

*Criminal Responsibility  
and the Proof of Guilt*

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## *I. Introduction*

“Now it is obvious that it is impossible really to know for certain what was passing in the mind of the accused person; it can only be surmised by a process of inference from what is known of his conduct. Of course in early times the difficulty felt in ascertaining the mind of man and the rule that a prisoner could not himself give evidence tended to produce the practice of imputing mens rea from certain given sets of circumstances. In more modern days the difficulty has not been regarded as insuperable...”<sup>1</sup>

This characteristically modern statement about the mental element in criminal law was made by JWC Turner in an influential essay published in 1945. That his argument was somewhat controversial need not concern us here,<sup>2</sup> for what is important about the essay is not only the articulation of a standard of subjective proof in relation to a recognisably modern tripartite division of criminal fault (intention, recklessness and negligence), but also the confidence of his claim that earlier difficulties in establishing the content of the accused’s mind have been surpassed. Of course, he concedes, while this knowledge is, in truth, unattainable, the modern law has nonetheless developed techniques for knowing the unknowable and escaping the clumsy and moralistic practices of the early common law. Where, in early times, the law was forced to rely on presumptions that created fixed inferences about the mental state of the accused, it was no longer necessary to presume that a man intends the

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<sup>1</sup> J.W.C. Turner, “The Mental Element in Crimes at Common Law” in Radzinowicz & Turner (eds) *The Modern Approach to Criminal Law* (London: Macmillan & Co., 1945) p.199. First published in (1936) 6 *Camb LJ* 31.

<sup>2</sup> For presenting a gloss on the history of English criminal law that overplayed the centrality of subjective tests of mens rea. For criticism see J. Horder, “Two Histories and Four Hidden Principles of Mens Rea” (1997) 113 *LQR* 95-119; K.J.M. Smith, *Lawyers, Legislators and Theorists. Developments in English Criminal Jurisprudence 1800-1957* (Oxford: Clarendon, 1998), pp.297-304.

natural consequences of his actions, a form of ‘constructive’ mens rea that Turner criticised. Instead, it was the task – albeit a difficult one – of the jury to interpret all the evidence, including the testimony of the accused where this was available, and thus to “come to a decision as to what must have been in the mind of the man himself.”<sup>3</sup>

Such statements about the form and the proof of the mental element in crime are now commonplace, and judges are accustomed to charging juries in these kinds of terms. However, this familiarity can lead us to overlook the distinctively modern characteristics of this kind of formulation. While the task of the jury was (and is) a difficult one, what is more important here is the claim about the knowability of the mind of the accused, and the question of the type of evidence that can establish this. Much recent scholarship has focused on the form of this kind of mens rea and the emergence of a new kind of legal subject, and it is worth identifying the significant features of the modern mental element in crime. First of all, it is differentiated. Where the earlier common law determined criminal liability on the basis of the undifferentiated concept of malice,<sup>4</sup> this subjective mens rea is broken down into the three forms of intention, recklessness and negligence, which were to be distinguished on the basis of an assessment of the relation between the possible consequences and the attitude of the accused towards these consequences. Thus, for Turner, intention denoted not only foresight of possible consequences, but that these consequences were also desired; recklessness was foresight of, or indifference or inadvertence to, possible consequences, with no desire to bring them about; and negligence, which

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<sup>3</sup> Turner *op.cit.* p.200.

<sup>4</sup> On malice, see J.F. Stephen, *A General View of the Criminal Law of England* (2<sup>nd</sup> edn.) (London: Macmillan & Co., 1890) ch.V; C.S. Kenny, *Outlines of Criminal Law* (Cambridge: Cambridge UP, 1904) ch.III.

Turner did not regard as criminal, was the pursuit of a course of conduct without awareness of the possible consequences.<sup>5</sup> Second, by distinguishing between different attitudes of mind, such as desire and motive, awareness or indifference, Turner sought to provide an objective means for the assessment of the subjective state of mind. Third, this modern test aimed to abandon the moral language of fault in the common law (malice, wickedness, gross culpability etc) and to replace it with a descriptive, psychologised concept of fault. It was believed that the existence of states of mind was a matter of fact, and was thus as susceptible to legal proof as any other matter of fact.<sup>6</sup> Fourth, this idea of mental states sought to abstract from ideas of character or situation, as these had been important to earlier conceptions of mens rea.<sup>7</sup> Finally, it has been argued that this new conception of the legal subject was a response to changing social and economic conditions, and the development of a new kind of governmental project, one which privileged the self-governing autonomous subject.<sup>8</sup>

Now it is without question that Turner's argument was programmatic rather than being an accurate description of practice. Older, character-based, conceptions of mens rea survived in the English criminal law for at least another twenty years, as the judiciary were reluctant to adopt the new tests on a wholesale basis, and it is arguable

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<sup>5</sup> *ibid.* pp.206-11. More recent analysis of these concepts may differ in details, but the structure is essentially the same. See e.g. Duff, *Intention, Agency and Criminal Liability*; Tadros, *Criminal Responsibility* (Oxford: OUP, 2005)

<sup>6</sup> See N. Lacey, "Responsibility and Modernity in Criminal Law" (2001) 9 *Jnl. of Political Philosophy* 249-76 at 268-9. It is significant that in another essay in the same volume Turner argues that criminal law must be seen as a branch of criminal science. See L. Radzinowicz & J.W.C. Turner, "The Meaning and Scope of Criminal Science" in *idem*, *The Modern Approach to Criminal Law* (London: Macmillan & Co, 1945 p.25

<sup>7</sup> See Lacey, *op. cit.* pp.256-61; Horder *op. cit.* On character and crime in nineteenth century thought see M. Wiener, *Reconstructing the Criminal* (Cambridge: Cambridge UP, 1990)

<sup>8</sup> See N.Lacey, "In Search of the Responsible Subject: History, Philosophy and Criminal Law Theory" (2001) *Mod LR* ???; etc.

that these tests were never fully adopted outwith the law of homicide.<sup>9</sup>

Notwithstanding this, Turner's argument raises the important, and somewhat neglected question of how the state of mind of the accused person was to be proved in court. He himself says little about this question, beyond outlining the legal test. It must be inferred from the conduct of the accused, their testimony and knowledge of the circumstances. And it is this question of the proof of guilt, rather than the intellectual history of the ideas of fault that is my focus in this paper, for I want to situate the development of these doctrinal rules within the broader context of the changing criminal trial. It is a precondition of any particular form of liability that there be certain practices of evidence and proof. What, however, allows Turner to assert with such confidence that particular states of mind can be distinguished and proved in a court of law? What sort of evidence could count as proof of a particular state of mind? What kind of transformation of legal procedures occurred to make it possible that the state of a person's mind at the time of the commission of certain acts was something that was capable of being proved in court? What, in other words, are the legal and cultural practices that made possible the emergence of certain forms of liability, and what can knowledge of these practices contribute to a critical analysis of modern conceptions of subjective responsibility? In other words we should not only be concerned with the new subject of the criminal law, but also with the way that that subjectivity is reconstructed in the trial.

In this paper I propose to look at changes in form of the criminal trial and in the law of evidence that, I shall argue, made possible the development of this kind of legal subjectivity. However, I shall also use this analysis to explore and challenge some of

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<sup>9</sup> Smith, *op.cit* sees 1957 as the key date, with the passing the Homicide Act, and following the publication of Glanville Williams' *Criminal Law: The General Part* (London) in 1953. It is arguable that the Criminal Justice Act 1967 s.8? was more significant.

the assumptions that are often made about subjective criminal responsibility, particularly in relation to the principle of autonomy. It is, as I suggested above, often argued that this modern conception of responsibility recognises the individual as an autonomous, self-governing subject, such that the imposition of punishment can only be legitimate under circumstances where this autonomy is fully recognised by the law.<sup>10</sup> It is further argued that the modern trial protects the individual against the state through the recognition of autonomy in criminal procedure: the requirements of ‘fair trial’, or ‘due process of law’, embodied in principles such as the presumption of innocence or the requirement of proof beyond reasonable doubt.<sup>11</sup> I shall argue that the development of criminal procedure in this formative period for the adversarial trial was usually motivated by a desire to facilitate prosecution rather than respect for autonomy, and moreover that the version of subjectivity that emerges from this process should qualify many of the assumptions that are often made about the respect for autonomy in the modern criminal law.

It should be clear that this is not an account of the development of either the criminal law or criminal procedure in general, but of the development of a particular highly influential conception of responsibility in relation to a particular type of trial – usually, though not exclusively, trials for murder. It is, nonetheless, indisputable that this kind of trial and this version of responsibility have a symbolic importance that far exceeds their practical significance.<sup>12</sup> There is a risk, of course, that in focusing on these narrow concerns simply ends of reproducing the narrow focus of much

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<sup>10</sup> See e.g. R.A. Duff, *Trials and Punishment* (Cambridge: CUP, 1985); M.D. Dubber, *Victims in the War Against Crime* (New York: NYU Press, 2007?).

<sup>11</sup> For an interesting theoretical discussion of the ‘fair trial’ in historical perspective, see M. Hildebrandt, “Trial and ‘Fair Trial’: from peer to subject to citizen” in R.A. Duff et al, *The Trial on Trial II: Judgement and Calling to Account* (Oxford: Hart Publishing, forthcoming).

<sup>12</sup> See L. Farmer, *Criminal Law, Tradition and Legal Order* (Cambridge: CUP, 1997) ch.5.

contemporary criminal law theory. However, I would argue that what is crucial here is that there is focus on a broader procedural, institutional and cultural context than the philosophical approach to questions of criminal responsibility normally allows.

The paper is in two sections, and will draw on examples from a number of ‘notable’ trials that took place between 1880 and 1930.<sup>13</sup> The first will look at changes in the form of the criminal trial, particularly the development of what I call the ‘reconstructive’ trial in the second half of the nineteenth century. The second looks at the role of various evidential and legal presumptions in the proof of mens rea, the different forms of evidence that were placed before the court, and how these were to be interpreted.

## ***II. The reconstructive trial in the late nineteenth-century***

In the first half of the nineteenth-century, the criminal trial replaced the scaffold as the “public climax of state justice and its imaginatively defining scene”.<sup>14</sup> The story of the decline of public punishment, focused on the birth of the prison, has been well told, but it has not always paid sufficient attention to the impact of these reforms on the criminal trial.<sup>15</sup> The transformation in crime and punishment was the result of a number of developments, which can be briefly summarised here. The movement for the reform of the Bloody Code argued that punishment would be a more effective deterrent of criminal behaviour if its infliction was seen as the certain consequence of

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<sup>13</sup> L.Farmer, “Notable Trials and the Criminal Law” in P. Chassaigne & J.-P.Genet, *Droit et Societé* (Paris: Presses de la Sorbonne, 2003)

<sup>14</sup> J.H. Grossman, *The Art of Alibi. English Law Courts and the Novel* (Baltimore: Johns Hopkins University Press, 2002) p.7.

<sup>15</sup> M. Foucault, *Discipline and Punish. The Birth of the Prison* (London: Penguin, 1977) Part I; V.A.C. Gatrell, *The Hanging Tree. Execution and the English People 1776-1868* (Oxford: OUP, 1994); J. Beattie, *Crime and the Courts 1660-1800*

criminal behaviour. It has also been argued that the display of authority in the spectacle of the scaffold was too easily subverted. Rather than a lottery of justice, which depended on the detection of a few offenders, and the infliction of capital punishment on even fewer, it was argued that lesser but more certain punishments should be used. This was accompanied by the rise of new institutions of punishment, principally the prison, but also the use of transportation, that offered the possibility of graduated punishments that could more exactly fit the crime. There was, in addition, a growing desire for more humane forms of punishment that were not public and were not aimed at the body of the accused. As a consequence, punishment became a secret process, hidden behind the walls of the prison, and operating on the soul rather than the body of the condemned person.

McGowen has pointed out that the reform of the Bloody Code led to the creation of a new image of criminal justice, as reformers sought to secure wider public support for the legal system.<sup>16</sup> The authority of the criminal law was no longer based on the personal authority of the judge and the widespread use of the pardon. Justice was instead to be the impersonal application of predetermined laws. There was a double principle of publicity at work, with the publicity of the penal norm linked to a new form of procedural publicity in the trial. This points towards the way in which trial was becoming central to the criminal justice process. With the decline in the public display of punishment, the spectacle of justice shifted from the scene of punishment to that of judgment.<sup>17</sup> The trial was a means of displaying the legitimate consequences of

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<sup>16</sup> R. McGowen, "The Image of Justice and Reform of the Criminal Law in Early Nineteenth-Century England", (1983) 32 Buffalo Law Rev. 89-125.

<sup>17</sup> Foucault, *op.cit.*, p.9. He goes on to argue that the criminal trial develops a new focus on the accused person, looking behind their acts to the pathologies of their character. While this might be true of French criminal procedure, it is clearly not the case in the English adversarial trial, where a consequence of the reform of the criminal law was the silencing of the accused. See *infra*. For an



a criminal act, the representation of punishment as an idea.<sup>18</sup> The trial was a means of staging questions of guilt and innocence, crime and punishment, its symbolic role increasing in inverse proportion to its practical importance.

If this points towards the importance of the image or ideology of criminal justice, how ritual and symbols play an important role in the creation and operation of social institutions, it leaves open the important question of how the adversarial trial was 'staged', and how (if at all) this changed in the course of the nineteenth-century. This is not to suggest that there was a conscious attempt to make the courtroom theatrical or to increase the drama of the trial. Historians of the English adversarial process have drawn attention to the muted nature of the nineteenth-century trial - the fact that there seemed to have been a deliberate eschewing of publicity, that flamboyant or over-dramatic advocacy was frowned upon, and that the court-room was organised so as to minimise dramatic potential.<sup>19</sup> However, this should not lead us to think that trials were not still in an important sense 'staged'. Trials are never exclusively about the identification and punishment of wrongdoers, they are always also about the relation between the legal and social order. In the procedures for the determination of truth, the standing of the various actors, the kinds of questions that can be determined, and in its relation to the broader criminal justice system, the trial is always something more than a simple legal procedure for the determination of guilt and innocence. The trial is a communicative process, which might either conflict with or reinforce the

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account which develops Foucault's argument in relation to French criminal procedure, see K.F. Taylor, *In the Theater of Criminal Justice* (Princeton: Princeton UP, 1993) Introduction.

<sup>18</sup> See also Taylor, *op.cit.* p.22. In nineteenth century France there was a rebuilding of courthouses, principally the Palais de Justice in Paris, to present the trial as spectacle or theatre, "reviving iconicity when its traditional subject, the ruler, had been displaced by a diffuse new subject, the public" (p.xxi).

<sup>19</sup> See Taylor 1993 p.13 also comparing it to a protestant meeting house. Noting also that the English courts limited public access and interest through the charging of an admission fee.

image of a universal and impartial legal order.<sup>20</sup> It is a form of public ritual of shaming or degradation.<sup>21</sup> It is also an imaginative space in which complex stories were told and new forms of responsibility contested.<sup>22</sup> The question of staging, then, is concerned with the trial as a legal and social event and the way that this changes over time: the way that reality is reconstructed and represented in the courtroom<sup>23</sup>; the relationship between substance and procedure; between written and unwritten laws<sup>24</sup>; the distribution of roles, burdens, presumptions; and even the way that the courtroom is spatially organised so as to represent the authority of the law.<sup>25</sup> Thus, even in the absence of conscious attempts to ‘stage’ or dramatise the law, it is nonetheless the case that the criminal trial is ordered so as to present the accused, the judge, the law in such a way as to perform certain social functions.

Recent work on the history of the adversarial trial has focused on reforms in criminal procedure and evidence in the period up to the passing of the Prisoner’s Counsel Act 1836.<sup>26</sup> Langbein, in particular, has argued that this date is significant, because with the passing of the Act, and the recognition of the right to a full legal defence, the fundamental features of the modern adversarial trial had been established. These

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<sup>20</sup> See e.g. R.A. Duff, *Trials and Punishments*, ch.4. cf. McBarnet on the ideology of triviality. See also McGowan.

<sup>21</sup> See Garland, *Punishment and Modern Society* p.70ff. This raises two further important points, namely that in the modern system different courts have different rituals and thus a different relation to the overall system (see e.g. Carlen on Magistrates’ Justice), and that there is an important question of how the ritual is structured. It is not enough merely to invoke the social importance of ritual.

<sup>22</sup> Grossman, *op. cit.*; L. Rodensky, *The Crime in Mind. Criminal Responsibility and the Victorian Novel* (Oxford: OUP, 2003); J. Bender, *Imagining the Penitentiary. Fiction and the Architecture of Mind in Eighteenth Century England* (Chicago: Univ. of Chicago Press, 1987).

<sup>23</sup> For contemporary analyses along these lines see e.g. L. Bennet and M. Feldman, *Reconstructing Reality in the Courtroom*; B. Jackson, *Law, Fact and Narrative Coherence*

<sup>24</sup> See C. Conley, *The Unwritten Law: Criminal Justice in Victorian Kent* (Oxford: OUP, 1991); M.M. Umphrey, “The Dialogics of Legal Meaning”; M. Wiener, “Judges v. Jurors”.

<sup>25</sup> See C. Graham, *Ordering Law. The Architectural and Social History of the English law Court to 1914* (Aldershot: Ashgate, 2003); Taylor *op. cit.*

<sup>26</sup> See J. Langbein, *The Origins of the Adversary Criminal Trial*. (Oxford: Oxford UP, 2003); A.N. May, *The Bar and the Old Bailey, 1750-1850* (Chapel Hill: U.N.C. Press, 2003); D.J.A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial* (Oxford: OUP, 1998)

fundamental elements were the presumption of innocence, requiring the prosecution to prove their case beyond reasonable doubt; the adversary system, allowing the defence to test the case of the prosecution, before an increasingly passive judge and jury; and the law of evidence, based around a series of exclusionary rules.<sup>27</sup>

There had been a clear shift from the early modern ‘altercation trial’: swift, requiring the accused to speak, directed by the judge and largely focused on the question of the amount of punishment the accused was to receive. The reformed trial was slower, a contest between lawyers and legal cases before a silent accused, and was increasingly concerned with determining the question of guilt or innocence. While it is undoubtedly the case that a recognisably modern adversarial trial had developed by this period, it is also the case that the trial continued to develop in the space that had been opened up by these early nineteenth century reforms.<sup>28</sup> Reforms of procedure, evidence and substantive law were more piecemeal even than in the early part of the century, but nonetheless the trial at the end of the century looked very different. We can best illustrate this by taking a particular example from the end of the period being looked at.

The trial of Dr Hawley Harvey Crippen for the murder of his wife by poisoning took place over five days in 1910.<sup>29</sup> While the trial has an enduring reputation, it was not by the standards of its day a particularly remarkable trial, though as a murder case it was unusual because of the absence of clear evidence linking the alleged victim and the human remains found in the cellar of his house. Much of the infamy surrounding

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<sup>27</sup> Langbein, *op. cit.*

<sup>28</sup> Eigen argues that a latent effect of the reforms of penal in the 1830s was the creation of a space in which questions of guilt, intention and evidence could be explored more fully than hitherto. See J.P. Eigen, *Unconscious Crime. Mental Absence and Criminal Responsibility in Victorian London* (Baltimore: Johns Hopkins UP, 2003) pp.158-60.

<sup>29</sup> *Trial of Hawley Harvey Crippen* (ed. F. Young) (Edinburgh: Wm. Hodge, 1919).

Crippen is based on his supposed callousness in poisoning his wife and burying her dismembered body in the cellar while inviting his mistress to come and live in the same house. It is also iconic of that particular kind of English crime, celebrated by Orwell, the suburban poisoning. I want to note a number of features of the trial. First, the length. Long trials were not unknown before 1900 (and Crippen's trial was not typical of all trials), but until the latter part of the century no trials would last longer than a day, or two at the most. It is clear that even as the overall number of trials was decreasing, as a consequence of the rise of plea bargaining and the growth of summary jurisdiction, the length of trials was continuing to grow.<sup>30</sup> Second, one reason that these trials were getting longer was because of the greater number of witnesses being produced. Here, the prosecution case was based on the evidence of 32 witnesses, and took the best part of three days to present. The defence case was somewhat shorter, consisting of only five witnesses over a day and a half. It is more revealing still to look at the identity of the witnesses. The prosecution witnesses included relations, friends and acquaintances who gave evidence as to Crippen's statement about the supposed death of his wife, and also to their surprise at seeing Ethel le Neve wearing her jewellery. There were also pieces of short testimony from witnesses including police constables and surgeons and even undertakers giving details about the discovery, removal and storage of the remains.<sup>31</sup> However, much of the case was based on the evidence of the investigating detective, Inspector Dew, and of five expert medical witnesses who testified as to the identity of the remains found beneath the cellar floor, and the likely cause of death – poisoning by hyoscin. The defence in turn brought in three experts in an attempt to refute the prosecution case on

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<sup>30</sup> See R.M. Jackson, "The Incidence of Jury Trial During the Past Century" (1937) 1 Mod. LR 132; on the rise of plea bargaining, see Fisher, McConville & Mirsky etc.

<sup>31</sup> It was, of course, increasingly necessary to prove that samples that were tested were those that had been removed from the crime scene. See ???

these points. Further, Crippen gave evidence under on his own behalf, a significant change in criminal procedure following the Criminal Evidence Act 1898.<sup>32</sup> Finally, we should note the lengthy opening and closing statements for the prosecution and defence, and the long charge to the jury.

The trial is given over to the reconstruction of past events, in order to make the court witness to the truth of the events and so prove the guilt of the accused person.<sup>33</sup> The trial has always to some extent been reconstructive, concerned with the proof of past facts, at least since the ending of the ordeal, but we can see from the Crippen trial that the issue of *what* was being reconstructed, and *how* it was being reconstructed has changed quite significantly. The aim of the trial is increasingly becoming that of providing sufficient circumstantial evidence that the mental state of the accused can be inferred – and I shall have more to say about this in the next two sections. For the moment I want to concentrate on the question of how this evidence was organised and presented in court.

The first thing that is striking is that the prosecution case reconstructs the crime through the process of detection. The order in which witnesses are called not only follows a strict chronology from the point his wife went missing, to the involvement of the police in the search for the missing woman, and then the discovery, removal and analysis of human remains from the cellar of Crippen's house. The presentation of witnesses represents how suspicion hardened into a sense of certainty of wrongdoing, only finally suggesting premeditation with evidence of the purchase of

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<sup>32</sup> On the movement for reform see D. Bentley, *English Criminal Justice in the Nineteenth Century* (London: Hambledon, 1998) chs.15-18

<sup>33</sup> On the reconstructive trial generally, see M. Foucault, "Truth and Juridical Forms" in *Essential Works Vol.III. Power*

poison. The increased number of witness reflects the involvement of a professional police force in the process of investigation, as they were better able to take statements and keep records of those who were spoken to in the course of the investigation.<sup>34</sup> Not only were the police increasingly involved in collecting evidence but were also testifying themselves – the evidence of Chief Inspector Dew being of particular importance in securing the conviction. The professional detective was alert to inconsistencies in statements or to the presence of clues of wrongdoing.<sup>35</sup> The case that was being tested was not only a legal one, but was back by the authority and power of the police, such that by the time Crippen came to testify on his own behalf his testimony was not so much presenting an opposing account of the events – as had been the case with the altercation trial – but was to be inserted into the account that had already been organised by the police and prosecution. The second feature of the case was the lengthy, and increasingly partisan, presentation of technical forensic evidence as part of the case for both prosecution and defence.<sup>36</sup> This was increasingly a feature of murder trials in this period, particularly where poison was involved. The third important feature of the process of reconstruction was the role of the lawyers, first counsel and then the judge, in organising the evidence, both through the lengthy cross-examination of key witnesses, and in pulling the various strands together so as to present various theories of the case. I shall say more about this below, so at this

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<sup>34</sup> And prosecuting counsel were instructed by the Director of Public Prosecutions, a post created in 1888(?).

<sup>35</sup> C.I. Dew searched the house and noticed the presence of loose bricks in the cellar floor, Trial, p.40 and Introduction p.xxxi. On police and detection see C. Valier, “True Crime Stories: Scientific Methods of Criminal Investigation, Criminology and Historiography” (1998) 38 *Brit. Jnl. of Criminol.* 88-105.

<sup>36</sup> The defence’s expert backfired spectacularly, as under cross-examination the first was required to admit that he had made an error as to the part of the body a certain piece of skin had come from, and another – the author of a standard textbook on poisons – had lamely to suggest that he had changed his opinion in the past weeks about the toxic effect of a certain drug, Trial p.143. On the rise of expert testimony generally, see S. Landsmann, “One Hundred Years of Rectitude: Medical Witnesses at the Old Bailey, 1717-1817” (1998) 16 *Law & Hist. Rev.* 445-94; M. Essig, “Poison Murder and Expert Testimony: Doubting the Physician in Late Nineteenth-Century America” (2002) 14 *Yale Jnl. of Law & Hum.* 177-210.

point I want principally to note how as a consequence of this some barristers obtained a public profile, even a kind of celebrity.<sup>37</sup> Finally, we should note the position of the jury. It is not just that they are passive, as Langbein points out, but that they are a particular kind of audience. Their role is to look for clues, not only as these are presented to them by the police, but also in the demeanour of witnesses, the accused and the others present in court so as to be able to read and judge their guilt. In this sense the trial is literally staged for them – and, by extension, for the external audience of newspaper readers – as they are asked to judge not only the facts but also, in an important sense, the performance of the actors in the trial.<sup>38</sup>

### *III. Evidence and its interpretation*

Turner pointed out that the modern mental element in crime displaced legal presumptions in favour of the use of evidence – and particularly circumstantial evidence – and in this section I want to look at the relation between legal presumptions, evidence and proof in the context of the reconstructive trial. I shall look first of all at changes in evidence law, before going on to look at the central question of how evidence was to be interpreted or evaluated in the courtroom.

The bulk of scholarship on the history of the laws of evidence has focused on exclusionary rules, looking either at how they developed in the course of the eighteenth-century – whether as a result of the desire to protect the jury or due to the lawyerisation of the trial – or at the subsequent loosening of some of these rules in the

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<sup>37</sup> The most famous was probably Edward Marshall Hall, but other celebrated criminal counsel included Richard Muir (counsel in this case), F.E. Smith etc

<sup>38</sup> See L. Farmer, “Notable Trials” p.??

course of the nineteenth century.<sup>39</sup> While this scholarship has told us a lot about the increasing professionalisation of the trial, it has had less to say about how this impacted on the substantive law or on conceptions of responsibility. It is also the case that the developments in the law go well beyond a simple concern with exclusionary rules, and also reflect broader debates in Victorian law and culture.<sup>40</sup> I want to note three particular developments. First, there was a rise in the use of circumstantial evidence, and a growth in concern about the proper inferences that could be drawn from this evidence.<sup>41</sup> We have already noted from the Crippen trial how changes in policing and the organisation of the prosecution had an impact on the amount and type of evidence that was placed before the court. Second, there was a greater use of medical testimony and testimony about mental states, particularly where the non-responsibility of the accused through some form of mental estrangement was in issue.<sup>42</sup> Thirdly, many customary rules and practices that had been within the discretion of the trial judge began to be formalised, as they were argued by lawyers and discussed by treatise writers looking for some underlying rationale to the hotch-potch of evidentiary rules.<sup>43</sup> Underlying this there was a fundamental and gradual shift in the basis of the law. Broadly speaking, the development of the law of evidence can be described as a movement from rules based on the competency of witnesses, to those concerned with the reliability and credibility of testimony. Though some of the exclusionary rules remained, the rationale underpinning the rules shifted to reflect a

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<sup>39</sup> For recent surveys see T.P. Gallanis, "The Rise of Modern Evidence Law" (1999) 84 Iowa LR 499-560; Langbein *op.cit* ch.4; C.J.W. Allen, *The Law of Evidence in Victorian England* (Cambridge: CUP, 1997)

<sup>40</sup> To date these debates have been of greater interest to literary and cultural historians than lawyers. See A. Welsh, *Strong Representations* (Baltimore: Johns Hopkins, 1992); J-M Schramm, *Testimony and Advocacy in Victorian Law, Literature and Theology* (Cambridge: CUP, 2000)

<sup>41</sup> Note the publication of treatises devoted solely to the questions from the 1820s on.

<sup>42</sup> See esp. J.P. Eigen, "Sense and Sensibility: fateful splitting in the Victorian insanity trial" in R.A. Melikan (ed.) *The Trial in History II. Domestic and International Tribunals 1700-2000* (Manchester: MUP, 2003); *op. cit.* n.??.

<sup>43</sup> See e.g. the law on the admissibility of dying declarations, discussed in Bentley pp.214-19. On the earlier justifications for the exception see Gaskill, *op. cit.*



concern with the quality and reliability of evidence in the trial.<sup>44</sup> The overall shift is reflected in the debates leading to the Criminal Evidence Act 1898, which permitted the accused to give evidence on oath, and its impact on the trial. This is of further interest because it has been suggested that the reform was consistent with the developing emphasis on individual responsibility in nineteenth-century political and legal thought: the responsible individual should not be denied the opportunity to participate in their own trial.<sup>45</sup>

The principal concern in the debates leading to the act was not the credibility of the accused person. Persons with an interest in legal proceedings had been allowed to testify following the passing of the Evidence Act 1843, and there was a growing confidence that courts would be able to identify false or misleading evidence as it would be difficult to contradict the circumstantial evidence.<sup>46</sup> The most important question driving the demand for reform, was a mounting concern over the silence of the accused in criminal trials – a consequence of the reforms of 1836 and 1848 that had allowed lawyers greater influence in the trial – which they frequently exercised by advising the accused to remain silent.<sup>47</sup> Even opponents of the reform agreed that it was necessary to change the law so as to increase the number of convictions, their concern was with the extent of the protection that the accused should receive so as to prevent wrongful convictions.<sup>48</sup> The consequence of the passing of the Act, as Bentley

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<sup>44</sup> e.g. Langbein, *Origins* p.236 argues that the basis of the hearsay rule shifts from a concern with the best evidence to being a means of controlling the fact-adducing process at trial. See also Gallanis, *op. cit.* pp.536-7.

<sup>45</sup> Allen, *op. cit.* ch.5, esp at p.184. For a contrary view see S.E. Farrar, “Myths and Legends: An Examination of the Historical Role of the Accused in Traditional Legal Scholarship; a look at the nineteenth-century” (2001) 21 *OJLS* 331-53

<sup>46</sup> 6 & 7 Vict. c.85. See also Cairns, *op. cit.* pp.77-82.

<sup>47</sup> For a discussion of the various ways in which the accused might put their side of the story prior to 1898 see Bentley, ch.15

<sup>48</sup> Most influentially, H. Stephen, “A Bill to Promote the Conviction of Innocent Prisoners” (1896) 39 *Nineteenth Century* 566.

has noted, was to irrevocably change the shape of the trial. The judge was pushed into an ever more passive role, thus increasing the control exercised by lawyers over the proceedings.<sup>49</sup> And the accused, and the question of whether or not they would give evidence on their own behalf, became a central issue in the trial.

The impact of these changes can be seen in relation to the general issue of how evidence should be evaluated, and specifically how evidence of mental state should be evaluated.<sup>50</sup> I want to look at the three issues of character, motive and demeanour. First of all, it is important to note that even well into the twentieth century, proxies such as evidence of character could stand in place of evidence of a particular mental state – perhaps not surprisingly given the legal development of tests such as provocation around the idea of building ‘good character’.<sup>51</sup> This was particularly the case in so-called ‘secret’ crimes, such as rape or sodomy, where there were no witnesses to the commission of the crime.<sup>52</sup> Evidence of good character could establish the standing or respectability of the accuser or victim, and by inference their mental state or predisposition to commit certain acts, and was permitted if it was relevant to the nature of the offence charged and related to the period of the offence.<sup>53</sup> Restrictions on evidence of bad character were stricter. The prosecution could not lead evidence of either general bad character or of prior convictions, unless rebutting evidence of character as part of the defence case or under the ‘similar fact’

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<sup>49</sup> As judges might otherwise interfere with defence strategy, by inadvertently trigger one of the exceptions allowing the accused to be examined on character or previous convictions. Bentley p.204.

<sup>50</sup> The central problem in the evaluation of evidence is the burden of proof, and the modern burden of proof was not established until 1935. However, I do not propose to discuss this here. See Cross, “the Golden Thread”; A. Stein, “From Blackstone to Woolmington”; B. Shapiro, Beyond Reasonable Doubt and Probable Cause.

<sup>51</sup> See Wiener, ‘Judges v Jurors’.

<sup>52</sup> On sodomy trials see H. Cocks, “Trials of Character: the use of character evidence in Victorian sodomy trials” in R.A. Melikan (ed.) *The Trial in History II. Domestic and International Tribunals 1700-2000* (Manchester: MUP, 2003); on rape trials, C. Conley op. cit. n.??

<sup>53</sup> See generally, Bentley, op. cit p.238.

exception.<sup>54</sup> These prohibitions were further tightened with the passing of the 1898 Act, which restricted cross-examination of the accused as to character and previous convictions unless they had put the character of the prosecutor or prosecution witnesses at issue.

Given that the restrictions on character evidence had been getting stricter throughout the century, it is perhaps surprising to find evidence of character playing such an important role in the Crippen case. Much of the defence cross-examination of prosecution witnesses was aimed at showing Crippen's good character. A medical colleague, Dr Burroughs, was asked whether he would describe Crippen as kind-hearted and well-mannered, willing to render any little service to his wife.<sup>55</sup> A friend of his wife, Clara Martinetti, was asked whether she thought him a kind-hearted man, and his mistress's landlady, Emily Jackson, was prompted to state that she thought him one of the nicest men she had ever met. The defence never missed an opportunity to ask witnesses to comment on their favourable impression of him, and placed a great deal of stress on his good character and reputation.<sup>56</sup> The prosecution case, by contrast, aimed to demonstrate his essential duplicity – shown in his extra-marital affair, his admitted lies about the disappearance of his wife, and his calmness in continuing to go about his everyday business.<sup>57</sup> Just as importantly, his coolness under the pressure of sustained questioning was presented as confirmation of his character and his capacity to perform the monstrous deeds of killing and dismemberment that were alleged by the Crown.<sup>58</sup> Alverstone LCJ then referred to the need to examine the

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<sup>54</sup> R v Cole (1810) in Bentley, *Select Cases from the Twelve Judges' Notebooks* (London: , 1997)

<sup>55</sup> Trial, p.12

<sup>56</sup> Possibly because of adverse press coverage before the trial. See Tobin, *Opening Speech, Trial*, p.79 See also Emily Jackson, p.26, Marion Curnow, p.28, William Long, p.31, Adeline Harrison p.77.

<sup>57</sup> See Muir, *Closing Speech*, p.154

<sup>58</sup> Trial, pp.103, 105-6, Summarised at pp.154-6

character of the accused in his charge to the jury, immediately going on to point out the jury could not rely upon the mere statement of Crippen as “[h]e has on his own confession lied for his own purpose, and was prepared to lie, if necessary, for the purpose of his own advantage.”<sup>59</sup> However, his qualification of this by stating that the general question of bad character was irrelevant to guilt of the specific crime charged, but that it was relevant to an inference that Crippen had lied about the disappearance of his wife, shows how character could be used as evidence of intent.

A second issue concerns the evaluation of circumstantial evidence and the inferences that could be drawn about the mental state of the accused. The general problem of circumstantial evidence was that of making the facts speak for themselves – but the growth in the availability of facts meant that this was increasingly less likely to happen, and that the jury required guidance on the evaluation of evidence. This in turn meant that the importance of counsel and judge, as interpreters of the evidence increased greatly, a state of affairs acknowledged by Sir Richard Muir in his opening speech to the jury.<sup>60</sup> An important issue, however, was that of how counsel and judge should interpret this evidence, and represent the interior thoughts of the accused. For counsel, this was done in opening and closing speeches to the jury, and much of the debate around the Prisoner’s Counsel Act 1836 concerned the question of who should have the final word and how counsel should speak.<sup>61</sup> After 1841 the practice had become firmly established of allowing the judge to summarise the evidence and

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<sup>59</sup> Trial, p.165

<sup>60</sup> Trial, p.9. This issue has been addressed in an important recent book by Rodensky, *The Crime in Mind*. She argues that the Victorian novel experimented to an unprecedented degree with the representation of the interior world of individuals, and that this had a substantial influence on legal understandings of interiority. However, she also argues this exposes the epistemological limits of the law, in that the trial cannot reconstruct the thoughts of the accused person in the same way as the novelist, but must rely on inference and circumstantial evidence.

<sup>61</sup> See Cairns, *op. cit.*

address the jury, though there was some debate over the extent to which the judge should express his opinion about the facts in the case.<sup>62</sup> Alverstone LCJ was careful to state his neutrality, that he had no wish to express an opinion, and that if he appeared to do so he was merely indicating a possible view of the facts.<sup>63</sup>

In murder cases generally, an inference of malice aforethought might be drawn from the use of a weapon in an assault, the type of attack, or even the nature of the wound.<sup>64</sup> This intersected with the felony-murder rule of substantive law, which by the turn of the century required that the initial felony be of such a type as to be likely to cause death.<sup>65</sup> There were, however, specific problems in relation to poisoning – including knowledge of poisons and of the consequence of application, as well as the fact that poisoning cases turned on proof of who had administered the poison – which meant that these kinds of inferences could not readily be drawn. In view of these difficulties, we find that the question of motive becomes a key issue in the representation of Crippen’s mental state. Thus, Crippen’s counsel placed great stress on the apparent absence of motive, whether financial or emotional, arguing that this made the prosecution account of Crippen’s actions inexplicable.<sup>66</sup> By contrast, the prosecution relied on Crippen’s motive of wanting to be with his mistress as a way, described as lust for a woman and lust for money, as a way of telling a coherent story about the disappearance of his wife and his subsequent flight – while simultaneously

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<sup>62</sup> Davidson v Stanley, 2 M & G at 727, 133 ER at 939. Stephen, General View, p.169 was of the opinion that the judge should not conceal his opinion from the jury. In the case of Florence Maybrick (1889) his charge to the jury, over two days, was widely regarded as having swayed them towards conviction.

<sup>63</sup> Trial, pp.163-4. Though on a reading of his direction his view is quite clear

<sup>64</sup> See M. Wiener, Men of Blood. Violence, Manliness and Criminal Justice in Victorian England (Cambridge: CUP, 2004) pp.242-55.

<sup>65</sup> Kenny, op.cit. pp.132-40

<sup>66</sup> Tobin, Closing Speech, Trial p.148-9

asserting dismissively that an adequate motive was rarely shown for murder.<sup>67</sup> This is significant given the standard efforts in definitions of intent to distinguish strongly between intent and motive. In general, as Turner argues, the former is irrelevant, the focus of the criminal law more narrowly on the question of whether the action was freely chosen.<sup>68</sup> In practice, this distinction was almost always transgressed, as lawyers relied on questions of motive in the construction of narratives that sought to make sense of the actions of the accused person.

The final issue in the evaluation of evidence that I want consider is that of how the demeanour of witnesses, and in particular the accused, could be judged for we find both counsel and the judge directing the jury to base their judgement on an assessment of the self-presentation of the accused person. Oldham has noted that little attention was given to the question of how evidence should be evaluated in the eighteenth-century, with attention only being drawn to the question of the problematic relationship between courtroom manner and veracity in the early nineteenth century.<sup>69</sup> Where veracity had been linked to the swearing of the oath, and the accused disqualified from testifying on oath because of the temptation to perjury, it came to be accepted that the court had to make its own judgment on the truthfulness of testimony and the weight it should be given. One way of measuring this was through circumstantial evidence, and Welsh has noted how one of the perceived advantages of circumstantial evidence over direct testimony was that it could catch the lie through

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<sup>67</sup> Muir, Opening Speech, pp.7-8, Closing speech, p.155. See also Introduction pp.xxii & xxviii.

<sup>68</sup> Turner, op. cit. see also Stephen, op. cit. p.69

<sup>69</sup> J. Oldham, "Truth-Telling in the Eighteenth Century English Courtroom" (1994) 12 Law & Hist Rev. 95 at 100-1. He identifies Evans' appendix to his translation of Pothier on Obligations (1806) as the best pre-Bentham discussion of the issue. The question is not new, but it had hitherto been considered that guilt would straightforwardly manifest itself in physical symptoms. See e.g. Gaskill, op. cit. ch.6.

weaving a more complete and intricate picture of events.<sup>70</sup> However, we also find more attention being given to the question of how guilt or unreliability would manifest itself in the person of the witness or accused – an issue that became particularly acute following the passing of the 1898 Act. Even a confession or statement on oath was not necessarily clear or unambiguous evidence of intent.<sup>71</sup> Cross-examination undoubtedly played an important role in the uncovering of the false or unreliable witness, but equally important was the judging of the demeanour of the accused.

The centrepiece of the Crippen trial was the lengthy cross-examination of the accused, which took up most of the fourth day of the trial. This was remarkable less for any particular admissions or moments of drama, than the way in which the sustained and intensive examination contributed to the prosecution's case as to the essential duplicity of Crippen. Long passages of the questioning focused on the lies that Crippen had told, the pretences he made and the subterfuges which he had employed.<sup>72</sup> Just as importantly, his coolness under the pressure of sustained questioning was presented as confirmation of his character and his capacity to perform the monstrous deeds of killing and dismemberment that were alleged by the Crown.<sup>73</sup> This is something that was specifically brought to the attention of the jury in the closing speech for the prosecution. Sir Richard Muir called attention to the evidence of his lack of emotion at key stages in the commission and concealment of

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<sup>70</sup> Strong Representations ch.1 esp at pp.39-40, discussing Bentham and Burke.

<sup>71</sup> The issue is considered from a theoretical perspective in P. Brooks, *Troubling Confessions*

<sup>72</sup> e.g. pp.105-6, 112-5

<sup>73</sup> "But the most amazing feature of the trial was the absolute coolness and imperturbability of Crippen in the long and terrible cross-examination". Trial, Introduction p.xxxii. It is also included in a volume entitled *Notable Cross-Examinations* (ed. E.W. Fordham) (London: Constable and Co., 1951).

the alleged crime, and under cross-examination.<sup>74</sup> He went on to say that although some men had “marvellous control” over their inner feelings, his calmness was not evidence that he could not have committed the crime. The jury were to consider whether he was not the type of man who could conceal and control their true thoughts and motives. The theme was taken up by the judge in his charge to the jury, placing great stress on the lies told by Crippen both in and out of the witness box, and the importance of relying on what they had seen and heard in the courtroom.<sup>75</sup>

While the admonition to rely on the evidence presented in court is formulaic, and no doubt of great importance in an age where there were few restrictions on pre-trial publicity, it is also an instruction to rely on everything that was seen and heard in the courtroom in making their judgement. In this we see that the words and actions of the accused person are scrutinised increasingly closely, to reveal the hidden meaning – that which cannot be concealed because it is beyond conscious control and is given away by the small gesture or the unconscious.<sup>76</sup> In other words, the jury should look for clues, going beyond the formal posture or the overt statements of the individual, but at their demeanour to see what lies behind, or what the person is seeking to conceal.<sup>77</sup>

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<sup>74</sup> Trial p.155.

<sup>75</sup> Trial pp.165, 173.

<sup>76</sup> Carlo Ginzburg sees this as the emergence of a new epistemological model. See “Clues: Roots of an Evidential Paradigm” in *idem*, *Clues, Myths and the Historical Method* (Baltimore: Johns Hopkins, 1986) pp.96-125.

<sup>77</sup> “in each case, infinitesimal traces permit the comprehension of a deeper, otherwise unattainable reality” p.101



#### *IV. The Proof of Guilt*

In concluding I want to offer two suggestions as to how this complicates or qualifies the conventional view of the responsible, autonomous, subject of criminal law. It is clear that the adversarial trial developed substantially over the course of the nineteenth century, and that as it did so there was a gradual ‘codifying’ of the rules and practices of evidence, practice and procedure – a process that continued into the twentieth century. One of the important outcomes of this process was the development of a space and language to talk about intention and responsibility – at least in relation to certain crimes – and that this tightened the definition of crimes such as murder.<sup>78</sup> It is less clear, however, that this recognition of the subjectivity of the accused was accompanied by a recognition of procedural autonomy, as procedural developments far from acknowledging the autonomy of the accused increasingly handed power to counsel and the judge. Initially silenced by the formation of the adversarial trial in 1836, the accused only later became the subject of the trial at the cost of a loss of control over the issue of autonomy. This is nowhere clearer than in the discussion of mental states, where loss of control of the process of interpretation meant that control of issues of intent and motive were taken away from them. The responsible legal subject is constructed through and by the means of these legal procedures.

This also has important consequences for how we think about the process of judgement. It is frequently argued that the modern jury operate on the basis of empathy, placing themselves in the position of the accused person to judge whether a

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<sup>78</sup> Though this does not mean that people avoided liability, as the expansion of the crime of manslaughter took up the slack. See Wiener, *Men of Blood*, ch.7; Farmer, *Criminal Law*, ch.5. It is also important to note that a concern with preventing wrongful convictions could go hand in hand with a desire to facilitate prosecution, as was recognised in the debates leading to the 1898 Act.

reaction was reasonable, or consequences foreseeable.<sup>79</sup> However, what I have argued here would suggest that this kind of identification relies as much on distrust, and that this distrust is institutionalised in certain features of the adversarial trial.

Circumstantial evidence is preferred to direct testimony; cross-examination is designed to reveal the unreliable witness; and the jury are encouraged to look beyond the surface of appearances, to see that which the accused person cannot conceal. The modern trial, arguably, institutionalises a “hermeneutics of suspicion”,<sup>80</sup> and if this is so it must challenge the idea that the function of the jury is based on empathy, or perhaps more precisely that empathy is only about identification.

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<sup>79</sup> cf Bender, op. cit. p.221 on Adam Smith and the reasonable man as an interior personification of juridical presence. Site of order as the individual, private and narratively structured. He accounts for an emergent order based on guilt rather than shame, and marked by the introjection of impersonal norms as character. Smith’s metaphor is theatrical, but the mode of representation is entirely mental.

<sup>80</sup> The term is taken from M. Matsuda, *Memories of the Modern* (???) p.103