"Monstrous Othering": The Gothic Nature of Origin-Tracing in Law and Literature

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Abstract

Much Gothic literature touches upon the concepts of familial injustice, disconnect from origin, and ill-treatment of the "monstrously-othered" or abandoned child. Certain works of fiction mirror those judicial discourses that involve contentious issues of unknown ancestry, not least anonymous gamete donation and cross-border surrogacy. Three novels in particular see their characters rendered monstrous by law, society, or unwritten norms of behavior: the clones of Katzuo Ishiguro's *Never Let Me Go*, the unnamed monster in Mary Shelley's *Frankenstein*, and Emily Brontë's Heathcliff in *Wuthering Heights,* share common features and horrific fates of endless exile. They are abused largely because of their genetic losses and unknowable origins, and thereby doomed to undertake fruitless quests and suffer flawed or fatal reunions. Dehumanizing policies of disenfranchisement enable or perpetuate such inequalities, but are justified in law, to preserve social order. In courtrooms too, there is a judicial need to balance conflicting human rights and interests: privacy, identity, family life. A "monstrous othering" can thus result, permanently exiling certain individuals from fundamental human rights protections. This is so despite the principles of child welfare paramountcy and best interests, not least where cross-border surrogacy, contact vetoes and sealed birth records are involved.

Keywords

Adoption, monstrous, origin, literature, law, rights

1. Introduction

"the monstrous, initially a juridical concept, was gradually made into a category of the imagination."

—Georges Canguilhem, *Knowledge of Life*

Within much Gothic literature, certain familial injustices involving the "primary theme of connection" tend to spark "compassion, sadness, revulsion, and rage" (Shaddox 455). This paper asks whether the treatment of the "monstrously-othered," abandoned child within certain works of fiction has perhaps served as a template for jurists dealing with contentious cases involving issues of unknown ancestry. Before analyzing some of the recent jurisprudence (on gamete donation and surrogacy), the paper looks to three novels in which characters are rendered monstrous by law, society, or unwritten policies. The clones in Katzuo Ishiguro's *Never Let Me Go* (*NLMG*), the unnamed monster in Mary Shelley's *Frankenstein,* and Emily Brontë's Heathcliff in *Wuthering Heights,* share common features and horrific fates in terms of their ill-treatment, unknowable origin, and fruitless quests. All search along a "nightmare path" (Peel 252) and suffer flawed or fatal "reunions" with those responsible for their creation. Dehumanizing—indeed demonizing—policies of disenfranchisement point to a clear "marginalization and mistreatment of such creations by society" (Tsao 214). This discriminatory treatment is justified in law, however, because of their inherently "'abhuman' status" (Hurley 3) and the need to preserve social orders.

The second half of the article examines recent, relevant jurisprudence on genetic connection, arguing that it at times perpetuates traditional sociolegal norms of secrecy and discrimination attaching to genetic non-origin (Cohen 1309; Davis 120). Recent UN Guidance on

the need to avoid “limping parentage” (The Hague, 2016 4) does suggest a gradual progress, but certain culturally acceptable cruelties still occur. These seem to be grounded in a judicial need to balance conflicting human rights, so as to avoid any “negation of the living by the nonviable” (Canguilhem 140). In other words, human rights protections may be denied to those “monstrous others” who are deemed to have acted—or to be existing—beyond the scope of the law (*Paradiso*). Fiction’s “relationship to real life cruelty” (Worley 68) is particularly apparent in those cases where monstrous outcomes likely include permanent exile from family and the removal of ancestral identity. Despite judicial respect for the principle of child welfare paramountcy (and the frail sanctity of family and private life) significant difficulties remain; as Hipchen observed of adoption, its “intersection with global and historical inequities” cannot be overlooked (229). Inconsistent legal and policy frameworks surrounding surrogacy suggest a repetition of adoption law’s worst excesses. Various legal sanctions (e.g. information or contact vetoes, donor anonymity) reinforce the affliction of otherness, crafting a uniquely horrific category of monstrous being that—much like the Gothic characters discussed below—lacks an adequate name of its own: the opposite of loved one.

2. The Gothic Monster: An Abhuman Exile from Rights, Citizenship, and Family

"enslavement is veiled in a theory of intention to manufacture and maintain property interests. Arguably, this amounts to an exercise of a power attaching to a right of ownership over a human being."

> —Gary Lilienthal, Nehaluddin Ahmad, and Zainal Amin bin Ayub, "Policy Considerations for the Legality of Surrogacy"

As J. Jack Halberstam observed of much Gothic writing, "the rhetorical style and narrative structure [is] designed to produce fear and desire" (2) and yet still, somehow, "horror attracts" us, just as certain dark "anomalies command attention and elicit curiosity" (Carroll 195). Unsurprisingly, the notion of "the monster came to speak for different kinds of political crises throughout the 19th century and beyond" (Baldick 61). Victorian fiction in particular frequently highlighted issues of poverty, injustice, and discrimination: it is no coincidence that the exploited clones of *NLMG* (euphemistically termed "students" by those who oversee them)—bred for compulsory organ harvesting—are often seen to read it, highlighting how their lack of self-awareness contrasts sharply with that of most Gothic monsters (Whitehead 56). In the three novels referred to here, issues of sociocultural inequality and biological "illegitimacy" overlap and drive the various narratives. Rights violations are framed, however, as both justifiable and necessary to the continued success (or at least the relative stability) of entrenched social and familial systems. Particularly contentious acts still tend to occur beyond the reach of legal or ethical regulation, as in *Frankenstein,* where the monster and his "parent-creator" must operate almost entirely in darkness to achieve their aims.[1]

Biological or social experimentation is generally underpinned by a desire to serve some greater good, however. Within both *Frankenstein* and *NLMG,* for example, the original, hubristic aim of the monster-makers was to overcome human frailties via illicit research involving cadavers or legalized cloning to ensure a steady supply of healthy "spare" organs for the rest of society. In *Wuthering Heights,* the odd philanthropy of the Earnshaw patriarch also upsets, by saving a foundling Heathcliff from the Liverpool streets, familial and social order for reasons that remain mysterious throughout the novel.[2] As jealous "adoptive sibling," Hindley sees the child as the "usurper of his parent's affections," with narrator Ellen Dean also stressing how old Mr. Earnshaw "took to the child strangely" (A. Levy 78). His appearance, and the unanswerable questions over his origins and ancestry, mark Heathcliff out as dangerously "other" right from the start, presaging his gradual descent into violent monstrousness: "Benevolently incorporated into the family by old Mr. Earnshaw, Heathcliff is viciously excluded from it by the others: indeed, his contradictory position at the Heights (as favorite and pariah) exposes Earnshaw's benefactory ideology to the contradiction that structures it. . . . the waif's inclusion is haunted throughout by his banishment" (Vine 341). That said, the kinless, abandoned "orphans" of these three texts present, initially at least, as "inherently sociable being[s]" even if they later "cannot be socialized" (Beenstock 406). Their monstrousness only fully emerges later on: Heathcliff transforms from "poor fatherless child" (A. Levy 78) into murderous vengeful "cuckoo" (Vine 342) only after being repeatedly abused by Hindley and (mistakenly) rejected by his beloved Catherine. Significantly, in adulthood he perpetuates the types of neglect that he himself suffered in childhood (53) by denying Hindley's son Hareton an inheritance and an education, much like *Frankenstein*'s monster is at first prevented from learning language and key social skills. This aspect of othering finds a sad parallel in modern foster care: young children may easily lose the language of their family of origin if they

are placed with only English-speaking carers, or where during supervised family contact visits, they are barred from communicating in their native language due to the absence of an interpreter (Doughty 10).[3]

It is behavior rather than appearance that marks out both Heathcliff and *Frankenstein*'s creation as irredeemably monstrous however, when they take revenge on those who abused or rejected them in early life. The sterile clones of *NLMG* in some senses represent the opposite of this, being normal in appearance and generally well-behaved (despite their shabby clothing). Their monstrous otherness consists in their biological non-ancestry, social purpose, and horrific destiny as organ donors. They are treated as inhuman only by those legislators and "carers" who know of their fate and origin—that they were deliberately created to die young after serving as organ donors. We see them being afforded kindnesses and respect by those who are unaware of their background, and who instead simply presume their humanity. In one key scene for example, Kathy recalls how a "silver-haired lady beamed, then she started to tell us how the artists whose work we were looking at was related to her. . . . she talked about where the paintings had been done, the times of day the artist liked to work, how some had been done without sketches" (Ishiguro 161). This episode is particularly significant for several reasons, not least that it is set just after a failed "reunion." It illustrates how "in the absence of all natural connection to others" the kinless can "seek to create or invent their pasts through speculative relations and connections." (Whitehead 69). Here, the clones have followed a woman whom they mistakenly believe to be Ruth's "possible" genitor into an art gallery/shop (suitably named the "Portway Studios," given its potential to further Ruth's journey towards enlightenment). Despite the peaceful, near-hypnotic setting, the clones gradually realize their error and its effect on Ruth. Kathy's summary of how the episode begins to sour could easily apply to a birth-family reunion gone wrong: "the woman was

too close, much closer than we'd ever really wanted. And the more we heard her and looked at her, the less she seemed like Ruth" (161). The scene is rich with details that might resonate with a searching adoptee: the women in the shop, oblivious to the clones' turmoil, discuss "some man they both knew, how he didn't have a clue with his children" (160). The walls feature murky underwater colors, "rotted pieces" of boat, and torn fishing nets as if to signify and symbolize both their journey's end and a failure to capture that which they were hoping for: information and truth. The level of irrelevant detail that the kindly gallery owner offers the clones about how some of the pictures on display came to exist calls to mind the sort of useless nonidentifying information that tends to be offered to closed-records adoptees. The notion of the craftsman often working "without a sketch" mirrors in any ways how lawmakers must somehow, perhaps retrospectively, produce some sort of statutory framework to manage human reproduction and the rights and emotions connected with it. (The fact that the craftsman is related to the saleswoman underscores further the clones' lack of connectedness to knowable relatives).

As with the Creature's in *Frankenstein,* Ruth's search amounts to a "futile search for definitive origins" that failed to find "kinship of any sort—conventional, adoptive, or divine" (Peel 253) As William R. Goetz further observes, nonorigin is a core issue for Heathcliff too: "one thing that sets *Wuthering Heights* off from another contemporary 'genealogical' novel like *Great Expectations* is the fact that the lack of knowledge concerning Heathcliff's origins will never be filled in" (359). Namelessness reinforces the exclusion. *Frankenstein's* anonymous monster offers the most egregious example of falsified origins, having been crafted from various illegal sources, and then suffering parental rejection at "birth," which embeds permanent filial denial. Heathcliff and the clones of *NLMG* have only been partially named by persons unknown some time before their stories begin. They are deemed less than human in part because of their uncertain genesis:

Heathcliff was ever "a strange child whose birth is to remain a mystery, who may be gypsy or prince, animal or devil" (A. Levy 78). As Miss Emily, a former school guardian, finally explains their "non human" status to the clones in *NLM G*, "We took away your art because we thought it would reveal your souls. Or to put it more finely, *we did it to prove you had souls at all*" (255).

If a monstrous creature is deemed to be merely a manufactured "living being with negative value" (Canguilhem 139), then it is easier to argue that principles of human dignity and equality are inapplicable to our treatment of it. In other words, these commissioned beings do not qualify as legitimately human. Law and society can frame them as objects, to justify their ill-treatment and lack of rights. Clearly, as in *NLMG*, "they are not accorded the status and rights of citizens within the dystopian political system that has brought them into being" (Whitehead 56). Such exile from justice serves "to teach the norm" however (Canguilhem 140). In life as in fiction, even the harshest of laws and policies can be deemed necessary to protect wider society from certain fearful others, who, as a "race of devils . . . propagated upon the earth . . . might make the very existence of the species of man a condition precarious and full of terror" (Shelley 128). As the clones eventually discover, even the very basic level of austere care that the "luckiest" students receive under Hailsham's more progressive regime is a short-lived phenomenon. Further experimentation with human cloning had apparently sparked a deep controversy (the "Morningdale scandal") that served to remind the public "of a fear they'd always had. It's one thing to create students such as yourselves for the donation programme. But a generation of created children who'd take their place in society? . . . That frightened people. They recoiled from that" (Ishiguro 259).

In keeping with their lack of family life rights, the monstrous are denied the opportunity of raising children of their own—the clones are sterile, and *Frankenstein*'s creature is denied a mate. Though Heathcliff fathers a son (whom he later essentially kills through neglect and abuse), he

despises the boy, and bears him no physical resemblance. Their "reunion"—or more accurately, their first meeting—only occurs once the child has grown into a sickly, bad-tempered teenager. He is useful to Heathcliff only as a means of gaining more wealth through marriage and inheritance laws, so as to wreak further revenge upon the descendants of those who've wronged him. The message for legislators is one of warning: these monstrous others are dangerous not only to their immediate "relations" but also to wider society. They are not to be trusted, given that their searches—for information, kinship, or social justice—can have wide-ranging adverse effects. Their otherness might be contagious, bringing stigma or shame to those who were complicit in enabling or perpetuating their excluded existence. As Kate Ellis notes of *Frankenstein*, the reader must follow "the dispossessed Monster back into the outer world, [to] witness his destruction of the remnants of Victor's harmonious family circle, and finally behold Walton's defeated attempt to discover in the land of ice and snow a Paradise beyond the domestic and the familiar" (123). *Wuthering Heights* similarly warns us that "to create a modern family, the novel must first dismantle an older historical family model responsive to the demands of blood" (E. Levy 160). The preservation of social status here requires that unknown others are prevented from inheriting or marrying into it.

As in *NLMG*, the "health" of the wider society demands that the clones are kept alive but apart from the "real" humans, who merit rights protections. Authentic ancestry matters, as do familial likenesses and public acknowledgements of them.[4] As has been noted in respect of other Gothic tales involving identity injustices (such as Horace Walpole's *The Castle of Otranto*), accurate pictures, whether in the form of portraiture, imagery, or truthful facts surrounding birth or conception, become increasingly important where fragile kinship ties are threatened (Elliott 8).[5] Portraits are especially indicative of humanity, pointing to genetic resemblance and ancestry:

hidden away and preserved within lockets, they serve almost as birth records, denoting a prized or privileged "pedigree" built up over many generations. The inability to access family names, traits, or images, or to be privy to accurate information, clearly indicates social exile, and a lack of rights-bearing status. It is unsurprising that *Frankenstein*'s monster, after murdering his creator's younger brother, uses a portrait locket that the child is wearing to frame an innocent Justine for the boy's death. In doing so, he extends his desire for revenge beyond his original paternal vendetta, essentially now endangering anyone within wider society "whose smiles are bestowed on all but me" (93). Heathcliff's destruction of the younger Cathy's locket containing pictures of her parents is similarly violent and pointless (330) but does serve to reveal his son Linton's greed and cowardice (and remind us of the gendered injustices of Victorian-era property law). As mnemonic devices, such portraits are highly coveted and steeped in emotional value, revealing the vulnerabilities of those who either cherish or seek to destroy them. As mementos evidencing legitimate background, they tend to carry much weight, with their presence or absence perhaps being decided by powerful, unseen decision-makers (much like closed birth records).

In *NLMG*, the clones' precious artworks also come to represent the many inequities that enable and underpin their curtailed existence. Despite their hopes to the contrary, their artistic efforts hold no value in determining the worth (or indeed the very existence) of their souls, nor do they assist them in their bid to defer organ harvesting. Just before they learn the truth about themselves, they must witness Miss Emily's vulgar concerns over the care of her well-wrapped bedside cabinet (234), reinforcing their lowly position as disposable items within a set hierarchy of objects. The particularly well-designed cruelty of having them read Victorian novels in childhood rests upon their receiving "an inappropriate imaginative template of social advancement that raises false hopes in a society that denies them any" (Whitehead 57). Their studies and creative

efforts (art, poetry) render them hopeful and therefore docile, by enabling them to possess, by earning or purchasing, small, discarded items. These junk-shop trinkets are cherished by them, in sharp contrast to their own harsh upbringing, serving as "metaphors for search and retrieval of loss, whether tangible or abstract" (Wong 81). The way in which the clones treasure their few precious belongings and creative works underscores the fact that they themselves will never truly belong anywhere, nor will they belong to anyone in particular. They will simply be shared out communally amongst wider society as an essential, curative resource when required.

They exist within a blind-eyed care system, aimed at keeping them hidden from view, via the "dark, political premise" (Rich 632) that requires fearful others to be framed as inhuman so that they do not qualify as rights-bearing. Madame, tasked with raising the clones to adulthood, is well named, in the sense that her "boarding school" is not unlike a brothel, where powerless inhabitants wait for their bodies to be chosen for exploitation. Their abuse reflects a wider, systemic need to protect certain key interests and norms, represented by Kathy's relationship with the novel's titular song, which she is reunited with after finding it on a long-lost junk shop cassette tape. Her recollection of dancing to it as an adolescent whilst cradling an imaginary infant initially serves as a comfort to her, until she realizes with hindsight the poignancy of the act ("when I think back, it does seem a bit sad") (Ishiguro 266) Many absences and losses are represented in that moment: maternal comfort, cherished infancy, and their own enforced infertility. "I imagined it was about this woman who'd been told she couldn't have babies. But then she'd had one, and she was so pleased, and she was holding it ever so tightly to her breast, really afraid something might separate them" (266). Madame's different interpretation of the dance scene confirms just how irrelevant Kathy's thoughts and feelings are to her and to the rest of society. She is not especially saddened or moved by the reality of the girl's tragic existence; rather she is upset by the loss of

the "old kind world," that had apparently existed before legalized cloning brought "cures for the old sicknesses" (248). Even after telling the clones the truth about their existence (that rumors on deferring donations were untrue), she cannot bring herself to reflect upon her complicit role in the process, nor will she use their names, or deem them fully human: "I saw a little girl. . . . it wasn't really you. . . . Poor creatures" (248).

Arguably, her pity for them is outweighed by her own guilt and fear: "All men hate the wretched" (Shelley 64) perhaps because of their resilient determination, which can send clear messages to those who seek to effect their disenfranchisement. Though "constructed horrific beings" (Carroll 120), the monsters do survive and navigate unforgiving, gale-swept landscapes, seeking out lost or absent kinships or the recovery of long redacted or falsified information. The rubbish-strewn, barbed-wire waste grounds of *NLMG* are not dissimilar to the isolated, frozen terrains of *Frankenstein,* and the desolate moors of *Wuthering Heights.* All of these backdrops symbolize abject separation from family life and lack of social inclusion. They grieve too for memories and lost, mythical places, seeking out warm pasts and bright futures that will, inevitably, evade them. In *NLMG* Kathy spends many years driving around England, but never manages to locate the whereabouts of the legendary "elite boarding school" Hailsham where she and the "more privileged" clones were raised. Heathcliff never regains his former childhood place at Catherine's side, as their brief reunion hastens her death (subsequent ghostly hauntings, and apparent afterlife reunion notwithstanding). Taking ownership of his enemies' wealth does little to promote him within polite society given his unknowable background (and, in fairness, his poor behavior after returning to the area). *Frankenstein*'s monster similarly tells his creator that throughout his long journey to find him: "the agony of my feelings allowed me no respite" (Shelley 91).

The characters peer through nicely lit windows that showcase and reinforce their exclusion and offer glimpses of all that they are denied: knowledge, familial affection, comfort, even cleanliness. As children, a muddy Heathcliff and shoeless Catherine gaze in awe upon the Linton family's "splendid place carpeted with crimson . . . a pure white ceiling bordered by gold, a shower of glass-drops hanging in silver chains from the centre" (Brontë 55). *Frankenstein*'s monster discovers the contented, affectionate De Lacey family via a small "crevice, [through which] a small room was visible, white-washed and clean" (Shelley 70). As Ellis further notes, despite the presence of other social or cultural exiles (the blind De Lacey, Turkish Safie) the creature is left alone "to articulate the experience of being denied the domestic affections of a child, sibling, husband, and parent" (123). As he peers in at all that he can never possess, he experiences "sensations of a peculiar and overpowering nature . . . a mixture of pain and pleasure. . . . [He] withdrew from the window, unable to bear these emotions" (Shelley 70). *NLMG* offers a similarly heart-breaking moment when Ruth, shortly after peering at her potential "possible" through the window of a shiny office, exclaims: "we're modelled from trash. Junkies, prostitutes, winos, tramps. Convicts, maybe, just as long as they aren't psychos" (Ishiguro 166). What she imagines here is quite possibly true, given that any likely laws or policies on cloning within the novel must have been drafted to reassure the organ recipients. The creation of the overly horrific monster must be avoided, just in case it might be driven by madness to rebel, or to become, like Heathcliff, "a demon akin to Young's barbarians—never sleeping, never eating, with eyes that do not close even after death" (A. Levy 77).

The windows that the othered and ostracized gaze through prove also to have dangers on the other side. *Frankenstein*'s monster loses his "adoptive" family by entering their cottage too soon, and he also leaps from the safety of the ship to deliberately end his existence at the novel's end.

The clones of *NLMG* come much closer to uncovering the harsh truth of their existence after they have entered the art showroom to follow Ruth's "possible." Heathcliff is essentially parted from Cathy—and has his status as dangerous outsider very clearly confirmed for him—the moment they are brought into the Lintons' grand parlor. Again, the message seems to be that there are risks associated with trying to access certain things that have been denied to us on the basis of birth.

That said, important reunions do occur in all three books, albeit generally in a flawed manner. Kathy and Tommy's eventual cornering of a revulsed Madame is especially poignant. She is the closest thing they have had to a mother figure, social worker, or legislator: they do wring some answers from her, but these only serve to confirm their worst fears about their future and less than human status (Ishiguro 267). Heathcliff arguably has several such meetings, driven by a pragmatic need for restitution and a desire for revenge. The most significant perhaps (apart from his apparent posthumous reunion with Cathy) occurs when he returns respectably well-shod after three mysterious years abroad, but with still-palpable otherness:" (A. Levy 84). Through the more shadowy workings of common law and equity, Heathcliff displaces Hindley, the now-dissolute heir to the Earnshaw estate, and then—via loveless marriage to Isabella, his imprisoning of young Cathy, and the contrived death of his own son—eventually inherits the Linton fortune as well. He seems equally determined to ruin the futures of the next generation until he is shocked into better behavior by their resemblance to his lost love: "They lifted their eyes together. . . . their eyes are precisely similar, and they are those of Catherine Earnshaw" (Brontë 380). Again, resemblances and birth right matter.

Frankenstein's monster repeatedly confronts his terrified, "vetoing" creator, eventually hounding both himself and this negligent "parent" to death (Shelley 145). As Ellis observes, "in his campaign of revenge, the Monster goes to the root of his father's character deformation, when

he wipes out those who played a part, however unwitting, in fostering, justifying, or replicating it" (124). The novels point out the most likely societal impacts of creating or engaging with unknown, monstrous others, namely that there might be "a deliberate attempt to infringe the order of things" (Canguilhem 142). *Frankenstein*'s monstrous nature can be seen as a challenge to the norms on parental relinquishment, while Heathcliff's social mobility circumvents long-standing rules on illegitimate birth and property inheritance rights. *NLMG* differs significantly in this respect. Its cohort of quietly defeated, obedient donors largely accept their rights-less status, never thinking to attempt escape or insurrection. Here, progress in the name of health and bioethics requires a section of the population to be deemed inhuman, yet kept stable. Myths, lies, and a variety of injustices must be perpetuated not only to deprive these commissioned creatures of any identity or ancestry, but to keep them under control and to maintain unjust but useful norms of ownership and resource allocation. A cruelly discriminatory social order means that there is no question of their rights having been outweighed by the weightier interests of true citizens, because the clones were never afforded any human rights to begin with. As such, this book's warnings are not aimed at those brave enough to flee from parental duties or bring unknowable foundlings into their family home. Rather, they caution against allowing the powerless "monster" to ask difficult questions, for fear that they might in time subvert inequitable systems. It is fitting that the clones of *NLMG* do not embrace suicide in quite the passionately vigorous way that the other monsters seem to (e.g. by deliberate exposure to the elements or starvation), but it can be argued that by failing to attempt any escape, they still are complicit in ensuring and accepting their own demise. Tommy's rages do not drive him towards revenge: instead, they serve to internalize blame for the clones' situation, suggesting that he perhaps all along "did know, somewhere deep down" that their fate would be inevitable (Ishiguro 270).

Certain truths must perhaps always remain unknowable (Heathcliff's ancestry, the identity of the clones' genitors) either to preserve the social order or to protect the interests of those who are not existing as "other." The law's role here is to maintain secrecy and distance, although it differs across these three texts. In *NLMG,* the law enables the horrific. Unethical cloning and organ harvesting require—in addition to the condoning of systemic murders—closed birth records and enough secrecy and disinformation to keep the clones compliant (if not complicit). Wider society must remain largely ignorant of their suffering or at least indifferent to it. Arguably, these aspects of their existence are echoed to some extent in certain jurisdictions where the courts must adjudicate rights clashes involving commissioned infants (discussed more fully in the next section). In *Frankenstein,* the law is most notable for its absence, ineffectiveness, and irrelevance: all that occurs is illegal, with creator and monster both operating well beyond the reach of law, social policy, or justice. In *Wuthering Heights*, law serves firstly to exclude, and later to enable Heathcliff's absorption into affluent society, which (along with the loss of Cathy) completes his monstrous transformation into cruel, Hindley-like patriarch. Like *Frankenstein*'s jealous monster, Heathcliff destroys the lives of those who should have been closest to him before succumbing to self-destruction: he is partially redeemed, however, by his premature death which enables the younger generation to slowly build—or rather restore—their own fortunes and familial bonds. Law, however, has little to do with this final outcome serving mainly to reinforce the otherness of the illegitimate and the vulnerabilities of those who lack kinship or ancestry, rather than to effect justice.

In sum, laws and policies within these novels will either ignore or enable harms suffered by those who were already facing exclusion by virtue of their birth status. Through absence, silence, inconsistencies or ambiguities, several opportunities to achieve justice are lost. Property

and the legal transmission of ownership remain sacred concepts throughout, however, whether represented by ancestral estates, secret information, stolen cadavers, "donated" organs, or precious mnemonic items.[6] Though nightmarish in terms of parental abandonments, subsequent rejections, disastrous kin reunions, and fatal consequences, certain aspects of these three novels therefore mirror a key reality: that the law often limps behind science when it comes to regulating assisted reproduction or permitting genetic reunions. Various law-averse black markets have long surrounded family creation and kin tracing, whether in connection with adoption, surrogacy, or gamete donation (Lucas 553). Unsurprisingly, property and contract law principles are often used to settle surrogacy disputes by looking to the "ownership" of embryos or infants, which has the potential to further objectify and dehumanize. Parental anonymity rights, protected by vetoes, further compound such otherness by entrenching societal disenfranchisement and confirming a hierarchy of rights and interests. This is difficult to justify in terms of those human rights law frameworks that are meant to protect the vulnerable and prevent rights violations arising from discriminatory, inequitable treatment.

The following section looks to recent case law involving uncertain genetic ancestry, arguing that monstrous decisions continue to perpetuate legal fictions and create vulnerable "others" who are born lacking legal status and any meaningful rights protections. The harms associated with "limping legal parentage" arising from cross-border surrogacy have at least been acknowledged by drafters of human rights provisions: to some extent these are gradually being examined, with a view to being addressed in future. In the meantime, the tendency by jurists to favor certain norms of legal ownership, and contractual obligations, is still apparent, despite the increasingly urgent onus upon "law maker(s) to make social, ethical and moral judgments" where necessary (*M.R. and D.R.* at para. 11).

3. Monstrous Intersections: Law, Rights, Science, and Ownership

> "safeguards in the form of contact preferences may not adequately protect donors from unwanted exposure or contact"
>
> — Michelle Taylor-Sands, "Removing Donor Anonymity: What Does It Achieve? Revisiting the Welfare of Donor-Conceived Individuals"

This section examines some of the recent jurisprudence on genetic connection and the need for authentic identity, questioning whether human rights frameworks can effectively prevent the othering of those lacking identifiable origin. As in the novels discussed above, it seems that the determination of legal parenthood remains a contentious aspect of family law (Carbone 1295; Steiner 2). Surrogacy cases particularly highlight the overlaps, injustices, and inconsistencies within law, ethics, and policy.[7] Arguably, a "politics of exclusion" (Whitehead 55) still serves to disadvantage those who cannot evidence genetic connection: though the best-interests-of-the-child principle increasingly guides decision-makers,[8] cross-border, commissioned births involving gamete donation still give rise to a number of legal and ethical problems. Responses differ widely across jurisdictions and are often contradictory: total bans, criminalization, judicial acquiescence, and the active promotion of global "fertility tourism" (Van Beers 103) are all evident, confirming the lack of consensus.

As one law firm noted recently: "surrogacy is a complex but wonderful journey to parenthood" (Hoechst and Sobottka 45). Lindy Wilmott has similarly suggested that "because surrogacy will bring benefit[,] . . . the practice should not be prohibited unless there is evidence that it is a harmful one" (230). Others have argued, however, that "commercial human surrogacy is sufficiently immoral and illicit to be suitable for a ban," given also that some agreements do

seek to veil any "tortious harm" (Lilienthal et al. 88). As Maire Ní Shúilleabháin (105) has recently stressed, cross-border surrogacy can easily amount to "forum shopping," with commissioning couples simply opting for whichever jurisdiction best suits their needs in respect of donor anonymity or the quiet circumvention of their own state's laws and policies. Jurists too often seem to fall back upon commercial law norms and property ownership doctrines (when drafting surrogacy arrangements or settling disputes, for example). Discourses on human trafficking (Lahl 241), "reproductive brothels" (Corea,276) and "womb-leasing" (Harris 137) remain relevant too, in terms of how surrogacy can easily compromise female autonomy, reproductive freedoms, and economic liberty (Vijay 210). Moreover, even if the commissioned "product" is not the child itself, but rather the "labor" of the surrogate (Hanna 341), the loss of the "juridical personality of the human foetus and its gestating mother" can still be seen as "indicative of slavery" (Lilienthal et al. 90). As such, "surrogacy raises serious issues of commodification[,] . . . allowing contracts, sales, and money" to essentially govern this area of family life and child welfare (Field 1155).

The monstrous treatment of the abhumans of Gothic literature—who were crafted, abused, objectified, and excluded to serve the proprietary interests of wider society—fits within such an ownership-led template for otherness. In cross-border surrogacy cases especially, where domestic laws tend to clash—and human rights principles seem to fear to tread—purchaser-friendly "legislative voids" arise (Finnerty 83). These have given rise to a monstrous body of conflicted case law that serves to further embed both the concept of otherness and the need for visible, underpinning ownership. And yet, a "laissez-faire approach" (Vijay 201) to commercial surrogacy means that very often "where there is no genetic relationship between the child and the surrogate, countries tend to leave it to the courts to decide parentage" (Finnerty 83). Domestic judges have therefore adjudicated upon sudden changes of heart by surrogates reluctant to relinquish the child

they have carried,[9] and heard pleas from gamete donors seeking contact with their genetic children.[10] The law is ill-equipped to regulate human emotions, or indeed to always predict them correctly. As the Family Court for England and Wales recently noted, frequently "the path to parenthood is less a journey along a primrose path, more a trek through a thorn forest" (2018).[11] The need for intricate "legal gymnastics" (James 178)[12] may also leave judges with "little choice but to stretch, manipulate, or even disregard" certain statutory provisions in a bid to achieve some semblance of "justice" for the child conceived via surrogacy or gamete donation (Fenton-Glynn, "International" 37). [13] This is perhaps why, somehow, cross-border "commercial surrogacy has been morally justified in many countries because it is not seen as the commoditisation of babies, even if the end-product of the whole arrangement is the baby" (Vijay 241). And yet, gendered, socioeconomic, and racial inequalities still attach to the process, especially in developing nations (Tobin 351). It is perhaps by necessity then that a "language of property" has so often been used to regulate or bestow legal parenthood arising via surrogacy (Maillard 226).

One positive development is the increasing judicial acknowledgement of the consequences of origin deprivation for those who lack identifiable ancestry. As the High Court (England and Wales) recently stressed, much "painful legal confusion …can arise when children are born as a result of unregulated artificial conception" (*L v C* per Jackson J at para 1).[14] In *L v C* it was noted how the child's "position is of great importance. . . . fairness to her calls for the circumstances of her conception and neonatal period to be reflected as accurately as possible amidst the adult discord" (*L v C* at para. 55, per Jackson L). In *Re DM and LK*, the need for transparency between all parties was similarly highlighted, especially where any changes to the genetic material being used had not been envisaged or covered by the original agreement. Here the religiously devout surrogate mother was not told that the intended commissioning couple had since divorced, with

the ex-wife having begun a new relationship. The use of a new partner's sperm left the surrogate mother in a "highly distressed" state, and quite reluctant to part with the child who had been, to her eyes, conceived by deception in sinful adultery. Had she not previously provided her consent to the making of the Parental Order (which allows for legal parenthood to be migrated to the commissioning couple), the court would likely have had to consider issues of "contractual" breach—or property ownership over gametes—in more detail (paras. 14–16). As was further confirmed in *H & S,* agreements can easily go wrong and cause "great distress to the biological parents and their spouses or partners."[15] Here, the relevant legislation could not be applied, as the surrogate mother simply refused to part with the child, and then withheld her consent to the making of a Parental Order.[16] The court's primary task in this case was to ensure that the child could mature into "a happy and balanced adult . . . to achieve [her] fullest potential." (per Russell LJ, at para. 7).[17] It was argued that the surrogate mother—if allowed to keep and raise the child herself—might paint the father and his same-sex partner in "a negative way" to the child, offering her only a "limited opportunity to understand the history behind her conception" (per Russell LJ, at para. 118). Though the court noted that the surrogate mother had likely been less than honest over the original agreement, the central issue was not the validity or otherwise of that arrangement. Rather, it was "the function of the court to decide what best serves the interests and welfare of this child throughout her childhood" (per Russell LJ, at para. 125). Significantly, the court stressed the importance of the child's identity, and the need for her to know the "reality of her conception." Child Arrangements Orders were made in favor of the commissioning couple to transfer parental responsibility and residence to the genetic father. Notably, contact with the birth mother was not prohibited.

In *Re B,* Theis J similarly set out how children's lifelong welfare needs must be the court's paramount consideration (EWFC 86). Until adopted, the baby in this case—conceived abroad via surrogacy and using an anonymous egg donor—remained in limbo and lacking in legal status. Having separated from his wife, the genetic father (also the legal father) rejected any contact with the child, effectively relinquishing his parentage. The court stressed that both he and the gestational surrogate mother were still "an important part of B's identity and background," though no mention was made of the anonymous egg donor who was the child's other biological ancestor. The adoption order would, it was hoped, bring "lifelong security and stability to her relationship" with her commissioning mother. The court noted that, as an adoptee herself, the commissioning, adoptive mother was likely to possess a good degree of "sensitivity and understanding to B's background," being "aware of the issues that can arise." Arguably, otherness is being acknowledged here alongside its potential effects. Further tentative acknowledgement of the complexities of such cases was also seen in *Re Z,* where again, a commissioning married couple separated soon after registering the child's birth. Here, the genetically unrelated father (who held legal paternity by virtue of the marriage) sought a formal, *Frankenstein*-worthy declaration of non-paternity. Theis J again called upon parents and fertility clinics to give greater consideration to the *potential* legal position of any child who might be so conceived, highlighting how many "medical, social and emotional reasons" underpin the need to seek out genetic truths. The pitfalls of "administrative falsehoods" and donor anonymity were also mentioned (*Re Z* EWFC 68).

Given that principles of contract law (honesty, consensus, consent) and property law (ownership, possession, written evidence) have been drafted in to settle certain cases, it seems reasonable—if perhaps a little distasteful—to suggest that surrogates and commissioning parents should focus on forming meaningful agreements at an early stage of the process (D'Alton-Harrison

357). Though generally informal in nature (within the UK and Ireland) such documentation could at least provide a workable "basis for granting early parental orders prior to the birth of the child, similar to Californian pre-birth judgments" (358). Whether this written evidence of agreement might be best drafted to emulate a trust instrument, title deed, or contract for sale is unclear, however. One recent case illustrates how a set of agreed "contractual" terms (in a hearing for a Parental Order) and veiled references to ownership did serve to settle a difficult case of international gestational surrogacy involving anonymous egg donation, heard in the wake of a sudden ban by the surrogate's state of residence (Nepal). The High Court noted that: "The agreement confirms SM [the gestational surrogate] undertook the surrogacy with her husband's knowledge and consent, they will not claim any rights in relation to the child SM gives birth to and that the child *contractually and genetically belongs* to the applicants. SM agrees to take any steps required to give full effect to the agreement. CH [the genetic father] covenanted as to his general health, agreed to bear various expenses and costs and to accept full responsibility for the surrogate born child" (*CH v SM* para. 17 per Theis J, emphasis added).[18] Significantly, the child was deemed here to *belong* to the applicants, not only through prior agreement but also because one of the applicants *possessed* genetic connection to the child. The fact that one half of his genetic inheritance was derived from an anonymous egg donor was not discussed, however, nor was there much mention of identity rights, though child welfare—and the child' vulnerability—were at least referred to: "The evidence demonstrates that X's lifelong needs require a parental order to be made. It is only that order that will give him the lifelong security his welfare requires" (*CH v SM* at para 29).[19] Although such reasoning perhaps veers towards the generally dangerous notion of humans being owned, it does in many ways reflect certain realities of human nature: we do have a tendency to avoid or "other" those who lack demonstrable connection to us, and we also place much value

on knowable ancestry. As Naomi Cahn has further argued, "the toxicity of internalized family secrets" is always best avoided, given how often such "secrecy has an emotional component" (1076). It seems fair to argue that genetic truths require meaningful acknowledgement but are often overlooked or side-lined in a bid to effect workable outcomes within the available legal and conceptual frameworks on "relatedness." The law struggles to keep up with science, and as a result can be said to permit or enable rights violations, much as it did in both *Frankenstein* and *NLMG.*[20]

In 2014, Ireland's Supreme Court highlighted (in *M.R. and D.R. & Ors -v- An t-Ard-Chláraitheoir & Ors)* an urgent need for legislative reform in the areas of surrogacy and birth registration given how "scientific and medical advances have far outpaced the use of existing legal practices and mechanisms" (Denham CJ para 113).[21] The value of knowable, accurate birth records was discussed here when an altruistic surrogacy agreement led to a legal challenge to Ireland's birth registration policies. Here, the lower court had originally permitted a genetic mother (whose sister had acted for her as altruistic, gestational surrogate only) to be legally registered as the child's parent. This reflected both the reality of the child's genetic ancestry and her ongoing parental role (i.e. the applicant's sister had carried the baby for her, but it was the applicant's own egg that was used to create the embryo, and she was now raising the child). The Supreme Court overturned that decision on appeal however, declining to intervene essentially, and declaring that any law on surrogacy "affects the status and rights of persons, especially those of the children; it [surrogacy] creates complex relationships, and has a deep social content. It is, thus, quintessentially a matter for the Oireachtas (Irish Parliament)" (Denham CJ para 113). The case seemed to turn upon the archaic Roman Law principle of *mater semper certa est* ("the mother is always certain") which firmly ties legal maternity to childbirth alone, and is therefore largely redundant given the modern realities of egg donation and gestational surrogacy. Though ostensibly used here to settle

the matter of *legal* maternity with expedience—falsifying a key genetic truth in the process—it was still held that this maxim had apparently, indeed oddly, never been a part of Irish law (para 154).[22]

The jurisprudence on international surrogacy offers further confusion. Despite growing judicial and social recognition of the importance of genetic ties,[23] worries remain in respect of protecting rights associated with child welfare paramountcy, family life, nationality, and immigration (Fenton-Glynn, "International" 555). Some previously tolerant states have suddenly become prohibitionist, leaving infants born abroad to be deemed stateless or legally parentless.[24] Such deliberate "orphanization" can see babies placed in state care for long periods of time.[25] A particularly horrific example involved the European Court of Human Rights. In *Paradiso and Campanelli v Italy*, an unmarried Italian couple entered into a gestational surrogacy agreement (using a third-party, anonymous egg donor) via a Russian fertility clinic. On the basis that they had subsequently used "forged" or inaccurate documents to successfully bring their child back into Italy, it was held that the boy had been legally "abandoned" by them. DNA tests found no genetic connection between the child and his commissioning parents, despite their initial belief that the applicant's sperm had been used in the conception. Although the child had spent the first eight months of his life with them and was being well cared-for, he was removed to a children's home, spending a contact-free fifteen months there before being adopted by another family. The European Court's Lower Chamber originally found that the applicants had clearly "acted as parents" towards the child (para. 98). The Grand Chamber disagreed on appeal however, allowing that only a basic right to respect for their private life (their "decision to become parents") was relevant (para. 163). The right to be afforded respect for one's home and family life (under Article 8 of the European Convention) had not been engaged, it seems essentially because genetic

connection was absent. The "short duration" of the child's relationship with the parents (eight months, or his entire life, depending on your perspective) was also seen as a key factor.

Much emphasis was placed too upon the illegality of the commissioning parents' actions, in terms of Italian law, which criminalizes commercial surrogacy. Given the ethically sensitive issues involved, the European Court was keen to afford Italy a wide margin of appreciation;[26] the child's lack of biological connection was clearly the key factor, however, somehow enhancing the illegal nature of the parents' actions. The reasons behind Italy's ban on commercial surrogacy were not discussed, even though the Court highlighted the need to enforce that particular domestic law provision (Ryan 202). Though the Court's remit is limited to procedural matters, there was a fairly "permeable line between procedure and substance" here: any retrospective recognition of familial rights in such cases potentially could apparently limit the state's ability to prevent surrogacy by way of deterrence (202).

As Marianna Illiadou has argued, too, the Court's "reliance on what seems to be a distinction between legitimate and illegitimate families" was a worrying development, in terms of stigmatizing those born outside of marriage (154). As Ní Shúilleabháin further observes, the European Court had previously shown considerable reluctance to interfere with national policies involving bioethics (122). In *Mennesson v France* for example, a married French couple had successfully brought their surrogacy-conceived children home from the United States but later suffered discriminatory treatment which affected their children's nationality rights and inheritance tax liabilities. Here, however, there *was* a genetic connection to the father, so that France's domestic laws were seen to amount to a "contradiction between the legal and social reality" and also "undermined the children's identity" within their society (Pluym). The best interests of the child were not being promoted, and there was an infringement of the private life element of Article

8 of the European Convention. No interference with the right to respect for family life was found, however. It seems fair to conclude that the rights of the commissioned child can still be quite easily side-lined or outweighed in such cases, either by those who have created them, or by the presumably much weightier interests of wider society (Noon).[27]

States can permit or enable vetoes on information and allow "anonymous births," despite the existence of Article 7 of the Children's Convention (UNCRC) which was designed to protect, as far as possible, the right to know one's parents. Similarly, the best-interests-of-the-child principle (as enshrined in Article 3 of the UNCRC) cannot compel jurists, legislators, or parents to provide children with genetic truths.[28] Traditional legal fictions therefore persist, including falsified or sealed birth records, even though the permanent removal of parental rights and familial contact should really only be justified as "necessary" (under Article 8(2) of the European Convention) where some "compelling reasons" exist to do so (Doughty 22). It is unsurprising then that the motives of those who seek out information on—or reunion with—unknown ancestors have also been questioned by some: "Harm caused specifically by a lack of access to identifying information is unclear, at times speculative and often extrapolated from adoption scenarios, which may not provide accurate analogies" (Taylor-Sands 564). Retrospective removal of donor anonymity may even see the relationship between donors and their genetic offspring framed as that of "angry and betrayed" people fleeing from their "stalkers," presumably in grand Gothic style. This could potentially also see anonymous donors being "demonised if they took legal action to prevent contact" with their descendants (45). There still seems to be a need for children so conceived to be regarded as free from any undesirable, inherent traits, to benefit both the greater good and their new, social parent(s) (Dillard 79).

As in *NLMG*, a sort of "disposability discourse" wrapped up in "the language of commerce" (Lilienthal et al. 98) still holds sway, given how easily we can side-line the rights and interests of certain othered individuals especially where they lack the sort of social status that generates automatic, inherent belonging. In other words, if blood-ties are absent and the law is silent, equivocal or inconsistent jurists still tend to look to common law rules of commerce and ownership (consent, agreement) for guidance, rather than to human rights principles (equality, dignity) for inspiration. Though certain adoptee-relevant rights and interests (accurate identity, meaningful information, kin contact) are gradually becoming more juridical in nature,[29] coherent "laws of surrogacy" have yet to be meaningfully articulated or aligned within a workable, child-centric human rights framework. The concept of family-life rights might well serve to complicate things. If the family is best understood as "a sort of mini-state, with near-absolute power vested in its heads" (Montgomery 325), then any putative "right" to procreate could rest upon near-sacred principles of "personal liberty or familial privacy" (Dillard 48). As seen in the novels referred to above, such rights generally serve to exclude or trump any opposing claims made by vulnerable, aggrieved "others" who may have originated—or are struggling to exist—beyond the privileged realms of genetic kinship, where belongingness confers rights automatically. As such, the contentious arena of adult-versus-child rights and interests is far from perfect.

As Cahn has argued, "the law's tight focus on the parent-child relationship has left out legal questions relating to donor-conceived adults" (1078). Even where families are regarded in law or policy as "communities of persons . . . with individual interests which must be protected" (Montgomery 325), it is still possible to view children as mere "things" that might be owned. Parents can be said to "possess" their offspring, in the sense that they can legally "access them, use them, and determine their future relations . . . in exclusion of others' power" (Dillard 49).

Fetuses and embryos have been described similarly as "the objects of property relationships" (Ford 267) meaning that a "property model of pregnancy . . . allows the law to dispose of maternal/foetal issues in different ways. Instead of asking '*what is this entity*?' the property model asks rather '*what relationships exist in respect of this entity?*'" (286). Similarly, on the basis of genetic contributions, deeming frozen embryos to be items of "matrimonial property" is unseemly but not impossible for the family lawyer: "when the egg and sperm unite, they are no less the property of the gamete owners, but rather . . . they become marital property instead of personal property" (Sublett 596). If such a "free market approach to reproductive questions" continues to hold sway, then economic laws will likely continue to govern global reproductive markets (Van Beers 133) especially where these have been developed to actively circumvent domestic bans on commercial surrogacy and gamete donor anonymity. The significance of such thinking will probably resonate with those who seek to challenge the use of closed records and disclosure vetoes.

As the case law above confirms, domestic laws and policies governing these areas are often largely symbolic, offering little if any reproach to those who simply choose to ignore the legislation, within or beyond their own national borders, and operate outside of the law. In the absence of profound infringements of fundamental rights, it seems unlikely that the European Court of Human Rights will call for the meaningful regulation of surrogacy across Convention-signatory states. A complete lack of consensus amongst EU nations has similarly enabled a wide margin of appreciation, to the extent that increasingly monstrous outcomes such as that seen in the *Paradiso* case seem set to continue. Indeed, in terms of predicting possible legal or policy reforms on the basis of this decision, it is worth noting that "a prohibitionist treaty is a far more realistic option and would be consistent with international human rights law, if it is accepted that commercial surrogacy arrangements amount to the sale of a child" (Tobin 352).

That said, there is some hope to be found within the various calls for the establishment of "a human rights based system of international governance . . . based on three regulatory models: public health monitoring, inter-country adoption, and trafficking in human beings, organs and tissues (Shalev et al. 9). The Hague Conference on Private International Law (the HCCH) recently acknowledged the difficulties arising from the "significant diversity in national approaches . . . [which] can lead to conflicting legal statuses across borders and can create significant problems for children and families, e.g., uncertain paternity or maternity, *limping parental statuses*, uncertain identity of the child, immigration problems, uncertain nationality or statelessness of the child, abandonment including the lack of maintenance" (*Malta IV*, 2016, para 4, emphasis added).

It was similarly stressed in *Malta IV* that "legal parentage is an issue of international concern . . . a gateway through which many of the obligations owed by adults to children flow" (para 5).[30] The harsh effects of "limping parentage" and the consequences of human exploitation (with the potential for trafficking or slavery) are at least now gaining wider recognition (para. 45). In 2019, the HCCH reiterated its commitment to the drafting of a new Convention aimed at recognizing foreign court decisions on legal parentage, with a separate protocol proposed for international surrogacy arrangements. Surrogacy as a practice was neither condemned nor supported, and intercountry adoption was specifically excluded from this new provision, on the basis that it already has its own bespoke human rights protections.[31] The proposed Convention would not cover rights and obligations relating to maintenance, succession, or nationality presumably because these fall within the remit of private property law matters and domestic immigration rules. It would likely require that surrogacy arrangements be made in writing, pre-conception, to promote greater transparency and offer more protections to all parties involved in the process. Significantly, discussions included the need for sensitive terminologies: "surrogate mother" could perhaps be

replaced by the term "surrogate woman" or "surrogate." Whether this reflects a need for contractual certainty, a desire for a more accurate indication of "ownership," or a burgeoning awareness of the emotional complexities attaching to the process is unclear. Crucially however, accurate information for donor-conceived children should also somehow be preserved, and—most encouragingly for those of us still affected by maternal vetoes—there was clear recognition of how domestic adoption similarly "raises many important issues and challenges." Though this was not deemed to be a priority for the HCCH at present, it was at least noted that the topic could be addressed by the Group at a later stage (HCCH 2019 Report, 2).

The telling—and empathetic hearing—of stories by the vulnerable remains a key component in achieving legal reform: this was confirmed in 2019 when the UN also heard direct testimony—and received formal Recommendations—from an NGO/support group for donor-conceived and surrogacy-born persons (Donorkinderen). These cited the "need for urgent national and international measures" not least legal frameworks that might ensure them "the right . . . to access information about their identity and origins … [and] preserve relations with their biological, social and gestational families" (The Hague, 2019). Acknowledging that intergenerational harms can often attach to non-origin, the Recommendations asked also that "comprehensive and complete records of all parties involved in the conception of the child be held by the State in perpetuity for future generations."[32] Such direct lobbying for change is a welcome development for the "tens of thousands of children . . . having their rights denied" by the current gaps and inconsistencies within international and domestic law (Allan, Adams, and Raeymaekers). Adoptees could perhaps benefit too from a renewed focus on the dangers and injustices of disclosure vetoes and closed or falsified birth records.

4. Conclusion

"Rather than bringing individuals together, society is designed to protect them from each other."

—Zoe Beenstock, "Lyrical Sociability: The Social Contract and Mary Shelley's *Frankenstein*."

The law, as a catalyst for meaningful change, is often fettered, much like *Frankenstein's* monster, in terms of how far it might seek to reason with those who continue to deny or diminish the importance of natal connections—and the abandoned human's need to belong somewhere. It seems fair to conclude that the law has been somewhat complicit—or at least remiss—in failing to embed meaningful, justiciable protections against the "othering" of the origin-denied vulnerable person. By framing certain basic needs as somehow monstrous, law and policy-makers perpetuate a number of rather cruel Gothic traditions, especially those grounded in the fear of encountering—or, worse, reuniting with—some instinctively feared, abhuman other. Under such a template, those with uncertain or unknowable origins must remain in a law-enabled exile, unclaimed, unrelated and often unnamed. Put bluntly, they must be denied fundamental rights so that some greater good is served, for example in terms of preserving social orders (familial sanctity, legitimacy, fertility) or protecting property interests, namely those wealth inheritance systems that are grounded in legal relatedness, or investments in certain "industries" (adoption, surrogacy, gamete donation). Such transactional relationships tend to demand binding contracts and evidenced ownership. They rely also upon secrecy, stigma, and sharp distancing to bury uncomfortable truths and then veto or prevent the potentially abject horrors of "kin-yet-other" reunion.

As the case law and Gothic novels referenced above also demonstrate, lawmakers often seem overly tolerant of—or perhaps oblivious to—the types of injustice that seem to affect those

unknown "others" who lack resemblances or genetic relatedness. Horrific issues that occur just beyond the law's gaze ("baby farms," illegal orphanages, or the "re-homing" of adopted children, for example) further illustrate just how easily and frequently "fiction molds reality and reality authenticates fiction" (Canguilhem 139) in both family life and family law. Adult-centric legislative reforms (in, for example, France and Ireland) seem set to maintain parental vetoes, perpetuating a deeply unjust form of discrimination.

Given how easily and often "horror emerges out of times of political turbulence" (O'Flinn 112) one could argue conversely, however, that meaningful reforms might yet somehow materialize out of the global chaos currently attaching to surrogacy laws and policies. As Willmot has observed, "the social landscape has shifted considerably" since assisted reproduction methods first became possible (232). Future generations may yet benefit from the human rights discourses currently taking place around surrogacy and the widespread, profoundly adverse consequences of "limping parentage." The harms and injustices associated with having one's fundamental rights disregarded are gradually being acknowledged, especially where certain "regimes have played a part in creating reproductive black markets which have led to dangerous consequences" (Kriari and Volongo 353). That said, given that increased state involvement in matters of private or family law is seldom seen as a welcome development, it seems unlikely that very far-reaching domestic reforms (such as the introduction of annotated birth certificates or some statutory requirement of disclosure on the part of adoptive/commissioning parents) will be implemented in many jurisdictions any time soon.

Enforcing laws or policies to prevent the rise of "a new illegitimacy" (Storrow 38) by providing children with accurate genetic information (or enabling some manner of contact with their genetic relatives) might be difficult in the absence of sufficiently robust, good faith promises

from parents. Having commissioning parents pre-agree to serve as trustees over the future "rights" of their children in such situations might perhaps be a workable option, especially where domestic courts seem determined to look to commercial and property law principles anyway for direction. As June Carbone suggests: "shortly after the child's birth, the parent or parents committing themselves to the child's future should join in establishing a permanent identity" (1344). It has been argued that children created via gamete donation exist under a sort of 'gift-debt' (Raphael-Leff 118). Donor anonymity adds to this: they exist, but only by virtue of an unfair—perhaps completely illicit—process that requires their fundamental human rights to remain systemically subordinate to those of their genitors. Such active discrimination occurs within all three of the novels referred to above: individuals "created" in such a manner outside of these fictional works are similarly expected to be grateful, invisible, or quietly accepting of their fate. They should not demand reunion or meetings with those who enabled or commissioned their existence, nor should they lay claim to identities or genetic ancestries against the wishes of wider society or veto-holding ancestors. Their best interests and human rights are capable, too, of being outweighed by the heavier interests of those whose place within society has been legitimated (by birth or adequate paperwork that legalizes and evidence their connections to others).

This is arguably the most horrific aspect of law's role in these processes: it is often capable of little more than entrenching further the already pernicious secrecy, "darkness and distance" (Shelley 149). It offers little comfort for those who must simply hope and wait for "everything [they'd] ever lost since...childhood" to perhaps somehow wash up beside them eventually at some unknowable point in their future (Ishiguro 263). And yet, the law permits a Gothic, deliberately de-humanizing denial of access to identity-rich mnemonic devices, whether these take the form of unaltered birth records, original nationality, medical records, original names, familial images,

accurate information, answers to questions, or some level of human contact. These various hallmarks of humanity—frequently taken for granted by those who have never found themselves on the "othered" side of law's thick, often opaque glass windows—speak to the innate human need to simply belong somewhere, to a knowable someone. Jurists should be mindful of their over-arching obligations to promote human dignity and address vulnerability where possible: they must avoid justifying the often-monstrous cruelties that can flow from discriminatory vetoes and dehumanizing interpretations of law and policy. In sum, laws and policies that permit or facilitate easy exclusions from human rights protections call to mind the Gothic traditions of fear, loss, loathing, and futile searches. To advocate meaningfully for those who are voiceless and vulnerable to permanent rights-exile, it bears remembering that "if we become indifferent to consequences …we, like Dr Frankenstein, risk becoming monstrous" (Jurecic and Marchalik).

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[1] The monster's problems (e.g. homicidal tendencies) truly start when he tries to emerge from shadows and wilderness to [re]join society: "I heard of the division of property, of immense wealth and squalid poverty; of rank, descent, and noble blood" (Shelley 78).

[2] See however Goetz (359) on the possibility—and potential consequences—of Heathcliff's biological relatedness to the Earnshaw family.

[3] See further Fenton-Glynn (34) on possible breaches of Article 30 of the UN Convention on the Rights of the Child and Article 8 of the European Convention on Human Rights for both child and parent, not least in respect of enabling meaningful post-adoption contact.

[4] A recent English court case merit mention here. In *PK v Mr & Mrs K* [2015] EWHC 2316 (Fam) 21, an Adoption Order was revoked, and the child's name changed. The High Court stressed that public policy would rarely permit such a contentious outcome but accepted that the girl—ill-treated by her adoptive family—sought "to once more assume the last name of her biological mother to reflect that she is her child and belongs to that family."

[5] Kamilla Elliott further notes how Gothic fiction is often particularly taken with evidencing maternal and daughter identities via miniature portraiture (8)

[6] Debts and indebtedness are significant also: Heathcliff gains ownership of *Wuthering Heights* from Hindley via an accumulation of gambling bills (either by way of equitable mortgages or estoppel claim, presumably). The notion that those who were made monstrous are due something from the society that created them is at odds with the fact that they are simultaneously owed nothing in terms of legal justice by virtue of their nonhuman, illegal, or illegitimate status.

[7] On surrogacy definitions see further Charrot who frames it as "an arrangement between a woman who is going to bear the child (the surrogate) and a couple who wish that child to be 'theirs' (the intended parents) whereby the surrogate undergoes artificial insemination in order to become pregnant, bears the child and then gives it up to the intended parents. [Where] . . . the surrogate's own eggs are used ('traditional' or 'partial' surrogacy) [occurs] otherwise (if the surrogate's eggs are not used) [then] 'gestational,' 'host' or 'full' surrogacy [occurs] . . . and could involve the

gametes of both intended parents, or the gametes (sperm/eggs) of one intended parent, plus those of a donor" (39).

[8] See United Nations, Art. 3 (1), which states that: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

[9] See for example *A v B.*

[10] See for example *Re Z.* The Irish Supreme Court's decision in *McD. v L. & Anor* [2009] IESC 81 offers a similar perspective, with the sperm donor father being refused a Guardianship Order but still permitted to apply for "access" (child contact).

[11] See *B*, citing Hedley J in *re X and Y (Foreign Surrogacy)* [2008] EWHC 3131.

[12] See also *In the Matter*, where the High Court (England and Wales) recently made a significant declaration of incompatibility (with the European Convention on Human Rights) in relation to s. 54 of the Human Fertilisation and Embryology Act 2008 ("HFEA"), under which only couples (rather than single persons) were able to apply for Parental Orders.

[13] Sums received by a surrogate cannot amount to more than "reasonable expenses" under the 2008 Act (as amended) so that surrogacy in the UK remains within the realm of altruistic endeavor. A time limit of six months from the birth of the child also applies to the making of a Parental Order (which transfers legal parentage from surrogate to commissioning couple), provided the child is already resident with them, and they are domiciled within the UK. The child must be genetically related to at least one of the applicant parents, and consent from the surrogate is also required, unless she is incapable of same or unable to be found. The Foreign and Commonwealth Office

Guide (2014) UK (Online), which warns that "International surrogacy is a complex area. The process for getting your child back to the UK can be very long and complicated, and can take several months to complete." (Accessed 01.06.19)

[14] See also *M v F* on sperm donation and *JP v LP*, which presented similar issues and difficulties.

[15] It was held that the surrogate mother had deceived the commissioning parent, having never had any intention to relinquish the child after birth. There were concerns that she might quit the jurisdiction taking the baby with her; she was suspected also of having tweeted a derogatory comment about the case, including homophobic allegations about the lifestyle of the same-sex commissioning couple. Interestingly, her need to express breast milk during the hearing was, in the court's opinion, based upon a desire to interrupt the other side's testimony.

[16] The central issues for the court were determination of parental responsibility, residence, and contact, but only insofar as these related to the infant's welfare. The child had been living mainly with her mother for fifteen months.

[17] The court relied upon the test for child welfare established in the Court of Appeal in *Re N (A Child)* [2007] EWCA Civ 1053.

[18] A key aspect of this case was the Nepalese government's decision to ban surrogacy and deny exit visas to children so conceived, shortly before the birth of any child.

[19] The court is applying s.1(4) of the Adoption and Children Act 2002.

[20] In *Wuthering Heights*, the law initially enabled Heathcliff's ill-treatment and his later revenge, but was eventually replaced by human nature (Cathy and Hareton's innate decency) as a device

for achieving justice (social and familial) and a degree of reparation for the intergenerational harms suffered.

[21] *M.R. and D.R.* at para 113. "Constitutional claims" to a right to parent have been upheld, however, in controversial contested adoptions. See for example, *N & Anor*, the "Baby Anne" case in which an adoptive placement was controversially overturned after two years. See also the UK Supreme Court in *Re G*, in which it was held that courts making a welfare determination must evaluate parental "contributions" that may be genetic, gestational, or social/psychological.

[22] Arguably, "the sociological and philosophical concept of motherhood should, in the case of surrogacy, give rise to a new principle of '*mater semper incertus est*' (the mother is uncertain)" (D'Alton-Harrison 382).

[23] See for example *Mennesson*; and *Labassee*.

[24] See for example *Re X*; and *Van der Mussele*.

[25] See for example *CH*, in which a change to the law in Nepal led to significant difficulties.

[26] Conceptually akin to "wiggle room," the doctrine allows signatory states to differ a little in their autonomy-led interpretations of the European Convention where necessary.

[27] Adding that the UK is apparently still obsessed with adoption, "regardless of whether it is the solution which best meets the needs of the child" (Noon).

[28] See further *Re H*, in which parents abroad rather than in their legal domicile have to permit kin contact.

[29] See, for example *Anayo*; and *Neulinger*. See further Diver.

[30] The 2016 Declaration of the Fourth Malta Conference ("Malta IV") on Cross-Frontier Child Protection and Family Law avoided addressing the difficulties of surrogacy directly but still at least highlighted the need for the 1996 Child Protection Convention (and its international co-operation mechanisms) to be better utilized.

[31] See further United Nations.

[32] Legal frameworks should also "3. Respect and promote the full and effective enjoyment of all the rights of donor-conceived and surrogacy-born children in both the immediate and longer terms. 4. Ensure that the best interests of the child be the paramount consideration in all relevant laws, policies and practices and in any judicial and administrative decisions. This should include, but is not limited to, pre-conception assessments/screening of donors, intended parents, and surrogates and post-birth follow up/review that upholds the best interests of the child as paramount. 5. Prohibit all forms of commercialization of gametes, children, and surrogates including, but not limited to, the sale and trafficking in persons and gametes."