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S. S. Heinzelman
University of Texas, USA

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Abstract

This spectacle of the promiscuous widow is described in a legal self-help book printed for women (and, in this case, by a woman). It was designed, claims its anonymous author, to inform the "fair Sex . . . how to preserve their Lands, Goods and most valuable Effects" (vii). Mixed in with this "serious matter" are anecdotes from customary law, provided by the author as "Things of Entertainment" (vi), of which this story of the widow-whore is one. In Patrick O'Brian's contemporary historical romance, The Mauritius Command, set in 1810 during the Napoleonic Wars, we find a re-enactment of the custom. In the novel Mr. Farquhar, a gentleman "bred to the law" (1977:72), who is en route to his position as Governor of Mauritius, newly "liberated" from French occupation by the English, asserts the superiority of English law over Buonaparte's "new French code." (164). It does not surprise the reader familiar with eighteenth century culture to discover that Mr. Farquhar has been led to reflect upon the difference between English and French law by "considerations on the inheritance of landed property" (164). For him, the law's wisdom lies in the way in which it protects property from illicit dissemination; or, put another way, the law's effects are most precisely realized in its capacity to distribute man's property, including women's bodies and their products, in an orderly and predictable fashion.

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Susan Sage Heinzelman

> *La condition juridique de la femme reflete l'idee qu'un societe se fait de l'ordre, qu'elle enonce et protege par son droit.* Arnaud-Duc 1990:9
>
> And in some Parts of England, by the Customs and Tenures of Manors, a Widow that has a Bastard, forfeits her Estate, unless she comes into the Court of the Manor, in the Presence of the Steward and all the Tenants, and pronounces the following Lines, riding on a Ram,
>
> *Here I am,*
> *Riding upon the Back of a black Ram,*
> *Like the Whore as I am;*
> *And for my Crincum Crancum,*
> *I have lost my Binkum Bankum;*
> *And for my Tail's Game,*
> *Have done this Worldly Shame;*
> *Therefore pray, Mr. Steward, let me have my Land again.*
>
> Upon this Penance she is restored to the Possession of her Estate, for that Time. Elizabeth Nutt, *A Treatise of Feme Covert: Or, The Lady's Law* (1732)

Riding Backward: Desire and Law

This spectacle of the promiscuous widow is described in a legal self-help book printed for women (and, in this case, by a woman).1 It was designed, claims its anonymous author, to inform the "fair Sex . . . how to preserve their Lands, Goods and most valuable Effects" (vii). Mixed in with this "serious matter" are anecdotes from customary law, provided by the author as "Things of Entertainment" (vi), of which this story of the widow-whore is one.2

In Patrick O'Brian's contemporary historical romance, *The Mauritius Command*, set in 1810 during the Napoleonic Wars, we find a re-enactment of the custom. In the novel Mr. Farquhar, a gentleman "bred to the law" (1977:72), who is *en route* to his position as Governor of Mauritius, newly "liberated" from French occupation by the English, asserts the superiority of English law over Buonaparte's "new French code." [3] (164). It does not surprise the reader familiar with eighteenth century culture to discover that Mr. Farquhar has been led to reflect upon the difference between English and French law by "considerations on the inheritance of landed property" (164). For him, the law's wisdom lies in the way in which it protects property from illicit dissemination; or, put another way, the law's effects are most precisely realized in its capacity to distribute man's property, including women's bodies and their products, in an orderly and predictable fashion.

Likewise the author of *Feme Covert* relies on the spirited description of an unregulated widow to instruct his female readers in the necessity for laws governing their behavior. The verse that the widow must recite is a confession that she threatens more than her own good name--she has undermined the very ground upon which the common law was constructed, that is, property in both its real and female forms. Her recitation of sins is not merely a confession of her promiscuity, but her admission that her very body has dis-ordered the law of property and succession. She has jeopardized her claim to her husband's copyhold by producing a bastard who might disinherit the lawful heir and she has jeopardized her dead husband's still present claim in her body. She has not only been sexually promiscuous--she has potentially "entailed" the land "and for [her] tail's game" she has threatened to break the legal contract that "entails" her, as property, to her dead husband.

Mr. Farquhar's interest in this manorial custom is not legal but patriotic. He cites the manorial custom as an example of the particular Englishness of the common law as opposed to the French code, which

"quite overlooks the illogical, [one] might say almost supra-logical and poetic side of human nature" (164-65). He continues:

> Our law, in its wisdom, has preserved much of this [illogicality], and it is particularly remarkable in the customary tenure of land, and in petty serjeanty. Allow me to give you an example: in the manors of East and West Enbourne . . . a widow shall have her free-bench--her *sedes libera*, or in barbarous law-Latin her *francus bancus*--in all her late husband's copyhold lands *dum sola et casta fuerit* [that is, while she remains unmarried and chaste]; but if she be detected in amorous conversation with a person of the opposite sex--if she grants the last favours--she loses all, unless she appears in the next manor-court, riding backwards on a black ram, and reciting the following words.4 (165)

Mr. Farquhar thereupon repeats the rhyme through which the widow appeals for the return of her forfeited lands: "Here I am/Riding on the Back of a black Ram/ Like the Whore as I am." He claims that "the universal, contented acceptance of her reinstatement" is to be attributed "largely to the power of poetry" (165). Mr. Farquhar insists that his "uncle owns one of these manors and [he] has attended the court" (165).

One might think that O'Brian writes anachronistically, that it was unlikely that such feudally-based, manorial law would still be remembered in the early nineteenth century, but representations of the merry widow on her black ram were employed in the interests of political caricature in 1820, when Queen Caroline is depicted riding into the House of Lords, arranged for the Bill of Pains and Penalties, on a ram with the face of her lover, Bergami.5 Presumably, the representation of this custom must have had some residual power to call up memories of manorial practices in order for it to be effective as satire. We should not take at face value, then, the claim by the author of *Feme Covert* that this custom is, in the early eighteenth century, merely a "merry" antiquity, an entertaining diversion for the readers of an otherwise serious text. On the contrary, the effort to marginalize folklaw, to trivialize its practice in relationship to formal black letter law, might very well indicate the continuing authority which it still carried in popular culture.

When Mr. Farquhar cites the widow's ride on the black ram as an example of English law's appeal to the "illogical . . . poetic side of human nature" (164), he does so obviously to promote English law over the French; by extension, of course, he also argues that the English national character is to be preferred over the French with their "logical automata" (164). Mr. Farquhar's promotion of English law, as representative of the English nation, echoes long-standing *encomia* on the unique wisdom and ancient history of the common law (see, for example, the praise of Fortescue, Coke, and Blackstone). Its uniqueness, according to these authorities, resides in the mixture of custom and codification, in the hybrid nature of a legal system reliant upon both local performance and habit, on the one hand, and the synthesizing and codifying practices of centralized and powerful authorities, on the other.

Such balance between local practice and central authority is rendered in the depiction of Queen Caroline's brazen entry *as a woman* into that privileged, quintessentially male, but nevertheless public space, the Houses of Parliament, represented as equal parts a social, political, and juridical court. (Figure 9) The struggle of Queen Caroline to proclaim her innocence is here made to stand for the struggle of the "mob" to gain a hearing for their grievances; both are represented as unseemly and disruptive. The Queen's sexual promiscuity is aligned with the unruly mob, who vainly try to present their Addresses; like the Queen, the lower social orders have already announced their guilt, merely by their presence in this august chamber. Opposed to the claims of customary legal practice, as exemplified in riding the black ram, is the majesty and authority invested in the House of Lords, here sitting as a court of law. Regardless of the legal outcome of the trial for treason, the Queen's reliance on popular justice for her remedy confirms her guilt.

Articulated in this early nineteenth-century cartoon is an opposition: between a legal system that is popular, custom-based, identified with the lower social orders and therefore dangerous, and marked as female, on the one hand, and a legal system that is elite, statute-based, identified with upper social orders and therefore stable, and marked as male, on the other. That such a recognition of two kinds of justice *could* be represented visually suggests the shift that had taken place over the course of the eighteenth century. Let me make a claim that space does not here permit me to support: what was once identified as peculiar to English common law--its hybridity--remains only material for satire. Customary legal performances once had the equivalent authority as statutes and formal law to bring about

punishment and restitution; dramatic representations of law, understood as symbolic rather than doctrinaire events, once had at least as much persuasive power as written texts and legislation to restore order. In the political cartoon, such manifestations of alternative forms of justice are made to appear both ridiculous and subversive.6

In the gradual centralizing and codifying of the legal system that culminates in the nineteenth century, written texts--the Commentaries, for example, of Bracton, Coke, and Blackstone, the pleadings and writs, the statutes and the legal opinions of the various courts7 -- came to be equated with "the law." The erasure of folklaw is already underway in *Feme Covert* where the author insists upon referring to "old Laws and Customs relating to Women" as "very merry," even though the "Makers of them might possibly be grave Men" (vii). Unwilling to relinquish the masculine authorship of even "merry" laws, the author of the treatise nevertheless consigns them to a legal past that must be distinguished from the written, and thus more regulated, law of the present, the superior value of which is, of course, embodied in a treatise like *Feme Covert* itself.

Despite the author's demurral, however, *Feme Covert* embodies precisely those qualities that O'Brian's fictional attorney praises almost an hundred years later: a legal system that is a mixture of poetry and logic, of informality and formality, of custom and fixed procedure, of fiction and regulation, or as Peter Goodrich argues in his essay "Poor Illiterate Reason":

> To study the common law historically is to study it as tradition, as a plural set of practices. ., as a mixture of image and myth, oral memory and written text, custom and judicial legislation . . . . It is to study a body of texts and contexts in which fiction is as forceful as analysis, image as significant as rule and the play of memory as strong as the logic of argument. (1992: 8)

Even as this treatise maintains that the common law's treatment of women can be systematized, it is also drawn irresistibly toward "reason's" other. Thus regulation comes inextricably linked to excess: the inclusion in *Feme Covert* of what the author dismisses as this "very merry tale" of the widow and her bodily excesses helps to popularize legal concepts of property but at the same time it inevitably disrupts law's formal discourse and reveals the vulnerability of that "serious" version of law to other juridical systems.8

What I am sketching here is an argument about the changing representation of "the law," a change that corresponds roughly to that historical moment when the intensification of commercial enterprises, assisted by the power of the printing press, necessitated a more stable and centralized judicial system. Central to the success of the commercial class was their ability to control the means of representation, specifically the means of self-representation. Self-regulation in the legal profession in the early eighteenth century and the codification of evidentiary procedures are strategies for regulating and stabilizing what the law means. That other cultural discourses, like literature, would also be the ground upon which the struggle for a morally sound but commercially viable society was waged, should not surprise us.

The next section of this essay suggests how complicity between the institutional discourses of the law and the novel secured, by mid-eighteenth century, a stable and mutually supportive representation for both.

Mere Entertainment and Serious Matter

The designation of the widow's performance as a "merry tale" and "mere entertainment" reminds us of the performative origins of law--that it is a dramatic enactment or resolution of some conflict--as well as its origins as a form of narrative, a kind of storytelling. I am not merely suggesting that storytelling takes place within the boundaries of what we consider the legal, but that law is, itself, a form of narrative, considered both in its quotidian and institutional forms. The author of *Feme Covert* insists, however, upon a distinction between black letter law, which he presumes to be neither storytelling nor entertaining (that is, not "a merry tale"), and those anecdotes that he would exclude from the serious discussion of law's effects. It is, however, precisely this exclusionary distinction between that which is merely merry and that which informs, between that which entertains and that which instructs, that confirms how radically heterogeneous and unstable such cultural discourse is, despite its efforts to represent itself as hardedged, as discretely ordered, as having, in other words, a recognizable inside

and outside. Thus, if legal discourse is to be perceived as stable and self-sufficient, it must constantly seek to delegitimize that which seems "mere entertainment," even though such apparent intrusions into the serious matter of the text are, in fact, constitutive of law's being. This mixture of what I would term 'regulation' and, following Bender, 'novelization' is inherent to the heteroglossic legal and literary discourse of the eighteenth century. (Bender 1987: 176)

The instability that finds itself marked as "feminine" in law is an instability that is inseparable from narrative and its effects (that is, it is the function of contingency and temporality) and recalls the way in which another powerful, early, eighteenth century cultural discourse--the discourse of and about the novel--also fixated upon that which seemed not to be fixed (and was therefore "marked" as female and in need of containment). It is more difficult to distinguish what must be excluded from that which should be privileged in the discursive domain of the novel than it appears to be in the realm of the law. One cannot rely upon apparently "obvious" and recognizable differences between the dominant and the marginal, as in a statute versus a customary practice, or a writ versus an anecdote. One might, it seems, readily distinguish between that which is "law" and that which is "storytelling," but how to point to that which is licensed storytelling as distinctive from that which is unlicensed? William B. Warner's argument in *Licensing Entertainment* helps us understand how certain of these hierarchical distinctions, primarily between the scandalous novels of women writers and the serious moral narratives of male writers, were constructed and enforced. His account of the cultural history of the novel "offers a deliberate alternative to the story of heroical authorial innovation, given its definitive modern shape in Ian Watt's *Rise of the Novel*," a text that relies upon a jurisprudential metaphor for its definition of the novel.9 (Warner 1998: iv) Warner argues for a "complex interplay between the emergence of novel reading for entertainment and the antinovel discourse, between that discourse and programs to elevate novel reading, and between elevated novels and the institution of the novel as a type of literature." (xv)

The campaign to make novel writing and reading respectable required, asserts Warner, that those novels of "amorous intrigue" associated with the popular women writers of the late seventeenth and early eighteenth centuries--for example, Aphra Behn, Delariviere Manley, and Eliza Haywood--had to be "overwritten" by male writers such as Defoe, Richardson, and Fielding "towards a higher cultural purpose"10 (1998: 192). Not all attempts to demote women writers were subtle: anti-novel critics and writers viciously attacked these women for the promiscuity of their lives and their pen, the two being inseparable. In Book IV of *The Dunciad*, for example, Pope explodes in rage against that disreputable scribbler, Eliza Haywood, one of the most popular novelists of her time: prize in a pissing contest, she is represented as a "Cow-like goddess" whose publisher, Curl, sucks from her distended breasts and whose filthy and numerous children, her novels, hang about her skirts. In a text that both condemns the profligacy of Grub Street writers and enacts that very profligacy in its multiple versions and commentaries, Pope "condenses female authorship, easy virtue, and cultural filth . . . It is Haywood's textual promiscuity . . . that makes her a type of Dullness, the poem's explicitly female goddess of cultural disorder." (Warner: 147) Like the widow who rides the black ram, Haywood's body is the source of unlicensed production, her novels the illegitimate bastards of her monstrous fantasies.

Popular women writers were parodied and caricatured as hags, whores, and consorts of the Devil, as emblematic, in other words, of what made "licensing" necessary. Aphra Behn, Eliza Haywood, Delariviere Manley--all were figured not simply as publicly displaying that which should be hidden, as making a spectacle of themselves, but also as illicitly claiming public space with their narratives, and thus putting into question the privileges of male writers. What these women writers threatened by their scandalous, amatory fictions were precisely those fictions, inscribed in the body of legal texts, about the "proper" relationship of gender to power that made them appear scandalous in the first place. Writers like Delarivier Manley claimed the right to make private trouble public scandal, to make domestic violence public narrative, and to make political intrigue the stuff of the novel.11

It is not surprising, then, that women writers seemed to many contemporary male writers to be versions of those midnight hags whose illicit deeds filled the news-sheets. If Mary Toft could give birth to seventeen-and-a-half rabbits, what monstrosities might not be produced by women whose power to represent reality seemed, at times, demonic, especially if that reality somehow stripped away the conceits of male privilege? Thus Pope's characterization of Haywood in *The Dunciad* not only invokes Milton's depiction of Sin, Satan's daughter and incestuous lover in *Paradise Lost*; he also reminds his audience that the magical power of transformation assigned to women's bodies, their tendency to assume the shapes of animals and monsters, as well as to reproduce themselves in textual

monstrosities, is the natural consequence of the ungovernable nature of their bodies and the fantastical power of their imaginations.12

This ideological symmetry between the women writer and other monstrous female forms is an acute expression of the fear felt by established writers that readers would be so entertained that they would fail to reject the work of these interlopers into the literary marketplace. As Paula McDowell remarks in her analysis of women and the literary marketplace, *The Women of Grub Street*, this fear is succinctly captured in Pope's explanation to his publisher of why he satirizes apparently obscure figures:

> Obscurity renders them more dangerous, as less thought of: Law can pronounce judgment only on open Facts, Morality alone can pass censure on Intentions of mischief: so that for secret calumny or the arrow flying in the dark, there is no publick punishment, but what a good writer inflicts. (McDowell 1998: 31)

Like witches, who engaged in "secret calumny," women writers of popular novels were guilty of inverting the proper order of things, of making fiction seem true and calling the truth into question. They not only produced fantastic fictions; they were, as inverters of the "real" (read "male") world, those fantastic fictions themselves. But, and here comes the persistent and unresolvable dilemma, if they were not "real," then how could they be regulated? As fantasies, the law had no hold over them--"since Law can pronounce judgment only on open Facts"--and thus the question of judgment and punishment, which "rightly" belongs in the domain of the law, a domain increasingly represented in the eighteenth century as existing *outside of literature*, is thrown back into the very cultural space that is being contested: rather than reasserting his claim as a writer to a culturally privileged position, Pope's self-promotion reminds us of how unstable and deeply contested are all claims of representation.

If we juxtapose the witch, the widow riding into court on the black ram, and the representations of women writers as transgressors of both literary and legal codes, we begin to see how legal and literary discourse worked in complicity to convert the figure of the woman writer into a sexualized, frightening, and fantastic fiction at the same time as those women were emerging as competitors in the world of literary production. It thus fell upon the judicious and rational poet, like Pope, to re-inscribe the proper, that is, hierarchically gendered and classed, order of things, an order that aligned itself with "the Law."

Appealing both overtly and covertly to the seriousness and antiquity of English law as the model of and source for rational inquiry into "truth" and "virtue," writers who wished to distance themselves from "popular" fiction could claim to represent both a moral (even if depicting the immoral) and a "realistic" universe. Indeed, such an alignment with the legal universe, claims Ian Watt, is central to the "realism" of their representation: "The novel's mode of imitating reality may . . . equally well be summarized in terms of the procedures of another group of specialists in epistemology, the jury in a court of law." (1957: 31) The stature, self-sufficiency, and "Englishness" ascribed to the common law was useful to those English novelists who wished to promote their version of the genre as a serious, moral narrative--in other words, as the kind of storytelling that only a serious, moral individual might write for the purposes of entertaining other serious moral individuals and instructing those naturally less serious, less moral individuals (i.e., female readers), who might otherwise succumb to frivolous, continental tales.

The consequence of this strategic alignment of the novel and the law was the production of a specific legal and literary subject: a proper legal subject does not indulge in "mere entertainment" (like writing or reading the scandalous narratives of women writers), except to draw attention to the seriousness of the law, and a respectable literary subject entertains and is entertained by representations of the judicious and the rational.

The dignity of the English law was thus aligned with the "elevated" English novel, as practiced by Fielding and Richardson, for example, and in both cases that which was suppressed to effect this appearance of stability and respectability was an unstable prehistory (Warner: 1-44).13 Just as English common law was formalized by distinguishing it from things of "mere entertainment" (i.e., custom-based practices associated with the unprofessional) so the serious English novel had to be sharply separated from its continental tradition and from scandalous local imitations. We see how these institutional representations of the law and the novel served to promote social and political interests when we compare, on the one hand, the way in which English law was distinguished from French law and, on the other, the way in which the English novel was elevated over its French counterpart. It seems that

precisely the terms that marked the "Englishness" of one institution were reversed when one spoke of the other. Warner describes this "articulation of nation and novel." (1998: 20):

> Repeatedly it is claimed that England is to France as the (elevated) novel is to the romance, as fact is to fantasy, as morality is to sensuality, as men are to women. (Terms can be added to this series: genuine and counterfeit, simple and frothy, substantial and sophisticated.) Grounded in a caricature of France as effeminate and England as manly, this loaded set of oppositions is simultaneously nationalist and sexist.(21)

Similarly "nationalist and sexist" are yet another set of oppositions--those that characterize English law, only now the terms are reversed. O'Brian's English chauvinist, Mr. Farquhar, draws his praise of the superior virtues of English law from a long history of such comparisons: English law is to French law as poetry is to prose, as inspiration is to regulation, as sensitivity is rigidity, as women are to men. English common law is responsive to its subjects' needs and resists the imposition of strict regulation and centralized authority--just as English citizens have rejected the tyrannical imposition of royal authority, be it in religion, politics, or law.

The way in which these two institutional narratives are characterized in almost exactly opposite terms, depending on the institution one observes, suggests how treacherous cultural history can be when called upon to witness its own construction. In particular, we might notice the complex way in which "the feminine" (and therefore "the masculine") shifts its symbolic import, being viewed both as that which provides English law with its flexibility, its poetic logic, but also that which, through its association with lay practice and folklaw, threatens the centralization and professionalization of the law. Such a double-facedness is precisely the point of John Selden's *Jani Anglorum Facies Altera* (1610). In this text, as Goodrich asserts, the "two faces (*facieque biformi*) of English law . . . are variously British and Norman, pre- and post-conquest, native and foreign, saturnine and mercurial, antique and contemporary, before and behind, and, finally, both male and female" (1993:286). Such ambiguity reminds us of the constructedness of social discourses, of what constitutes "the law," as well as what constitutes "the novel," and thus requires us to view the law's version of itself in the early eighteenth century with as much skepticism as we view the novel's version of its own importance and dignity. Each representation mutually enforced the other and both promoted the interests of those who "practiced" law and literature and sought to invest those practices with a particular set of values.14

"Questions of Virtue and Questions of Truth"

The association of the novel with "serious matters" allows it to become the literary equivalent of the law, settling in fictional terms the battle between the legal and the illegal, the moral and the immoral, arbitrating what literary historian Michael McKeon calls "questions of virtue and questions of truth." (1987: 20) As Warner has demonstrated, to accomplish such work, the genre gradually shifted its character from an early seventeenth-century form, the somewhat salacious, continental romance, to its specifically English form. Defoe began the work of disassociating the English novel from continental romances (and from their women authors) by claiming the status of truth for his narratives, labeling them as "history" and thus pointedly distinguishing them from the "secret" (covert) histories of Behn, Haywood and Manley. Moreover, as Warner points out, Defoe's development of "the double-voiced memoir narrative enables him to make a particularly cogent intervention in the print market . . . [the memoir narrative] allows him to write other print genres, like criminal biographies and the erotic secret history, to which he has moral objections. At the same time, he can offer his own moral texts as a corrective and substitute for the pleasures of the narratives he would replace." (151)

By the 1740s, Richardson and Fielding consciously distinguished their "new" species of writing from the popular novels of women writers who were, being women, naturally cast as alien and immodest and whose right of ownership in the form of the novel was constantly compromised by their gender. Both Fielding and Richardson claimed that their version of the novel--the literary aesthetic equivalent of law's empire--could convincingly portray the personal choices that produced a morally reliable, social order. They disagreed about what technique best represented that social order, a quarrel exemplified in Fielding's parody in *Shamela* (1741) of Richardson's enormously popular novel, *Pamela* (1740); however, they both agreed that the novel could construct epistemologically and morally sound representations of a reality that was shared by author and reader alike (and that even women like Richardson's Pamela and Clarissa could be "witnesses" to a certain kind of truth about their world).15

Part of the definition of the novel shared by these authors relied upon an agreement between author and reader about what constituted sufficient evidence of "moral design," and about how that evidence should be narrated, how, in other words, the reader could be shaped into sufficiently informed judge of the moral choices made by fictional characters. By mid-eighteenth century this jurisprudential metaphor was the governing fiction of the novel. Clearly, the access to and knowledge of the legal system that most men of a certain status possessed strengthened the tendency to turn to jurisprudential metaphors in questions of judgment. Such was especially the case with Fielding, of course, who was himself a magistrate and whose novels draw extensively on his legal career.16

Both the social status of the novel and the effort to naturalize legal discourse benefited from this alliance between law and literature. Fictional narratives read like court transcripts, with detail piled on detail; autobiographies and biographies read like criminals' confessions, and criminals shaped their confessions and life-histories as if they were fictions; readers were asked to read "judiciously" and to take on the role of the judge in their assessment of characters. What better way to inculcate the pervasive and growing professional force of the law than through the novel, a form of narrative that *appeared* to reproduce the way ordinary citizens thought about their lives and told their stories?

It seems to me, then, no historical accident that the professionalization of the legal system as we understand it today, its concentration in the hands of trained readers and writers and its cultural representation as a formal rather than popular discourse, and the development of a serious, moral narrative, the novel, that is likewise concentrated in the hands of the trained practitioner, should have occurred at precisely the same historical moment: from approximately the last quarter of the seventeenth century to the mid-eighteenth century. As Wilfred Prest has argued: "it is quite clear that a fundamental transformation of the professional sector occurred between the mid-sixteenth and mid-seventeenth centuries. During those years the legal profession was in effect reconstituted along modern lines."17

As I have already indicated, particular representations of legal or literary institutions advance national agendas. If this is so, then it follows that disciplinary narratives, besides working at the national level, must also work at the social level. The official history of the common law and the canonical account of the "rise" of the novel partake of certain shared qualities, one of the most important of which is, paradoxically, the insistence that they are, in fact, two different social formations with their own spheres of authority and action. Blinded by the disciplinarity of our contemporary culture, many critics continue to treat literature and law in the eighteenth century as distinct and separate discursive systems, in particular opposing the "reality" of the law to the "fictiveness" of the novel, although they have long since abandoned such a facile opposition in their definitions of contemporary law and literature. Often the same critics who have re-evaluated the construction of the canonical history of the novel, and thereby complicated enormously our understanding of the relationship between the popular novelists and those who have been dubbed the "fathers of the English novel"--Defoe, Richardson, and Fielding--have, nevertheless, continued to represent the law as a monolithic and self-evident discourse, regardless of whether the writers, Grub Street or self-styled "serious" writers, contested or promoted the dominant legal system.

Thus, although there has been extensive appreciation of the presence of the law in the novel of the early to mid-eighteenth century, there has been little or no consideration of the reverse. That is, both literary and legal critics appear not to have considered that if the boundary between legal and literary discourse allows law to seep into novelistic representations, then one should expect to see "novelizing" narratives in formal legal texts (as opposed to popular representations of judicial proceedings or trials).18 What has been observed, however, is just the contrary: law has been traditionally seen as impervious to other discursive systems; indeed, this imperviousness operates as one of law's primary "fictions" of authority. That it is a "fiction" should be apparent from the ongoing complaints from English legal commentators about corruption from foreign systems of law, or the vulgar readings of the people, or the levity of certain legal customs, like riding the black ram; this mixture of rules, customs, and "fictive" antiquities has always been perceived as untidy at the least and dangerous at the worst because it "dissipates . . . the palpably coercive unitary conception of common law" (Goodrich 1993: 277). The representation of the history of the law and the history of the novel as discrete formations is no accident, such discreteness being intimately tied to the construction and validation of a certain kind of social order and, by extension, to a certain kind of subject.

Even though, as I have suggested, the law is infiltrated with novelistic moments and the novel generates a truth-function, as well as its claim to verisimilitude, by its invocation of legal concepts and its representations of law in action, there nevertheless exists in their own self-definitions a kind of "gentleman's agreement" not to tread on the other's territory. I use the term "gentleman's agreement" precisely because it seems to me that these two discourses represent and accrue moral authority, not only as I have suggested by insisting upon disciplinary separateness, but also by inscribing a vision of order, of faith in the judicial process, and in the properly trained judicious reader, that must be kept safe from the forces of excess, promiscuity, and disorder, identified with women and the lower social orders. To accept, then, at face value a reading of the common law in the eighteenth century as a self-evident, sufficient, and formal discourse--and thus as a reliable and worthy source for novelistic representation--is to confuse what those jurists and writers invested in law's authority and literature's moral value *wished* it might be with what it was.

As with the worthy spokesman of the common law, so the reliable narrator or protagonist of the elevated novel (who was frequently connected in some way with the legal system) represented certain male- and class-identified interests and a belief in an inherent sense of moral rectitude. Such a narrator/protagonist could be depended upon to present to the alert reader a model of the kind of narrative that could be taken seriously--that is, the reader would learn how to judge evidence and how to determine reliable witnesses from unreliable ones by following the advice of the narrator or the experiences of the protagonist. What was represented fictionally in the novel was another version of what was played out every day in the courts of law: the struggle over what constituted evidence and who was privileged to debate its value. The contest between writers over what constituted a reliable representation of the world, a contest that engaged both class and gender bias, coincided with the contest in law between those who would formalize, codify, and professionalize the law and those who would maintain the powerful presence of customs and rituals that required only the knowledge of communal traditions, a shared memory, rather than the knowledge of legal forms and procedures known only to the educated. From this point of view, the rejection of customary law is the rejection of a "poetic" or "fictive" system in favor of a "real" system of legal representation, sustained by conventions of interpretation that limit access only to the elite. It is this latter version of the common law with which the elevated novel strategically aligned itself.

Sir Geoffrey Gilbert's Laws of Evidence and John Locke

The promotion of professional law over popular law received a powerful boost in the late seventeenth and eighteenth centuries from the authority attributed to empirical science and the logic of what can be seen and reasoned therefrom against the appeal to revelation, divine intervention and the logic of the poetic.19 This turn towards the empirical was supported by the work of John Locke, whose *Essay Concerning Human Understanding*, published in 1689, provides the philosophical support for Sir Geoffrey Gilbert's *Laws of Evidence* (c. 1726; pub. 1754), "the first English treatise devoted entirely to the problems of legal evidence." (Shapiro: 181) So taken was Gilbert with Locke's premises that he provided an abstract of the *Essay* with his *Laws of Evidence*.20

Sir Geoffrey Gilbert's treatise is based primarily on Locke's two "Grounds of Probability" for discovering truth from Book IV, xv, 4 of his *Essay*: "Conformity with our own Experience, or the Testimony of others' experience." Gilbert follows Locke in asserting the primacy of the sense perceptions and, consequently, he assigns priority to first-person narrative, for "All Certainty is a clear and distinct Perception, and all clear and distinct Perception depends upon man's own Proper Sense." (1754: 2) Like Locke, Gilbert expresses a deep suspicion about the capacity of language to reconstruct the reality of the thing observed, a suspicion that, combined with his distrust of man's "Memory and Recollection," (3) leads him to insist upon the primacy of written texts: "most of the Business of civil life subsists on the Actions of Men that are transient Things, and therefore oftentimes are not capable of strict Demonstration." (3) As is clear from the list of subscribers to his treatise, Gilbert's audience were those lawyers who represented that growing body of litigants who were bringing their business to the courts: the merchants and investors for whom the written word had special significance as evidence of intent and motive.21

The legal authority granted to the first-person narrative, to the written document over the informal agreement, and to the "Publick" document over the "Private [document], between Party and Party" (5) encouraged the privileging of certain kinds of evidence and witnessing and this privileging both

reflected, and helped to produce, a specific kind of social agent: the juridically constructed, property-owning, public male whose observations of empirical reality could be trusted.22 And that particular agent is the one whose voice is most often imitated in the novels of the 1730s and 1740s; what will not be represented, except as penitent or domesticated, is the voice of precisely those who could not be trusted to speak "truthfully"--women and those who were not gentlemen.

Gendered and class-based moral judgments over the nature of and inquiry into "truth" also find support in Locke's analysis of the treachery of language. Locke argues that although the search for truth is instinctive in all men, only a few and not "the greatest part of Mankind" will ever pursue that search seriously. Those few who search for truth will have to confront the paradox of employing language, which is inherently unreliable, to investigate and report their findings. In particular, Locke denounces the way in which rhetoric, or figurative language, obscures the object of perception, like a "mist before our Eyes." In a famous denunciation, he specifically associates these arts of deception with women (even though he elsewhere employs the traditional figuration of women as truth and justice). Although he asserts that most men are willingly deceived, he implies that truth-seeking and truth-telling men find clarity in the (less than perfect but more reliable) language of philosophy:

> 'Tis evident how much Men love to deceive, and be deceived, since Rhetorick, that powerful instrument of Error and Deceit, has its established Professors, is publickly taught, and has always been had in great Reputation; And, I doubt not, but it will be thought great boldness, if not brutality in me, to have said thus much against it. *Eloquence*, like the fair Sex, has too prevailing Beauties in it, to suffer it self ever to be spoken against. And 'tis in vain to find fault with those Arts of Deceiving, wherein Men find pleasure to be Deceived. (508)

Relying on the classical distinction between the language of philosophy, that seeks out the truth, and the language of art that seeks merely to entertain and please and thus has no necessary relationship to truth, Locke specifically associates rhetoric (read "figurative language") with women and deceit. The instability in language is assigned in Locke's philosophy to those figures of speech that prevent access to the truth; like the "mist" of eloquence that obscures reality, so female beauty distracts the mind of man and makes weak and various that which should be clear and stable. Locke's own figurative language is, however, apparently not subject to such properties--the manliness of Locke's philosophical discourse apparently silences the siren call of those "Beauties" that would otherwise seduce the faint-hearted reader into a state of mere pleasure. Once again, as in the account of the widow and her paradoxical status under the law--as both central to and yet excluded from--we confront a philosophical system built upon the simultaneous presence and absence of the female. This paradox is precisely embodied in the comparison Locke draws between the "fair Sex" and figures of speech: women's beauties which must surely be material and of the body are nevertheless "like a mist" and therefore precisely not of the body. Female instability, then, is both material and nonmaterial, both present and absent, both true and yet fallacious, both real and yet fictitious.

Ruth Salvaggio argues for a similar "present absence" in the Enlightenment's construction of its own "classical systematicity." (Salvaggio 1998: iv)

> My own sense of Enlightenment history is not only that women have been excluded from its notable 'documents' but that the very idea of woman became a metaphor and figure of the essence of exclusion--of not being, of absence . . . . Women may have been excluded from discourse, but discourse is filled with references to woman.23 (5)

As Warner's argument about the "overwriting" of women's fiction has made clear, this assertion needs to be qualified somewhat: women were not excluded from discourse so much as re-defined as the practitioners of a discourse (insofar as it concerns the novel) that needed to be "re-written" as "the" novel--in a form, in other words, capable of carrying the weight of national and cultural aspirations. This kind of novel must endeavor to refine from its language the evidence of the fair sex and its inherent deceptiveness, which produces monstrous lies rather than fair truths. Thus it must seek to disguise its inherently rhetorical character and in both form and style strive to emulate those discourses that represented reality in a philosophically "true" sense, seek to align itself with those discourses that more closely approximate the "objective," factual reality they describe.

If we examine the traditional meta-narrative of the novel's formation, we find repeated in the critical history precisely this original desire to stabilize the novel, a desire manifest in part by the explicit

connections drawn by eighteenth-century novelists between the narrative and epistemological conventions of the novel and those of the law. Those same relations are cited by Ian Watt, whose *The Rise of the Novel* (1957) remains the single most powerful model of that genre's formation. The version of the law which grounds Watt's analogy is, of course, the unitary one rather than that which popular customs and narratives disrupt.

It should not surprise us, therefore, if one of the major consequences of this critical analogy between the novel and the law, an analogy which moves beyond formal considerations to include their moral and political values, has been to exclude women from the history of the novel. Such exclusion began at the precise moment women novelists became popular and was couched in precisely the terms that women's excess in the law is figured--as sexual promiscuity. This version of the history of the novel still dominated critical narratives until recently, although feminist literary scholars had recovered many lost women writers. Nevertheless, women novelists appeared only in the pre-history of the "true" novel, which had become, by definition, the form of the novel that could be analogized in its formal and functional qualities with jurisprudential form and function: the author as judge, reader as jury, and text as sentence and regulation. Thus both the critical utility of connecting novelistic epistemology with legal epistemology and the definition of what constitutes the generically recognizable form of the novel absolutely depend upon the exclusion of gender as a constitutive factor.

Just as the canonical history of the novel requires simultaneously the presence of women writers in its pre-history, as transgressors of the genre code, and the absence of women writers in the production of the "proper" novel, so the production of the representative judicial subject requires both the presence of women, as transgressors of the legal code, and the absence of women subjects in the enactments of that code. My opening quotation from *Feme Covert* illustrates this double requirement precisely: the promiscuous widow must physically represent herself as a potential transgressor of the legal and moral practices of her society so that the re-establishment of those practices, embodied in the figure of her male steward who can restore her estate, can be symbolically played out before her tenants. Her physical presence as a transgressive figure is necessary to reinscribe her absence as an active legal and moral agent.

Conclusion

What I have tried to sketch out in a preliminary way in this essay is an hypothesis, an imaginative but not, therefore, an ahistorical, ideological homology about the way in which official histories of institutional formations arise. I have argued that the official history of common law and the canonical history of the rise of the novel indulge in positivist versions of discourse formation at the cost of marginalizing other, more complicated, internally inconsistent, versions. Both histories depend upon the absence of women's bodies in all but their promiscuous sexual figurations, those sexual excesses being precisely the warrant for legal and literary disciplinarity. The invoking of sexual excess inevitably invokes images of social disorder and thus both histories naturalize the gender and class hierarchy that the novel and the law, understood in their privileged forms, seek to represent.

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Footnotes

1 This custom is also recorded in Thomas Blount's *Fragmenta Antiquitatis* (1679) as occurring in the manors of East and West Enbourne, Berkshire, as well as in the manor of Torre, Devon. See also, *The Spectator* (No.614 [Nov. 1, 1714] and No.623 [Nov. 22, 1714]) where the custom is cited as part of an ongoing satire upon widows and their voracious appetites for money, power, and sexual satisfaction. For an extensive account of this custom, see Ruth Mellinkoff, "Riding Backwards: Theme of Humiliation and Symbol of Evil," 4 *Viator: Medieval and Renaissance Studies* 153 (1973). See also, E. P. Thompson, *Customs in Common*, 467 (1991). For other legal texts focusing on women's law, see the earlier version of *Feme Covert*, entitled *Baron and Feme: Treatise of the Common Law concerning Husbands and Wives* (1700); T.E., *The Lawes Resolution of Women's Rights* (London, 1632); Henry

Swinburne, *A Treatise of Spousal Contracts* (London, 1686); and Thomas Salmon, *A Critical Essay Concerning Marriage* (London, 1724) See also, W. Prest, "Law and Women's Rights in Early Modern England", *The Seventeenth Century*, 6, 169 (1991) and his "Lay Legal Knowledge in Early Modern England", in Jonathan A. Bush and Alan Wijffels, eds. *Learning the Law: Teaching and the Transmission of Law in England*, 1150-1900, 303 (1999).

2 Customary law is defined as "being of oral origin and nature. It is based on customs that are old (of at least forty years' duration), reasonable, and acceptable, as evidenced by the fact that people have been willing to practice them for a long time. A custom may be written down and made into law, but this does not make it any less a custom" (33) Adrienne Rogers, "Women and the Law," in Samia Spencer, ed., *French Women and the Age Of Enlightenment*, 33 (1984). My thanks to Janis Bergman-Carton for drawing my attention to this article.

3 The Civil Code of 1804, known as the Napoleonic Code, replaced the law promulgated under the Revolution (1789) but drew its "inspiration [from this law] in separating Church and State, in stressing individualism and the rights of man, and in consolidating man's political and economic rights." *See* Rogers, *supra* note 2, at 34.

4 Copyhold is also called "customary tenure." As Plucknett argues: "There grew up in the manors of tolerant lords the custom of allowing villeins to succeed by hereditary right to their ancestors' holdings." *A Concise History of the Common Law*, 311 (1956). The "machinery of custom" (*see* Rogers, *supra* note 2 at 33) conveyed legal rights that were retroactively, and reluctantly, recognized by the common law.

5 "Steward's Court of the Manor of Torre Devon." [? T.Lane] *Decr. Published by G. Humphrey. 27 St. James St. 1820.* # 14013 in M. Dorothy George, ed., 10 *Catalogue of Political and Personal Satires*, 1820-1827 (1952). George describes the print as "one of a set of elaborately cruel but amusing prints, published by Humphrey . . ., which must have contributed to the Queen's rapid loss of popularity. John Bull is warned against the dangerous tendency of mass agitation as represented by Addresses [right foreground] . . . . Lord Anglesey (or, it is sometimes said, Wellington), stopped by the mob on his way to the House of Lords with the demand that he should shout 'God save the Queen', did so, adding 'and may your wives be like her'" (145).

6 E. P. Thompson (*supra* note 1 at 478) characterizes the relationship between folklaw and the official legal system in early modern England as both a mockery of and an assertion of "the legitimacy of authority." For further discussion, see David Underdown, "The Taming of the Scold: The Enforcement of Patriarchal Authority in Early Modern England" in Anthony Fletcher and John Stevenson, eds., *Order and Disorder in Early Modern England* (1985); Martin Ingram, "Scolding Women Cucked or Washed: A Crisis in Gender Relations in Early Modern England" in Jenny Kermode and Garthine Walker, eds., *Women, Crime and the Courts in Early Modern England* (1994) and his "Juridical Folklaw in England Illustrated by Rough Music" in Christopher W. Brooks and Michael Lobban, eds., *Communities and Courts in Britain*, 1150-1900 (1997). For a discussion of communal judgments in the medieval period, see John S. Beckerman, "Toward a Theory of Medieval Manorial Adjudication: The Nature of Communal Judgments in a System of Customary Law," 13 *Law and History Review*, 1, 1 (1995). For a detailed survey of the shift, in the later Middle Ages, from trothplight, as a communally pledged contract, to the legal, written contract, from "troth" to "truth," see Richard Firth Green's *A Crisis of Truth: Literature and Law in Ricardian* England (1999).

7 I am aware that a distinction must be made within the common law between pleadings, writs and statutes and the law as understood through precedent and commentaries. My concern, here, however, is to distinguish primarily between law as written and law as actualized in individual and communal practices, the former identified with a literate and sophisticated clientele, the latter with an oral and local community.

8 Susan Stewarts *Crimes of Writing* addresses how law "developed as a particularly idealized and transcendent form of writing" (3).

9 The story of "heroical authorial innovation" might also be an apt description of how canonical histories of the common law proceed, attaching changes in the understanding of critical legal concepts to particular jurists, like Coke or Blackstone. The common presence of the "male heroical ideal" should

alert us to the historicity of this particular representation. See also Warner's reference (23) to David Perkins's argument in *Is Literary History Possible?* (1992) where Perkins defines as characteristic of "romantic literary history," the importance attached to beginnings or origins, the assumption that development is the subject . . ., the understanding of development as continual rather than disjunctive, and the creation of suprapersonal entities as the subjects of this development" (86). Such characteristics might be said to define the historical narratives of the English common law.

10 Arguing against the simple accommodation of English novels written by women within the tradition of the French romance, I am completing an article that re-situates the novel of "amorous intrigue" in the literary tradition of medieval narratives of the courts of love. I see these novels as part of an ongoing tradition in which women's courts dealt women's jurisprudence in matters of love. For a similar reading of *les precieuses*, erudite, mid-seventeenth-century, French women who challenged patriarchal politics, see Peter Goodrich, "Epistolary Justice: The Love Letter as Law," 9 *Yale Journal of Law and Humanities* 617 (1997). For a satirical version of this inquiry into the forms of love, see the "Love Casuist" in *The Spectator*, No. 614, Monday, Nov. 1, 1714.

11 For a detailed discussion of Manley's narratives and an extensive analysis of the degree to which women from a wide range of socioeconomic backgrounds participated in the production and dissemination of the printed word, see Paula McDowell, *The Women of Grub Street: Press, Politics, and Gender in the London Literary Marketplace 1678-1730* (1998), especially 225-284.

12 Dennis Todd, *Imagining Monsters: Miscreations of the Self in Eighteenth-Century England* (1995) and John Locke's association of women's sexual promiscuity with monstrous births, cited in William Walker, *Locke, Literary Criticism, and Philosophy* (1994), 60. For the connection between midwife, witch, whore and writer, see Robert E. Erickson, *Mother Midnight; Birth, Sex, and Fate in Eighteenth-Century Fiction (Defoe, Richardson, And Sterne)*. (1986)

13 Peter Goodrich makes a similar case about the construction of legal history in his remarks on the suppressed feminine presence in the common law (Goodrich: 1993).

14 This mutuality of interests is also reflected in the way in which the reporting of trials moved from sensational penny sheets, often in traditional oral form like ballads, to longer, more formal accounts that reported in more detail on the actual workings of the law and thus reinforced the centrality of legal ideology to the resolution of social instability. For an account of the production and distribution of trial reports, see Michael Harris, "Trials and Criminal Biographies: A Case Study in Distribution" in Robin Meyers and Michael Harris, eds., *Sale and Distribution of Books from 1700* (1982).

15 "By reality Fielding means moral or factual truth apprehended by the reader, whereas he sees in Richardson a reality that means the true workings of a character's mind, without any concern for the truth or falseness of apprehension in relation to the external word." Ronald Paulson, *Satire and the Novel in the Eighteenth Century* 106 (1967), quoted in Bender (1987: 145).

16 For an account of the intimate relationship between Fielding the magistrate and man of business and Fielding the novelist, see Lance Bertelsen, *Henry Fielding at Work: Magistrate, Businessman, Novelist* (2000).

17 Wilfred Prest, *The Rise of the Barristers: A Social History of the Bar 1590-1640* (1986). See also Christopher W. Brooks, *Lawyers, Litigation and English Society Since 1450* (1998), especially 231-258 and David Lemmings, *Gentlemen and Barristers: The Inns of Court and the English Bar, 1680-1730* (1990), especially 58-110.

18 For an account of the relationship between popular, novelistic, and legal representations of infamous trials, see my "Guilty in Law, Implausible in Fiction: The Narrative of Mary Blandy, Parricide, 1752", *Texas Journal of Women and the Law* 1, 337 (Spring 1992), reprinted in Susan Sage Heinzelman and Zipporah Batshaw Wiseman, eds. *Representing Women: Law, Literature and Feminism* (1994). See also, Kristina Straub, "Heteroanxiety and the Case of Elizabeth Canning," 3 *Eighteenth-Century Studies*, 30, 296 (1997) and Judith Moore, *The Appearance of Truth: The Story of Elizabeth Canning and Eighteenth-Century Narrative* (1994).

19 See Barbara J. Shapiro, *Probability and Certainty in Seventeenth-Century England: A Study of the*

Relationships Between Natural Science, Religion, History, Law (1983) and Alexander Welsh, *Strong Representations: Narrative and Circumstantial Evidence in England* (1992).

20 For the edition with the abstract of Locke's Essay, see *The Law of Evidence*, Considerably enlarged by Capel Lofft, Dublin (1795-1797). For Locke, see *An Essay Concerning Human Understanding*, Peter Nidditch, ed. (1982).

21 For an extensive analysis of the shift from oral to written contacts, seen as part of the general movement from folklaw to a centralized, formal system of law in the medieval period, see Green, *supra* note 16, especially Chapter 7.

22 For an analysis of the relationship between social status and the credibility of evidence in contemporary law, see Mark Cooney, "Evidence as Partisanship," Law & Society Review 28, 4 (1994).

23 William Walker comments thus on Salvaggio's thesis (1994: 71; fn. 12): "Rather than using women to figure all that threatened and did not fit his system, which is what Salvaggio claims 'Enlightenment men' typically did, Locke uses them to represent the central components of his system: ideas that constitute knowledge. And that Locke is determined to document the presence and power of women in the contexts which determine men's belief would seem to call for qualifications to Salvaggio's claim that 'it is not the Enlightened mind that rescues woman from historical obscurity, but rather suppression of women and all her feminine associations that allows Enlightenment to thrive'.