface' of civilised society. Melanie Williams, for example, observes a mismatch between our society conceived as civilised and the brutal realities which underpin it, but which are not faced.[62] In her analysis of J. G. Ballard's novel *Super-Cannes*, a challenging view of humanity derived from psychiatry and anthropology emerges of 'man' as a "reformed hunter-killer of depraved appetites",[63] universally capable of violence, and with an abundance of deviance bubbling 'beneath the surface' of society. Williams sees little humour in this masking of depravity, and neither does Moira Gatens who argues that the 'spectacular cruelty' associated with particular visible

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[60] Moore and Gibbons, *Watchmen*: Chapter VI, p. 10. (Ellipses in original.) Rorschach makes reference to Kitty's unwanted dress in this passage. In his earlier life, Rorschach (then Kovacs) worked as an unskilled labourer in the garment industry, during which time the diegetic Kitty Genovese had ordered a dress made from a special material invented by Osterman/Manhattan, but had not wanted to purchase the finished product. The material was "viscous fluids between two layers latex, heat and pressure sensitive", giving rise to areas of "black and white moving [and] changing shape... but not mixing, no gray". This is beautiful to Rorschach (the lack of 'mixing' or 'grey areas' is symbolic of Rorschach's hard-line perspective on the simple existence of 'good' and 'evil'), and since nobody else wanted it, he took the material for himself, using it to make his hero mask, his 'new face' – thus demonstrating the importance of this view of the unpunished degradation beneath the surface of civilisation, epitomised by the case of Kitty Genovese, (and the certain good/evil divide) in his motivation for being a vigilante.

[61] Rorschach carries a huge burden in this knowledge: either he joins the ranks of those who ignore the infestation of filth beneath the surface, or he works to distribute just punishment to all the 'human cockroaches' he can. See Held, 'Can We Steer This Rudderless World?': pp. 19-20.

[62] See Williams, *Empty Justice*: pp. 1-26.

[63] ibid: p. 1.

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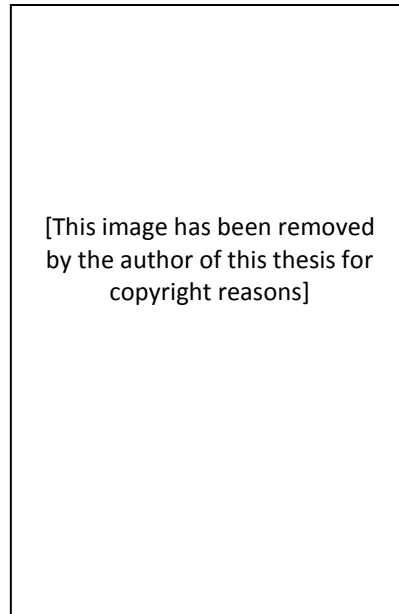
Figure 8.5: Moore and Gibbons, *Watchmen*: Chapter II, p. 27.

crimes, such as violence, rape, and the killing of women, "only serves to mask the underlying banality of a largely unacknowledged violence which structures our social relations".[64]   By perpetrating horrific acts whilst wearing his 'happy' little badge, however, the 'Comedian' enacts an ironic parody, both highlighting and mocking the attempts of society to cover up its violent foundations, to mask what is 'beneath' the surface.

This dark comedy also operates at the conceptual level of modern masculinity, although perhaps with less (diegetic) self-consciousness on Blake's part, reconfiguring the rational surface as a modern-masculine masking of weakness with strength. Observing Figure 8.5, we can see an image of a strong, heroic character, 'saving the world' and leading us into the future. The same image actually occurs earlier in the graphic novel, depicting the Comedian claiming himself as the embodiment of the American Dream: he is powerful and free, strong and patriotic – an ideal of masculinity.[65]   In Figure 8.5 there is a disjunction between the redeployment of this image and the accompanying text, a disjunction that replicates the one between the

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[64] Moira Gatens, *Imaginary Bodies: Ethics, Power, and Corporeality* (London: Routledge, 1996): p. 122.

[65] See Moore and Gibbons, *Watchmen*: Chapter II, p. 18.

'ideal man' and the fear of weakness and failure that rents his psyche that is emblematic of the conceptual category of modern masculinity. The comics form here also suggests something about embodiment in relation to this conflict: it is the image, the body, that is strong and muscular, and the accompanying text, or thoughts, which belies modern masculinity's internal weakness. Modern masculinity may be physically (that is, externally) strong, but this strength is accompanied by an internal struggle against loneliness, limitations, and immanent failure.

The Comedian's 'joke' takes this further, however. The irony is that Blake *is* being a hero, he *is* living up to his 'manhood training', yet he is still participating in the masculine ideal of violence and strength, masking a deep loneliness and alienation. He is partaking in the fantasy of masculine heroism, of being strong and independent, but this independence comes at a price, as Horrocks tells us. The Comedian fulfils an important function of fighting social evils, but as a result he cannot dwell in the security he helps create. Like Veidt he has become too alienated from humanity. As Miles also observes:

> "...the successful man [cannot] ever share his trials or the resulting distress... In effect, the most 'successful' adult men are those who have most closely absorbed, and can most efficiently reproduce, the constant lesson of their boyhood: that emotions are dangerous because they are 'female' [read: 'feminine'], uncontrollable, and liable to provide others with a hold over you".[66]

In this way, the Comedian shows us the perfect 'modern' man: he displays a 'happy surface' of the ideals of classical masculinity, whilst also being permeated with a weakness that threatens the stability of that surface. As an epistemological concept, then, modern masculinity masks with strength and rational certainty that which threatens the stability of these idealised characteristics.

The ideals of classical masculinity (strength, power, and rational independence) are maintained in modern masculinity not through a simple perfection or attainment, but by denying and masking that which threatens to undermine those idealised traits. It is the vision of the chaos beyond the confines of the rational surface, the spectral

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[66] Miles, *The Rites of Man*: p. 163.

indeterminacy beyond its borders, the astonishing dimensions of the complex surface, which threatens to disrupt the order of the rational surface, and that the rational surface masks to maintain itself and its power to order the world. Modern masculinity, as an epistemological concept, shows us the mode of understanding that maintains or perpetuates the rational surface, the mode of understanding of which the rational surface is symptomatic. This epistemological grounding shapes and limits the structures that are built upon that rational surface, including the inability of rational choice models of the moral self to penetrate or engage with the non-rational and non-linguistic dimensions of the self and the world(s) it inhabits. Thus it is the epistemological approach of modern masculinity that needs to be reconfigured, but before this can be done we need to understand in more detail how it operates to maintain the rational surface.

8.5 Chaos, the sublime, and modern masculinity

It is through the operation of the experience of the Kantian sublime that the rational surface is maintained, and this maintenance is linked in Kant's philosophy with the modern-masculine traits of the autonomous (abstracted) self. Kant distinguishes between the beautiful and the sublime. The beautiful, for Kant, is the perception of something that fits perfectly with our faculties of reason and the empirical imagination (the phenomenal world synthesised by the transcendental self[67]); it represents those things which match our perception of the world, suggesting a link between beauty and order. Veidt's heroism can be seen to fit within this category: his prowess and ability to manipulate the world derive from his rational understanding and his powerful position; he is beautiful, able to shape the world to his rational will. Unlike Kantian 'beauty', the sublime is associated not with order but with the fracturing of the empirical world through the perception of its boundaries and the positing, by our faculty of reason, of the existence of a supersensible or noumenal realm 'beyond' that re-establishes the threatened order.[68] Veidt's power may be unstable due to the fact

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[67] See Section 6.3.

[68] See Section 5.4.

it is not truly originless, but it is not threatened in the manner of the sublime. The Kantian sublime exposes the limits of conceptual knowledge, and represents the threat from the unstructured chaos of the universe beyond its boundaries.

Although there may be something 'chaotic' about the *experience* of the Kantian sublime, the sublime itself is not directly concerned with chaos, but rather the limits of rational knowledge. As described in Chapter Five, the experience of the sublime is the experience of a conflict or tension between our faculty of empirical imagination, that is our ability to synthesise empirical experience, and our faculty of universal reason. This conflict is ultimately resolved by accepting the existence, posited by reason, of the noumenal that re-orders our perception of the world. In experiencing the sublime we thus come up against the limits of our empirical imagination, our ability to synthesise the phenomenal world under concepts. Kant's system turns away from what is outside this conceptual understanding, what is outside the rational surface, by accepting the power of reason to order the world from beyond our experience, from the noumenal, which remains 'veiled' beyond the limits of conceptual understanding. This veiling is linked with the modern-masculine traits of Kant's autonomous self.

If we consider Christine Battersby's reconfiguration of the Kantian sublime, we can see this 'turning away' from the limits of conceptual understanding more clearly. In Kant's sublime, Battersby argues, it is not the existence of some veiled beyond that is exposed, but rather simply the limits of our ability to understand through rational forms. Battersby gains this observation through her reading of Nietzsche's metaphysics of surface:[69]

> "Nietzsche is right to complain that what is veiled in the Romantic discourses about the sublime veil of Isis is no Dionysian 'beyond', but the 'I', the understanding (Socrates) and the (Kantian) limits of conceptual thought... As apparently systematic knowledge systems get caught within their own illusions, Nietzsche suggests that a kind of false infinity arises as the circle of knowledge (which aims at completeness) conceals an 'infinite number of points' which could not possibly all be surveyed... [In facing the Kantian sublime] we confront merely

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[69] See Section 4.4.

that which has been excluded as the I positions itself as free, as a unity or as the 'master' of nature and the space-time which it imposes on the world."[70]

This reading of Nietzsche exposes the chaos at work in relation to the Kantian sublime. The over-structured approach of Kant leads to unpredictable dynamic interaction as its 'illusions' (perspectival knowledge constructions) feed back into each other in 'a kind of false infinity' that avoids going 'beyond the veil' of the empirical imagination; going beyond the veil is impossible for Kant. For Nietzsche, however, the sublime does not 'veil' a 'beyond', but rather, in approaching the boundaries and limitations of conceptual knowledge, the Kantian system turns away from the unstructured chaos outside knowledge, outside reason, and feeds back into itself. This formless 'beyond', for Nietzsche, is not seen as inaccessible, a failure or intractable problem for the business of knowing, but rather signals the turn to the metaphysics of surface.

In facing the sublime, we do not experience a veiling of a realm 'beyond' but rather we experience the limits of conceptual thought, of our ability to 'understand' the world (or, to put in another way, of our ability to synthesise the world as unitary under the transcendental self). This experience, under Kant, is linked with emotions and feelings of awe: our world is shaken, and we experience internal conflict between our empirical imagination and the faculty of reason. Here Kant re-establishes the primacy and ordering ability of reason and the transcendental self. When we come up against something indefinitely vast or infinite, our empirical imagination, our ability to understand the world we experience through our senses, fails us. As Battersby terms it, we 'sacrifice' our empirical imagination, what we experience through our senses, to the power of reason, thus allowing reason to step in, as universal, and once again explain and order the world.[71]

Jane Kneller, in her exploration of the aesthetic dimension of Kantian autonomy, observes how Kant's moral actor is generally characterised as an atomistic masculine hero. We have already discussed elements of this in Chapter Five relating to the

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[70] Battersby, *The Sublime, Terror, and Human Difference*: pp. 173-75.

[71] ibid: pp. 29-30.

embedded and human nature of moral action that 'abstract autonomy' readings of Kant often overlook.[72] Here, however, it is specifically the masculine and heroic nature of the autonomous actor that is relevant. Kneller talks of the 'questionable' figure of the autonomous moral actor often read from Kant's *Foundations of the Metaphysics of Morals* as:

> "...a moral superstar alone on a rock of rational will power, removed from the individuals whose humanity this will requires him (Kant's hero is clearly conceived as male by Kant himself) to respect, relying only on himself, with no 'taint' of love or emotion spoiling his moral glory".[73]

As can be seen from the discussion on masculinities so far, and as Kneller herself observes,[74] there is an overt modern-masculine orientation in this autonomy. Kant's moral hero is isolated, independent, and free from the supposed 'weaknesses' of (conceptually) feminine emotion. As we saw in Chapter Five, although Kant generally accepts the embedded nature of the moral self, Kneller argues that Kant's later work on aesthetics more obviously relocates this moral hero within the world of sense and emotion, a reading which appears to go against the modern masculinity just observed.

Battersby's reading of the Kantian sublime, however, notes that it is only those who are able to *transcend* fear and thus experience the sublime 'successfully' (that is, in a way that allows reason to re-establish the order the world) that are able to become truly moral in the sense of the typical 'heroic' reading of Kantian autonomy.[75] As she argues, the sublime involves conceptual and sensory conflict, with a gap appearing between our understanding and our sensory experience:

> "But as this gap between the faculties opens up, the manly man can regain a sense of order precisely through an act of comparison (or judgement) that makes the space-time ordering imposed by man on the world give way to the idea of a

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[72] See Section 5.2.

[73] Kneller, 'The Aesthetic Dimension of Kantian Autonomy': pp. 174-75.

[74] See ibid: p. 175.

[75] Christine Battersby, 'Stages on Kant's Way: Aesthetics, Morality, and the Gendered Sublime' in *Feminism and Tradition in Aesthetics*, edited by Peggy Zeglin Brand and Carolyn Korsmeyer (University Park, PA: Pennsylvania State University Press, 1995); Battersby, *The Sublime, Terror, and Human Difference*: p. 60.

> 'higher' or 'supersensible' order that does not have the human 'I' as its source...
> the elite male re-orders the chaos through displacing his own centrality – thereby
> containing the uncontainable and bringing it within the bounds of reason."[76]

As Janice Richardson also observes, the "experience of the sublime is closely linked with Kant's image of autonomy and selfhood":[77] someone who is terrified cannot experience the sublime,[78] and thus cannot develop full rational personhood. Thus it is Kant's abstractly autonomous moral hero – the idea of a purely rational and non-empirical self that is able to will free from the influences of sense and impulse – that 'steps in' when the edges of conceptual thought are threatened by the unstructured chaos outside, accepting the power of reason to order the chaotic world from beyond our experience. This masculine hero,[79] as Nietzsche's configuration suggests, covers up the looming chaos outside the rational and re-establishes its own power to order the world through its access to the faculty of universal reason.

In the first section of this chapter it was argued that the rationally knowable world exists upon a rational surface, outside of which there is a chaotic realm of non-rational and non-linguistic indeterminacy. The question was posed as to how this rational surface is maintained against the potentially disrupting chaos outside its borders. It can now be argued that the unstructured chaos that threatens as we approach the limits of the rational surface – that is, the limits of conceptually ordered experience – is held at bay as the Kantian 'I' heroically sacrifices itself to reason.[80] The abstractly autonomous, modern-masculine 'I' of reason takes control of the experience of threatening chaos and 'masks' it by sacrificing sensory experience to the supremacy of reason; a masking that acts to secure the hegemonic position of rationality in the ordering of the world, and thus to maintain the security of the rational surface as 'the'

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[76] Battersby, *The Sublime, Terror, and Human Difference*: pp. 33-34.

[77] Richardson, 'The Law and the Sublime': p. 234.

[78] ibid: p. 233. See also Section 5.4.

[79] Battersby also highlights the requirements of being male in order to access Kantian autonomy: see Battersby, 'Stages on Kant's Way'. Richardson, too, notes the exclusion of women from the sublime: Richardson, 'The Law and the Sublime': p. 234.

[80] See Battersby, *The Sublime, Terror, and Human Difference*: pp. 28-34.

basis of knowledge. The Kantian 'I' may be embedded, as Kneller argues, in a world of senses and feelings, but it maintains its strength through the modern-masculine denial of the experience of immanent insecurity of its boarders in favour of the abstract ordering power of reason. Modern masculinity thus operates to cover up the insecurity and threat to the stability of the rational surface posed by the chaotic indeterminacy of the non-rational and non-linguistic beyond its borders; the threat to order is masked, covered up, or turned away from, as sensory experience is sacrificed to the primacy of rational explanation.

8.6 Conclusion

The problem of the prioritisation of the rationally choosing agent in criminal theory is emblematic of the problem with Kantian abstract autonomy: judging universal morality by the standard of the autonomous self that is able to will its own actions free from the influences of empirical reality, thus undermining the legitimacy of lived experiences in understanding how the self is morally responsible for behaviour. The injustice of rational choice models of the moral self, then, can be seen to relate to the characteristics of modern masculinity that prioritise the ability to be rationally independent, and have the power to control one's actions and the strength generally to resist, or direct, irrational, sensual, or emotional desires and impulses. In Kant's wider aesthetic philosophy, the modern masculinity of abstract autonomy is linked with our experience of the limits of the phenomenal world. It is the primacy of the independent rationality that shapes Kant's experience of the sublime as one that maintains the order of the phenomenal world through a sacrifice of empirical imagination to the power of reason, of experience to rationality. Abstract autonomy may be achieved through the experience of the sublime, and thus feelings have a role to play in the development of Kantian morality, as we saw in Chapter Five, but the sublime itself operates to maintain the primacy of reason – in shaping our understanding of the world and the idealised characteristics of the moral self – over our lived experience. The rational surface of knowledge, set up via the synthesis of the unstructured universe into rational forms, is maintained by turning away from or

masking the chaos of the unstructured world that haunts it, threatening to disrupt it, from beyond its limits.

The responsibility understood on the rational surface cannot meaningfully encounter the inherently embedded and embodied dimensions of astonishing individuals and the links between them and their lived behaviour. This chapter has argued that the limits of the rational surface, of which rational choice models are symptomatic, are shaped by the epistemological concept of modern masculinity which masks the indeterminacy of the non- or pre-synthesised world. In order to escape the rational surface, we need to reconfigure this philosophical grounding and produce a new mode of understanding that can enable engagement with the lived human contexts of behaviour and selfhood. It is the approach of 'relational masculinity', developed in the next chapter through continued engagement with *Watchmen*, that this thesis argues will enable such a movement beyond the boundaries of the rational surface, and thus beyond the limitations of rational choice in criminal responsibility theory.

CHAPTER NINE

Relational Masculinity

> Adrian Veidt: "I did the right thing, didn't I? It all worked out in the end."
> Osterman/Manhattan: "'In the end'? / *Nothing* ends Adrian. Nothing *ever* ends."[1]

9.1   Introduction

Rational choice models, as we have already seen, are symptomatic of the rational surface: they are produced through the synthesis of the complex, unstructured world and self into idealised rational forms. In the previous chapter we saw that the rational surface is maintained through a modern-masculine masking of the unstructured chaos beyond its boundaries. The current chapter proposes the concept of 'relational masculinity', which, by reconfiguring the modern-masculine boundary of the rational surface, can enable ethically enriched engagement with the unstructured, non-linguistic world of astonishing experience accessible beyond its limits.   This epistemological concept can thus reshape understanding of the self-as-responsible in criminal theory by enabling theoretical engagement with the fluid dynamics of existence without relying on the limited structures of rational knowledge.   Such engagement will enrich understanding of the links between individual and behaviour, and thus enable the future production of more ethical concepts of responsibility.

Developed through engagement with the feminist philosophy of Christine Battersby (Section 9.2), relational masculinity (Section 9.3) reconfigures the relationship between idealised masculinity and that which threatens it as one of 'peaceful' symbiosis and generative change, not the masking of the threat to order, and thus enables engagement outside the rational surface to which modern masculinity clings, and opens the door to a reconceptualisation of the moral self that is sensitive to its spectral dimensions. These spectral dimensions are seen in the fluid self of Friedrich Nietzsche (Section 9.4), as part of the indicative self as a nexus of drives and influences. It is

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[1] Moore and Gibbons, *Watchmen*: Chapter XII, p. 27.

argued, with Nietzsche and Battersby, that the limited models of rational choice in criminal theory *as linguistic concepts* efface the unique, lived difference of astonishing individuals, thus resulting in the haunting of general categories by the infinite difference of the complex surface; this infinite difference constantly threatens to return and disrupt conceptual understanding, constituting the Nietzschean sublime. In moving outside the rational surface, we need to be sensitive to the positive benefits of chaos in order to avoid the nihilism it traditionally implies; this requires us to break the typical association of justice and order seen in, for example, the work of Elaine Scarry. Section 9.5, through engagement with *Watchmen*, argues precisely this: conceptual understanding is infused with the constant threat of rupture from the Nietzschean sublime, but this rupture need not signal a turn to nihilism; rather it is the restlessness of the generative potential of chaos.

In the final section of this chapter (Section 9.6), the limitations of criminal theory's understanding of the moral self are recalled from Chapter Five and considered in light of the epistemological model of relational masculinity and the shifting dimensions of the living self. The central problem with models of criminal identity is that they prioritise rationality over the fluid dimensions of the self, making the vast non-rational and non-linguistic dimensions of the self subservient to the rational will. Such a modelling effaces the shifting and symbiotic nature of the moral self that we see in Battersby's metaphysics and the self as constituted by the various internal and external influences acting within and upon it; it also effaces the spectrality of the self and our understandings of it. It is thus the relationship between the rational and the fluid self that needs to be restructured, via relational masculinity, in a way that does not prioritise the rational and that remains restless in the way it models the shifting and symbiotic self. If we are to avoid the potential for nihilism that moving beyond rational autonomy might engender, such a reconfiguration of the criminal theory's moral self as proposed in this thesis will require a similar reconfiguration in how we understand the idea of responsibility itself since the standards of rational choice will no longer be sufficient to attribute blame to the self as complex interrelation of drives

and influences. Ultimately, the restlessness of the living self precludes the development of a new general or settled model of criminal identity.

9.2 Metaphysics of becoming

In *The Phenomenal Woman*, Christine Battersby develops a rereading of Kant which takes the female subject position as norm.[2] Her focus on 'natality' raises significant issues for the traditional modern masculinity of Western metaphysics. Natality suggests a being that has the potential to grow an 'other' within itself and to give birth to that other; and a being which grows from within an other, and which develops through its spatiotemporal existence.[3] Such notions radically destabilise concepts of identity typically derived from writers such as Kant – identities which sharply delineate between self and other, and which are stable, autonomous, and rational. Although focusing on the female, Battersby notes that her metaphysics may be more relevant than traditional abstract autonomy for men as well as women.[4] There are two distinctive dimensions to Battersby's 'metaphysics of becoming': one, as the name suggests, is the recognition that we are all born and that we grow and develop through our lives, that we are constantly 'becoming'; the second is the breaking down of the strict boundaries between self and other that grounds Kant's metaphysics. As we will see, Battersby's metaphysical model of the self suggests an orientation towards futurity and otherness that is responsive and open, including a 'restlessness' that avoids settled forms in the making of criminal identity.

We have already seen in the previous chapter some of the ideas behind 'becoming' a man in the work of Rosalind Miles. Battersby notes a similar denial of femininity in the making of the male:

> "To exhort a boy to 'become a man' is, in our culture, to exhort him to take charge
> of his own life: to adopt codes of behaviour and conduct that involve, at the very

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[2] Battersby, *The Phenomenal Woman*: p. 2.

[3] For a more detailed description of Battersby's 'female subject position', see ibid: pp. 1-14.

[4] ibid: pp. 3-4.

least, a control of – and often an outright denial of – his emotions and his appetites".[5]

As we also saw in the previous chapter, the modern-masculine model of the autonomous self in Kantian metaphysics involves a transcending of embodied experience and the influences of the sensual world in favour of non-empirical, universal rationality.[6] As we saw in Chapter Five, such processes of abstraction away from lived embodiment, through the hegemony of 'rationality' (in Kant and criminal identity), effaces the lived individuality of astonishing humans. However, it is not only embodied interpersonal differences that are effaced in modern-masculine models of the abstract self, but also the uncertain and shifting nature of identity implied by the constancy of 'becoming' and symbiosis with otherness.[7]

The permeability of the line between self and other is a central aspect of Battersby's metaphysics. As we have seen in previous chapters, the Kantian self defines itself in opposition to that which it is not.[8] Battersby reconfigures this opposition from her position of taking the *female* as the norm for embodied humans:

> "Thinking the female body that is normatively not simply 'penetrable', but also fleshy and 'wombed' allows us to register an 'otherness' that can exist within the self itself".[9]

Problematising the metaphysical idea of the body as a mere container for the self (a position which, in Kant, makes the conceptualisation of internal spaces such as organs and foetuses impossible since everything inside the body-container is seen monolithically as 'self', defined against the external 'other', and thus the body cannot

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[5] ibid: p. 18.

[6] See Section 8.5; see also ibid: pp. 18-19.

[7] Battersby explores in detail in her more recent work how Kant's modern-masculine metaphysics of the sublime denies access to personhood for various non-male (and non-European) individuals, an aspect of Kantian philosophy which readings have tended to ignore as simply 'outdated' in favour of applying his autonomy to humanity in general. See Battersby, *The Sublime, Terror, and Human Difference*. See also Sections 5.4 and 8.5 regarding role of the sublime in Kant's moral personhood.

[8] See Section 6.3.

[9] Battersby, *The Phenomenal Woman*: p. 123.

contain biological objects or growing and living others[10]), Battersby suggests a self that can be conceptualised in a much more fluid manner, such as the one she finds in Nietzsche.[11] Beyond the simplicity of being merely rational and emotional, Nietzsche's self is constituted by multiple intersecting and conflicting drives, or energies: this is a model of identity which accepts uncertain boundaries, growth, and being in a general state of flux.[12]

For Battersby, however, the self is not an amorphous collection of fluctuating energies, but is closer to the indicative idea of the self as a nexus of drives and influences that we saw in Chapter Six. Battersby's model highlights the ways in which the self is patterned out of relationality:

> "...personality emerges out of the blur and resonances set up via patterns of relation with otherness (established over time)... the female subject-position is linked not to specific [or essentialist] modes of 'feminine' experience, but to ways of thinking identity as emerging out of patterns of becoming. On such a model, 'self' grows out of 'otherness', and 'sameness' is patterned from 'difference'."[13]

Battersby's reading of Kierkegaard informs her understanding of this process of patterning. While Kant's space-time world depends upon a sharp self/other distinction and the positing of a noumenal realm that exists beyond the phenomenal providing a stable backdrop over which our empirical imaginations synthesise 'reality',[14] Battersby takes from Kierkegaard a fluid model of the self that is more structured than the amorphous self of Nietzsche, and that emerges through the interaction of internal drives and external influences.

> "The 'I' finds its melody or shape through a process of screening out sudden and indefinite noises into patterns... [Like] the perception of sound, the patterning could not come except by absorbing that which comes from outside. And it is mood – and the repetitions and rhythms of the embodied self – which establish

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[10] ibid: pp. 70-71.

[11] See ibid: pp. 38-60.

[12] ibid: pp. 54-55. See, for a fuller discussion of the Nietzschean self, Section 9.4. See also Section 6.5 regarding the self as a nexus of drives and influences.

[13] ibid: p. 209.

[14] See ibid: pp. 171-72.

patterns of resonance within this absorbed 'otherness'. That which is the self's 'essence' or identity emerges through patterns of flow, and cannot simply be ascribed to the [Cartesian] *cogito*'s conscious decision or 'will' to produce itself... Neither fully autonomous nor completely determined, the self is produced relationally: in the resonances between self and other, in a 'present' that is a generative caesura [or pause] between future and past."[15]

Thus, in Battersby's philosophy we find a self that exists in a fluid relationship with that which it is not, without any sharp division between the two; a self that shifts, grows, and develops over time, patterned out of its relationality with the world and its others. A self that exists in symbiosis with the empirical universe of sense and experience, that can only be found in its immersion in the world and not abstracted from it, and that is neither purely determined by, nor totally apart from, the world it creates. The generative potential of the embodied female to grow and birth otherness from within becomes a general character of the self. We are in symbiosis with otherness, dependent upon that which we are not whilst growing and patterning our own independent selves, a patterning and shaping that takes place relationally and temporally. Our selves and others interpenetrate, taking in that which is outside as they learn, grow, and change. We may appear stable, but this stasis is dynamic, a snapshot of constant flux.[16] We thus have the two defining aspects of Battersby's position: *the permeability of the line between self and other* as we are *patterned and shaped over time* through our symbiotic relationship with otherness.

A self that is in a constant state of becoming instantly recalls the idea of self-making that we saw with in Chapter Six. That chapter introduced Foucault's ethics as the concept of the self's relation to itself, which asks how the self understands itself, and examines the work done upon the self as part of an on-going project of development. As we saw, this ethical shaping works outside or against the subject-shaping forces of disciplinary power, thus enabling us to 'escape' the pure determination of modern attempts to construct knowledge about individuals; the self was seen to be the product of a nexus of forces and processes of making, of drives and influences, that is

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[15] ibid: p. 184.

[16] See ibid: pp. 33-34; Richardson, 'The Law and the Sublime': p. 242.

anchored in the existential world in which it is always at least partially immersed. Battersby registers the specific importance of Foucault's approach to self-making in describing processes of becoming:

> "Delineating a self that is neither totally free, nor totally determined, the Foucaultian self is not formed via its confrontation with 'otherness'. Instead it emerges together with its 'others' from intersecting force-fields of power. [Despite his failure to consider natality,] Foucault is thus useful for thinking the... self that gains its specificity as it remains in a continuous dynamic play of power with other bodies and other forces."[17]

Golder and Fitzpatrick take a similar reading of Foucault, highlighting the creative nature of his ethics and its suggestion of alterity and openness to change. Arguing against criticisms of Foucault's ethical self as isolated and essentialist, they expound instead the Foucaultian self as "the unfinished result of a political negotiation with and through others".[18] The art of oneself is not concerned with discovering any 'true' self (through self-improvement or the individuation of disciplinary knowledge, for example), but with understanding the effects of 'truth' *on* oneself and orienting ourselves towards the creation of the self anew.[19]

Considering Battersby, then, the self as a nexus of drives and influences, which we participate in the making of, is thus one that is open to otherness and is in a constant state of becoming, restlessly patterned by multiple intersecting drives and influences. Similar to the claims of Adam Gearey that we need to take responsibility for our aesthetic creation of the world,[20] the central thesis of Golder and Fitzpatrick's work takes the orientation towards change and alterity in Foucault's self as demanding an epistemological orientation towards response and change (towards 'futurity') in legal knowledge; being open as opposed to static, deterministic, and closed. This suggests an 'illimitability' or 'restlessness' to criminal categories and theory (as part of the legal discipline more generally) which must remain able, like the self, to shift and respond

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[17] Battersby, *The Phenomenal Woman*: p. 206.

[18] Golder and Fitzpatrick, *Foucault's Law*: p. 115.

[19] ibid: pp. 115-17.

[20] See Section 4.4.

over time.[21]   The models of criminal theory should thus also adopt these characteristics of openness and restlessness, found in Battersby's self, enabling the constant (re)configuration or 'becoming' of criminal identity and a recognition of the moral self's relational position of symbiosis with otherness.   The pressing of astonishing individuality into general models of 'criminal responsibility' that adhere to the 'stability' of the rational surface (and which we have seen taking place in criminal theory) is counter to this call for restlessness, and denies the shifting and symbiotic dimensions of the moral self.

9.3   Relational masculinity

9.3.1 Dan Drieberg and relational patterning

In *Watchmen*, the character of Dan Drieberg navigates a path that does not follow the classical masculinity of Veidt or the modern masculinity of Blake, approaching a model of 'relational' masculinity. If we recall Figure 8.3,[22] we can see something of Drieberg's relationship with the idealised masculinity of Veidt. This image of the spectacular Veidt appears on a television in the background of a scene between Dan Drieberg and Laurie Juspeczyk. Veidt is undertaking a charity gymnastics performance, and we see across the page various spectacular images of his strong and agile body, effortlessly displaying his physical prowess, alternately with images of Laurie and Dan attempting to make love on the sofa.[23] As the speech balloon at the bottom of this panel suggests, the sexual manoeuvres of Laurie and (notably) Dan have little of the grace and power that we see in Veidt's gymnastics. The images of the powerful performance of Veidt overlain with the fumbles of Drieberg and eventual *lack* of 'performance' highlights the gulf between the 'real' life of Dan's manhood and the sexualised ideal of the classical hero. This impotence feeds into a more general lack of power that we see Drieberg experiencing in Figure 9.1 and Figure 9.2.

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[21] See Golder and Fitzpatrick, *Foucault's Law*: pp. 122-24.

[22] This figure can be found on page 265.

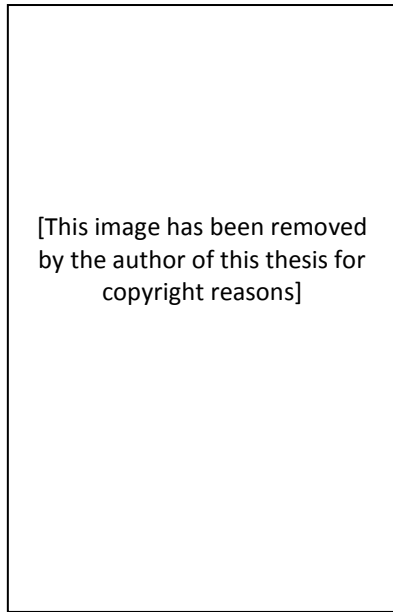[23] See Moore and Gibbons, *Watchmen*: Chapter VII, pp. 14-15.

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Figure 9.1: Moore and Gibbons, *Watchmen*: Chapter VII, p. 19.

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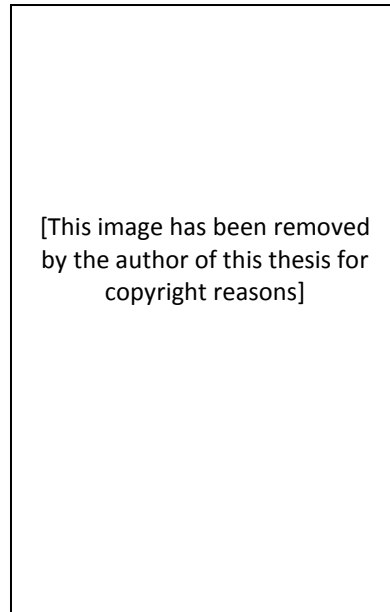
Figure 9.2: Moore and Gibbons, *Watchmen*: Chapter VII, p. 20.

In Figure 9.1 and Figure 9.2 we can see elements of Drieberg's feelings of powerlessness and impotence and their interplay with the visual depictions of his male body. In Figure 9.1 we see a flabby Drieberg describing his feelings of powerlessness and impotence to Laurie Juspeczyk; his inability to stop the looming nuclear war, to 'save the world', is manifested in his lack of physique. His depiction as a mere body, unclothed, wearing only the goggles from his hero costume, highlight this: although he sees the world and himself through the eyes of a hero,[24] he cannot transcend his physical inability to be that hero. Although this lack of transcendence is still operating in Figure 9.2, that panel shows a more complex relationship between the visual body and Drieberg's heroic impotence. He tells Laurie that he is worried and confused, that he feels the terror and anxiety of weakness and death bearing down on him. At the same time we see his body in a more heroic pose, displaying his musculature and physical strength, thus juxtaposing internal feelings of impotence and fear with an image of external strength. This juxtaposition shares many similarities with that found in the concept of modern masculinity epitomised by Blake, but there is a key distinction to be made. Whereas Blake's modern masculinity violently masks his deep-

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[24] In the panels of *Watchmen* we actually 'see' from Drieberg's first-person perspective as he wears the goggles. See ibid: Chapter VII, pp. 19, 21.

seated anxiety and weakness, Drieberg's fears are intertwined with the existence of an other, in the female shape of Laurie Juspeczyk.

It is this relationality with otherness that allies Drieberg with Battersby, and thus enables an explication of a masculine dimension to her metaphysics. The move from the specifics of female physiology (natality) to a general metaphysics in Battersby's thought is important in our consideration of the masculine dimension of her relational self. Battersby's female-oriented starting point becomes less of an obstacle to an understanding through the lens of masculinity than would first appear. Men, too, are born and grow, and exist in relation to others. Both the classical and modern concepts of masculinity described in the previous chapter, however, attempt to deny such relationality, prioritising instead the ideals of rational independence that are associated with the characteristics of abstract autonomy and rational choice. Dan Drieberg's masculinity navigates a path that avoids these hermetic archetypes.

Rather than masking or attempting to deny his powerlessness and fear, Drieberg recognises his position in relation to an other and shares his weakness, releasing parts of himself beyond the traditional boundaries of the modern-masculine self. Unable to enter Laurie physically due to his sexual impotence, part of Drieberg is taken into Laurie's otherness as he shares with her his weaknesses and nightmares.   This relationality, as Battersby suggests from her female subject-position, is symbiotic: Dan also absorbs elements of Laurie, notably her confidence and support. This inter-patterning is reinforced through the visual dimensions of Figure 9.1 and Figure 9.2, specifically Laurie's typically masculine attire. Analysis of Rorschach's abstract mask in Chapter Six highlighted the substantive spectrality at work in the effacement of the lived difference of astonishing humans,[25] and the same process can be seen in the gendered masking of embodiment with respect to the image of the business suit. Richard Collier observes the effacement of male sexuality when compared to the embodiment of women: the business suit, he argues, serves to 'de-sex' the male body, removing its physicality, blending it into uniformity and thus enabling men to

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[25] See Section 6.2.

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Figure 9.3: Moore and Gibbons, *Watchmen*: Chapter VII, p. 21.

participate in business and government on a purely rational level; the lack of an equivalent 'de-sexing' in women's clothing, Collier argues, accordingly detracts from their ability to be similarly 'rational', or to be perceived as such.[26]   Figure 9.2 thus inverts the 'sexualisation' of female bodies and de-sexing of male bodies as observed by Collier: Drieberg's body is portrayed as fleshy and overtly sexed (as male), whilst Juspeczyk is wearing a man's shirt that is part of the uniform of the business suit, covering up her sexed (female) body.

   Through their relational interplay, these characters' identities shift as they pattern themselves towards difference. Keeping our focus on the concept of masculinity, we see a patterning of Dan through his interrelation with Laurie out of his stupor of inadequacy and impotence and into a stronger heroic form. The physical comics form of *Watchmen* highlights the shift that Dan undergoes in this short interaction with Laurie. The image of the impotent Drieberg in Figure 9.1 is found in the bottom-right panel of a double page, and turning the page we find the large panel of Figure 9.3 in the same position. This panel depicts Dan in his hero costume (as the 'Nite Owl'), accessing his physical strength and readiness to 'fight for justice', symbolised by his prominent fist. The deceptively short 'distance' between these two images, like with

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[26] Collier, *Masculinities, Crime, and Criminology*: pp. 45-46.

the vast distances traversed across the gutter that we saw in our attempt to synthesise Osterman/Manhattan's identity in Chapter Six,[27] serves to foreground Drieberg's metamorphosis. The impotent, flabby Drieberg of Figure 9.1 is replaced by the capable and prepared 'Nite Owl' that we see in Figure 9.3.

9.3.2 *The haunted self*

There is a deeper level to Drieberg's relationality, one that is linked with both love and his deep fears and anxieties. If we look to Figure 9.4, we can see this aspect displayed without any recourse to linguistic representation. Perhaps the most striking dimension to this line of panels is in finding images of massive nuclear destruction between parentheses depicting gentleness, love, and respect. This juxtaposition reflects other layers of tension and interplay between and within these images. One of Dan's major sources of anxiety and powerlessness is the looming threat of nuclear war, and here we see this fear (in the form of images recalled from a nightmare[28]) embedded within his adoration of Laurie. The full page from which Figure 9.4 is taken reinforces this embeddedness, and also the centrality of this fear for Drieberg, by locating the images of nuclear destruction in the central space of a regular three-by-three, nine-panel grid, surrounded by various images of Drieberg beside a peacefully sleeping Laurie.[29] There is a seething fear inside Drieberg that the world and those in it whom he loves will be destroyed, and that he is powerless to stop it; but he does not react in the way typical of modern masculinity. Faced with imminent and immanent death, he does not succumb to the nihilism of a world that is doomed to destruction. Where Blake does succumb, and where Veidt in his unthreatened heroic beauty successfully takes up the

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[27] See Section 6.4.

[28] See Moore and Gibbons, *Watchmen*: Chapter VII, p. 16.

[29] See ibid: Chapter VII, p. 17. This scene takes place after the two of them have fallen asleep following their 'failed' attempt at lovemaking, discussed above; Drieberg is thus arguably feeling sensitive with respect to the threat posed to his masculinity by both this sexual 'failure' and the looming war that filled his nightmare. It is in the scene following the one from which Figure Seven is taken that we find the pair's inter-relational patterning, as Dan overcomes his fears through interaction with Laurie, seen in Figures Four through Six.

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Figure 9.4: Moore and Gibbons, *Watchmen*: Chapter VII, p. 17.

task of averting worldwide disaster,[30] Drieberg seeks comfort from both death and powerlessness in the soft skin of his lover's hand. By embedding fears and anxieties within a tender gesture, the visual dimension of *Watchmen* here marks the sharp distinction between Drieberg's shifting, relational masculinity on the one hand, and the beautiful ideal of classical masculinity and the constant masking of threat in modern masculinity on the other.

There is a second tender act of love embedded within the images of destruction: two silhouetted figures embrace and kiss as they are taken apart by the nuclear blast. There is obvious reference here to the shadowy and spectral image of the embracing lovers intermittently deployed throughout the whole work.[31] This visual reference suggests that the concept of spectrality is embedded within Drieberg's relational masculinity: in a similar way to how the idea and attainment of rationality remains haunted by our feelings and impulses, and the astonishing dimensions of the moral self remain spectral in relation to (and thus haunt) rational attempts to capture it, here Drieberg's heroic strength, like that of modern masculinity, is haunted by that which

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[30] See ibid: Chapter II, pp. 10-11 (regarding Blake); Chapter XI, p. 19 (regarding Veidt). Note, of course, that Veidt's 'success' in the matter is not entirely unproblematic: he destroys half of New York City in order to achieve world peace. There is surely a discussion to be had on this specific point in relation to the moral limits of utilitarianism, but it is not the concern of this thesis.

[31] See Section 6.2.

threatens it. Relational masculinity, however, does not simply mask this threat with an image of strength and power.

Battersby taps into a similar notion of a haunted self when she discusses Emily Dickinson's 'One need not be a chamber – to be haunted'. This poem, she argues, through its rejection of the singular and stable 'I' associated with the Kantian transcendental self (the persistent self which defines itself against its other), contains instead:

> "…a 'one' that moves into an 'our' since the one contains within itself the bodies and ghosts of the others that haunt it: 'ourself behind ourself, concealed'. It is the unseen phantoms in the dark corridors of the brain that terrify, making the 'one' into an 'ourself'."[32]

Through our interaction with otherness, we become 'haunted' by those others; we cannot sever our links with those around us and in our past, they become a sublime dimension of ourselves, hidden in the 'dark corridors' of our psyches, always ready to *disrupt* the masculine presumption of a separate and stable 'I' that can order the world and the self through its wielding of reason. David Gurnham, as we saw in Chapter Two, comes to a similar conclusion through analysis of the myth of Narcissus: the spectral presence of the other within our selves (represented by the reflected image of Narcissus which vanishes as he tries to touch it) pushes us closer to consideration of the specificity of the other when tackling ethical problems.[33] Thus, Drieberg shows us that the self is haunted by that which threatens to overthrow the stable self's seat of power in the ordering of the world. Whereas modern masculinity responds to this sublime threat in a way that results in the denial or masking of otherness, Drieberg shows us that, through a continual and symbiotic interaction with the indeterminate otherness of the world, an identity can be patterned from that otherness which is secure in its fluidity and able to respond and change, that is 'restless', rather than

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[32] Battersby, *The Sublime, Terror, and Human Difference*: p. 113. The poem is reproduced in full in Appendix Two of this thesis.

[33] See Gurnham, 'The Otherness of the Dead'. See also, regarding the repressed urges that haunt the self and which we project onto the external other and thus denigrate and control as 'criminal' or 'deviant', and accordingly dehumanise the criminal individual, the discussion at notes 31-33 in Section 6.2.

having to violently mask the threat posed by the chaos of otherness. A dimension of spectrality is thus embedded in the concept of relational masculinity. With relational masculinity the self remains haunted by otherness – as rationality is haunted by its aesthetic, homo-cultural origins and the excess of the astonishing self – but in a way that is non-threatening, in a way that does not turn away from the indeterminacy beyond the rational surface. Relational masculinity, as an epistemological concept, thus reconfigures the boundaries of the rational surface, enabling engagement beyond its borders to take place and can thus ground the future approach to ethical models of the moral self.

9.4 Nietzsche and the non-linguistic

9.4.1 *The Nietzschean self*

In Chapter Six it was argued that, as part of the self as a fluid and connected group of internal and external influences, significant spectral dimensions of the self were to be found in the Nietzschean idea of the self as a loose collection of 'drives'.[34] Alongside the indeterminacy of the self as understood with respect to its shifting, symbiotic nature under the metaphysics of becoming, the spectral drives of Nietzsche's self constitute major dimensions of the astonishing self that criminal theory needs to engage with if the responsibility links between embodied individuals and their lived behaviour are to be meaningfully and ethically understood. Although there are other dimensions of the self-as-nexus that could be considered under relational masculinity, they cannot all be considered within the limited space of this thesis. However, the emblematically spectral nature of Nietzsche's 'drives' make his philosophy a suitable focus in the move beyond the boundaries of the rational surface. Moreover, Nietzsche's model of the self also highlights the interlinking of language and rationality, especially in relation to how the self is modelled grammatically as an 'I' that (for example) 'thinks', and how linguistic categories mask the infinite variety of living, embodied forms. As we have already noted, the limits of the linguistic is an important

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[34] See Section 6.5.

concern for legal theory and one that can be seen in the comics form (which is also linked with Nietzsche's more general metaphysics). The Nietzschean sublime also involves the constant threat to order posed by the potential for the infinite difference of living beings to return and disrupt or shatter rational categories: the spectral threat of chaos. It is Nietzsche's model of selfhood, then, that will be the driving focus of this section.

In Chapter Four the nature of Nietzsche's metaphysics of surface was described as a reconfiguration of surface and its relation to depth – there is only surface, there is no depth or beyond. Rather, the surface of experience is complex and folded. It is impossible for it to be perceived in its entirety without losing significant amounts of important detail, and if a more detailed perspective is maintained then the whole is lost.[35] This shares a strong similarity with Desmond Manderson's observations of the nature of the fractal – there are manifold levels of analysis or perception, each with their own details and limits, and none able to give an ultimate picture of truth.[36] In Chapter Four the importance of this metaphysics of surface was noted in relation to the surface of the comics page – a field alive with layers of tensions and interplay; the page surface is complex and unknowable, always re-interpretable. Significantly, the comics form embeds the linguistic and the rational amongst the complexities of the visual (or non-linguistic) and non-rational, and thus helps to model Nietzsche's claim that rationality is merely one limited mode of understanding the complex surface amongst many. This approach also has significance for our understanding of the sublime that does not result in a modern-masculine masking of the astonishing complexity outside the rational surface. Relational masculinity suggests a less violent or compensatory reaction to the threat of the sublime, a more accepting position against the otherness of the complex surface. Recalling Nietzsche's metaphysics, this position becomes one situated amongst the shifting indeterminacy of a chaotic universe in such a way that recognises the permeable and fluctuating nature of the self, and the limitations of conceptual thought, without attempting to cover up this

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[35] See Section 4.4.

[36] See Section 9.5.

chaos by establishing some kind of isolating and complacent 'happy' surface of rational forms.

While Wayne Morrison claims that Nietzsche "portrayed the cosmos not as ultimately a coherent rational structure but as an enormous flux of power(s) where we were lonely souls",[37] the relationality that comes out of Battersby's reformulation moves us into a world of unavoidable interaction and symbiosis with this shifting 'cosmos'. Morrison observes the masking character of reason in Nietzsche's philosophy, suggesting that the general structures of legal understanding are similarly supported by a formless chaos of impulses.

> "Nietzsche implies we must not be fooled by claims to rationality; beneath apparent rationality lies irrationality. Behind the reason of the law lies unreason. Dig beneath the surface of civilisation and one finds a mass of conflicting emotions and desires. Reason imposes order".[38]

This pressing of chaos into 'stable' and reductive forms loosely maps onto the distinction between the Apollonian and the Dionysian that Nietzsche describes in *The Birth of Tragedy*. The Apollonian, for Nietzsche, represents rational knowledge, beauty, the world of appearances, restraint and moderation, individuality; the Dionysian, on the other hand, is formless flux, revelry, dance, horror, self-abandonment, the loss of individuality and release into the communal.[39] The division between these two energies or realms in Nietzsche's early work still retains an understanding of the 'veiling' of reality: "Apollonian consciousness... cast[s] a veil over this Dionysian world".[40] Note that Morrison also uses the terminology of 'going beneath the surface'. As Nietzsche's philosophy develops, and his notions of surface and depth become more sophisticated (as his metaphysics of surface demonstrates), he loses the simple model of surface and what is beneath, but retains 'Dionysus' as emblematic of the chaotic and formless universe that exists outside the limited

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[37] Morrison, *Jurisprudence*: p. 293.

[38] ibid: p. 295.

[39] Nietzsche, *The Birth of Tragedy*: pp. 21-26. See also p. xvi of Douglas Smith's introduction to this edition.

[40] ibid: p. 26.

knowledge of rationality.[41]   The argument in Chapter Seven that we move towards attaining rational coherence in our understandings because we have strong beliefs in our selves as rational and coherent also suggests a rational masking of Dionysian energies.   This feeds into the making of the world, linking the two dimensions of spectrality: the compression of the self into a rational form – the denial of the formless and multiple drives of the self – results in the denial of similar impulses in the construction of knowledge.

A general aspect of Nietzsche's metaphysics calls for a rejection of the 'hinterworldly', that outside of human experience, a world 'beyond'.   This beyond is not to be confused with the Dionysian, but rather signifies the attempt to 'know' about that which we cannot experience in life, such as God, or existence after death. Focusing upon this beyond effaces understanding and knowledge of the empirical world in which we live, the world of the earth, of life, and for Nietzsche this is a dimension of existence which we cannot transcend.[42]   As already noted, Nietzsche conceives of the self as consisting of various drives and impulses, only some of which are 'rational'.   We saw a tendency towards the rational dimensions of the self with models of moral identity in criminal theory in Chapter Five.   Nietzsche observes a similar tendency in *Beyond Good and Evil* from a linguistic perspective.   The tendency is to associate the entire self with the grammatical 'I', the rational and causative agent of language.   However, Nietzsche argues, in dissecting 'I think' one needs to distinguish 'thinking' from other sensations such as 'feeling' or 'willing'; thus 'thinking' depends upon comparison between the current state of the self and past states that have been experienced, between various 'types of knowing', or various drives of the self.[43]

Elsewhere we can see that Nietzsche understands the self as an uncertain and shifting multiplicity which cannot be understood simply.   He claims that rational

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[41] For a discussion on Nietzsche's understanding of the sublime in *The Birth of Tragedy* as a genealogy of his later reconfiguration of surface/depth, see Battersby, *The Sublime, Terror, and Human Difference*: pp. 157-76.

[42] See Nietzsche, *Thus Spoke Zarathustra*: pp. 20-22.

[43] See Nietzsche, *Beyond Good and Evil*: pp. 16-17.

knowledge knows only "the spark of the spirit", but does not see "the anvil that it is, nor the cruelty of its hammer",[44] an observation that shares much with the notion of (substantive) spectrality. In a similar vein, he states that our "strongest drives, the tyrants in us, subjugate not only our reason but our conscience as well".[45] Highlighting the difficulty in deciphering this multifaceted self, he notes that "our actions shine with different colors in turn, they are rarely unambiguous, – and it happens often enough that we perform *multi-colored* actions";[46] that is, our behaviour or creations are driven not by a simple unitary 'I', but by a complex intersection of drives operating 'behind the scenes' of the rational self. It is those who adhere to the belief in a unitary, rational self that Nietzsche calls the 'despisers of the body'. They hate, and thus efface, the panoply of drives and impulses that influence our actions, the non-hinterworldy dimensions of living embodiment that constitute the Nietzschean self, and that haunt the very idea of reason.[47]

> "Behind your thoughts and feelings, my brother, stands a powerful commander,
> an unknown wise man – he is called self. He lives in your body, he is your body."[48]

The body here is symbolic of all that is non-hinterworldly: the infinite difference and variety of the non-conceptual world, the living empirical world, in which we, as *embodied* humans, exist and grow. By rejecting this lived embodiment and the panoply of drives that goes with it, and focusing upon the singular rational and grammatical 'I', the 'despisers of the body' abstract a small part of the self away from the living individual – a process that is almost identical to the abstraction that occurs in the rational choice models of the moral self in criminal theory.

Nietzsche's model of the self thus suggests the existence of powerful impulses that operate outside the boundaries of the simplified 'I' of the rational self, impulses which criminal theory's belief in the self as generally able to rationally direct its various

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[44] Nietzsche, *Thus Spoke Zarathustra*: p. 80.

[45] Nietzsche, *Beyond Good and Evil*: p. 71.

[46] ibid: p. 110.

[47] See Nietzsche, *Thus Spoke Zarathustra*: pp. 22-23.

[48] ibid: p. 23.

dimensions is unable to appreciate. As Sarah Kofman observes, conscious, rational thoughts for Nietzsche are merely simplified reductions of that which is unconscious; consciousness becomes a metaphor for the unstructured drives and impulses of the self and vice versa.[49] Her understanding of metaphor in Nietzsche's philosophy is instructive here:

> "Metaphor is linked to the loss of the 'proper' understood as the 'essence' of the world, which is indecipherable and of which [we] can have only representations which are quite 'improper'".[50]

Thus there is no knowable 'essence' to the self (no 'beneath'), but only that which we can come to know through various spheres of representation (the complex 'surface' of the self), of which language is only one example (for Nietzsche, the poorest example).[51] The importance of Nietzsche's move beyond language is something that Battersby only touches upon; but for the argument of this thesis in relation to the move into the non-rational and non-linguistic, it needs to be drawn out in detail.

9.4.2 Escaping the rational surface

Battersby's explanation of Nietzsche's move beyond the linguistic is limited to her quotation of a passage from his essay 'On truth and lies in a non-moral sense', which she reads as uncovering the way in which difference is masked by general categories. This passage is important, and worth repeating here in full.

> "'Every concept arises through the equation of unequal things. Just as it is certain that one leaf is never totally the same as another, so it is certain that the concept 'leaf' is formed by arbitrarily discarding these individual differences and forgetting the distinguishing aspects. This awakens the idea that, in addition to the leaves, there exists in nature the "leaf": the original model according to which all the leaves were perhaps woven, sketched, measured, colored, curled, and painted – but by incompetent hands, so that no specimen has turned out to be a correct, trustworthy, and faithful likeness of the original model... we obtain the concept, as we do the form, by overlooking what is individual and actual; whereas nature is

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[49] Sarah Kofman, *Nietzsche and Metaphor*, trans. Duncan Large (London: Athlone, 1993): p. 25.

[50] ibid: p. 14.

[51] ibid.

acquainted with no forms and no concepts, and likewise with no species, but only with an X which remains inaccessible and indefinable for us.'"[52]

The Nietzschean sublime, she argues, employs the recall of these forgotten differences (put differently, the recognition of the infinite complexity of the surface) which shatters conceptual understanding that inherently relies on general categories. With this point we can see that the spectrality associated with attempts to categorise individuals under abstract masks, discussed in Chapter Six, finds a more general application with respect to grammatical concepts: the inaccessible and indefinable 'X' haunts (threatening to return and shatter) the general category which attempts to mask it. More specifically, the astonishing dimensions of the living individual (the 'X') haunt rational concepts of the moral self (the 'I'). This can be seen in relation to the rational surface of which the yellow smiley is emblematic in *Watchmen*.[53] As Dave Gibbons says of this 'central motif' of the work, it shows "the ultimate simplistic cartoon image splattered with real, messy blood".[54] This motif, then, suggests the idea of conceptual understanding, of simplified rational forms, being disrupted by the 'messy' chaos of life, the excess and threatened return of lived, embodied reality. It represents the life-blood of astonishing humanity splattered across the abstract image; the living, full-blooded 'X' that haunts the 'happy' complacence of the 'I'. There is, however, more to be understood in relation to the operation of linguistic categories in Nietzsche's philosophy.

In *Daybreak*, Nietzsche describes how the use of language as the primary dimension of 'truth' or 'knowledge' actually serves as a hindrance to understanding.

> "*Words lie in our way!* – Wherever primitive mankind set up a word, they believed they had made a discovery. How different the truth is! – they had touched on a problem, and by supposing they had *solved* it they had created a hindrance to its solution. – Now with every piece of knowledge one has to

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[52] Battersby, *The Sublime, Terror, and Human Difference*: p. 188. (Quoting Nietzsche.)

[53] See Figure 8.1 for a quintessential example of this motif.

[54] Gibbons, Kidd, and Essl, *Watching the Watchmen*: p. 45.

stumble over dead, petrified words, and one will sooner break a leg than a word."[55]

Nietzsche thus claims that we cling solely to the rational and the linguistic, to the extent that (symbolically) we would rather suffer bodily injury than relinquish the security that language brings to our ability to understand the world. The non-linguistic Dionysian, the formless chaos of impulses, drives, and energies of the universe and the fluid self, thus bring a profound threat to the security of language, and our concomitant security in the world as knowable. The deeply ingrained reliance on language in criminal theory (and legal knowledge more generally), alongside the prominence of rational understandings of the world and the moral self, exposes that theory and the world it makes to this same threat.

Nietzsche's point is that by being fully dependent upon linguistic security not only do we miss the delusion of language as something that is 'set up' or made by humans, a rational surface on which we can 'know' the world, but we are also unable to penetrate the formless and life-affirming energies of the Dionysian. The modern-masculine denial of this sublime threat serves to reinforce this delusion. We come up against the limits of the knowable, the edges of the conceptual world, of the rational surface; but rather than moving into the formless and energetic potential outside those boundaries, rather than freeing ourselves "from the seduction of words"[56] and engaging with the astonishing dimensions of lived existence and the embodied individual in more open and sensitive ways, we violently force or abstract the fluid chaos of life into the limited, and limiting, generalities of rational language. These generalities, as spectrality suggests, are then constantly haunted by the excessive difference they mask and the threat of its disrupting return (substantive spectrality), as well as the lived impulses – that is, the influences operating in the astonishing homo-

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[55] Friedrich Nietzsche, *Daybreak: Thoughts on the Prejudices of Morality*, ed. Maudemarie Clark and Brian Leiter, trans. R. J. Hollingdale (Cambridge: Cambridge University Press, 1997): p. 32. (Emphasis in original.)

[56] Nietzsche, *Beyond Good and Evil*: p. 16.

cultural contexts within which knowledge is made – that shape this modern-masculine masking (epistemological spectrality).

Part of the threat of difference comes from the profound variety of shapes and forms that exist once we break out of the tendency to press everything into general categories. Picking up on the discussion of leaves and 'leaf', Nietzsche talks of the tree:

> "...just as little do we see a tree precisely and completely, with respect to leaves, branches, colors, and shape. We find it so much easier to imagine an approximate tree instead."[57]

Perhaps closer to Battersby's reading of this point in relation to the effacement of human difference, Osterman/Manhattan's model of human value can be seen as exposing how the mere equality of value (all humans are equally valuable as they are all equally rare[58]) has something of a platitude about it. One's mere equality with others accesses nothing of the meaningful experiences of one's shifting, living existence – it actually effaces it by claiming that we are all the same, thus equating unequal things. The relative ease to conceive of a general idea of something ('the human', 'the self') rather than the intricate complexities of each specific thing in existence (individual living people) keeps us within the locus of the rational surface.[59] Coupled with this is Nietzsche's notion of perspectivism, which serves to limit the horizons of our experience and our ability to know, via reason or otherwise:

> "The habits of our senses have woven us into lies and deception of sensation: these again are the basis of all our judgments and 'knowledge' – there is absolutely no escape, no backway or bypath into the *real world*! We sit within our net, we spiders, and whatever we may catch in it, we can catch nothing at all except that which allows itself to be caught in precisely *our* net."[60]

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[57] ibid: p. 82.

[58] See Section 7.5.

[59] See also, regarding Adorno's arguments relating to the denial or repression of difference (or 'non-identity') in order to establish and maintain conceptual 'identity thinking', Barron, '(Legal) Reason and Its "Others"': pp. 1065-66.

[60] Nietzsche, *Daybreak*: p. 73. (Emphasis in original.)

We cannot escape this 'prison' of perspective; the 'real' is outside our experience because we cannot experience all of 'reality', and its infinite detail, at once.

The limits of language in this respect can be seen, as Adam Gearey describes, in that which exceeds the text in the works of Shelley. For Shelley, poetry had the ability to summon something excessive, something 'more than' the mere words, elements of which always remained elusive or dissipated as he tried to capture it in his work.[61] For Nietzsche, comprehensive general categories and universal truths are unattainable; and this leads to the conclusion that all is surface. There is no absolute or universal true reality 'beneath' the surface, no general categories of things beyond the unique forms of the empirical world; there is no hinterworldly, there is only the earth, experience, the senses – the complexities and formless chaotics of life that elude and haunt the net of language and the boundaries of the rational surface.

The rational surface, as an epistemological phenomenon of human knowledge-making, limits not only access to the unstructured universe, but also to the indeterminate and astonishing dimensions of the *self*. Relational masculinity, however, reconfigures our approach to the moral self and to knowledge of the world in general. Applying the reading of Nietzsche just undertaken to modern and relational masculinity, these conceptual models can be seen to remain haunted by the inability of rational language to go beyond the limits of the rational surface. The constant threat to the security of the rational, linguistic, and world-synthesising 'I' sits as a sublime dimension embedded within the models of modern and relational masculinity. The 'female sublime' described by Battersby moves towards the unification and joining of the self and the other, an interpenetration between the two, and a lack of terror in the encounter.[62] When the world is threatened at the boundaries of conceptual thought, modern masculinity steps in and 'saves' it through its ability to wield reason and language, and to cut abstract lumps of certainty out of the seething mass of unstructured chaos. Relational masculinity, on the other hand,

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[61] See Gearey, *Law and Aesthetics*: pp. 20-21.

[62] See Battersby's discussion of the female sublime in Karoline Von Gunderode's poetry: Battersby, *The Sublime, Terror, and Human Difference*: pp. 119-27.

inspired by Battersby, calls for a much more open response. Relational masculinity involves an orientation to the supposed threat to the security of the rational and the linguistic from outside the rational surface that accepts, rather than masks, our modern-masculine limitations and weaknesses, and our location in relation to others and a complex world that is other. The formless and astonishing indeterminacy of the non-rational and non-linguistic universe outside the rational surface is not masked in relational masculinity, but the generative potential of its chaos is embraced; its ability to be endlessly (re)configured is taken as a source of positive progression, of constant overcoming or becoming, of 'restlessness', rather than a threat to the security of rational language and the order of the world.

9.5   Approaching chaos

In Chapter V of *Watchmen*, Moore and Gibbons make overt reference to William Blake's poem 'The Tyger'.[63]   The current section argues that the sublime shattering of conceptual understanding that can be read in Blake's poem is reconfigured through *Watchmen*'s deployment of it as the spectral infusion of the rational surface with the threat of chaos, a threat that relational masculinity can reconfigure to enable engagement with the non-rational and non-linguistic. Overcoming this spectral threat requires an appreciation of the 'beauty' of chaos, not a fearful reaction to the challenge it poses to order. Elaine Scarry suggests a connection between beauty and truth, and between beauty and justice. It is the experience of beautiful objects that is important for Scarry; thus her claim of a link between beauty and truth is not one of access to a universal realm of accuracy, nor that beauty and truth are identical:

> "...but rather that it [beauty] ignites the desire for truth by giving us, with an
> electric brightness shared by almost no other uninvited, freely arriving perceptual

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[63] Note that, although William Blake can generally be seen to engage with a dual visual-textual artistry, in specific relation to 'The Tyger' his accompanying plate-design adds little to the reading of the poem. As Jean Hagstrum observes: "the magnificent verbal 'Tyger' is unworthily illustrated by a simpering animal", arguing that the poem demonstrates an instance where Blake's usual standards of complexity and interplay are not met. Hagstrum, *William Blake Poet and Painter*: p 86.

event, the experience of *conviction* and the experience, as well, of error [when we see beauty where we thought there was none]".[64]

Thus, she argues, beauty does not distract us from the work of justice as the division between law and artistic creation may suggest,[65] but rather places "requirements on us for attending to the aliveness of our world, and for entering into its protection".[66] Experiencing beauty, Scarry argues, compels us to care more about the world, and about making the world as beautiful, and as just, as we can:

> "...surely what we should wish is... a world where the pleasure-filled tumult of staring is a prelude to acts that will add to the beauty already in the world – acts like making a poem, or a philosophic dialogue, or a divine comedy; or acts like repairing an injury or a social injustice. Either beauty already requires that we do these things (the essentialist view) or we are at liberty to make of beauty the best that can be made – a beauty that will require that we do these things."[67]

The link between beauty and justice, which suggests that order, symmetry, and equality are characteristics of a just society, is more than an analogy for Scarry.[68] Systems of justice, Scarry notes, are distributed over too large a field to be properly comprehended by the senses in the way a beautiful object can be; thus the 'equality of beauty'[69] both exists apart from justice and is more accessible to the senses, and is thus a more immanent imperative towards the creation of a better world.[70]

Desmond Manderson's position on the aesthetics of justice suggests that the imperative towards beauty and order may not be the only legitimate aesthetic desire when it comes to criminal categories. Like the fractal (which maintains the details and variation of its lines regardless of scale and is thus infinite but perceived in a finite

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[64] Scarry, *On Beauty and Being Just*: p. 52. (Emphasis added.)

[65] ibid: p. 57.

[66] ibid: p. 90.

[67] ibid: pp. 74-75.

[68] ibid: pp. 95-97.

[69] ibid: p. 108.

[70] See ibid: pp. 100-15.

space), legal knowledges exist on multiple levels and scales,[71] each with their own degree of uncertainty and detail, and none able to give an ultimate or 'true' picture.[72] Legal knowledge is also dynamic, with unpredictable, non-linear interactions and vast 'feedback loops' between its multiple layers.

> "It serves us well to understand that this process is itself a dynamic one and its results therefore nonlinear. For law is generated by the constant iteration and reiteration of rules and understandings, a feedback loop as inherently unpredictable as Chinese whispers... Modernism assumes almost without exception that 'systems' are normally linear in function... A small input will have a proportionally small output. But nonlinearity turns that on its head. Small variables have disproportionate results as they magnify and feed back through the system."[73]

This chaotic and non-linear nature of the development of legal (including criminal) understanding, Manderson argues, makes the importance of detailed and contextual knowledge apparent.[74] Importantly, there is also a strong aesthetic dimension to chaos:

> "Chaos, it turns out [from images of fractals], is beautiful and colourful; in architecture, art, and human life, we value the nonlinear and the fractal and find, on the contrary, linearity to be deeply alienating. Chaos, then, is not to be feared and not to be confused with anarchy. It is above all an appeal to *complexity* and to the surprise it promises... [It] asks us to abandon the relentless and arrogant system building of modernity and direct our attention instead to the poetry and power of the local and the particular."[75]

This chaotic pluralism is more than a multiplicity of monisms, which suggests stasis, a lack of interaction, no engagement with difference, and ultimately solipsism.[76]

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[71] Fractals are the result of complex mathematic algorithms, and can be manipulated for artistic purposes. For some examples of fractals, see '43 Spectacular Examples of Fractal Art' http://www.presidiacreative.com/43-spectacular-examples-of-fractal-art/, accessed on 21 April 2011.

[72] Manderson, *Songs without Music*: pp. 177-79.

[73] ibid: pp. 179-80.

[74] ibid: p. 180.

[75] ibid: pp. 181-82. (Emphasis added.)

[76] ibid: pp. 182-83.

"On the contrary, beauty lies in their conjunction, in the way tiny perturbations may have unpredictable results. The result is a vibrancy and anticipation which is worth celebrating."[77]

The pluralistic and indeterminate nature of criminal understanding is, as Manderson suggests, a thing of beauty rather than something to be masked or reconfigured into a rationally coherent whole.[78] Uncertainty, indeterminacy, unpredictability, and particularity are not failures of analysis once we break the connection between beauty and order.[79]

Recalling Scarry's notion of beauty as an imperative towards the creation of a more ordered (more just) world, it would seem that Scarry's and Manderson's positions are dramatically different. Scarry maintains that order and symmetry are the characteristics of beauty that give us the 'equality of beauty', pushing us towards the creation of just systems of equality; Manderson observes the beauty in a system that is chaotic, indeterminate, and unpredictable. Manderson's point, however, is that the assumption that legal knowledge should be ordered and coherent is not a necessary or natural imperative; rather, it is a particular goal based upon our desire to be rationally coherent beings and our aesthetic preference for an ordered beauty over the shifting challenge (and generative potential) of chaos.[80] Accepting the aesthetic underpinnings of the world we create, and the lack of necessity for beauty (or justice) to be ordered, there is still something to be taken from Scarry's work. Combining her work with that of Manderson, we can see the more functional point that aesthetic appreciation plays a vital role in making the world 'better' or more 'just'. It was argued in the previous chapter that in approaching what is outside the rational surface, we must be wary of succumbing to a perceived threat of nihilism from the looming chaos of the indeterminate universe.[81] The aesthetics of chaos just discussed, when considered in
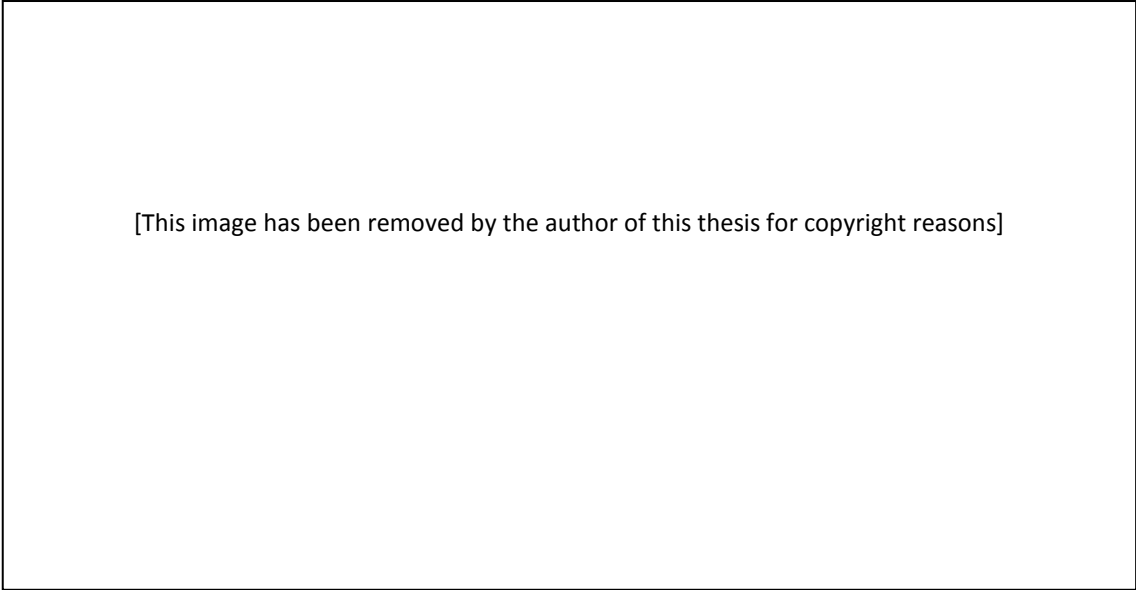
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[77] ibid: p. 183.

[78] cf. Balkin, 'Understanding Legal Understanding'.

[79] Manderson, *Songs without Music*: p. 182.

[80] See Section 7.4.

[81] See Section 8.2.

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Figure 9.5: Moore and Gibbons, *Watchmen*: Chapter V, p. 4.

light of the operation of the modern-masculine sublime with respect to the maintenance of the rational surface, suggests that if we are unable to appreciate the chaos outside the rational surface, its beauty and generative potential, then we will want only to cover it up, mask it, and thus remain unable to engage with its astonishing reality.

In *Watchmen* these themes collide, via the work of William Blake, with the idea of spectrality. The title of Chapter V can be seen in Figure 9.5 as 'Fearful Symmetry', an overt reference to William Blake's 'The Tyger', the first stanza of the poem itself being quoted at the end of the chapter:

> "Tyger Tyger, burning bright,
>   In the forests of the night;
>   What immortal hand or eye,
>   Could frame thy fearful symmetry?"[82]

The phrase 'fearful symmetry' itself, reinforced by the jarring of 'eye'/'symmetry' with the ordered rhyming-couplet structure of the poem, suggests a problematic relationship between beauty and order. Order and symmetry, as we have just seen, are traditionally associated with beauty, and thus should not be 'fearful'. This

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[82] See Moore and Gibbons, *Watchmen*: Chapter V, p. 28. Blake's poem is reproduced in full in Appendix Three.

juxtaposition is emblematic of the key themes in Blake's poem, which approach the Nietzschean sublime. What is typically beautiful, nature, in Blake's poetry becomes 'fearful'. There are references throughout the poem to the 'dreadful' dimensions of nature; the burning 'tyger' with the 'deadly terrors' of its brain; the 'dread grasp' that 'dare' frame it. There are references also to 'deeps and skies', and the stars that 'throw down their spears' (itself a reference to threat or attack) – examples of indefinite nature that challenge our conceptual understanding. We also see a conflict between the immensity of the earth, of nature and experience, and the hinterworldly 'immortal hand or eye'. This hinterworldly, however, is ruptured by the immense difference found in 'nature': in attempting to synthesise both the 'tyger' and the 'lamb' under the same conceptual maker, Blake's poetry exposes the excessive nature of chaotic earthly reality, of the infinite difference of the complex surface. Thus the beauty, or 'symmetry', of nature becomes 'fearful', chaotic, and shatters conceptual understanding.

In Figure 9.5 this fearful symmetry is reconfigured with respect to spectrality and chaos. The face of Edward Jacobi[83] is located above the word 'fearful', whilst Rorschach's masked face is above 'symmetry'. At first glance, the association seems quite simplistic: Jacobi is afraid, fearful, whilst Rorschach's mask is symmetrical. However, the connection with Blake's poem goes deeper than this: what Jacobi is fearful of is precisely Rorschach, and his symmetrical mask. What is usually beautiful and ordered – the symmetrical – is now a source of terror. Rorschach's mask, as argued in Chapter Six, is layered with spectrality: Rorschach masks his fleshly self with the indeterminacy of the ink-blot, his embodied difference haunting the abstract mask; the indeterminate nature of the mask itself haunts attempts at settled categories of self. More generally, the spectrality of human feeling, of astonishing reality, of the complex surface, haunts our 'happy' homo-cultural structures of knowledge and reason, both substantively and epistemologically. We have also seen, above, that the

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[83] Edward Jacobi, alias 'Moloch', is a retired 'super-villain' who has recently been released from prison. During Rorschach's investigations, he (violently) questions Jacobi a number of times for information relating to the death of The Comedian: see ibid: Chapter II, pp. 20-24, Chapter V, pp. 1-6.

masculine self is haunted by the threat of otherness, of that outside the rational surface – the indeterminacy of the non-rational and non-linguistic. The symmetry of Rorschach's mask is divorced from the beauty of order, and is associated instead with the threat of the otherness that haunts. The symmetry of the mask, the conceptual order of the world we find with the modern-masculine masking of chaos in the sublime, is thus infused with that which threatens to shatter it. The actual shattering of conceptual understanding in Blake's poem is thus reconfigured in Figure 9.5 as the spectral infusion of conceptual understanding with the threat of such disruption, the threat of chaos. As the above discussion suggests, approaching the non-rational and non-linguistic requires an appreciation of the generative potential and beauty of chaos, not a fearful reaction to the threat it poses to order. Beautiful order is not inherently just; indeed, it can be seen to mask the unique and meaningful reality of astonishing individuals, to destroy that meaning in favour of rational comprehension, and thus to engender injustice in criminal theory's models of the moral self. Relational masculinity enables an approach to spectral threat which does not succumb to the modern-masculine ordering of the world under concepts, does not tend towards general categories, but accepts a symbiosis with indeterminate otherness and the immanence of becoming, and thus retains the astonishment of lived existence through a position of restless engagement.

9.6 Relational masculinity and criminal theory

9.6.1 Enriching understanding of criminal identity

In Chapter Five we saw that in criminal theory individuals need to be guided by rational motives or aims in order to be responsible, and these 'reasons' for behaviour need to reach a certain level of rationality that is determined by their general coherence and accuracy in relation to a normative conception of external reality. Unlike the 'pure reason' of Kantian abstract autonomy, in criminal responsibility theory we are seen as beings with 'rationality' who possess 'irrational' aspects (such as feelings, senses, and impulses) but are primarily guided by their general ability to shape these indeterminate aspects by accepting or rejecting guiding 'reasons'. To the extent that

we are 'rational', we have the ability to 'choose' (or direct), and are thus responsible for, what we do, think, feel, or believe. As we saw, this model of 'rational choice' may take the fluid dimensions of human feeling into account, but only by making them subservient to the rational will and prioritising rationality as 'the' legitimate moral concern. We have emotions, desires, beliefs, and feelings, and they impact upon how we behave, but it is the general ability to *rationally* direct those dimensions of ourselves that underlies models of the moral self in criminal theory. The prioritisation of rational choice over other indeterminate or experiential influences engenders at least a partial abstraction of the moral self away from the lived entirety of the astonishing individual, an abstraction that rational choice shares with the idealised separation of abstract and contextual self in Kantian moral autonomy. In both rational choice and abstract autonomy it is our ability to employ our rational will in choosing our behaviour that underpins our responsibility. If we examine only part of the self (be it purely or partially abstract) by trying to press it into rationally linguistic models, the astonishing reality of human behaviour and action is largely overlooked and thus cannot be meaningfully encountered in theoretical models.

This excessive nature of the human is essentially what is contained in the substantive dimension of spectrality: astonishing humanity is always already more than abstract categories can contain. In terms of the Nietzschean sublime, the infinite difference of the embodied individual can be seen to threaten to return and shatter, and thus haunt, general (rational-linguistic) concepts of identity; it is the 'X' that haunts the 'I'. As we saw through Chapters Six and Seven, the making of knowledge in a way that orders the world under rational concepts is interlinked with the belief in the rationally coherent 'I'. More specifically, the legal knowledge of criminal theory relies upon such a belief in the (ideal) rational self. The epistemological perspective that structures such interlinked understandings of the world and the self, the 'rational surface', describes a way of knowing about the world that interacts with the complexity of living reality, the infinite difference of embodied forms, through the synthesis of chaotic existence into rationally linguistic concepts. This 'happy' surface is then haunted by infinite difference, the 'X' that threatens to disrupt the stability, or

'knowability', of the world qua (rational) knowledge of the world. By reconfiguring the operation of this chaotic threat into something fluid, generative, and constantly (re)accessible, relational masculinity suggests a way that criminal theory can encounter the non-rational and non-linguistic (that is, unstructured or unsynthesised) dimensions of complex lived reality. Engagement through this epistemological concept is theoretical, enabling understandings of criminal identity to be developed that are better able to comprehend the complex and shifting relationships between living, astonishing individuals and their embodied and meaningful behaviour, and thus opening the way to more ethical approaches to responsibility.

In Chapter Two we saw a number of theoretical approaches that are relevant to the general ethical move towards more comprehensive and meaningful engagement with the realities of unique living individuals argued for by this thesis. Jody Freeman, tapping directly into the ethical concern with understanding the other that underpins this thesis, argues that legal theories and texts do not simply describe reality, but help to constitute it; thus they need to respect individual identities and not rely upon general concepts that are potentially damaging due to their effacement or overlooking of the 'reality' of people's lived embodiment.[84] Ian Ward suggests that we can gain a better, richer understanding of the experiences of particular extreme dimensions of human existence by engaging with aesthetic descriptions of those experiences.[85] His focus is on terrorism, but the experiences of criminal perpetration and victimisation could also be explored in this way as part of an enriched engagement with the living and embodied dimensions of criminal responsibility. Martha Nussbaum sees similar benefits for aesthetic descriptions in helping us to understand and imagine more richly, meaningfully, and empathetically the lived realities and inner worlds of other people, particularly those distant or different from ourselves.[86] This kind of benefit could also lead to more ethical theoretical models of those 'others' being developed. On a similar level, the approach proposed in this thesis is primarily concerned with

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[84] See Freeman, 'Constitutive Rhetoric'.

[85] See Ward, 'Towards a Poethics of Terror'. See also Skinner, 'As a Glow Brings out a Haze'.

[86] See Nussbaum, *Poetic Justice*.

promoting theoretical engagement with the vast, irreducible complexity of the world and the humans who populate it in a way that is able to encounter this fluidity outside the confines of existing and limited rational concepts. Melanie Williams's work shows how we can use the literary aesthetic in a kind of 'theoretical play' that is (relatively) free from the disciplinary confines of orthodox knowledge. This fluid engagement enables the aesthetic to be encountered as an alternative discourse on questions of ethics and jurisprudence, including understandings of human nature. Williams moves us closer to an ethical understanding of real, living individuals when she calls for the derivation of an 'ought' to come only from an *authentic* 'is'.[87] Similarly concerned with aesthetic engagement, we have seen that Manderson's work taps into the inherently aesthetic nature of human experience and how recognising that inherence can enrich our understanding of knowledge production in a legal context.

Relational masculinity, as a methodological approach to theoretical engagement, brings together these multiple dimensions of enriching understanding. It incorporates the aesthetic as sensory experience, thus promoting concern with ethnographic and qualitative empirical research and the theoretical examination and philosophical groundings thereof. More centrally, as an epistemological approach relational masculinity also involves the aesthetic understood as a different order of the conceptualisation of unstructured, spectral reality, (as Manderson terms it, a different 'way of knowing') and theoretical engagement therewith. This includes examining artistic forms as a non-rational or non-linguistic discourse that can help to supplement our understanding of aesthetic experience, and also as an alternative discourse that can help promote 'theoretical play'. This methodology means that interdisciplinary legal theory's project of enriching understanding can be vastly expanded in terms of its ability to engage with fictional narratives: the call to engage beyond the rational surface, both with empirical engagement with lived reality and with aesthetic products as an alternative mode of conceptualisation, potentially brings a wide variety of narrative and artistic forms under consideration alongside empirical and other more

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[87] See Williams, *Empty Justice*.

'orthodox' academic studies. The particular methodological concern of this thesis has been to open legal theory up to the broader aesthetic perspective just described through the turn to graphic fiction: a narrative art-form that encounters the relationships between textual and visual representation and thus questions the adherence to language and enables the development of a way of understanding that is free to 'play' with both the non-rational and the non-linguistic.

9.6.2 *Relational masculinity and responsibility*

This thesis challenges the ways in which we think about criminal responsibility; it challenges the epistemological foundations that shape and limit our understanding of the self-as-responsible in criminal theory in an effort to open up theoretical access to the complex and meaningful realities of living individuals that can enable more ethical concepts of criminal identity to be developed. What this means in terms of substantive criminal theory is that our models of the moral self need to be examined and reconfigured in light of relational masculinity; the relationship between the rational and non-rational dimensions of the self in particular needs to be restructured. The core problem in rational choice is in the primacy given to rationality over other aspects of the individual that are important with respect to understanding our responsibility for what we do. Beliefs, emotions, feelings, memories, relationships, perceptions, doubts, hates, experiences, embodiment, influences, loves, meanings, hopes, fears, desires... all these things and more are also elements in the complex matrix of the self and how that self relates to and makes the world. Subsuming these vast complexities under the general guidance of rationality profoundly limits our ability to understand how the self operates in general; but more specifically it limits our understanding of the behaviours that people undertake and how those behaviours relate to the constitution or operation of the self-as-responsible, and thus our ability to attribute responsibility to that self for those behaviours in a meaningful or ethical manner. If we are to overcome these limitations we need to reconfigure the relationship between the fluid and the rational self through the lens of relational masculinity. Such a reconfiguration, it can be suggested, should produce a way of approaching the self that does not mask or deny its indeterminacy, its spectrality, and

can engage with astonishing living humans *restlessly* – that is, without assuming the primacy of rationality or tending towards general and settled concepts of selfhood. Moreover, such an approach should attribute responsibility not simply to the rational surface of the individual, but also to the fluid and indeterminate dimensions of that individual that feed into his or her patterns of behaviour.

Moving beyond the rational surface of the self in this way encounters the idea that, by accepting a determinative role in people's behaviour for influences and drives that are not under the control of our general ability for 'rational direction' of the self, the attribution of responsibility is undermined. This is the major nihilistic threat that comes from the chaos beyond the rational surface in relation to responsibility theory. If we lose our ability to 'control' our actions because our rational will is undermined, because it is determined by an unknowable 'beyond', then responsibility cannot be securely pinned to us and the very idea of responsibility becomes meaningless. This threat of chaos can be couched more broadly as a threat to the very idea of justice. Richard Sherwin, in his analysis of the film *Cape Fear*, observes how the limitations of the legal system may have changed between the film's original (1962) form and its 1991 remake. The ending, in particular, highlights the potential role of 'fate' or 'chance' in the outcomes of specific events and the bearing this has on the operation of justice. In 1962, the film depicted a heroic ending where the protagonist refuses to kill the man who had been harassing his family, instead surrendering his fate to the justice of law. In the remake, however, this same protagonist smashes a rock onto the head of the antagonist, only to have his 'victim' swept away by the currents of a river before the stone could strike.[88] Sherwin describes the repercussions of such a vision of the limitations of justice:

> "Today we must depend upon purely circumstantial forces, a wind, a current – something more in keeping with a theory of chaos than of rational order. In the

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[88] There are many other alterations, too, that undermine the seeming stability and 'justice' of the 1962 version: see, for his full analysis, Sherwin, *When Law Goes Pop*: pp. 172-85.

end we are left with fateful justice, justice as chance, justice as contingent upon irrational forces beyond our control. But what kind of justice is that?"[89]

The indeterminacy beyond the limits of the rational surface, however, does not have to be understood as a radical challenge to the very idea of justice and our ability to attribute responsibility for behaviour. The challenge, although still radical, is to how we think about the issues of responsibility and the moral self. Engaging with indeterminate dimensions of individuals does not necessarily mean that they are no longer responsible for what they do, but that when we think about the self-as-responsible we need to think about it in a radically different way from what the limited models of rational choice can allow. This thesis has challenged existing approaches to understanding the moral self in criminal theory by examining and taking seriously the idea that there is much more to the self than its ability to rationally choose or direct what it does or how it develops; that there are indeterminate dimensions of emotion, feeling, experience, embodiment, desires, impulses, and influences; astonishing dimensions that are irreducible to rational or linguistic structures, that cannot be contained or properly examined or taken into account by stable, knowable, rational models of the choosing self. These chaotic dimensions that lurk outside the rational synthesis of the world, haunting it with the threat of infinite difference, profoundly challenge the rational choice models of criminal theory by suggesting that those models simply cannot comprehend moral identity in a way that is capable of meaningfully attributing responsibility to living individuals; instead, they pin blame upon a single abstracted dimension of that individual. Accepting the chaos beyond the rational surface of the self does not entail relinquishing all responsibility for behaviour, but simply that we need to rethink what it means to be responsible. Relational masculinity can help in this task because it does not turn back from the indeterminacy of the world and the self in fear, it does not mask that chaotic beyond in order to maintain the security of the rationally linguistic, but accepts the shifting nature of the self and its symbiosis with, and uncertain separation from, the otherness of the world it inhabits, and the constant need to (re)encounter and (re)synthesise unstructured

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[89] ibid: p. 182.

existence. In this way, relational masculinity turns away from the production of settled models of criminal identity, instead accepting the illimitability of the self as a largely non-rational entity that is non-hermetic and constantly becoming. For this very reason, the approach of this thesis precludes the development of a new substantive and comprehensive model of criminal identity: the infinite difference and chaotics of living individuals and embodied reality, if they are to be ethically approached, must be encountered *restlessly*, and cannot be synthesised into stable, unitary forms.

Although relational masculinity may disable us from constructing a neat and knowable model of moral selfhood, we can still see how the standards of responsibility that rational choice adheres to are insufficient. If an individual's behaviour is determined by some non-rational influence, such as his or her emotions or an unconscious desire, then to accept that this influence operates in 'causing' that individual's behaviour is to suggest that he or she did not 'rationally choose' what he or she did, and that he or she is thus unable to be held responsible under the standards of rational choice.[90] Criminal theory attempts to avoid this issue by claiming we are able to rationally direct our indeterminate dimensions, and thus can be held responsible insofar as we are rationally 'in control' of ourselves. One is thus responsible for following a non-rational desire because one is generally able to direct or control one's desires. If an individual 'rationally' directs his or her desires towards robbing banks, for example, he or she is responsible for that desire and the behaviour which stems from it; the fact the desire might actually stem from an indeterminate dimension of the self is overcome by relocating that indeterminate desire as (ideally or normatively) subservient to the rational will. If the desire was accepted as, say, 'an uncontrollable urge' or the result of social influences (or some other indeterminate drive or influence that more accurately reflects the living 'reality' of that individual), this would suggest that the individual was not responsible for that desire or any behaviour stemming from it.

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[90] See, for example, the quotation from Norrie in Chapter Five at note 127.

Alan Norrie argues that many attempts to go beyond individualism in modelling the moral self encounter this problem, stemming from the undermining of Kantian abstract autonomy.

> "Legal theorists see what the modern law lacks in moral terms and so seek out a richer moral account [involving the context of individuals' lives] to remedy the problems. When they do so, however, they realize that the richer moral account may yield more than they bargained for... Underlying this drive beyond Kantianism is the false separation of the Kantian agent from [his or] her broader moral context, while the problem of accommodating the contextual, morally substantive, agent within the law is the result of the law's intrinsically individualist form."[91]

In order to blame a person securely, Norrie argues, judgments of responsibility must be able to consider that person in an individualised form, that is, as separate from any determinative influences from 'beyond' the rationally directing self. Norrie argues that there is a strong tendency to retain some form of Kantian autonomy in attempts to go beyond it because rejecting it completely concurrently undermines any ability to judge 'individuals' as sufficiently responsible to attract criminal blame. This issue also arises in relation to forensic-psychological, sociological, and criminological explanations of crime that seem to locate criminality in the social and psychological structures and systems that people live within, rather than in choosing individuals themselves.[92] As we have seen, Norrie's position is not that we need to blame 'society' *instead of* individual criminals, but that what exists 'beyond' the individual (the 'social context') is at least partially determinative of what an individual does, and thus should attract at least some of the blame for that individual's crimes. Norrie thus side-steps the problem of undermining our ability to attribute responsibility by retaining a 'Kantian' (autonomous) dimension in the criminal agent, rather than claiming to reject it completely.

The argument in this thesis, however, suggests that the problem is in the very structure of responsibility itself. There are important dimensions of the self beyond

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[91] Norrie, *Punishment, Responsibility, and Justice*: pp. 38-39.

[92] For an extended introduction to these kinds of 'predestined actor' theories of criminality, see Hopkins Burke, *An Introduction to Criminological Theory*: pp. 74-120.

the typical 'rationally choosing agent' of criminal theory, and adherence to the rational surface that maintains this understanding of individuals limits access and understanding of these indeterminate aspects of the self. Recalling Chapter Seven, the very idea of responsibility can be related to the ways in which we construct, or 'make', understandings of the moral self, the world(s) it inhabits, and the relation between the two. If we understand the self as (ideally) rationally coherent, we symptomatically construct an understanding of responsibility that judges the individual by the standards of rational coherence: a concept of responsibility that is symptomatic of the rational surface. If we reconfigure our understanding of the moral self in a way that accepts its indeterminate dimensions and the importance they have in the astonishment of lived human behaviour but concurrently fail to reconfigure how we understand the standards of responsibility, we retain a block to the legitimacy of, and our ability to properly consider, those fluid dimensions in attributing responsibility. The standards of responsibility will remain that of rational choice, whilst the individual will be unable to attract responsibility under those standards because he or she will be understood as indeterminate, shifting, and symbiotic with otherness. If we reconfigure the moral self under relational masculinity, we need symbiotically to rethink what it means to be responsible. The standards of rational choice are no longer sufficient once we accept the spectral nature of both the self and our understandings of it; we need the same restlessness both in how we approach criminal identity and in how we understand what it means to be responsible.

9.7 Conclusion

Relational masculinity enables consideration of different ways of codifying reality, different understandings of reality and volition and experience that can help us to model and conceptualise individuals and their behaviours in ways that are better able to encounter the astonishing dimensions of existence. This is on the level of theoretical engagement, helping us develop models and understandings; it is not a new substantive model of criminal responsibility, but a new way of thinking and engaging that can underpin the future engagement with more substantive issues. It

involves a restlessness in the approach to chaos, to the unstructured universe, that recognises the fact that the world, like the comics form, can always be re-interpreted, re-synthesised. Our understandings and concepts are not settled or universally accurate, but based upon perspectival encounters with experiential reality filtered through theoretical, ideological, and homo-cultural lenses. The aesthetic is key. It has a dual structure, both relating to sensory experience, lived reality, the fluid, that outside (but haunting) the rational surface, and also including ways of 'codifying' reality that don't rely on the logic, coherence, and normative accuracy of hegemonic forms of expression (such as rational language and quantitative data). The aesthetic is indicative of method (the turn to alternative discourses), and also promotes a concern with embodiment, experience, lived reality, and the empirical studies that try to access these fluid dimensions of human life. (In a criminal context, the field of cultural criminology is a reach seam of enquiry in this regard.) It is this aesthetic element that is important with respect to rectifying the ethical shortcomings in 'rational choice' models of criminal identity by enriching understanding of the links between unique individuals and their lived behaviour. Developed through an aesthetic approach to legal issues, relational masculinity opens up our considerations of individuals, our ways of imagining them, enabling increasingly ethical considerations of their living wholeness. In criminal theory, this reconfiguration calls for the relationship between the rational and the fluid self to be re-ordered in models of criminal identity, and thus for the idea of responsibility itself to be shifted towards a highly nuanced – and *restless* – understanding that remains sensitive to the fluid dynamics of living individuals by turning away from the temptation of producing 'settled' models of moral selfhood.

CHAPTER TEN

Conclusion

The central argument of this thesis is that in order to produce models of the moral self in criminal theory that are able to adopt a more ethical approach to the unique 'otherness' of living individuals, we need to reconfigure the epistemological foundations that shape our existing models of rational choice. This reconfiguration, it has been proposed, should be undertaken through the concept of relational masculinity. Relational masculinity, as an epistemological concept, has been derived from engagement with the Kantian sublime, Nietzsche's metaphysics, and Battersby's feminist philosophy, and developed through engagement with the comics work *Watchmen*. It suggests an approach to the moral self that is 'restless', not tending towards settled and generalised abstraction or model-making, and re-orders the relationship between the rational and fluid dimensions of the moral self in criminal theory. Although accepting that behaviour might be determined by influences and drives 'beyond' the rationally choosing individual may initially seem set to undermine the very idea of responsibility, this fear does not manifest itself if we reconfigure our understanding of responsibility alongside that of the moral self. It is not that we should 'forgive' individuals or deny them any responsibility because their behaviour may derive from fluid dimensions beyond their ability to 'choose', but that these fluid dimensions can also attract responsibility and may do so in a manner that reflects more accurately, more 'ethically', the lived reality of embodied humans. As was suggested in Chapter Six, free will is *lived*; it is not a purely 'rational' concept.

This thesis thus makes two distinct contributions: one methodological, relating to the use of comics in legal theory; and, one analytical, relating to the epistemological model of relational masculinity and its ethical reconfiguration of criminal identity. This analytical contribution itself has two dimensions: one epistemological and one substantive. Epistemologically, as we have just seen, it proposes a new approach to knowledge that can re-shape, or reconfigure, the understanding of the moral self in criminal theory. Substantively, it suggests a general model of the self as a nexus of

drives and influences. This substantive model of the self, although not developed as a full-blown theory of selfhood in this thesis, is important in the way it indicates the vast complexities and irreducible nature of the self in general that efforts to model or 'know' the specifically *moral* self (the self-as-responsible) need to encounter. Relational masculinity opens a way for this encounter to occur, via engagement with aesthetic forms, in a criminal-legal context on the level of theoretical enquiry.

In opening this way for encounter, the comics form has played an important role. In Chapter Four we saw that the comics form involves a complex epistemological interaction, between the rational, the non-rational, the linguistic, and the non-linguistic; and that the comics page was itself a complex and irreducible field of interacting tensions that were able to be indefinitely (re)synthesised and (re)interpreted. This complexity of the comics form was linked with, and shown to model, Nietzsche's metaphysics of surface. This open-textured metaphysical approach to comics enables various levels of textual-visual interactions within a comics work to be encountered, interpreted, and analysed, without closing down avenues of meaning or effacing the form's epistemological dimensions. The 'metaphysical' analysis of *Watchmen* in this thesis is thus arguably incomplete; there may not only be aspects and narrative layers of *Watchmen* that this thesis has not considered or analysed, but the work itself can always be encountered differently; it can always be re-negotiated and re-interpreted. In this way, any analysis must always remain incomplete. This is part of the restlessness that comes from the metaphysics of surface, and it is also one of the key critical features of aesthetic products such as comics. The irreducibility of, and epistemological interactions in, the comics form specifically are what predispose it for inclusion in analyses such as the one in this thesis. And this is true not only for *Watchmen* itself, but potentially for many other works of comics. *Watchmen* has been used in isolation in this thesis primarily because, beyond the relevance of its substantive themes, as a single, self-sustained work that is not part of a larger sprawling narrative universe, it is methodologically manageable. There is no inherent reason, however, why other comics, graphic novels, manga, or bandes dessinées that engage with themes and issues relevant to law and justice cannot also be examined as

part of a legal project of enriching understanding. The interaction of word an image is a major dimension of what makes *Watchmen* so rich a resource for the study in this thesis, *but this interaction is also an overt part of the comics medium as a whole*. Moreover, there are a large number of comics that deal expressly with criminal justice or legal concerns; to name just a few from the Western mainstream: *Batman*, *Judge Dredd*, *Superman*, *The Punisher*, *Justice League of America*, *Daredevil*, and *X-Men* could all make rich analytical resources for legal theory. Indeed, the extension of the analytical canon to include the comics form as a whole is an important area of original contribution that this thesis makes.

The analytical combination of word and image in this thesis is both unique and expansive, developing a novel mode of engagement with aesthetic ideas and a widened understanding of the living self and its relationship with the world. The idea of the rational surface, maintained through the operation of modern masculinity, and that masks the indeterminate chaos of the unstructured universe beyond its boundaries, and that relational masculinity reconfigures through its orientation towards that chaos, in many ways derives from the very nature of the comics form. The complexity of the surface of reality is modelled in the complexity of the comics page, including its irreducible nature, the need for synthesis or 'closure' when making sense of what is experienced or encountered, and the approaches of rationality and language that form only one type of encounter with that complexity. Through engagement with a work of the comics form: the constructed nature of the rational surface and its substantive limits with regard to the excessive nature of the individual have been seen with the twofold concept of 'spectrality', derived from analysis of Rorschach; the epistemological limits and symptomatic nature of the rational surface have been seen with Osterman/Manhattan; and the modern-masculine epistemological perspective that maintains the rational surface has been seen with Blake. Through Drieberg (and Juspeczyk), this epistemological foundation of the rational surface has been reconfigured. In the overall analysis of *Watchmen*, the unique epistemological characteristics of the comics form have come together with the substantive content of a comics work to enrich our understanding of how we think

about the moral self – not only in specific relation to criminal theory, but also in relation to knowledge-making more generally. This enrichment has enabled a reconfiguration of the epistemological foundations of rational choice towards a more sensitive and restless relationship with lived reality.

Before we can develop a new 'ethical' model of criminal responsibility, we need to examine the existing models and how they need to be altered. This thesis has undertaken such an examination, via engagement with the unique medium of comics, and thus suggests a path for future research. In a broad sense, this future work may involve not only the reconfiguration of the moral self but also how we understand the very idea of responsibility. Relational masculinity suggests the examination of the ways the fluid self can be linked meaningfully and ethically with embodied behaviour, and the relationship between the living self and the external, aesthetic world. The development of such understanding will necessarily involve engagement not only with empirical research into lived realities of crime, but also theoretical legal work that engages with the alternative discourses of aesthetic products, as well as existing 'orthodox' work on criminal responsibility. In such a project, the call for restlessness implied by the constancy of becoming and the infinite complexity of both the self and the world(s) it inhabits must be remembered. Although such a call raises profound challenges for the development of substantive models or practical policy, it is ultimately what makes it possible for understanding to approach the uniqueness of living, human individuals without destroying or effacing their profound astonishment. Settled or practical models of criminal identity may be impossible under relational masculinity, but the widening of the net of the analytical canon undertaken in this thesis serves to increase our ability to enrich theoretical understanding through engagement with forms of a different conceptual order to the typical rational knowledge of legal theory, and thus to increase the ethical nature of our theoretical concern with the unique other. In approaching the other under relational masculinity, however, we will never achieve a comprehensive or unitary understanding that can simply give rise to altered models or policy in practical adjudication; instead we must content ourselves with a restless engagement that remains always able to shift and re-

encounter the other via a different way of knowing. Such an engagement may not give us instant practical answers, but it does move us closer to an ethical approach to the other in understanding criminal responsibility.

Appendix One

'*Ozymandias*' by Percy Bysshe Shelley

> I met a traveller from an antique land
> Who said: "Two vast and trunkless legs of stone
> Stand in the desert. Near them on the sand,
> Half sunk, a shattered visage lies, whose frown
> And wrinkled lip and sneer of cold command
> Tell that its sculptor well those passions read
> Which yet survive, stamped on these lifeless things,
> The hand that mocked them and the heart that fed.
> And on the pedestal these words appear:
> 'My name is Ozymandias, King of Kings:
> Look on my works, ye mighty, and despair!'
> Nothing beside remains. Round the decay
> Of that colossal wreck, boundless and bare,
> The lone and level sands stretch far away."

Reproduced from Gearey, *Law and Aesthetics*: pp. 16-17.

Appendix Two

'One need not be a Chamber – to be Haunted' by Emily Dickinson

One need not be a Chamber – to be Haunted –
One need not be a House –
The Brain has Corridors – surpassing
Material Place –

Far safer, of a Midnight Meeting
External Ghost
Than its interior Confronting –
That Cooler Host.

Far safer, through an Abbey gallop,
The Stones a'chase –
Than Unarmed, one's a'self encounter –
In lonesome Place –

Ourself behind ourself, concealed –
Should startle most –
Assassin hid in our Apartment
Be Horror's least.

The Body – borrows a Revolver –
He bolts the Door –
O'erlooking a superior spectre –
Or More –

Reproduced from Battersby, *The Sublime, Terror, and Human Difference*: p. 112.

Appendix Three

'The Tyger' by William Blake

Tyger Tyger, burning bright,
In the forests of the night;
What immortal hand or eye,
Could frame thy fearful symmetry ?

In what distant deeps or skies,
Burnt the fire of thine eyes ?
On what wings dare he aspire ?
What the hand, dare sieze the fire ?

And what shoulder, & what art,
Could twist the sinews of thy heart ?
And when thy heart began to beat,
What dread hand ? & what dread feet ?

What the hammer ? what the chain,
In what furnace was thy brain ?
What the anvil ? what dread grasp,
Dare its deadly terrors clasp ?

When the stars threw down their spears
And water'd heaven with their tears:
Did he smile his work to see ?
Did he who made the Lamb make thee ?

Tyger Tyger, burning bright,
In the forests of the night:
What immortal hand or eye,
Dare frame thy fearful symmetry ?

Reproduced from William Blake, *Songs of Innocence and of Experience* (Oxford: Oxford University Press, 1970): p. 99.

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