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LOOKING FOR LAW IN ALL THE "WRONG" PLACES: OUTLAW TEXTS AND EARLY WOMEN'S ADVOCACY*

KRISTIN BRANDSER KALSEM**

I. INTRODUCTION

In Mary Wollstonecraft's 1797 novel, *The Wrongs of Woman: or, Maria. A Fragment*,¹ the heroine Maria is locked up by her husband, first in their home and later in a mental institution. Imprisoned in the asylum, Maria writes a memoir for the benefit of her infant daughter who has been taken away from her.² Offering her own life story as a critique of the doctrine of coverture — the legal fiction that, upon marriage, the husband and wife become one — Maria writes:

But a wife being as much a man's property as his horse, or his ass, she has nothing she can call her own! He may use any means to get at what

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1. MARY WOLLSTONECRAFT, *The Wrongs of Woman: or, Maria. A Fragment*, in MARY AND THE WRONGS OF WOMAN (Gary Kelly ed., Oxford Univ. Press 1976) (1797) [hereinafter *Maria*].

2. *Id.* at 124. Maria explains:

Addressing these memoirs to you, my child, uncertain whether I shall ever have an opportunity of instructing you, many observations will probably flow from my heart, which only a mother — a mother schooled in misery, could make....Gain experience — ah! gain it — while experience is worth having, and acquire sufficient fortitude to pursue your own happiness.

Id.

the law considers as his, the moment his wife is in possession of it, even to the forcing of a lock.³

Emily Brontë's *Wuthering Heights* also explores the significance of a husband's absolute right to the person and property of his wife. In this novel, yet another young wife is kept locked away in a room.⁴ Refusing to release Catherine to visit her dying father, her husband Linton recites the lessons about marriage that he has learned from his father:

He says I'm not to be soft with Catherine: she's my wife, and it's shameful that she should wish to leave me. He says, she hates me and wants me to die, that she may have my money; but she shan't have it: and she shan't go home! She never shall!—she may cry, and be sick as much as she pleases!⁵

In the nineteenth century, such tales of wives under lock and key were far from confined to the realm of fiction. For example, during the month of March, 1891, the British public was treated to a real-life sensation story, "the Clitheroe Abduction case."⁶ On a Sunday morning, two men seized Emily Jackson as she was coming out of church and forced her into a waiting carriage; one of the men was her estranged husband.⁷ Following the abduction, the carriage drove to her husband's place of residence in Blackburn, where all of the occupants went inside and the doors were locked.⁸ Fortunately, Emily's friends tracked her and "demanded admittance to the house."⁹ When they were refused, the police were asked to "break into the house and rescue the lady."¹⁰ The police, however, "declined to interfere."¹¹

3. WOLLSTONECRAFT, *supra* note 1, at 158–59. As Mary Lyndon Shanley explains, "the common law doctrine of coverture dictated that when a woman married, her legal personality was subsumed in that of her husband." MARY LYNDON SHANLEY, *FEMINISM, MARRIAGE, AND THE LAW IN VICTORIAN ENGLAND, 1850–1895* 8 (1989). See also *infra* notes 22 and 145 and accompanying text (discussing specific aspects of the doctrine of coverture).

4. See EMILY BRONTË, *WUTHERING HEIGHTS* 332–344 (Modern Library Paperback ed., Random House 2000) (1847). Heathcliff locks Catherine in the Heights until she agrees to marry his son Linton. After the marriage, Linton refuses to let her out of her locked room. *Id.*

5. *Id.* at 344. Linton Heathcliff is speaking to Ellen Dean, the family servant who is the narrator of most of the novel. *Id.*

6. This was the heading *The Times* used in its ongoing reporting of the case. Its first story, on March 10, 1891, was titled, "Remarkable Abduction Case." *Remarkable Abduction Case*, *TIMES* (London), Mar. 10, 1891, at 8.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* The police refused to offer assistance once Mr. Jackson's solicitors produced a decree that Mr. Jackson previously had obtained for restitution of conjugal rights. *Id.*

The Times reported that there was "considerable romance in the affair,"¹² and, for ten days, the more dramatic details of the case filled the pages of the newspapers. On the morning after the abduction, "milk and the papers were taken in by means of a string let down from one of the bedroom windows, and, later on, all kinds of provisions were obtained in the same way. At noon a box of cigars was hoisted up to the garrison."¹³ Crowds thronged the streets "in spite of the snow and a bitter wind," and police were on hand to keep order.¹⁴ Then, on March 11, 1891, Emily's husband, Haughton, was finally forced to leave the Blackburn house. He had to respond to assault charges filed against him by Emily's sister for injuries she sustained while trying to hold onto Emily during the abduction. However, before he left the house, "a dozen men armed with picking sticks...filed into the yard," and when Haughton unbarred the door and came out, six of these armed men proceeded into the house and took possession of it "to prevent anybody opposed to Mr. Jackson's interest from getting into the place."¹⁵

On March 16, 1891, the Queen's Bench Division of the High Court rejected an application for a writ of habeas corpus¹⁶ filed by Emily's family, stating that "though generally the forcible detention of a subject by another is prima facie illegal...where the relation is that of husband and wife the detention is not illegal."¹⁷ On appeal, however, Haughton's arguments that he had a common-law right to custody of his wife were rejected, with the Court of Appeal (composed of the Lord Chancellor, Lord Esher, and Justice Fry) claiming that such an idea derived from "quaint and absurd dicta" which could not be considered authoritative "in a court of justice in this or any other civilized country."¹⁸

As a result of this decision, Emily was free to return to her family. The reactions to the *Jackson* case ranged from shocked derision to utter jubilation. The newspaper *The Standard* reported, "[m]arriage, in fact, without a note of warning, has, by this single decision of the Appeal Court, been placed upon an entirely new footing. The judgment has sprung a

12. *Id.*

13. *Id.*

14. *The Clitheroe Abduction Case*, *TIMES* (London), Mar. 11, 1891, at 8.

15. *The Clitheroe Abduction Case*, *TIMES* (London), Mar. 12, 1891, at 12.

16. A writ of habeas corpus is "a writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal." *BLACK'S LAW DICTIONARY* 715 (7th ed. 1999).

17. *Law Report, High Court of Justice, Queen's Bench Division. Ex Parte Emily Jackson-Application for a Writ of Habeas Corpus.*, *TIMES* (London), Mar. 17, 1891, at 3. There is no official published opinion recording the decision of the Queen's Bench Division of the High Court.

18. *Queen v. Jackson*, 1 Q.B. 671, 679 (1891).

mine upon society, and destroyed at one blow the prescription of ages."¹⁹ On the other hand, the nineteenth-century feminist Elizabeth Wolstenholme Elmy celebrated that "[c]overture is dead and buried."²⁰ While Elmy's initial assessment certainly was overstated, the case undisputedly was a landmark decision with respect to the doctrine of coverture and its concomitant fiction of marital unity.

Emily Jackson, in response to the ongoing judgments of her character and her actions in the papers, periodicals, and Parliament, published her side of the Clitheroe story as a lengthy five-part "Vindication" in the *Lancashire Evening Post* (which was reprinted in *The Times*).²¹ In this narrative, Emily vividly exposed the aptly named "disabilities" of coverture as lawful methods of preserving inequality between husbands and wives,²²

19. STANDARD, Apr. 13, 1891, reprinted in EDMUND HAUGHTON JACKSON, *THE TRUE STORY OF THE CLITHEROE ABDUCTION; OR, WHY I RAN AWAY WITH MY WIFE* 41 (Blackburn, Blackburn Standard 1891) [hereinafter, *WHY I RAN AWAY WITH MY WIFE*]. Emily's husband Edmund Haughton Jackson hereinafter will be referred to as Haughton Jackson.

20. Elmy wrote as follows in a published letter to *The Manchester Guardian*:

Of the momentous character of this judgment there can be no question whatever. It is a declaration of law which is epoch-making in its immediate consequences, and its ultimate results reach far into the future, involving indeed the establishment of a higher morality of marriage, and the substitution in relation of husband and wife, of the ethics of justice and equality for the old and worn-out code of master and slave.

Letter from Elizabeth Wolstenholme Elmy to Harriet M'Ilquham (Mar. 21, 1891) (available in Elmy Collection, British Library), quoted in SHANLEY, *supra* note 3, at 182.

21. The five-part "Vindication" may be found in the *TIMES* (London), Apr. 18, 20, 21, 22 and 23 of 1891 under the heading *Clitheroe Case* or the like [hereinafter cited in text as *Vindication*].

22. The "disabilities" of coverture included general prohibitions against a married woman entering into a contract, making a will or suing on her own behalf in court. She also had no right to control her own property, and no right to her own wages. See generally SHANLEY, *supra* note 3 (discussing the doctrine of coverture). These disabilities were remedied in certain respects by legislation such as the Married Women's Property Acts of 1870 and 1882, see *infra* note 118; however, as Maeve Doggett argues, "the 'power principle'...the societal assumption that women were lesser beings, that they should be subject to men and that men had the right to control them" was still accommodated and supported by the law in the late nineteenth century. MAEVE E. DOGGETT, *MARRIAGE, WIFE-BEATING & THE LAW IN VICTORIAN ENGLAND* 145 (1992). See *id.* at 34-61 (detailing a wife's legal disabilities, including exceptions to the general rules). Jackson's narrative also shows how coverture, in worst case scenarios, served as cover for legally sanctioned abuse. The principle of coverture served as justification for a husband's right to restrain and chastise his wife. William Blackstone wrote in his *Commentaries on the Laws of England*:

[F]or, as he [the husband] is to answer for her [his wife's] misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer.

1 WILLIAM BLACKSTONE, *COMMENTARIES* *444. In the late nineteenth century, laws had been passed to give wives who had been beaten certain rights. Specifically, in 1878, there was legislation enacted that enabled a wife whose husband had been convicted of beating her to apply for a separation order and live apart from him as a *feme sole*. Matrimonial Causes Act of 1878, 41 & 42 Vict., ch. 19 (Eng.). However, as became apparent in the *Jackson* case, the law was far from clear on the issue of a husband's right with respect to domestic chastisement. Doggett's research, based on an examination of the case law relating to a husband's right to beat and to confine his wife, led her to conclude, "[o]n the

and described the tragedy of "ever after" for those wives who lived in fear and danger, as well as those who could not live happily in such an unequal relationship.

The *Jackson* decision grew out of and then became a part of shifting cultural debates about the institution of marriage. Recently, in considering the meanings of cruel and unusual punishment in *Atkins v. Virginia*²³ and the right to privacy in *Lawrence v. Texas*,²⁴ the United States Supreme Court has reached decisions that similarly illumine the mutually constitutive relationship between law and culture. The opinions in both of these cases specifically address the linkages between cultural and legal developments.²⁵

strength of this authority, legal textbook writers had been assuring their readers, right up until 1891, that a husband was entitled to 'coerc[e] his wife into domestic habits.'" DOGGETT, *supra* note 22, at 32–33 (quoting JOHN FRASER MACQUEEN, *THE RIGHTS AND LIABILITIES OF HUSBAND AND WIFE WITHIN THE JURISDICTION OF THE QUEEN'S BENCH AND CHANCERY DIVISIONS* 339 (London, Sweet 1849)). Indeed, Haughton Jackson had sought legal advice before the abduction, *WHY I RAN AWAY WITH MY WIFE*, *supra* note 19, at 26, and his lawyers in the case argued:

It is not contended that the law entitled a husband to beat his wife, as stated in Bacon's Abridgement and some of the earlier authorities; but the authorities generally shew [sic] that he is entitled to the custody and control of his wife, and to detain her by force if she refuses to live with him.

Queen v. Jackson, 1 Q.B. 671, 675 (1891). As Emily's lawyers responded, however, "[i]f he may use any violence necessary to control and keep possession of her, it follows that he may beat her for that purpose if necessary. The two things necessarily go together, and are constantly associated in the ancient dicta that have been cited." *Id.* at 677.

23. *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that executions of mentally retarded criminals are cruel and unusual punishments prohibited by the Eighth Amendment).

24. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), and holding that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause of the Fourteenth Amendment).

25. In *Atkins*, the Supreme Court relied on "evolving standards of decency" in determining that executions of mentally retarded criminals are unconstitutional. 536 U.S. at 321. Taking into account cultural developments, the Court specifically interpreted legislative changes in the direction of prohibiting such executions in the context of "a much broader social and professional consensus." *Id.* at 316 & n.21. In *Lawrence*, the Court noted that "our laws and traditions in the past half century...show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." 123 S. Ct. at 2480. In the majority opinion, Justice Kennedy wrote:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Id. at 2484. In commenting on *Lawrence*, as well as the other landmark decisions of the Supreme Court's 2002–2003 term, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) and *Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003), Paul Gewirtz identifies as "the most significant aspect of the term...the court's role in 'consolidating cultural developments,' legitimizing them and translating them into 'binding legal principle.'" Linda Greenhouse, *In a Momentous Term, Justices Remake the Law, and the Court*, N.Y. TIMES, July 1, 2003, at A1.

In the increasingly important field of law and cultural studies,²⁶ scholars focus critical attention on the relationship between law and culture²⁷ and theorize about why a cultural analysis of law is imperative to an understanding of legal developments:

Legal meanings are not, however, invented and communicated in a unidirectional process. Litigants, clients, consumers of culture, and others bring their own understandings to bear; they deploy and use meanings strategically to advance interests and goals. They press their understandings in and on law, and, in doing so, invite adaptation and change in legal practices.²⁸

Relatedly, scholars such as Richard Delgado, Kathryn Abrams, and William Eskridge have made compelling arguments that narratives²⁹ offer particularly rich insights into the meanings of law from the perspectives of those who resist having the law *passed down* in a unidirectional fashion.³⁰

26. See, e.g. LAW IN THE DOMAINS OF CULTURE (Austin Sarat & Thomas R. Kearns eds., 1998); Rosemary J. Coombe, *New Direction: Critical Cultural Legal Studies*, 10 YALE J.L. & HUMAN. 463, 478 (1998); PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999); 13 YALE J.L. & HUMAN. (Special Issue 2001) (documenting a major symposium in this area held at Yale Law School in April 2000).

27. Drawing on Raymond Williams' pioneering work in the field of cultural studies, Naomi Mezey describes culture as "any set of shared, signifying practices — practices by which meaning is produced, performed, contested, or transformed," with law being one of those signifying practices. Naomi Mezey, *Approaches to the Cultural Study of Law: Law as Culture*, 13 YALE J.L. & HUMAN. 35, 42 (2001). Mezey proposes a method of inquiry that attempts to break down distinctions between law and culture, instead attempting to "locate the slippage and elision between the two [these two dependent discourses], directing us not so much to a singular explanation as to neglected questions and revealing juxtapositions." *Id.* at 38.

28. Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. 3, 19–20 (2001).

29. For the purposes of this Article, the following broad definition of narrative is appropriate: [A] telling of some true or fictitious event or connected sequence of events, recounted by a narrator to a narratee (although there may be more than one of each)...A narrative will consist of a set of events (the story) recounted in a process of narration (or discourse), in which the events are selected and arranged in a particular order (the plot).

CHRIS BALDICK, THE CONCISE OXFORD DICTIONARY OF LITERARY TERMS 145 (1990).

30. Richard Delgado describes the power of storytelling and counterstorytelling as follows: Ideology — the received wisdom — makes current social arrangements seem fair and natural. Those in power sleep well at night — their conduct does not seem to them like oppression.

The cure is storytelling (or as I shall sometimes call it, counterstorytelling)....

Most who write about storytelling focus on its community-building functions: stories build consensus, a common culture of shared understandings, and deeper, more vital ethics. Counterstories, which challenge the received wisdom, do that as well....

But stories and counterstories can serve an equally important destructive function. They can show that what we believe is ridiculous, self-serving, or cruel. They can show us the way out of the trap of unjustified exclusion. They can help us understand when it is time to reallocate power. They are the other half — the destructive half — of the creative dialectic.

Richard Delgado, *Storytelling For Oppositionists and Others: A Plea For Narrative*, 87 MICH. L. REV. 2411, 2413–2415 (1989) (footnotes omitted). Specifically with respect to the value of feminist narratives of women's experiences, Kathryn Abrams writes:

Specifically, narrative is central to the genre of "outsider scholarship,"³¹ a prominent type of scholarship that brings to the foreground of legal analysis the views and experiences of "outgroups"³² whose voices traditionally have been excluded from legal discourse on the basis of race, gender or sexual orientation. While much of the focus of the law and narrative movement has been on the value of contemporary storytelling,³³

[T]he narratives of those who occupy a comparatively powerless position are not only evidence of what has been excluded, but testimony to the law's relentless perspectivity....Experiential narratives are significant not only for the substantive message they convey but for the way they claim to know what they know. Feminist narratives present experience as a way of knowing that which should occupy a respected, or in some cases a privileged position, in analysis and argumentation.

Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 975-76. Similarly, William Eskridge explores how gaylegal narratives offer insights into the lived experience of law for the lesbian, gay, bisexual, transgender, and queer community:

[Gaylegal narratives] deepen our understanding of 'law.' If law changes from the bottom up, then it is useful for the legal system to understand the process by which social and economic movements challenge old rules to justify themselves anew....[These] stories call into question the legitimacy of what is considered 'law' in the United States.

William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 636-37 (1993-94).

31. Mary Coombs comments:

The term [outsider scholarship] encompasses a range of scholarship rooted in the concerns of and reflecting the perspectives of groups that have not traditionally been part of legal scholarship....Outsider scholarship is created and defined, in part, by contrast to traditional legal scholarship, which adopts a prescriptive approach, is grounded in normative positions, and is expressed in judicial discourse....[O]utsider scholarship is characterized by a commitment to the interests of people of color and/or women, by rejection of abstraction and dispassionate 'objectivity,' and by a preference for narrative and other engaged forms of discourse.

Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 683-85 (1992).

32. Delgado describes "outgroup" as "any group whose consciousness is other than that of the dominant one." Delgado, *supra* note 30, at 2412, n.8.

33. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 615 (1990) ("In order to energize legal theory, we need to subvert it with narratives and stories, accounts of the particular, the different, and the hitherto silenced."). In discussing storytelling as methodology, Patricia Cain comments:

Telling stories is good feminist methodology. Concrete examples ensure that we begin at the same particular point before we jump to abstract principles. Because I have lived my life differently than you have, you are not likely to catch my full meaning if I make all my comments at the abstract theoretical level.

Patricia A. Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 SO. CAL. L. REV. 1945, 1946 (1988). In her article, *Legal Images of Battered Women: Redefining the Issue of Separation*, Martha Mahoney explains her use of narrative methodology:

To illustrate the contrast between women's lives and legal and cultural stereotypes, and to accomplish a translation between women's lives and law, this article offers narratives and poems from the lives of survivors of domestic violence, and a few from the stories of non-survivors, as part of its analysis and argument.

Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 7 (1991); cf. Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 808 (1993) ("Rather than asking whether storytelling is, generally speaking, a beneficial activity, we will focus on the appropriate role of storytelling in legal scholarship.").

scholars also have noted the importance of paying attention to the role of and resistance to law that is recounted in narratives of the past.³⁴

In order to demonstrate how a study of what I will characterize as "outlaw" texts can enrich our understanding and critical consideration of legal history, the meaning of law, and law's meanings, this Article presents a detailed analysis of examples of historical narrative advocacy by women. These "outlaw" texts include narratives of nonfiction and fiction that focus our historical perspective on the important (but much overlooked) role that women have played in the development of law. I use the word "outlaw" to emphasize that, while these texts are not considered official legal texts and are thus "out" of the purview of much legal inquiry, these are texts with respect to which "law" is an integral signifying system.³⁵ At the same time, the word "outlaw" also signals that these texts present the voices of outgroups and suggests a dialogic relationship between this Article and others that have emphasized the importance of outsider narratives to an understanding of law.³⁶ Finally, I use the term "outlaw" because it also connotes the positive possibilities of conceiving of law and justice in a different way.³⁷

34. See, e.g., Mari Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989). Matsuda discusses the methodology of "outsider jurisprudence" of people of color, noting that the method "is consciously both historical and revisionist, attempting to know history from the bottom....[T]he desire to know history from the bottom has forced these scholars to sources often ignored: journals, poems, oral histories, and stories from their own experiences of life in a hierarchically arranged world." *Id.* at 2324. Delgado describes the historical practice by outgroups of resistance through narrative as follows:

Subordinated groups have always told stories. Black slaves told, in song, letters, and verse, about their own pain and oppression. They described the terrible wrongs they had experienced at the hands of whites, and mocked (behind whites' backs) the veneer of gentility whites purchased at the cost of the slaves' suffering. Mexican-Americans in the Southwest composed *corridos* (ballads) and stories, passed on from generation to generation, of abuse at the hands of gringo justice....Native American literature both oral and written, deals with all these themes as well. Feminist consciousness-raising consists, in part, of the sharing of stories, of tales from personal experience, on the basis of which the group constructs a shared reality about women's status vis-à-vis men.

Delgado, *supra* note 30, at 2435-36.

35. I use the term "official" legal texts in the positive law sense of "the written law of a centralized government that has assumed authority over law." MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE* 111 (1994).

36. See *supra* note 30.

37. Ruthann Robson, for example, celebrates the expression of lesbian desires, "desire that is not domesticated by legal categories....Desires that mark us as our own (out)laws." RUTHANN ROBSON, *LESBIAN (OUT)LAWS: SURVIVAL UNDER THE RULE OF LAW* 185 (1992). See also, e.g., Eskridge, *supra* note 30, at 639. Eskridge writes, in reference to the attitudes of gay men and lesbians towards the military's gay-lesbian ban: "One who has been declared an outlaw literally beyond the Constitution's protection, is less likely to ascribe legitimacy to decisions that condemn her." *Id.*

Part II of this Article focuses on nineteenth-century nonfiction narrative advocacy, with particular emphasis on Emily Jackson's account of the Clitheroe abduction case. Jackson's *Vindication* presents aspects of the concept of marital unity and the "protections" of coverture that are missing from the official legal record. Through its presentation of the real-life experiences of a Victorian woman, it provides a clear example of what injustices the law was failing to protect against.

Legal scholars increasingly are recognizing the value of looking beyond traditional positive law texts to narratives such as Jackson's in the study of law and legal history.³⁸ Part III of this Article breaks new ground by arguing that this expanded inquiry should also include an important but heretofore unacknowledged source of legal history: the novel. More particularly, it sets forth theoretical and cultural frameworks for examining the novel as a valuable forum for a feminist critique of the law. As this Article will show, the nineteenth-century novel was not only a very popular form of women's writing but also an important public legal forum for women throughout the course of the century. By providing a space where women's stories could be told and read, by calling into question the law's authoritative claim to "truth,"³⁹ and by creating new knowledge through the

38. Martha Minow explains:

Legal rules and practices daily influence how people act by affecting the expectations they hold and the risks they take. Yet people's actions cannot be described completely by legal texts, nor by the institutional practices of courts, legislatures and executives — so neither can the nature of law as a feature of lived experience.

Martha Minow, *Forming Underneath Everything That Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819, 822. Minow acknowledges her methodological alliance with "law and society" historians "who believe that law may be properly described only after examination of the practices and structures of social life." *Id.* at 821. She also draws on the work of feminist historians "who champion the importance of histories of ordinary people usually missing from the scholarly story of our past." *Id.* at 820–21. See also Coombe, *supra* note 26, at 478 ("Rather than stress isolated decisions, statutes, or treatises, we need to attend to the social life of law's textuality and the legal life of cultural forms as it is expressed in the specific practices of socially situated subjects"). Also, Ariela Gross has analyzed a longstanding and deep "institutional and intellectual divide" between social and legal history, with a sharp distinction made between "using legal records to study society" and "studying the history of law." Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery* 101 COLUM. L. REV. 640, 640 (2001). In the developing field of cultural-legal history, Gross sees evidence of the breakdown of what had heretofore been the "hermetically-sealed realms" of "legal history" and "social history using legal records." *Id.* at 643. This Article seeks to contribute to that breakdown by arguing for a broader conception of what are considered legal records.

39. Drawing on Michel Foucault's work on power, knowledge and the claims of the sciences to speak the truth, Carol Smart discusses law's parallel "claim to [T]ruth." Carol Smart, *Law's Truth/women's experience*, in DISSENTING OPINIONS: FEMINIST EXPLORATIONS IN LAW AND SOCIETY 1, 2 (Regina Graycar ed., 1990). Smart explains:

Law has its own method, its own testing ground, its own specialised language and system of results. It may be a field of knowledge that has a lower status than those regarded as real sciences, but nonetheless it sets itself apart from other discourses in the same way that science does.

Id. at 4. Specifically,

shared tellings of women's lived experiences, these novels performed what today we would call "feminist jurisprudence."⁴⁰

Finally, Part IV offers more specific evidence of the important relationship between novels and a more complete understanding of women's role in legal history. It focuses on two late nineteenth-century New Woman novels,⁴¹ *The Beth Book* by Sarah Grand⁴² and *A Writer of Books* by George Paston.⁴³ Specifically, New Woman novelists revised the traditional marriage plot, taking up the story where most romances ended. More broadly, writers like Grand and Paston "saw the novel as a concrete and immediate, if fictional, structure within which to begin, at least imaginatively, the transformation they wanted to effect in the public

the power that law arrogates to itself by making this claim to Truth, or ultimate correctness...can disqualify other discourses, confirming a hierarchy of knowledges in which law is positioned close to the top. Lay knowledge and women's experience does not count for much in this regime of Truth.

Id. at 2.

40. Patricia Smith broadly defines "feminist jurisprudence" as the "analysis and critique of law as a patriarchal institution." Patricia Smith, *Introduction to FEMINIST JURISPRUDENCE* 3 (Patricia Smith ed., 1993). As Smith explains, "[t]his analysis and critique manifests itself in a variety of ways, owing partly to the range of issues it covers and partly to the divergence among feminists on virtually all points other than the rejection of patriarchy." *Id.* at 3. Far from limiting its scope to the fields of equal protection, reproductive freedom, rape, sexual harassment, spousal abuse, prostitution and pornography, "the issues covered by feminist jurisprudence are as wide ranging as the areas covered by law." *Id.* at 4. For helpful introductions to and overviews of this field, see, e.g., MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* (2d ed. 2003); CAROL SMART, *FEMINISM AND THE POWER OF THE LAW* 66-89 (1989); Katharine Bartlett, *Perspectives in Feminist Jurisprudence*, in *FEMINIST JURISPRUDENCE, WOMEN AND THE LAW: CRITICAL ESSAYS, RESEARCH AGENDA, AND BIBLIOGRAPHY* 3-21 (Betty Taylor et al. eds., 1999); Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 *BERKELEY WOMEN'S L.J.* 191 (1989-90); Harris, *supra* note 33; Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 *YALE L.J.* 1373 (1986); and Smith, *supra* note 40. For collections of essays on feminist jurisprudence and feminist legal theory, see, e.g., *FEMINIST JURISPRUDENCE* (Patricia Smith ed., 1993); *FEMINIST JURISPRUDENCE, WOMEN AND THE LAW: CRITICAL ESSAYS, RESEARCH AGENDA, AND BIBLIOGRAPHY* (Betty Taylor et al. eds., 1999); *FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER* (Nancy E. Dowd & Michelle S. Jacobs eds., 2003); *FEMINIST LEGAL THEORY: FOUNDATIONS* (D. Kelly Weisberg ed., 1993); *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* (Katharine T. Bartlett & Roseanne Kennedy eds., 1991); and *SOURCEBOOK ON FEMINIST JURISPRUDENCE* (Hilaire Barnett ed., 1997).

41. Ann Ardis describes the New Woman as follows:

She was called "Novissima": the New Woman, the Odd Woman, the Wild Woman, and the Superfluous Woman in English novels and periodicals of the 1880s and 1890s. A tremendous amount of polemic was wielded against her for choosing not to pursue the conventional bourgeois woman's career of marriage and motherhood. Indeed, for her transgressions against the sex, gender, and class distinctions of Victorian England, she was accused of instigating the second fall of man.

ANN ARDIS, *NEW WOMEN, NEW NOVELS: FEMINISM AND EARLY MODERNISM* 1 (1990). New Woman novels were very popular in the 1880s and '90s. Ardis has identified more than one hundred New Woman novels written between 1883-1900. See *id.* at 4.

42. SARAH GRAND, *THE BETH BOOK* (Dial 1980) (New York, D. Appleton 1897).

43. GEORGE PASTON, *A WRITER OF BOOKS* (Academy 1999) (1899). George Paston is a pseudonym for Emily Morse Symonds.

world."⁴⁴ Sarah Grand's *The Beth Book* explicitly examines the closely related roles of women writers and political activists in bringing about a wide array of legal reforms. George Paston's *A Writer of Books* probes a woman writer's relationships to various aspects of the law, as well as her contributions to the historical record. These two novels illustrate through their very themes why a study of law and legal history is incomplete without them.

Outlaw texts such as Emily Jackson's *Vindication* and the novels of Wollstonecraft, Brontë, Grand, and Paston illumine knowledge, practices, perspectives, and resistance that are not accessible from a study of only official sources of positive law. The everyday effects and negotiations of law — the lived experience of law — are central to these narratives. In emphasizing the need to attend to outlaw texts, this Article illustrates the far-reaching benefits of looking for law in what traditionally have been considered all the "wrong" places.

II. NINETEENTH-CENTURY WOMEN'S NARRATIVE ADVOCACY: REAL-LIFE STORIES

Looking for law in nonfiction narratives is a valuable tool that others have highlighted. As Mari Matsuda writes:

Outsider scholars have recognized that their specific experiences and histories are relevant to jurisprudential inquiry. They reject narrow evidentiary concepts of relevance and credibility. They reject artificial bifurcation of thought and feeling. Their anger, their pain, their daily lives, and the histories of their people are relevant to the definition of justice.⁴⁵

In the nineteenth century, women like Caroline Norton, Georgina Weldon, and Emily Jackson recognized these same things.

More than fifty years before Emily Jackson published her *Vindication*, Caroline Norton put her personal experiences on public display, first as proof of the imperative need to change the laws relating to child custody and later in the cause of marital property and divorce reform. Norton's husband George was a vindictive and violent man. During the first nine years of their marriage, the couple separated several times, and in 1836,

44. TERESA MANGUM, *MARRIED, MIDDLEBROW, AND MILITANT: SARAH GRAND AND THE NEW WOMAN NOVEL* 13 (1998). For insightful analyses of many New Woman novels and discussions of the historical and social contexts of this genre, see, e.g., ARDIS, *supra* note 41. See also GAIL CUNNINGHAM, *THE NEW WOMAN AND THE VICTORIAN NOVEL* (1978).

45. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN'S RIGHTS L. REP. 297, 298 (1992).

George sent their three sons away and refused to tell Caroline where they were located.⁴⁶ He also locked her out of the house.⁴⁷ Finding that she had no legal right to be reunited with her children, she undertook to reform the law.⁴⁸ A progressive Member of Parliament, Thomas Talfourd, sponsored a child custody bill, and Norton published *Separation of Mother and Child by the 'Law of Custody of Infants' Considered* (1837) in support of that bill.⁴⁹ With her narrative, she showed the great injustice of the existing laws, and, largely due to her efforts, the Custody of Infants Act of 1839 was enacted.⁵⁰ This law provided that a woman who was separated from her husband could petition in equity for custody of children of their marriage who were under the age of seven.⁵¹ The mother also could petition for access to her children over seven.⁵² Tragically, even after passage of the Act, Norton remained unable to see her sons because her husband had moved them to Scotland, beyond the reach of the English courts.⁵³ Only after her youngest son died in a riding accident did George Norton allow her access to her other two sons.⁵⁴

Later, when it was determined that a marital separation agreement she had entered into with George was invalid because, as a married woman, she had no legal capacity to enter into that contract, she wrote *English Laws for Women in the Nineteenth Century* (1854).⁵⁵ Mary Lyndon Shanley describes this narrative as "an impassioned defense of her own activities and an indictment of the laws governing married women's property rights" and explains that if Norton "could not win her case in the English courts of law, she would appeal directly to public opinion and the verdict of history."⁵⁶

In 1879, another ill-treated and rightfully outraged wife, Georgina Weldon, published *How I Escaped the Mad Doctors*, her harrowing tale of

46. SHANLEY, *supra* note 3, at 23.

47. *Id.*

48. *Id.* at 136.

49. *Id.* at 136-37.

50. An Act to Amend the Law Relating to the Custody of Infants, 1839, 2 & 3 Vict., ch. 54 (Eng.). This legislation was known as "Mrs. Norton's Bill." James Hoge & Jane Marcus, *Introduction to CAROLINE NORTON, SELECTED WRITINGS OF CAROLINE NORTON* xiii (1978). *Id.* See also SHANLEY, *supra* note 3, at 25 (discussing Norton's central role in the passage of this Act).

51. An Act to Amend the Law Relating to the Custody of Infants, 1839, 2 & 3 Vict., ch. 54 (Eng.).

52. *Id.*

53. SHANLEY, *supra* note 3, at 136.

54. *Id.* at 25.

55. See *id.* at 25-27 (discussing Norton's critique of coverture in this text).

56. *Id.* at 26.

her husband's attempt to put her away in a mental institution.⁵⁷ Weldon became a leader in the campaign to reform the British lunacy laws, and her efforts are widely credited as resulting in amendments to the Lunacy Acts that made it impossible to institutionalize someone without first obtaining a judicial order.⁵⁸

While Norton and Weldon lived much of their lives in the public eye,⁵⁹ Emily Jackson had lived a quiet life in a small community before her notorious abduction.⁶⁰ After the *Jackson* case was decided, however, she was at the center of a whirlwind of controversy over the meanings of marriage in law and society.

Far from agreeing with the Lord Chancellor's dicta that behavior such as Mr. Jackson's had never been legal in England, a leading legal publication, the *Solicitors' Journal*, hailed the *Jackson* decision as a "rude shock" to the common law.⁶¹ The article expressed great surprise at the Lord Chancellor's decision "to declare, *for the first time*,"⁶² the following:

[T]hat, according to English law, a wife is at liberty, immediately after going through the ceremony of marriage in church, to desert her husband, and without any excuse to condemn him to a life of celibacy; that the continuance of the marriage relation is perfectly voluntary, and that a husband may, for no fault of his own, be deprived of a home and the prospect of children to inherit his name.⁶³

This "legal conclusion" was in keeping with much of the publicly expressed sentiment. It was reported that Haughton Jackson received many sympathetic cards and letters and that a fund had been established to help

57. GEORGINA WELDON, *HOW I ESCAPED THE MAD DOCTORS* (London, Weldon 1879). Georgina and Harry Weldon had been separated for nearly three years, *id.* at 6, when he sent two doctors to her home to certify her as insane. *See id.* at 11. The doctors spoke with her for a short time, and later that evening two asylum attendants arrived to take her away. *Id.* She escaped and took refuge with friends. *Id.* at 19.

58. Lunacy Act of 1890, 53 Vict., ch. 5 (Eng.). *See also* KATHLEEN JONES, *LUNACY, LAW, AND CONSCIENCE 1744-1845: THE SOCIAL HISTORY OF THE CARE OF THE INSANE* 198 (1955) (discussing the influential role that Weldon played in legislative reform of the lunacy laws).

59. Caroline Sheridan Norton was a well-known novelist and poet. She wrote five novels and poetry that earned her the title of a "female Byron." Hoge & Marcus, *supra* note 50, at vii. Weldon was a talented vocalist who performed at such venues as the Opéra Comique in Paris and Covent Garden in London. EDWARD GRIERSON, *STORM BIRD: THE STRANGE LIFE OF GEORGINA WELDON* 74-75, 175-76 (1959).

60. *See The Clitheroe Abduction Case*, *TIMES* (London), Apr. 18, 1891, at 14 [hereinafter *Clitheroe*, Apr. 18].

61. *Husband and Wife*, *SOLICITORS' J.*, Vol. XXXV, No. 2, Mar. 28, 1891, at 357.

62. *Id.* at 359 (emphasis added).

63. *Id.*

him take his case to the House of Lords.⁶⁴ In contrast, Emily Jackson, upon returning to Clitheroe, was mobbed by a hostile crowd: "Groans, hisses and yells were given for Mrs Jackson, and cheers, with the singing of 'He's a jolly good fellow' for her husband. The midnight scene was an extremely stormy and threatening one, the police being hard-pressed to prevent violence."⁶⁵

Haughton Jackson did not appeal the decision to the House of Lords, but in mid-April the Lord Chancellor and Lord Esher were questioned about the decision in a parliamentary session.⁶⁶ In defending the decision, Esher made the following telling comment:

Those intelligent people who have declared that the judgment is wrong must be prepared to maintain the converse — namely, that if a wife disobeys her husband he may lawfully beat her; and if she refuses him a restitution of conjugal rights he may imprison her, it was urged, in the cellar or in the cupboard, or, if the house is large, in the house by locking her in it and blocking the windows.⁶⁷

With the *Jackson* case, legally sanctioned domestic violence, which was an unspoken "disability" of coverture, was brought into broad daylight. When Emily Jackson filed for a writ of habeas corpus, she gave the Court of Appeals two choices: either to publicly articulate the law's acceptance of brute force in the relationship of husband and wife or to set her free. As the Court of Appeals decision makes clear, the thought of explicitly acknowledging that the law supported such a position compelled the Court to say it wasn't so.

Emily Jackson's voice is completely missing from the official legal record of this case. The published opinion includes detailed discussions of legal authorities and precedents relating to a husband's right to beat, confine, and imprison his wife.⁶⁸ It also presents certain facts specific to this case based on affidavits that were filed on both sides.⁶⁹ However, "the wife had no opportunity of making any affidavit" as she was locked up in her husband's house.⁷⁰ The affidavits on her side were not hers, but rather filed on her behalf. The published opinion also notes that the judges spoke with Mrs. Jackson and determined that she was acting as a free agent and

64. *The Clitheroe Case*, TIMES (London), Apr. 1, 1891, at 5. The House of Lords is the body to which a decision of the Court of Appeals would be appealed.

65. *The Clitheroe Case*, TIMES (London), Mar. 28, 1891, at 5.

66. *The Clitheroe Case*, TIMES (London), Apr. 17, 1891, at 6.

67. *Id.*

68. *Queen v. Jackson*, 1 Q.B. 671, 674–5 (1891).

69. *Id.* at 672–74.

70. *Id.* at 672 & n.2.

not under the undue influence of her relatives.⁷¹ There is no legal record, however, of what Emily Jackson said.

However, Emily Jackson's voice, perspectives, and experiences are documented in an outlaw text. Like Norton and Weldon, Emily Jackson presented, in the court of public opinion, "private" details that are missing from the legal record. In the newspapers' first installment of the *Vindication*, she explained: "I wish simply to appeal to my countrymen, and especially to my countrywomen, against the opinions which in many directions have been formed against me without hearing my side of the case";⁷² she lamented that she has been "condemned unheard."⁷³ Just as novels present the details of the everyday as integral to an understanding of the story, so Emily presented what to her were crucial facts.⁷⁴ Specifically, she publicized her disillusionment and her fear, rewriting the "romance" that *The Times* alluded to in the early days of the abduction from the perspective of the damsel for whom marriage represented only increasing distress.

Emily married Haughton Jackson when she was forty-six.⁷⁵ They married speedily, just before Haughton was to sail to New Zealand to set up a farming operation.⁷⁶ Her family was surprised to learn of the marriage and disapproved, although she published a letter from her sister to Haughton suggesting that her family had become reconciled to the marriage.⁷⁷ Upon reflection, Emily felt that her constitution was not sufficiently strong to endure the strenuous life of a colonial settler and so she wrote Haughton asking him not to buy land or to begin to build a house.⁷⁸ Instead, she expressed her desire for them to settle in England.⁷⁹ She also told him that she did not expect him to return for six months or so,

71. *Id.* at 678 & n.17.

72. *Clitheroe*, Apr. 18, *supra* note 60, at 14.

73. *Id.*

74. Emily's comment that she is appealing "to my countrymen, and especially to my countrywomen" suggests that she is speaking to a "jury of her peers," presenting facts that have been omitted that she believes clarify her motives and actions. Similar to Susan Glaspell's short story of that name, Jackson's narrative emphasizes what, in an official legal text, might be deemed "trifles." Susan Glaspell, *A Jury of Her Peers*, EVERYWEEK, Mar. 5, 1917, at 42, reprinted in *THE BEST SHORT STORIES OF 1917*, at 256 (Edward J. O'Brien ed., 1918). Glaspell's *A Jury of Her Peers* is based on an earlier dramatic production entitled *Trifles*.

75. DOGGETT, *supra* note 22, at 1.

76. *The Clitheroe Abduction Case*, TIMES (London), Apr. 20, 1891, at 12 [hereinafter *Clitheroe*, Apr. 20].

77. *Id.*

78. *Id.*

79. *Id.*

and that he should make the most of his journey.⁸⁰ In response to this request, she received a package including two letters from Haughton: one "public" letter, written in affectionate terms, speaking of his voyage and his illness on the journey, the other that she was to keep private asking her to send £100 for the return fare of Haughton and his friend, Mr. Dixon Robinson.⁸¹ As Haughton and Robinson had had no time to spend the capital Emily believed they had both taken out to begin their farming operations, she was shocked that they had no money to pay their return fare.⁸² Moreover, the letter also suggested to Emily that Haughton wanted to use Emily's money to set up "a sort of joint home" with his sister and Dixon Robinson.⁸³ Emily published the actual letters to leave "anyone to judge of the effect which they were calculated to have upon me."⁸⁴

Feeling that she had been much deceived, that she had been married for her money and not for herself, she lamented, "[h]ow I felt any woman can best understand who has ever trusted as I had trusted, and with such a result."⁸⁵ Disillusioned with her marriage, Emily wrote Haughton an indignant response, a letter expressing the sentiments of someone who is used to managing her own affairs. In the letter he wrote back, the hitherto tacit threat that marriage had posed to Emily's happiness and her ability to have any say in her own future was made manifest. Haughton wrote:

As you justly say, everything between husband and wife should be sacred, yet you have dared to tell your people what I have written you. Do not make any mistake; there shall be a perfect understanding between us, but I will make it, not you. It is most ridiculous for you to say you will have this or that; it depends upon whether I approve or no.⁸⁶

Based on this letter, Emily decided that it was impossible for them to live together.⁸⁷ With the help of a supportive family, she managed for a while to enforce her decision, refusing to see Haughton when he returned to England.⁸⁸ She recounted a violent altercation between Haughton and her sister and brother-in-law when he stormed into their home, demanding to see his wife. She reprinted a letter she wrote to him the following day:

80. Nov. 13, 1887 letter from Emily Jackson to Haughton Jackson, *quoted in* WHY I RAN AWAY WITH MY WIFE, *supra* note 19, at 16.

81. *Clitheroe*, Apr. 20, *supra* note 76, at 12.

82. *The Clitheroe Case*, TIMES (London), Apr. 21, 1891, at 12 [hereinafter *Clitheroe*, Apr. 21].

83. *Clitheroe*, Apr. 20, *supra* note 76, at 12.

84. *Id.*

85. *Id.*

86. *Clitheroe*, Apr. 21, *supra* note 82, at 12.

87. *The Clitheroe Case*, TIMES (London), Apr. 22, 1891, at 12 [hereinafter *Clitheroe*, Apr. 22].

88. *Id.*

Sir, — I was on the staircase and heard the violent way you forced yourself into my sister's house last evening, and also your abuse of everybody and especially abominable language to my sister on her quietly requesting you to leave the house. Your insulting and unmanly letter to me of the 28th of May opened my eyes to your real character, and your behaviour last night only more fully confirms me in the determination I then formed — to have nothing more to do with you.⁸⁹

When she finally did agree to meet with him on January 16, 1889, after he had applied for a writ of restitution of conjugal rights, she explicitly told him that she was afraid to live with him.⁹⁰ She described how he raised his voice considerably and characterized himself as having "just a little bit of temper."⁹¹ While there are contested facts in the *Jackson* case, Haughton Jackson's undisputed abduction of Emily on that Sunday morning proves that her fears were justified. Exhibiting classic batterer behavior, he was determined to have her — by any and all means.⁹²

In her *Vindication*, Emily documented her terror inside the carriage: "Mr. Jackson was very excited, and shook his fist in my face in a menacing manner. I was faint and sick and breathless, and all I could say was, 'You surely are not going to hurt me?'"⁹³ She further explained that:

From the rough handling I received in the struggle I felt sore all over my body for several days; my chest was very painful, my arms were very much bruised and swollen, and were black and blue from the shoulders to the elbows and discoloured, and finger marks and swelling were seen by the doctor a month afterwards.⁹⁴

But her most persuasive evidence of the violence of this episode comes in her detailed description of "the bonnet incident."

It was admitted by all parties that, upon arriving at the Blackburn House, Mr. Jackson ordered Emily to remove her bonnet, and when she refused, he threw it into the fire. *The Times* treated this incident as comical: "Unless it was an extremely unbecoming bonnet, this was outrageous on the part of Mr. Jackson. A man may show his determination

89. *Id.*

90. *The Clitheroe Case*, TIMES (London), Apr. 23, 1891 [hereinafter *Clitheroe*, Apr. 23].

91. *Id.*

92. Haughton's actions and testimony evidence very typical batterer behavior. A batterer wants sole possession of his wife, often driving away her friends and family. Batterers also are masters of justification. See Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions* 60 WASH. L. REV. 267, 286–91 (1985).

93. *Clitheroe*, Apr. 23, *supra* note 90.

94. *Id.*

that a lady shall not leave him without burning her bonnet."⁹⁵ In Mrs. Jackson's account of this event, there was nothing funny about it:

He was very violent and furious, and seemed quite beside himself with passion. After he had abused me in this way [applied opprobrious epithets to her and her sisters] he ordered me in a commanding manner to take off my bonnet. I said I would not do so, and then he seized it with great violence and tore it off my head. It was fastened in my hair with two long pins 6 in. long, while two other pins quite 4 in. long fastened my veil. The strings of the bonnet were tied securely under my chin and the bows pinned down. He dragged it savagely away from those fastenings, and the strings caught my neck and hurt me so much that I managed to push the knot forward from under my chin. My neck was very much hurt and very sore for some time afterwards. When he had torn it off he placed it on the fire and burnt it, grinning at me with rage all the while. I was most frightened and indignant at this, and said, "Are you aware, Mr. Jackson, that you have assaulted me?" When this happened Mr. Dixon Robinson said to him, "You are going beyond bounds." Mr. Jackson then seized me most violently by the shoulders and pushed me on a sofa, saying, "Sit there until I tell you to move, and if you don't do as I tell you I will screw your neck round like a chicken's."⁹⁶

The violence of this act would not be lost on or dismissed as funny or irrelevant by those who were intimately familiar with those tightly secured fastenings and six-inch pins.

Feeling compelled to respond, Haughton answered Emily's *Vindication* in a pamphlet entitled *The True Story of the Clitheroe Abduction; or, Why I Ran Away With My Wife*, which is framed by "objective" editorial commentary that, in fact, advocates on Haughton's behalf.⁹⁷ While the introduction claims that the publishers are not going to suggest "whether Mr. Jackson is right or Mrs. Jackson is an injured woman," their biases are patently obvious.⁹⁸ A brief analysis of the style and substance of Haughton Jackson's defense illumines ideas about the patriarchal and private nature of marriage that the *Jackson* decision exploded.

As the title suggests and the introduction clarifies, Mr. Jackson's narrative provides the "true" facts. Mrs. Jackson's side of the story is her side of the story; his is *the* story. In explaining why they believe this case has been in the press for so many months, the publishers explain,

95. *Ex Parte Emily Jackson*, TIMES (London), Mar. 20, 1891.

96. *Clitheroe*, Apr. 23, *supra* note 90.

97. *WHY I RAN AWAY WITH MY WIFE*, *supra* note 19.

98. *Id.* at *Introductory*.

"[m]arriage is a social institution which is vital to our well-being, and apparently the last decision in the Courts has robbed it of every semblance of reality: the wife would seem to incur no obligation when she goes to the altar, and the man to obtain no rights."⁹⁹ The wording shows the realities of the institution of marriage; it means rights for husbands and duties for wives. The pamphlet hopes that "Mr. Jackson's artless tale will 'catch on,'" and lead to the reversal of this "travesty of justice."¹⁰⁰

The pamphlet itself is comprised of many letters, with brief explanations by Haughton Jackson concerning his courtship, marriage, and fallout with Emily. Melodramatic in its presentation, it includes large-print section headlines such as "What a Charming Fellow Dixon is," introducing one of Emily's letters, and "'Come Back, Come Back!' she cried in grief" introducing another.¹⁰¹ Editorial comments appear in brackets throughout the forty-eight page pamphlet, with one of the more interesting suggesting that a lack of sexual urgency on the part of both parties was a big part of the problem:

Indeed, this strange courtship is a forcible argument for early marriages. As Hamlet says, after a certain age the hey-day of the blood is lost, sentiment does not exert its force, the fires of ardour burn lower, the will is less powerful, and the man or the woman know themselves less as purely sexual entities.¹⁰²

In the editor's opinion, this "romance" began too late to follow the well-known marriage plot. Another reading of this same story, however, is that the woman's will was more powerful, and that she did not let sentiment overrule what her mind suggested to her was not fair and not right.

That Emily would have a mind of her own seems impossible for Haughton to grasp. He interpreted her lack of "appropriate" wifely sentiment as either madness ("I considered my wife to be the victim of some strange hallucination") or the machinations of her interfering family ("I conceived her to be under an undue restraint on the part of her relatives").¹⁰³ In speaking of the abduction, Haughton said that he had been planning it for weeks and reported: "I was legally advised what my rights and powers were."¹⁰⁴ While he states that he shrunk from the sensational abduction, he felt that he had no other choice. In his defense, he states the following:

99. *Id.*

100. *Id.*

101. WHY I RAN AWAY WITH MY WIFE, *supra* note 19, at 9, 15.

102. *Id.* at 16.

103. *Id.* at 22.

104. *Id.* at 26.

At the outset, I believed that when she saw me her professed love for me would change her point of view, and let her come away with me without the slightest use of force. This I hoped and believed. Having determined upon such a scheme, I also wished to spare my wife all possible publicity, notoriety, or discomfort; and, I may say that if there was any "scene" at Clitheroe at the time of her "abduction," she and her relatives and friends made it.¹⁰⁵

In providing such an explanation for his behavior, Haughton unintentionally reveals character traits of an abuser. As Waits explains, "[b]atterers are also quite remarkable in their ability to externalize and rationalize their acts. The most obvious and frequent target of blame is, of course, his victim....Even when the batterer does not blame his wife, he attributes his behavior to other forces."¹⁰⁶ Haughton's own account of what happened scripts his belief that the violence on his part was fully justified by the intolerably inciting behavior of Emily and her family.

His language testifies to his determination to take his rightful possession of Emily, "[w]as I going quietly to submit to the extraordinary course which she had elected to take? No!"¹⁰⁷ Moreover, throughout these proceedings, Emily Jackson is spoken of as a misplaced possession. She belongs to her husband, but her family refuses to turn her over to her rightful owner. The law's role (prior to the decision of the Court of Appeal) in supporting this view is obvious in Justice Cave's words when he first denied Emily's application for a writ of habeas corpus: "He [Haughton] has a right to re-take possession of her from those who were endeavoring equally by force to restrain him having the custody of her."¹⁰⁸

Haughton Jackson's purpose in speaking out, he asserts, is to clear up matters that are obscure.¹⁰⁹ While his story does raise questions of fact concerning, for instance, what Emily should have realized about his limited financial means, his "defense" reads as a justification rather than a denial. In fact, his story corroborates the fear and violence that Emily documented. For example, he claims that his behavior at Emily's sister's house was ungentlemanly, but provoked. The story is told under the Headline, "I go to Claim my Wife," and concludes with his rhetorical question and response, "What married man would have behaved less violently under similar circumstances? I wonder now I did not strike at those who stood

105. *Id.*

106. Waits, *supra* note 92, at 289.

107. WHY I RAN AWAY WITH MY WIFE, *supra* note 19, at 26.

108. *Id.* at 31-32 (quoting Justice Cave's March 16, 1891 ruling).

109. *Id.* at 7.

between me and my wife."¹¹⁰ In speaking of the abduction itself, he relates that when they arrived at the Blackburn house,

she [Emily] was rather obstreperous, and would not say anything. When her relations came I wanted her to go upstairs but she would not, so I took her up, in the same way as you would carry a bundle....She appeared to be under the impression that I contemplated doing her some injury.¹¹¹

He also admits to making several attempts to be intimate with her, with his account saying, "I am afraid I cannot say that she gave me any real sign herself of returning affection."¹¹² To his proposals that they consummate the marriage, "she always refused."¹¹³ Of course, it would have been perfectly within his legal rights to force her compliance, marital rape not being a crime in England until 1991.¹¹⁴ Because the case had become a public spectacle, however, the Jacksons were not accorded the level of privacy that so easily accommodated this lawful crime in other marriages.

Haughton's conclusion clarifies his ideas of marriage, which Emily so clearly did not live up to:

Good wives before now in thousands have given up all to be true and loyal to the man of their choice. She has given up nothing. She has made no sacrifice. Her marriage vow remains as false as a dicer's oath. I will not believe that she realises the enormity of the offence she has committed.¹¹⁵

In his eyes, he has done nothing wrong, and he appeals to the British public to condone his justified acts:

However our joint stories have gone forth to the world. She writes a Vindication. I make no apology. The world already thinks the woman doth protest too much. Instead of a Vindication she has given forth a most pathetic and voluminous exposition of feelings mainly based upon imaginary situations.¹¹⁶

In other words, the more vehement her protest, the less reliable her story. But as Emily Jackson and others published real and fictional accounts of

110. *Id.* at 34.

111. *Id.* at 30. *But cf.* Waits, *supra* note 92, at 289 (explaining that "[e]ven when confronted with undeniable evidence of his violence, he [the batterer] will minimize its severity.").

112. *Id.*

113. *Id.* at 31.

114. *See* DOGGETT, *supra* note 22, at 45–46 (discussing marital immunity in British rape law until the decision in *R. v. R.*, 3 W.L.R. 767 (1991)).

115. WHY I RAN AWAY WITH MY WIFE, *supra* note 19, at 45.

116. *Id.*

violent and unhappy marriages, it became increasingly difficult simply to accept the husband's story as true and dismiss the wife's as imaginary.

Haughton Jackson's pamphlet supports the idea that the subordination of women within marriage was still an integral aspect of the institution in the late nineteenth century.¹¹⁷ However, it is my contention that the many late-century reforms and reform efforts, such as the changes to laws relating to married women's property,¹¹⁸ the sixteen-year campaign during the 1870s and 1880s to repeal the Contagious Diseases Acts,¹¹⁹ and the continuing work of New Woman literary reformers in the late 1880s and 1890s to break down the public/private barrier,¹²⁰ did much, *from the point of view of women*, to alter the marital relationship. Reading the *Jackson* decision in the social contexts of these boundary-breaking efforts by women activists emphasizes the radical *repositioning* it articulated and constituted. After *Jackson*, it was illegal (and thus, to many, morally wrong) to force women to stay within what many still considered their properly designated private sphere.

117. In her study, *Marriage, Wife-Beating and the Law in Victorian England*, Doggett argues that while the *Jackson* decision represented a "significant change in the law," it did little to alter the nature of the marital relationship. DOGETT, *supra* note 22, at 142. Doggett contends that the male judges and parliamentarians ultimately responsible for the changes in the laws regarding divorce, married women's property, child custody and wife-beating were motivated by a sense of gallantry and by a desire to punish deviations from what were viewed as middle-class family values, rather than by any interest in increasing women's civil liberties. *Id.* at 133–35.

118. In the 1870s and 1880s, feminists such as Elizabeth Wolstoneholme, Elizabeth Gloyne, Lydia Becker, Jessie Boucherett, Frances Power Cobbe and Josephine Butler worked to reform the laws affecting married women's property. They achieved limited success with the Married Women's Property Act of 1870, 33 & 34 Vict., ch. 93 (1870), followed more than a decade later by the much more comprehensive Married Women's Property Act of 1882, 45 & 46 Vict., ch. 75 (1882). Under the 1870 Act, a wife was entitled to keep her own wages and earnings made after marriage and passage of this law. Property belonging to her prior to marriage, however, was her separate property only if so agreed to by her husband in writing. She was entitled to keep any personal property as one of the next of kin of an intestate and specific bequests of money (but only up to £200). The law did not address at all the limitations on a married woman's own testamentary powers. See LEE HOLCOMBE, *WIVES AND PROPERTY: REFORM OF THE MARRIED WOMEN'S PROPERTY LAW IN NINETEENTH-CENTURY ENGLAND 166–183* (1983) (discussing the legislative history of this Act). Under the much broader 1882 Act, a married woman was considered to have the rights of a feme sole with respect to acquiring, holding, and disposing by will or otherwise of her separate property. Her separate property included all real and personal property that belonged to her prior to marriage, as well as her wages and earnings acquired after marriage. Married women were also granted the right to enter into contracts and to sue on their own behalf. See *id.* at 184–205 (discussing the legislative history of the 1882 Act). See generally DOROTHY STETSON, *A WOMAN'S ISSUE: THE POLITICS OF FAMILY LAW REFORM IN ENGLAND 1882*. Stetson analyzes "the political influence of feminists on the development of divorce and matrimonial property law in England." *Id.* at 15.

119. See *infra* Part IV.A.

120. See *infra* Part IV.

In nineteenth-century Britain, women were institutionally barred from making, administering, litigating, or adjudicating the law.¹²¹ Women could not be members of the House of Commons until 1919 or the House of Lords until 1958; they could not sit on juries until 1919; they were not admitted as solicitors or called to the Bar until 1922.¹²² The first woman judge was appointed in England in 1962.¹²³ This did not mean, however, that women were not actively engaging with the law and working to reshape it. It is important to acknowledge these efforts and understand the role that women have played in the evolution of law. But precisely because traditional legal sources are those texts that are written by or record the views of legal insiders, in order to access the perspectives of those who *were not allowed* in, it is necessary to look to outlaw texts such as the self-authored narratives of Norton, Weldon, and Jackson.

III. MORE NARRATIVE ADVOCACY: THE NOVEL AS LEGAL FORUM

One of the reasons that looking for law in real-life narratives is so valuable is that these texts provide different contexts for understanding the meanings of law. Specifically, the translation of abstract concepts into concrete realities in these narratives illumines how the law is put into practice — how it really "works." In the nineteenth century, novels were a highly influential forum where these types of translations also were taking place.¹²⁴ In fact, as I will illustrate in this part, the novel form was particularly suited to a feminist critique of the law.¹²⁵ Before elaborating

121. See Kristin Brandser, *Alice in Legal Wonderland: A Cross-Examination of Gender, Race, and Empire in Victorian Law and Literature*, 24 HARV. WOMEN'S L.J. 221, 249–50 (2001). Kristin Brandser is now Kristin Brandser Kalsem, the author of this Article.

122. *Id.* at 252.

123. See *id.* at 253. Women were able to hold certain offices in local government in the late nineteenth century. See *id.* at 227–29. In addition, the first woman was appointed as a magistrate in the British Empire in 1890. See *id.* at 244.

124. See EDWARD W. SAID, *CULTURE & IMPERIALISM* 73 (1993) (identifying the nineteenth-century novel as a cultural form "whose central continuous presence is not comparably to be found elsewhere").

125. Scholars such as Edward W. Said and D.A. Miller have characterized the novel as a cultural form that reinforced the status quo. *Id.* at 77. See also D.A. MILLER, *THE NOVEL & THE POLICE* 16 (1988). Specifically in connection with the law, Said cites Dickens as an example of an author who "stirs up his readers against the legal system" but whose novels such as *Bleak House* ultimately achieve resolution in a way that reinscribes rather than critiques existing institutions. SAID, *supra* note 124, at 77. Similarly, D.A. Miller argues that the novel's overt disavowal of "police practices" in novels such as *Bleak House*, for example, only rendered it a more discreet form of social discipline. MILLER, *supra* note 125, at 16. While the claims of both Said and Miller are supported by thoughtful and discerning analyses, their conclusions are based on limited studies of only canonical or very well-known nineteenth-century texts. It is my contention that taking into account outlaw novels by women — those that were written as acts of civil disobedience, those that accurately may be accused of resisting the

on this argument in Part B, however, I will set forth in Part A why certain novels operate as outlaw texts.

A. NOVELS AS OUTLAW TEXTS

Novels that are most obviously outlaw texts are those that were overtly critical of the legal institution, with their authors announcing a critique of the law as a primary purpose in writing the novels. For example, Wollstonecraft's *Maria* sets out in its Author's Preface that it is written with "the desire of exhibiting the misery and oppression, peculiar to women, that arise out of the partial laws and customs of society."¹²⁶ Similarly, Florence Dixie, in the Preface to her New Woman utopian novel *Gloriana* (1890), writes:

"Gloriana" pleads woman's cause, pleads for her freedom, for the just acknowledgment of her rights. It pleads that her equal humanity with man shall be recognized, and therefore that her claim to share with what he has arrogated to himself shall be considered. "Gloriana" pleads that in women's degradation man shall no longer be debased, that in her elevation he shall be upraised and ennobled.¹²⁷

Dixie's Preface concludes with an explicit statement of the novel's purpose: "If, therefore, the following story should help men to be generous and just, should awaken the sluggards amongst women to a sense of their position, and should thus lead to a rapid revolution, it will not have been written in vain."¹²⁸

Closely related to these outlaw texts are those novels that include equally sharp and specific critiques of the law or some aspect of it, but that are not introduced with a specific statement of authorial intention. In these novels, the law is indicted within and by the fiction itself. Frances Trollope's *Jessie Phillips: A Tale of the Present Day* (1843) is an example of this type of outlaw text. In this novel, an unmarried woman is falsely accused of infanticide. The reader (who knows who really murdered the child) witnesses the power of legal discourse to shape the understanding of

rules of law and society — alters landmark literary conclusions about the policing effects of Victorian novels. Many of these novels (and their authors) were very popular in their day, and thus they call into question theories about the normative effects of novels on nineteenth-century readers that are based only on texts that have been deemed acceptable as literary precedents. For example, Ann Ardis discusses how the overtly political aspects of New Woman novels have been taken as signs of "aesthetic deficiency" and thus, these novels have been disqualified from much literary study. ARDIS, *supra* note 41, at 2–3.

126. WOLLSTONECRAFT, *supra* note 1, at 73.

127. LADY FLORENCE DIXIE, *GLORIANA; OR, THE REVOLUTION OF 1900* xi (New York, Standard Publ'g Co. 1892).

128. *Id.* at xii.

Jessie's character and to (mis)interpret her situation.¹²⁹ By presenting the life experiences of a "fallen woman" (her seduction, her betrayal, her loss of employment upon the discovery of her pregnancy, her unsuccessful attempts to seek help from the child's father and a lawyer, her time in the workhouse), the novel also offers a scathing critique of the bastardy clauses of the 1834 New Poor Law which made an unmarried mother solely responsible for the maintenance of her "bastard" child.¹³⁰

Finally, there are those novels that do not seem to be overtly about the law. They are likely to include no courtroom scenes, nor any major characters who are lawyers or judges; rather, they vividly portray the effects of the law on everyday lives. *Wuthering Heights* is such an outlaw novel. This novel has no explicitly legal scenes; however, it would be difficult to imagine a novel in which the law of coverture and its implications with respect to married women's property, child custody, and the power relationships within marriage were more integral to the plot. The language of coverture frames all of Heathcliff's and his son Linton's discussions of marriage; moreover, knowledge of the workings of the laws of coverture illuminates how Heathcliff ultimately ends up owning *everything*. Similarly, an understanding of a nineteenth-century father's almost absolute right to custody of his children (even if he loathes and abuses them) underscores the horror of Heathcliff's ravings, "'I'll have it [his child]...when I want it,'"¹³¹ and makes the situation of Isabella (the child's mother) all the more tragic.

All of the above-described novels also are "outlaw" in that they are narratives by women that present legally relevant experiences, perspectives, critiques, questions, appeals, and imagined reforms that have not yet been examined as the important sources of legal history that this Article argues that they are. While literary works are being assigned in innovative ways in various law school classes,¹³² they are most obviously

129. See Kristin Brandser, *In Defence of 'Murderous Mothers': Feminist Jurisprudence in Frances Trollope's Jessie Phillips*, 5.2 J. VICTORIAN CULTURE 179, 193-98 (2000). Kristin Brandser is now Kristin Brandser Kalsem, the author of this Article.

130. See *id.* at 186-98 (discussing the interrelationships between Trollope's novel and the legislative history of the 1834 New Poor Law). See also *id.* at 202 (discussing the 1844 amendment to the 1834 New Poor Law that "reinstated the right of unwed mothers to sue putative fathers for maintenance").

131. BRONTË, *supra* note 4, at 226.

132. See, e.g., Rob Atkinson, *How the Butler Was Made To Do It: The Perverted Professionalism of The Remains of the Day*, 105 YALE L.J. 177 (1995) (discussing the insights into legal professionalism that can be explored using Kazuo Ishiguro's novel *Remains of the Day*); Judy Scales-Trent, *Sameness and Difference in a Law School Classroom: Working At the Crossroads*, 4 YALE J.L. & FEMINISM 415 (1992) (discussing her use of slave narratives, poetry, and literary essays in a seminar on school desegregation).

part of the curriculum in law and literature courses. In important empirical studies of this field that were conducted in 1987 and 1993, Elizabeth Gemmette asked the following question in her survey: "What is the objective of the school and/or the professor in teaching this course?"¹³³ Only two responses from the 1987 survey said anything at all about reading literature for its historical perspective.¹³⁴ In summarizing the responses to the 1993 survey, Gemmette identified thirteen general categories of objectives, none of which mentioned history.¹³⁵

Fictional narratives, such as these outlaw novels, should be integral to the study of law precisely because they tell us about "missing" legal

133. Gemmette conducted these studies to gather data about the law and literature courses that were being offered in law schools. In 1987, she sent out surveys to 175 ABA-accredited law schools. One hundred and thirty-five schools responded to the survey and, at that time, thirty-eight of the responding schools reported offering such a course. Elizabeth Villiers Gemmette, *Law and Literature: An Unnecessarily Suspect Class in the Liberal Arts Component of the Law School Curriculum*, 23 VAL. U. L. REV. 267, 267 (1989). Gemmette repeated the study in 1993 and eighty-four of the one hundred and ninety-six responding schools reported offering law and literature. Elizabeth Villiers Gemmette, *Law and Literature: Joining the Class Action*, 29 VAL. U. L. REV. 665, 666 (1995). Gemmette sent this questionnaire to all of the law schools listed in the 1993-94 American Association of Law Schools Directory (199 schools). *Id.*

134. One course specified that the course would be structured historically. This same course suggested that one of the course subjects would be "the content of literary critiques of law and the legal profession." *Law and Literature: An Unnecessarily Suspect Class in the Liberal Arts Component of the Law School Curriculum*, *supra* note 133, at 303. Another course entitled "Dickens and the Law" mentioned looking at "yesterday's English law" as one of the course objectives. *Id.* at 305.

135. *Law and Literature: Joining the Class Action*, *supra* note 133, at 671-72. Two categories that are mentioned, however, are very much in keeping with the arguments in this Article: "to present legal issues through literature" and "to teach feminist jurisprudence and reflect on the experience of and discrimination against women in and outside of the law." *Id.* at 672. While not included in Gemmette's surveys, Carolyn Heilbrun and Judith Resnik describe a course that they have team-taught on "law and feminism as revealed in literature." Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature, and Feminism*, 99 YALE L.J. 1913, 1921 (1990). Specifically, I am arguing in this Article that there should be more work of this kind, particularly involving a historical perspective, but more broadly, this Article suggests that the law and literature movement could be much enriched from some of the insights of cultural studies. Over the past two decades, cultural studies and its emphasis on breaking down interdisciplinary boundaries has completely changed the face of the study of literature in the Humanities:

All [current] versions of literary theory [Marxist, feminist, psychoanalytic, deconstructionist]...move boldly beyond the text....These passages beyond the text or even beyond literature by supposedly literary critics are clear challenges to traditional ways of understanding the humanities disciplines. They are also all movements in the direction of cultural politics that aims to overcome the disabling fragmentation of knowledge within the disciplinary structure of the university.

PATRICK BRANTLINGER, *CRUSOE'S FOOTPRINTS: CULTURAL STUDIES IN BRITAIN AND AMERICA* 15-16 (1990). In her 1999 essay on the current state of the field of law and literature, Jane Baron concludes that "the law-and-literature movement has failed to generate the excitement that it is capable of generating...because it has not been sufficiently interdisciplinary, or—to be more precise—it has not been very thoughtful about interdisciplinarity." Jane Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059, 1060-61. In this Article, I am proposing a different way to think about how to conceive of and categorize legal and literary texts.

history. Victorian women, officially silenced by the law, actually challenged the law nonetheless. They did so by writing in those venues where they could be heard, producing outlaw texts such as those discussed in this Article. Part B discusses the specific ways in which nineteenth-century women were working to reshape the law and legal meanings through the feminist jurisprudence performed in their novels. In these widely-circulated outlaw texts, women writers were strategically shifting and redefining legal discourse to illustrate the imperative need for legal change.¹³⁶

B. A NOVEL APPROACH TO FEMINIST JURISPRUDENCE

1. *Early Consciousness-Raising*

On a practical level, the novel's accessibility to and its popularity with women in the nineteenth century made it an ideal forum for the exploration of women's lived experiences (on the part of both writers and readers).¹³⁷ Women's stories called into question the law's version of reality or its "truth"; they created knowledge and understanding "by exploring common experiences and patterns that emerge from shared tellings of life events."¹³⁸ In Wollstonecraft's *Maria*, for example, the "telling" of Maria's story, which is interwoven with the experiences of diverse and multiple other women in the novel, presents women's complex realities in resistance to silencing and limiting legal definitions and categorizations.

In their narratives, women writers engaged in what today we would call "consciousness raising," a feminist legal method that emphasizes the importance of publicizing private wrongs.¹³⁹ Leslie Bender describes the

136. Because I wish to emphasize women's contributions to legal history in this Article, I am focusing the discussion on novels written by women. I want to clarify, however, that not all law-related novels by women critiqued the patriarchal nature of law and that many novels written by men, such as George Moore's 1894 *Esther Waters*, did.

137. Gary Kelly argues that Wollstonecraft's novel *Maria* was a fictionalization of the arguments in *A Vindication of the Rights of Woman* (1792). *Introduction to WOLLSTONECRAFT, supra* note 1, at xvi. Wollstonecraft had recognized that, in writing a political treatise like the *Vindication*, she had limited the number of women who would be reading about her ideas. Mary Poovey, *Mary Wollstonecraft: The Gender of Genres in Late Eighteenth-Century England*, 15 *NOVEL: A FORUM ON FICTION* 111, 111 (1982).

138. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 *J. LEGAL EDUC.* 3, 9 (1988).

139. Katharine Bartlett identifies consciousness-raising as one of three key feminist legal methods that "attempt to reveal features of a legal issue which more traditional methods tend to overlook or suppress":

One method, asking the woman question, is designed to expose how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups. Another method, feminist practical reasoning, expands traditional notions of legal

feminist methodology of consciousness raising as "a process of educating and exposing one another to the subtleties and harms of patriarchy," a process by which "[w]hat were experienced as personal hurts individually suffered reveal themselves as a collective experience of oppression."¹⁴⁰ The consciousness raising championed in the 1970s involved the sharing of unspoken and hitherto unspeakable details of women's private lives.¹⁴¹ To be most effective, Bender contends that this "subversive and transformative" practice must not be limited to "small-group interactions," but also must include "bearing witness to evidences of patriarchy as they occur, through unremitting dialogues with and challenges to the patriarchs, and through the popular media, the arts, politics, lobbying, and even litigation."¹⁴² The women writers that I discuss in this Article used language and narrative in such a way as to create knowledge and understanding of the effects of law in women's lives.

2. *Kristeva's Intertextuality: Words, Law, and Novels*

The novel also, on a formal basis, was fitting for a feminist critique of the law. The work of French feminist Julia Kristeva offers insights into the novel's ability to exteriorize the oppression of women that was inherent in the very language of legal discourse.¹⁴³ Through the novel's use of "ambivalent" words that have multiple and often oppositional meanings, novels could highlight how words *mean* in different ways in different contexts.¹⁴⁴ Specifically, novels were able to expose the devastating

relevance to make legal decisionmaking more sensitive to the features of a case not already reflected in legal doctrine. A third method, consciousness-raising, offers a means of testing the validity of accepted legal principles through the lens of the personal experience of those directly affected by those principles.

Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 836-837 (1990).

140. Bender, *supra* note 138, at 9.

141. CHAMALLAS, *supra* note 40, at 4-5.

142. Bender, *supra* note 138, at 9-10.

143. Kristeva, in her essay *Word, Dialogue, and Novel*, identifies the potential of novels to "disapprove of the very structures of official thought founded on formal logic" through their participation in Bakhtinian dialogism. JULIA KRISTEVA, *Word, Dialogue & Novel*, in *DESIRE IN LANGUAGE: A SEMIOTIC APPROACH TO LITERATURE AND ART* 64, 85 (Leon S. Roudiez ed., Thomas Gora et al. trans., Columbia Univ. Press 1980) (1977). Dialogism involves "a constant interaction between meanings, all of which have the potential of conditioning others," Michael Holquist, *Glossary* to M. M. BAKHTIN, *THE DIALOGIC IMAGINATION* 423, 426 (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., Univ. of Tex. Press 1994) (1981), and thus, "situates philosophical problems *within* language; more precisely, within language as a correlation of texts." KRISTEVA, *supra* note 143, at 89. Kristeva clarifies that this "intertextuality" is not to be understood "in the banal sense of 'study of sources,'" but rather as the "transposition" of one (or several) sign-system(s) into another. JULIA KRISTEVA, *Revolution in Poetic Language*, in *THE KRISTEVA READER* 89, 111 (Toril Moi ed., Margaret Waller trans., Basil Blackwell Ltd. 1986) (1974).

144. See *Word, Dialogue, & Novel*, *supra* note 143, at 73 (describing three types of ambivalent words: those that are "characterized by the writer's exploitation of another's speech — without running

meanings and significance of words the law used to describe women, such as "covered" and "protected," when those words were translated into the contexts of women's everyday lives.

Wollstonecraft's novel *Maria*, for example, engages intertextually with the definition of coverture in William Blackstone's *Commentaries on the Laws of England*:

By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and *cover*, she performs every thing...and her condition, during her marriage, is called her *coverture*.¹⁴⁵

Literally imprisoned by her husband in a madhouse, Wollstonecraft's heroine, Maria, writes in her memoir: "Marriage had bastilled me for life. I discovered in myself a capacity for the enjoyment of the various pleasures *existence* affords; yet, fettered by the partial laws of society, this fair globe was to me an universal blank,"¹⁴⁶ and "I could not sometimes help regretting my early marriage; and that, in my haste to escape from a temporary dependence, and expand my newly fledged wings, in an unknown sky, I had been caught in a trap, and caged for life."¹⁴⁷ In these passages, Wollstonecraft linguistically signals the intertextuality between her novel and Blackstone's definition of coverture as Maria longs for "existence" and looks back on a time when "wings" signified freedom, not cover. Revising the legal text, Wollstonecraft articulates the "universal blank" that more accurately describes a woman's condition under coverture, and exposes and metaphorically reconstitutes the law's "cover" as capture.

In *Wuthering Heights*, in an amazing scene that takes place a few weeks after Heathcliff marries Isabella, Heathcliff treats his new wife monstrously and boasts to Ellen Dean of his cruelties to his wife:

Tell your master, Nelly, that I never, in all my life, met with such an abject thing as she is. She even disgraces the name of Linton; and I've sometimes relented, from pure lack of invention, in my experiments on what she could endure, and still creep shamefully cringing back. But tell

counter to its thought — for his own purposes"; those that parody, with the writer "introduc[ing] a signification opposed to that of the other's word"; and those "characterized by the active (modifying) influence of another's word on the writer's word. It is the writer who 'speaks,' but a foreign discourse is constantly present in the speech that it distorts"). Kristeva also explains, "[t]he term 'ambivalence' implies the insertion of history (society) into a text and of this text into history." *Id.* at 68.

145. BLACKSTONE, *supra* note 22, at 441.

146. WOLLSTONECRAFT, *supra* note 1, at 154–55 (emphasis added).

147. *Id.* at 144.

him, also, to set his fraternal and magisterial heart at ease: that I keep strictly within the limits of the law.¹⁴⁸

Fearing that knowledge of Heathcliff's words and actions might provoke her brother in such a way as to give Heathcliff even greater control over the Linton family, Isabella fires back:

He's a lying fiend! a monster, and not a human being! I've been told I might leave him before; and I've made the attempt, but I dare not repeat it! Only, Ellen, promise you'll not mention a syllable of his infamous conversation to my brother or Catherine. Whatever he may pretend, he wishes to provoke Edgar to desperation: he says he has married me on purpose to obtain power over him, and he shan't obtain it—I'll die first! I just hope, I pray, that he may forget his diabolical prudence and kill me! The single pleasure I can imagine is to die or to see him dead!¹⁴⁹

Heathcliff silences Isabella, "There — that will do for the present!"¹⁵⁰ and then impresses on her that the law would interpret her madness (rage) as madness (an all-too-typical diagnosis for nineteenth-century women)¹⁵¹:

If you are called upon in a court of law you'll remember her language, Nelly! And take a good look at that countenance: she's near the point which would suit me. No; you're not fit to be your own guardian, Isabella, now; and I, being your legal protector, must retain you in my custody, however distasteful the obligation may be.¹⁵²

The law is fully on Heathcliff's side and he knows it. He is careful to act within "the limits of the law,"¹⁵³ which, as this scene dramatically exposes, are really no limits at all. The emotional abuse is explicit and the intensity of Isabella's hatred of Heathcliff suggests that his "experiments" have very likely included the completely legal act of marital rape, as well as any force that was necessary to keep her from leaving.¹⁵⁴ Her rage

148. BRONTË, *supra* note 4, at 187.

149. *Id.* at 188.

150. *Id.*

151. See ELAINE SHOWALTER, *THE FEMALE MALADY: WOMEN, MADNESS, AND ENGLISH CULTURE, 1830–1980* (Virago Press 1987) (1985). Exploring the connections between societal attitudes toward women and madness, Showalter writes:

The advent of the Victorian era coincided with a series of significant changes in society's response to insanity and its definition of femininity. New legislation made the public asylum the primary institution for the treatment of the insane....As the inmate population of public asylums increased during the century, so too did the percentage of women; by the 1850s women were the majority of the inmate population, and the asylum rather than the attic was identified as the madwoman's appropriate space....They designed their asylums not only to house feminine irrationality but also to cure it through paternalistic therapeutic and administrative techniques.

Id. at 17–18.

152. BRONTË, *supra* note 4, at 188–189.

153. *Id.* at 187.

154. *Id.*

works only to make her appear more in need of his "protection." In its presentation of speakable and unspeakable acts of this husband's cruelty, this outlaw text shows the "protection" of coverture to be far from anything anyone could *ever* desire.

3. *The Novel's Critique of the Epic Aspects of Law*

Whereas the law is an epic discourse in many respects, feminist jurisprudence is ideologically allied with the novel form. In his essay *Epic and Novel*, the literary and cultural theorist Mikhail Bakhtin characterizes the literary epic as one in which "'beginning,' 'first,' 'founder,' 'ancestor,' 'that which occurred earlier' and so forth are not merely temporal categories but *valorized* temporal categories, and valorized to an extreme degree";¹⁵⁵ the language of the epic is "unitary, completely finished-off and indisputable."¹⁵⁶ The law shares many of these epic qualities. Its authority is bolstered by its celebrated reliance on precedent, that which has been decided in the past. The requirements of legal language mean that often to be heard in the legal world, one must "speak with the voice of dispassionate reason; be simple, direct, and certain; avoid the complexity of varying, interacting perspectives and overlapping multi-textured explanations."¹⁵⁷ Epic discourses tend to be more about preservation than change.

In contrast to the epic, Bakhtin describes the novel as "structured not in the distanced image of the absolute past but in the zone of direct contact with inconclusive present-day reality";¹⁵⁸ the language of the novel is "a living mix of varied and opposing voices."¹⁵⁹ Feminist jurisprudence is all about questioning absolutes, "especially the norms or assumptions implicit in received doctrine [precedent]";¹⁶⁰ it is about accepting and encouraging "diversity, complexity, and contradiction."¹⁶¹ In the ways that feminist jurisprudence works to expose the oppression in the law's epic and monologic claims to be unitary and certain, or, more traditionally, "universal and objective," it represents a particularly "novel" reconception of the law.

155. M. M. BAKHTIN, *Epic and Novel: Towards a Methodology for the Study of the Novel*, in THE DIALOGIC IMAGINATION, *supra* note 143, at 15.

156. M. M. BAKHTIN, *From the Prehistory of Novelistic Discourse*, in THE DIALOGIC IMAGINATION, *supra* note 143, at 49.

157. Lucinda Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 905 (1989).

158. BAKHTIN, *supra* note 156, at 39.

159. *Id.* at 49.

160. Finley, *supra* note 157, at 905.

161. *Id.*

IV. LAW, LITERATURE, WOMEN, AND HISTORY: NINETEENTH-CENTURY EVIDENCE OF THE CONNECTIONS

In order to illustrate aspects of the law that are exteriorized in a study of nineteenth-century novels, as well as to show how these novels performed feminist jurisprudence and told stories counter to dominant legal discourse, this Part discusses two late-century New Woman novels in detail: *The Beth Book* by Sarah Grand and *A Writer of Books* by George Paston. I have chosen these two particular novels because they demonstrate with their very plot lines that certain nineteenth-century women writers were very much aware of the legal work that their novels were performing.

At the time that Emily Jackson published her narrative, the public critique of the institution of marriage had gotten sharper, with New Woman novelists playing a crucial role in fostering public debates on the issue.¹⁶² *The Beth Book* and *A Writer of Books* both examine the process of and the potential for further revision of the institution of marriage. These two particular novels also offer nineteenth-century evidence of the important connections between women writers, women activists, and women's legal history that this Article argues must be acknowledged.

A. *THE BETH BOOK*: "LITERARY WOMAN" AND THE LAW

While *The Beth Book* shares the *bildungsroman* qualities of novels such as Charlotte Brontë's *Jane Eyre* (1847) and is reminiscent of George Eliot's *Mill on the Floss* (1860) in its engaging portrait of young girlhood, the changes in law and literature that took place in the 1880s and 1890s fundamentally changed the identities that women were able to publicly acknowledge and claim as their own.¹⁶³ Thus, *The Beth Book* is a coming-

162. In 1888, a New Woman novelist Mona Caird published an essay in the *Westminster Review* critiquing the institution of marriage. The article was taken up by the *Daily Telegraph* which received 27,000 letters in response to its related inquiry, "Is Marriage A Failure?" See "CRIMINALS, IDIOTS, WOMEN, AND MINORS": VICTORIAN WRITING BY WOMEN ON WOMEN 306 (Susan Hamilton ed., 1995). For a collection of essays elaborating on Caird's views on marriage, see MONA CAIRD, *THE MORALITY OF MARRIAGE AND OTHER ESSAYS ON THE STATUS AND DESTINY OF WOMAN* (London, George Redway 1897). Caird also makes a fictional case against marriage in her New Woman novel *The Daughters of Danaus*. MONA CAIRD, *THE DAUGHTERS OF DANAUS* (Feminist Press 1989) (1894).

163. See generally SHANLEY, *supra* note 3 (discussing feminist reformers and movements relating to changes in areas of law such as married women's property, divorce, child custody, wife abuse, and employment). In New Woman novels, "the Victorian conceptualization of 'character' or identity as something seamless, unified, and consistent over time is also shattered as these novelists demystify the ideology of 'womanliness,' an ideology that gives middle-class women 'no life but in the affections.'" ARDIS, *supra* note 41, at 3 (quoting GEORGE GISSING, *THE ODD WOMEN* 59 (New Am. Library 1983) (1893)).

of-age story for a progressive age. The conflation of literary woman and political activist is actualized in the character Beth, whose book appears to be (until the final pages) the fictional biography of a writer. It is only in the last few pages, when Beth identifies her vocation as that of a political activist that it becomes clear that signifying beneath Sarah Grand's literary heroine is a woman like the heroine of Grand's own childhood, Josephine Butler.¹⁶⁴ Butler was the energetic and seemingly tireless leader of one of the most sustained women's legal movements of the late century, the sixteen-year campaign to repeal the Contagious Diseases Acts (the "CDAs").¹⁶⁵

The first CDAs were passed by Parliament in 1864 and 1866 as sanitation measures, "designed to control the spread of venereal disease among enlisted men."¹⁶⁶ These Acts provided that plainclothes "medical police" could apprehend any woman suspected of being a common prostitute and order her to submit to a genital examination to determine if she were infected.¹⁶⁷ If a woman refused to be examined, she was taken to a magistrate, who could order her to submit to the examination under threat of imprisonment for her failure to comply.¹⁶⁸ Women who were found to be diseased were subject to involuntary confinement¹⁶⁹ in Lock hospitals.¹⁷⁰

Although written in 1898, *The Beth Book* is set in the 1870s and 1880s, a time period during which the CDAs were in effect.¹⁷¹ The novel portrays the feminist activism that resulted in the repeal of the Acts and

164. See GILLIAN KERSLEY, *DARLING MADAME: SARAH GRAND AND DEVOTED FRIEND* 28 (1983). When Grand was fifteen, she "formed a club to perpetuate the principles of Josephine Butler." *Id.* (quoting *Interview with Grand, S.*, BATH DAILY CHRONICLE, June 19, 1928). These activities resulted in her dismissal from school. See *id.*

165. JUDITH R. WALKOWITZ, *PROSTITUTION & VICTORIAN SOCIETY: WOMEN, CLASS AND THE STATE* 118 (1980).

166. *Id.* at 71–72.

167. *Id.* at 1–2, 78. The CDAs included no definition of "common prostitute." Dr. William Acton, one of the leading proponents of the Acts, quoted the following working definition that had been given in testimony before Parliament: "[a prostitute is] any woman whom there is fair and reasonable ground to believe is, first of all going to places which are the resorts of prostitutes alone, and at times when immoral persons are usually out. It is more a question of mannerism than anything else." Dr. William Acton, quoted in JANET HOROWITZ MURRAY, *STRONG-MINDED WOMEN AND OTHER LOST VOICES FROM NINETEENTH-CENTURY ENGLAND* 425 (1982). In other words, all women were vulnerable.

168. WALKOWITZ, *supra* note 165, at 2.

169. The original CDAs provided for detention up to three months. *Id.* at 76. The 1869 extension of the CDAs increased the period of confinement from three months to nine months. *Id.* at 86. See generally *id.* at 69–89 (discussing the specific provisions of the CDAs).

170. Lock hospitals had special wards to treat venereal disease. *Id.* at 57–63.

171. The CDAs were repealed in 1886. Contagious Diseases Repeal Act, 1886, 49 Vict., ch. 10 (Eng.).

intertextually engages with much of the reformers' rhetoric. The novel also illustrates the ways in which the ideology that underwrites coverture — that women are to be subordinate to men — affects the treatment of all women under the law. Before turning to a specific discussion of *The Beth Book*, however, I will briefly describe the campaign to repeal the CDAs that so informs this outlaw text.

1. *Literary Politics in the Movement to Repeal the Contagious Diseases Acts*

When women were excluded from the first meeting of The National Association for the Repeal of the Contagious Diseases Acts, they formed the Ladies' National Association for the Repeal of the Contagious Diseases Acts (LNA) and chose Butler as their leader.¹⁷² While arguing on a practical level that the CDAs were not effective in controlling venereal disease, the central argument of these feminist repealers was that the CDAs evidenced the state's acceptance and sanction of the sexual subordination of *all* women to men. As Butler argued, the definitions of women embodied in the CDAs categorized women on the basis of their sexual relation to men (pure or fallen), and were used not only to justify a "slave class of women for the supposed benefit of licentious men," but also to keep "pure" women safely enslaved within the home.¹⁷³ In the campaign, Butler stressed the importance of having women of all classes and life experiences working together.

In discussing the twentieth-century law and literature movement, Robin West introduces a new character, one she calls "literary woman."¹⁷⁴ She contrasts this character, who has emerged from a literary analysis of the law, with "that abstract character who has emerged from the economic analysis of the law: 'economic man.'"¹⁷⁵ West argues that "literary woman" is necessary to any meaningful justice because she is able to take context and marginal perspectives into account; she provides a "bridge that

172. WALKOWITZ, *supra* note 165, at 93 (describing the formation of the LNA in 1869).

173. JOSEPHINE BUTLER, *PERSONAL REMINISCENCES OF A GREAT CRUSADE* 42 (London, 1898), reprinted in SUSAN KINGSLEY KENT, *SEX AND SUFFRAGE IN BRITAIN 1860–1914*, 66 (1987).

174. Robin West, *Economic Man & Literary Woman: One Contrast*, 39 *MERCER L. REV.* 867, 867 (1988).

175. *Id.* West sees the law and literature movement as a necessary and powerful check on the more established interdisciplinary arena of law and economics. West focuses on two distinct characteristics of the "economic man" of the field of law and economics. First, he is "perfectly rational," *id.* at 869, always knowing and motivated to seek what is best for himself. Secondly, he has no empathetic understanding of others. *Id.* West argues that these characteristics of "economic man" do not describe real people. *See id.* at 870. "Literary woman," by contrast, understands that people are multimotivational and act in complex ways. *Id.* at 871. She has the ability to empathize. *Id.* at 871–72.

facilitates empathetic understanding."¹⁷⁶ Through narrative and metaphor, West's "literary woman" gains insight into different experiences and perspectives:

Metaphor and narrative are the means by which we come to understand what was initially foreign. Narrative is the communication that facilitates the profoundly difficult "intersubjective comparison of utility" [empathy] when more ordinary means fail. In political contexts, we rely on metaphor when our differences leave us desperate, when nothing else works and we have no other choice.¹⁷⁷

Butler and her fellow repealers understood this power and, employing a literary politics, they used metaphor and narrative to bridge the gulf between public and private women.¹⁷⁸ Examinations with the speculum were decried as "instrumental rape."¹⁷⁹ Stories of women who were tracked down and captured, victims of a "medical lust of handling and dominating women" and a "police lust of hunting and persecuting women," were published in pamphlets like J.J. Garth Wilkinson's *The Forcible Introspection of the Women for the Army and Navy by the Oligarchy Considered Physically* and the LNA's journal *The Shield*.¹⁸⁰ Personal testimonies were narrated and retold in speeches made throughout the country. Judith Walkowitz summarizes the power of this narrative advocacy:

Stories of instrumental rape, false entrapment, and pitiful suicides had the virtue of appealing to all supporters of repeal — to working-class radicals and middle-class nonconformists alike. These accounts tended to depict registered women as innocent victims of male lust and medical

176. *Id.* at 874.

177. *Id.* West clarifies that "[t]he knowledge we learn...through metaphor, allegory, narrative, literature, and culture — is a peculiar sort of knowledge, but it is absolutely essential to any meaningful quest for justice, legal or otherwise." *Id.* at 876–77. Contrasting these ideas to those of the proponents of law and economics, West claims, "Knowledge of the other's subjectivity is not rationally acquired, and it cannot be rationally calculated, quantified, aggravated, or compared. It is knowledge that moves us rather than informs us." *Id.* at 877.

178. While Josephine Butler and her followers called for radical feminist reforms, not all women who advocated repeal of the CDAs wanted to become or be associated with public women. Many reformers adhered to a separate-sphere ideology, stressing women's moral supremacy, purity and domestic virtue. Yet even those women who fought the CDAs on purely moral grounds were influenced by the powerful narratives of women's suffering. See generally WALKOWITZ, *supra* note 165, at 108–112 (analyzing the various and diverse ideas and motivations of the repealers).

179. *Id.* at 108–109. Walkowitz comments that "[i]n highly colored language, LNA literature denounced the examination as a surgical outrage, an 'espionage of enslaved wombs.' The examination was depicted as an unnatural, voyeuristic intrusion into the womb that degraded any female, whether she be a private patient or a public prostitute." *Id.* at 129–30.

180. J.J. GARTH WILKINSON, *THE FORCIBLE INTROSPECTION OF THE WOMEN FOR THE ARMY AND NAVY BY THE OLIGARCHY CONSIDERED PHYSICALLY* 15 (London, 1870), reprinted in WALKOWITZ, *supra* note 165, at 108.

and police tyranny; as such, the women remained appropriate objects of solicitude, even for middle-class moralists who chiefly condemned the acts for making "vice" safe.¹⁸¹

Stories of Butler's own victimization since she had become a "public woman," speaking out against the CDAs and in defense of prostitutes, also circulated widely. For example, in Pontefract, in 1872, Butler was planning to speak in a hayloft, having been turned away from all other locations in town.¹⁸² When she arrived, she discovered the floor of the loft covered with cayenne peppers which made it almost impossible to breathe, let alone speak.¹⁸³ After a group of women had gathered in the loft, the bundles of hay below were set on fire. Butler recounts the following:

Then, to our horror, looking down the room to the trap-door entrance, we saw appearing head after head of men with countenances full of fury; man after man came in, until they crowded the place. There was no possible exit for us, the windows being too high above the ground, and we women were gathered into one end of the room like a flock of sheep surrounded by wolves....Their language was hideous. They shook their fists in our faces, with volleys of oaths.¹⁸⁴

In another incident in Manchester, Butler "was covered with flour and excrement, her clothes had been torn off her body, her face was discoloured and stiff with dried blood and she was so bruised that she could hardly move."¹⁸⁵ Kent comments that these incidents "suggest that women who left the private sphere and ventured into the public arena were perceived by men to be public women — prostitutes — and deserving of the same treatment."¹⁸⁶ Not an epic heroine, but rather one very much in contact with everyday realities, Butler was a proto-New Woman; stories of women like her would be told in novels.

2. *Women's Writing/Women's Activism: The Connections*

In *The Beth Book*, Beth's literary proclivities are apparent at an early age. As a young girl, she constantly is making up elaborate stories, oftentimes living the fantasy life she creates. For the benefit of her friend Charlotte, for instance, she weaves a world of intrigue, centered around a

181. WALKOWITZ, *supra* note 165, at 110.

182. MURRAY, *supra* note 167, at 295.

183. *Id.*

184. JOSEPHINE BUTLER, Speech at Pontefract (1872), reprinted in MURRAY, *supra* note 167, at 295–96.

185. GLEN PETRIE, A SINGULAR INIQUITY: THE CAMPAIGNS OF JOSEPHINE BUTLER 134 (1971), reprinted in KENT, *supra* note 173, at 72.

186. KENT, *supra* note 173, at 73.

mysterious fictive hero Hector.¹⁸⁷ Confiding to Charlotte that she works with Hector in the Secret Service of Humanity, Beth orchestrates dangerous missions and all-night vigils.¹⁸⁸ This story becomes so "real" that Beth accumulates large debts in hiring out horses and buying fancy costumes.¹⁸⁹

Beth composes her first poem for a neighborhood boy Sammy, who at the age of eleven is the love of her life.¹⁹⁰ Having earlier informed her that "[m]en write books...not women, let alone gels," Sammy refuses to believe that Beth has written the poem.¹⁹¹ Beth, who has been struggling for days, piecing together small bits of envelopes, margins of newspapers, precious half-sheets of paper, responds indignantly: "I made it myself, every word of it. I tell you it came to me. It's my own. *You've got to believe it.*"¹⁹² He doesn't, however, and he soon "lapsed from her life altogether."¹⁹³

At sixteen, Beth marries Dr. Dan Maclure.¹⁹⁴ Like Wollstonecraft's Maria, Beth sees marriage as an escape from an oppressive home life, but all too soon she learns that Dan's interpretation of coverture's "husband and wife are one" (one of his favorite phrases)¹⁹⁵ means that he controls (and spends) all of their money, that he may open and read her letters, and that she is entitled to no privacy at all. Desperate to find a place of refuge from his overbearing presence, she searches the house and literally discovers what Virginia Woolf years later would write was essential for a woman writer: "a room of one's own."¹⁹⁶ Beth's room is in the attic, "a secret spot, sacred to herself, where she would be safe from intrusion."¹⁹⁷

It is in this room that Beth begins to write seriously. Despite the constant insults of her husband (who knows that she writes but not where), who protests that "[l]iterature is men's work," Beth perseveres.¹⁹⁸ She is fascinated by the lives of authors, specifically women writers: "As she read

187. GRAND, *supra* note 42, at 264–65.

188. *Id.* at 266–70.

189. *Id.* at 277.

190. *See id.* at 181–82.

191. *Id.* at 172.

192. *Id.* at 183.

193. *Id.* at 185. Beth suffers many of the "anxieties of authorship" that Gilbert and Gubar have identified as common to nineteenth-century women writers. *See generally* SANDRA M. GILBERT AND SUSAN GUBAR, *THE MADWOMAN IN THE ATTIC: THE WOMAN WRITER AND THE NINETEENTH-CENTURY LITERARY IMAGINATION* 45–92 (2nd ed. 2000).

194. GRAND, *supra* note 42, at 337.

195. *Id.* at 342, 352.

196. In October 1929, Virginia Woolf published an essay entitled *A Room of One's Own* in which she claimed that "a woman must have money and a room of her own if she is to write fiction." VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* 4 (Harvest Books 1989) (1929).

197. GRAND, *supra* note 42, at 347.

198. *Id.* at 366.

of those who had gone before, she felt a strange kindred with them; she entered into their sorrows, understood their difficulties, was uplifted by their aspirations, and gloried in their successes."¹⁹⁹ And after suffering her own sorrows and difficulties (ultimately separating from Maclure), she achieves success as an author. Her book is critically acclaimed and she is described as "a new light of extraordinary promise on the literary horizon."²⁰⁰

The study of Beth's life, however, does not conclude on this bright note. Instead, Beth finds that she has no desire to begin writing again. She expresses her concerns to her friend Angelica who consoles her by suggesting that her writing may have been a necessary precursor to some other vocation. Angelica assures Beth that,

versatile people make mistakes sometimes. They do not always begin with the work they are best able to do; but there is no time lost, for one thing helps another — *one thing is necessary to another*, I should say, perhaps. Your writing may have helped to perfect you in some other form of expression.²⁰¹

In other words, this literary woman could be an advocate of a different kind.

But some other form of expression? What work is Beth best able to do? In the end, it turns out to be the kind of activist work that women like Josephine Butler did. Many nineteenth-century women like Norton, Weldon, and Butler were "literary women" in the sense of Robin West's figure — women who made connections between storytelling and justice. Those literary women who chose to write novels had been doing much more than writing entertaining books; they had been collecting and publicizing stories of oppression and resistance — using them, just as reformers like Butler did, to advocate for change in women's lives.²⁰² *The*

199. *Id.* at 370.

200. *Id.* at 518.

201. *Id.* at 520 (first emphasis added).

202. In addition to Wollstonecraft, Brontë, Trollope, and Dixie, *see infra* notes 1–5, 126–131, 146–154 and accompanying text, and Grand and Paston, *see infra* and *supra* Part IV.A and B; other novelist activists include Caroline Norton, Elizabeth Gaskell, Jane Clapperton and Mona Caird. Norton's novels

relate to her condition as a married woman, and each reveals the author to be an *agitatrice* whose stories are intended first of all to point up the tragic injustice of the English husband's absolute legal supremacy. Caroline wrote novels with a purpose, focusing her attention on a hypocritical society which oppressed and degraded women and indicting the double standard and the *marriage de convenance*.

Hoge & Marcus, *supra* note 50, at vii. Gaskell wrote several social problem novels, including *Mary Barton* (1848) and *North and South* (1855) (depicting the effects of industrialization on the working classes). Gaskell's 1853 novel *Ruth* daringly presented a fallen woman as heroine. Clapperton's 1888 utopian novel *Margaret Dunmore; or, A Socialist Home* sets out a blueprint for a society in which

Beth Book highlights these connections in the way it startles us — with its sudden shift in direction — into looking again and anew at the nineteenth-century woman writer.

A revisionary look at *The Beth Book* illuminates that Beth's change of vocation at the end of the novel is a move that makes perfect sense. Protesting from the day of her birth, Beth refuses to accept the world's injustices in the docile manner that her mother mandates.²⁰³ Beth's mother is a portrait in conformity, apolitical in every way:

[A]ny discussion even of social problems, would not only have been a flying in the face of Providence, but a most indecent proceeding. She knew that there was crime and disease in the world, but there were judges and juries to pursue criminals, doctors to deal with disease, and the clergy to speak a word in season to all, from the murderer on the scaffold to the maid who had misconducted herself. There was nothing eccentric about Mrs. Caldwell; she accepted the world just as she found it, and was satisfied to know that effects were being dealt with. Causes she never considered, because she knew nothing about them.²⁰⁴

In other words, the world that she accepted was run exclusively by men (judges, juries, doctors, and clergy).²⁰⁵ Her only thoughts of women were in terms of their moral conduct. Women speaking of social problems (like Butler) were indecent, and she associates maids misconducting themselves

women have true equality in employment, education, and the family. Mona Caird's novels *The Wings of Azreal* (1889) and *Daughters of Danaus* (1894) vividly illustrate problems with the institution of marriage.

203. Beth's mother is a most complex character. She frequently beats Beth severely and we despise her for this treatment; however, she is not presented as completely unsympathetic. The novel, in fact, opens with a very poignant portrait of Mrs. Caldwell on the day preceding Beth's birth:

She was weak and ill and anxious, the mother of six children already, and about to produce a seventh on an income that would have been insufficient for four. It was a reckless thing for a delicate woman to do, but she never thought of that. She lived in the days when no one thought of the waste of women in this respect, and they had not begun to think for themselves.

GRAND, *supra* note 42, at 1. Beth's mother is presented as a self-sacrificing woman who puts all of her husband's needs before any of her own. Ignoring her own weariness and backache, she frets about the small amount of whiskey left in the bottle. *Id.* at 2–3. Brightening at the very sound of her husband's footsteps, she is forced to endure his angry mood, his criticism of her appearance and his insults about her uselessness. *Id.* at 3–7. Later in the evening, he leaves her to meet his mistress on the beach. *Id.* at 7. Beth arrives that night, "unassisted and without welcome, and sent up a wail of protest." *Id.* at 9. Although Mrs. Caldwell's behavior is not excused, stories of her own experiences provide contexts that at least work to explain her complex motivations. In many ways, she is presented as a victim herself, trapped in the architecture of patriarchy in which "every effort was made to mould the characters of women as the homes of the period were built, on lines of ghastly uniformity." *Id.* at 124.

204. *Id.* at 2.

205. It should be noted that in 1859, Elizabeth Blackwell became the first woman doctor to be listed in the British Medical Registry. NANCY KLINE, *ELIZABETH BLACKWELL: A DOCTOR'S TRIUMPH* 158 (1997). Yet, there was still very much a "male monopoly on medicine," which many women who campaigned against the CDAs also agitated against. KENT, *supra* note 173, at 121.

with murderers. While painful and personally costly, Beth continually has to distance herself from the idea of womanhood that her mother represents.

From a very early age, it is clear that Beth *is* concerned with causes; she also takes special note of injustices to women. For example, when Beth would pass a house on her way to school in which a man had murdered his wife, "beaten her brains out with a poker," Beth would always expect to see a slender stream of blood running beneath the door.²⁰⁶ To her, women's oppression is very *real*. One of the family servants, Harriet, herself a gifted storyteller, told Beth about a woman who had dreamt that her husband's fishing boat didn't come home and so the next morning wouldn't let her husband leave. Harriet recounts as follows:

'[E]' was that mad 'e struck 'er an' knocked 'er down an' broke... 'er arm, an' then, needs must, 'e 'ad to fetch the doctor to set it, an' by the time that was done, the boat 'ad gone wi'out 'im. The other men thought 'e was drunk—'e often was—an' they wouldn't wait. Well, that boat never came back.'²⁰⁷

Beth's only response to this story is a question: "'And did he beat his wife again?'"²⁰⁸ She says exactly what is on her mind to anyone who will listen.

Things change drastically, however, when Beth becomes a wife. In its critique of women's subordination in marriage, the novel engages with important late-century topics for feminist reformers such as wife abuse and marital rape, as well as aspects of coverture that still defined many marital relationships.²⁰⁹ While Beth is never actually struck by her husband, the verbal and emotional abuse in the relationship is constant. For example, in response to her comment that she prefers "to look like what I am," her husband responds, "So you do....You look like a silly little idiot."²¹⁰ Maclure also regularly undermines her self-confidence:

If anything were amiss in her dress or appearance, he told her of it in the offensive manner of an ill-conditioned under-bred man, generally speaking when they were out of doors, or in some house where she could do nothing to put herself right, as if it were some satisfaction to him to make her feel ill at ease; and if she were complimented by any one else

206. GRAND, *supra* note 42, at 16.

207. *Id.* at 126.

208. *Id.*

209. See SHANLEY, *supra* note 3, at 164–176 (discussing the work of feminist reformers, particularly Frances Power Cobbe, on legislation relating to domestic violence). See *id.* at 184–87 and DOGGETT, *supra* note 22, at 141 (discussing the work of Elizabeth Wolstenholme Elmy on issues of marital rape).

210. GRAND, *supra* note 42, at 342.

about anything, he had usually something derogatory to say on the subject afterwards.²¹¹

The Beth Book also explores the implications of a husband's absolute right to access to his wife's person. Desperate for some measure of privacy, one day Beth locks herself in her bedroom.²¹² Her husband's irate reaction to this small act emphasizes how central his complete and ready access to her body is to his conception of marriage: "I cannot understand a wife locking her husband out of her room, and what's more, you've no business to do it. I've a legal right to come here whenever I choose."²¹³ It was then that "Beth began to realise what the law of man was with regard to her person."²¹⁴

This novel also daringly presents a woman's perspective on conjugal rights. Beth is not presented as at all passionless,²¹⁵ but rather her sexual desire is turned off by dutiful (forced) sexual responsiveness:

But he had satiated her once and for all, and she never recovered any zest for his caresses. She found no charm or freshness in them, especially after she perceived that they were for his own gratification, irrespective of hers. The privileges of love are not to be wrested from us with impunity. Habits of dutiful submission destroy the power to respond, and all that they leave to survive of the warm reality of love at last is a cold pretense. By degrees, as Beth felt forced to be dutiful, she ceased to be affectionate.²¹⁶

211. *Id.* at 359–60.

212. *Id.* at 345.

213. *Id.*

214. *Id.* *The Beth Book* was written after the *Jackson* decision; however, this scene takes place in the 1880s before *Jackson* was decided. While the novel does not take up the issue of whether Dan could lock Beth in (an issue over which the *Jackson* case demonstrates that legal minds disagreed), it highlights what was key in the movement to have marital rape recognized as a crime—that under the "law of man," a wife was never allowed to lock her husband out. See SHANLEY, *supra* note 3, at 156–59, 184–87 (discussing nineteenth-century feminist arguments in England for married women's control of their own bodies, including Elizabeth Wolstenholme Elmy's vocal advocacy for abolishing the marital exemption in rape law). See generally Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L.R. 1373 (2000) (offering an in-depth historical analysis of the public critique of marital rape by nineteenth-century feminist activists in the United States).

215. "Passionlessness," as described by scholars such as Nancy Cott, is an ideology that characterizes the mid-century "angel in the house" and that empowered women culturally in the high Victorian era because it underwrote the doctrine of separate spheres, the gender-based division of human labor and cultural spaces. So long as women were assumed to be without sexual appetite, they could be recognized as autonomous moral agents in middle-class Victorian culture; they could be credited with having minds that were not controlled by their animal passions.

ARDIS, *supra* note 41, at 13–14.

216. GRAND, *supra* note 42, at 343–44.

Her sense of isolation as a married woman is exacerbated by the fact that Beth is shunned by the women in her town with whom she shares common interests because (unbeknownst to her) Dan is a doctor in a Lock hospital who examines and treats women brought in under the CDAs.²¹⁷ Dan has "protected" Beth from knowledge of the nature of his work. As she struggles to perform her wifely duties in spite of Dan's increasingly intolerable behavior (fits of jealous rage, relationships with other women, vivisectioning a dog in their home), Beth begins to lose her sense of self:

Since her marriage she had given up her free, wild, wandering habits. She would go into town to order things at the shops in the morning, and take a solitary walk out into the country in the afternoon perhaps, but without any keen enjoyment. Her natural zest for the woods and fields was suspended. She had lost touch with nature. Instead of looking about her observantly, as had been her wont, she walked now, as a rule, with her eyes fixed on the ground, thinking deeply.²¹⁸

As a result of her condition of coverture ("since her marriage"), it was not just Beth's legal existence that had been suspended, but her very nature. For Beth, the everyday effects of being under coverture (without "free, wild, wandering habits") resulted in a loss of vitality. Moreover, this vivacious young woman, who had been always observant, always speaking her mind, was now required ("as a rule") to keep her thoughts and ideas to herself.

Rather than celebrating the merging of two into one, the novel graphically details "the awful oppression of [Beth's] married life; the inevitable degradation of intimate association with such a man as her husband."²¹⁹ Countering the comforting image in Blackstone's definition of a woman's position "under wing, cover, and protection,"²²⁰ the novel notes: "The tragedy of such a marriage consists in the effect of the man's mind upon the woman's, shut up with him in the closest intimacy day and night, and all the time imbibing his poisoned thoughts."²²¹ In the novel, Beth is not "under wing," but rather "shut up" with her husband in a tragic and dangerous situation. Literally losing herself in Dan's way of thinking, she almost succumbs to madness.

Beth's eyes begin to open to her own degradation in her marriage, however, as she befriends a group of activists who, in the novel, are working toward repeal of the CDAs. Rejecting her unhealthy and

217. See *id.* at 386–90.

218. *Id.* at 354.

219. *Id.* at 418.

220. See *infra* note 145 and accompanying text.

221. GRAND, *supra* note 42, at 356.

maddening condition under coverture, "[s]he had recovered her self-possession, her own point of view....During that dreadful phase she had seen with Dan's suspicious eyes....Now, however, she had recovered herself."²²² Emphasizing its importance, the phrase "she had recovered her self-possession" is almost identically repeated two sentences later, "she had recovered herself." Beth has become the acting subject. She has recovered by reclaiming her own personhood. Once she has recovered herself, she begins to discover how she can use her own experiences to help other women.

The fictional group of reformers in *The Beth Book* understood, just as twentieth-century feminist activists do, that it is crucial for women to get together and tell their stories. When Beth first comes among these women, she is told, "I hope you are prepared to discuss any and every thing...for that is what you will find yourself called upon to do among us."²²³ This activist explains the reason for this as follows:

The peculiarity of man is that he will do the most atrocious things without compunction, but would be shocked if he were called upon to discuss them. Do what you like, is his principle, but don't mention it; people form their opinions in discussion, and opinions are apt to be adverse. Our principle is very much the opposite.²²⁴

Beth is in complete agreement, "I have just begun to know the necessity for open discussion....I do not see how we can arrive at happiness in life if we do not try to discover the sources of misery."²²⁵

Over the course of the novel, the CDAs are, in fact, repealed, and Beth separates from the husband who has been so cruel. While changes in the laws regarding married women's property have made it possible for Beth to support herself and to have complete access to her inheritance, she is unable to obtain a divorce ("the acute mental suffering her husband had caused her had merely injured her health and endangered her reason, which does not amount to cruelty in the estimation of the law").²²⁶ In this novel that is concerned with how things *should* be, however, Beth is not fated to a

222. *Id.* at 433.

223. *Id.* at 412.

224. *Id.*

225. *Id.*

226. *Id.* at 518. See also An Act to Amend the Law Relating to Divorce and Matrimonial Causes in England, 1857, 20 & 21 Vict., ch. 85, § XXVII (Eng.). The Act provided that a wife could petition for divorce on the ground that her husband:

has been guilty of incestuous Adultery, or of Bigamy with Adultery, or of Rape, or of Sodomy or Bestiality, or of Adultery coupled with such Cruelty as without Adultery would have entitled her to a Divorce *à Mensâ et Thoro*, or of Adultery coupled with Desertion, without reasonable Excuse, for Two Years or upwards.

Id.

life alone. The reappearance near the end of the novel of Arthur Brock, a man with whom Beth had fallen in love after she had left her husband, suggests new possibilities for this New Woman.²²⁷

Having taken steps to alleviate her own suffering, Beth is called to speak to others. The following description of the crowd's reaction to a political speech Beth delivers near the end of the novel echoes the enthusiastic responses to reformers like Butler:

For she had spoken that night as few have spoken—spoken to a hostile audience and fascinated them by the power of her personality, the mesmeric power which is part of the endowment of an orator, and had so moved them that they rose at last and cheered her for her eloquence, whether they held her opinions or not.²²⁸

An early dream of Beth's may have foreshadowed this inevitable move. As a young girl, she had dreamt that she was in a cave, a cave located, oddly enough, beneath the stage of a theatre.²²⁹ Trapped in this cave, which was filling with smoke (reminiscent of Josephine Butler's well-publicized incident in the Pontefract hayloft), Beth awakens.²³⁰ It is telling, however, that if the dream had continued, Beth's only way out of the cave (not a womb-like safe place, but an increasingly dangerous place of confinement) would have been *through* the theatre — out into that quintessentially public sphere. Sarah Grand's representation in the final pages of *The Beth Book* of her heroine speaking to a great crowd as an advocate for women's legal rights testifies to the reforming possibilities that literary women throughout the nineteenth century helped to engender. Beth's story illuminates not only the pressing need for legal reforms, but

227. GRAND, *supra* note 42, at 527.

228. *Id.* at 525. It is interesting that Beth is not excited about the discovery of her true calling; instead she is frightened and dismayed:

She was cowering from the recollection of a great crowd that rose with deafening shouts and seemed to be rushing at her—cowering, too, from the inevitable which she had been forced to recognise—her vocation—discovered by accident, and with dismay, for it was not what she would have chosen for herself in any way had it occurred to her that she had any choice in the matter....Beth could not have lived for herself had she tried. So that now, when the call had come, and the way in which she could best live for others was made plain to her, she had no thought but to pursue it.

Id. at 524. In many ways, she resembles her self-sacrificing mother—only Beth is sacrificing herself for the cause of women. While disheartening, there is no doubt much truth in this portrayal. While a great achievement, Josephine Butler's all-consuming, sixteen-year campaign to repeal the Contagious Diseases Acts also was exhausting and frightening. Many times she must have felt that her life was not her own. Similarly, Sarah Grand's biographer relates that Grand suffered acute depression because she "yearned to escape and yet felt bound by what she saw as her vocation." KERSLEY, *supra* note 164, at 81.

229. GRAND, *supra* note 42, at 27.

230. *Id.*

also the process by which legal outsiders worked to bring such reforms about.

B. A WRITER OF BOOKS: LITERARY HISTORIANS

There is no sudden change in career path at the end of George Paston's 1899 *A Writer of Books*, and the eponymous character, Cosima Chudleigh, remains just that through the final pages of the novel. However, this book too explores the connections between literary women and feminist activism, focusing on the role of the woman writer, as a writer, at the end of the nineteenth century. While Beth's childhood accounts for more than half of *The Beth Book*, Cosima's desire to write is explained in a few pages by her book-filled, secluded upbringing by her father, a small town librarian.²³¹ When he dies, she moves to London to gain more experience of real life, taking the manuscript of her first book with her.²³²

Like Gissing's *New Grub Street*, this book critiques the pressures that writers felt in the 1890s to sacrifice their art to create best sellers. Cosima's publisher, for example, tells her she must "stow the jaw,"²³³ and "[c]ut out all the dissertations and all the dialogue that doesn't advance the action of the story."²³⁴ He explains that his readers read for the plot; she must change her story to have a happy ending, specifically a wedding.²³⁵ As this is her first novel, and she desperately wants to gain a hearing, she agrees: "During the next few days Cosima was occupied in slashing and mutilating the offspring of her brain, and soon began to feel as if she were up to her elbows in gore."²³⁶ While she conforms (and in her mind deforms) her first novel, she does not give up on trying again to tell her own kind of story.

One evening, "as Cosima was at work upon her [second] book,"²³⁷ she is disrupted by muffled sobbing coming from the boarding house room adjoining hers, occupied by Mr. and Mrs. Barton.²³⁸ Knocking on the door, she discovers Mrs. Barton, alone and in tears, and asks if she can be of any use.²³⁹ The unhappy woman despairingly responds: "You! No; how should you be of any use?...You're only a woman, and women are powerless to

231. PASTON, *supra* note 43, at 5–6.

232. *Id.* at 11–12.

233. *Id.* at 78.

234. *Id.* at 79.

235. *Id.*

236. *Id.* at 81.

237. *Id.* at 49.

238. *Id.*

239. *Id.*

help themselves or each other."²⁴⁰ Rather than leaving her to suffer in private, Cosima encourages Mrs. Barton to tell her story.²⁴¹

Mrs. Barton's narrative illustrates the cruelty of child custody laws that still permitted the involuntary separation of a mother from her children. While Caroline Norton had succeeded in gaining limited rights for mothers who were separated from their husbands, Mrs. Barton still lives with her husband.²⁴² He is a man with sensitive nerves, who dislikes noise, and has sent their young son away to school.²⁴³ Mrs. Barton, who her husband felt was too lenient with the child, is allowed to see the boy once a month.²⁴⁴

When Cosima asks her why she didn't refuse to let him go, Mrs. Barton explains that even at this time, "[a]ccording to our laws, children belong solely to the father as long as he has done nothing to forfeit his rights over them."²⁴⁵ The cruelty of taking away her child is not something "that the law takes cognisance of."²⁴⁶ Far from seeing herself as under the protective wing of her husband, Mrs. Barton compares herself to a mother thrush whose nest and young birds had been destroyed:

[M]orning after morning, I used to hear the unhappy mother [thrush] searching for her children. She would fly round and round the spot, uttering one long piercing note, the most heartwringing sound I ever heard....It made me feel so wretched that I had to change my room at last for one where I couldn't hear it.²⁴⁷

Upon hearing Mrs. Barton's real-life tragedy, Cosima indignantly responds, "I wish I were a man — a member of Parliament or a great lawyer. I would never rest until I had changed such an infamous law."²⁴⁸ Cosima's desire to be a man is only a desire to be in a position to change the law; she now understands the significance of Mrs. Barton's observation that she is only a woman. But she has been of some use; Mrs. Barton is a little calmer after this late-night telling.²⁴⁹ Cosima, a writer of books,

240. *Id.*

241. *Id.*

242. See *supra* notes 50–52 and accompanying text. Further reforms pursuant to the Infant Custody Act, 1886, 49 & 50 Vict., ch. 27 (Eng.) also did not help women who were not legally separated from their husbands: "In families that were intact and living together...Parliament continued to allow fathers alone to exercise legal control over the children of the marriage." SHANLEY, *supra* note 3, at 131–32.

243. PASTON, *supra* note 43, at 50.

244. *Id.*

245. *Id.* at 51.

246. *Id.*

247. *Id.* at 50.

248. *Id.* at 51.

249. *Id.*

leaves with the knowledge that a well-told story has the power to evoke a pressing need for change.

While Cosima's writing is interrupted for one evening by Mrs. Barton's legal wrongs, this literary woman's life is forever altered when she becomes a wife herself.²⁵⁰ When her childhood friend, Tom, asks her to marry him, she is shocked; she loves him only as a brother.²⁵¹ But when he persists with his entreaties, certain that she will learn to love him, she weighs the pros and cons of marriage in a most deliberate and unromantic manner.²⁵² She ultimately decides that the marriage plot is one she must explore:

If...she were to resolve never to marry until she fell passionately in love, it seemed likely that she would be doomed to remain a spinster all her life, and so lose an experience that must be valuable to any woman, and practically indispensable to a novelist.²⁵³

Shortly after she accepts this proposal, however, she meets Quentin Mallory, a man who cares about what she cares about and is interested in her ideas and opinions.²⁵⁴ She begins to have serious doubts about her upcoming marriage, but feels that she cannot disgrace Tom by backing out.²⁵⁵ Much is made of the fact that they have acquired a flat and furniture, and human suffering is thus discounted and considered largely irrelevant when weighed against social trappings and expectations.²⁵⁶

Immediately after the wedding ceremony, Cosima laments her unalterable mistake:

She was no longer one; she had ceased to belong to herself. Her freedom and independence were gone forever....She was seized by a sudden, almost uncontrollable impulse to shriek aloud that she had made a

250. Mrs. Barton later starts to imagine that her son is with her, and she croons to a bundled sofa cushion. When the child actually dies, Mrs. Barton is sent to a private asylum and Mr. Barton moves away. Cosima views the entire tragedy as a "deliberate crime," *id.* at 86, but a woman doctor who also lives in the boarding house assures her that the law will take no notice:

The laws are supposed to be framed to protect the weak? Oh, I know that's a pleasant little legal fiction. The laws are framed by the strong, and naturally they are framed for the benefit of the strong. That's why women, children and animals have such a poor time of it generally. I can remember a time when I used to be hot and fierce and rebellious over the wrongs of the weak, but now I take all that as a matter of course. It is the natural and logical result of our lopsided system of government, a government by one sex only.

Id. at 86.

251. *See id.* at 109.

252. *Id.* at 110.

253. *Id.*

254. *See id.* at 122–25.

255. *Id.* at 131–35.

256. *Id.* at 135.

mistake, that she did not wish to be married, that she took back all the dreadful vows she had uttered so mechanically.²⁵⁷

Too late, Cosima understands the dreadful condition of coverture, that in "becoming one," *she* was no longer one.²⁵⁸ Her new knowledge makes her want to "shriek," affiliating her with women activists like Butler who had been dubbed the "shrieking sisterhood."²⁵⁹

One of the New Woman novels to rewrite the happily-ever-after marriage plot, *The Writer of Books* details Cosima's misery from the fateful day of her wedding. Cosima, however, finally is enabled to leave her husband when her friend Bess presents her with a packet of love letters that Tom has sent to Bess.²⁶⁰ While Bess knowingly warns, "You can't divorce your husband on that sort of evidence, not even get a legal separation,"²⁶¹ Cosima replies with a radical revision of the meaning of the law in her life:

I no longer have a husband — I am free to follow my own inclinations. If the law doesn't allow me to dissolve my marriage, why then, I'll be a law unto myself. No woman has ever had a voice in making the laws, and therefore no woman is bound to obey them.²⁶²

She goes to Mallory and announces: "The law does not give me freedom, but I acknowledge no law except my own. I divorce myself by my own law, and I shall marry again by my own law if it seems good to me."²⁶³ But Mallory refuses to be the cause of her social ruin.²⁶⁴ More conventional regarding the possibility of a relationship outside of marriage than *The Beth Book*, *The Writer of Books* does not hold out much promise that Cosima and Mallory will be together. The ending, however, is far from tragic as Cosima realizes that she has important and fulfilling work to do:

257. *Id.* at 139.

258. Cosima is shocked by how little consideration she gave to this life-altering decision: Surely...this trivial little ceremony should only be the preliminary to a betrothal, while the wedding itself should occupy several days like a divorce case, the different stages of the proceedings should be reported in the public press, and opportunity should be given to the contracting parties to withdraw at any moment; while the final joining of hands should be performed to the accompaniment of drums and trumpets, alarms and excursions. Such a proceeding would impress the awful nature of the act upon people's minds, and intending couples would hesitate at the publicity and expense, just as now husbands and wives often hold together rather than face the horrors of the divorce court.

Id. at 138. Cosima envisions a more equal relationship, with the joining of hands, and each party having an equal opportunity to back out or proceed with the ceremony.

259. Butler was described by a journalist as "a shrieking sister, frenzied, unsexed, and utterly without shame." PETRIE, *supra* note 185, at 19–20 (1970), reprinted in KENT, *supra* note 173, at 10.

260. PASTON, *supra* note 43, at 241–42.

261. *Id.* at 242.

262. *Id.*

263. *Id.* at 245.

264. *See id.* at 247.

Love may once have been a woman's whole existence, but that was when a skein of embroidery silk was the only other string in her bow. In the life of the modern woman, blessed with an almost inexhaustible supply of strings, love is no less episodic than in the life of a man. It may be eagerly longed for, it may be tenderly cherished, but it has been deposed forever from its proud position of "lord of all."²⁶⁵

As she nurtures her pain with a pen, the novel's ending holds out the promise of a fulfilling future.²⁶⁶

The relationship between Cosima and Mallory, however, is much more than a thwarted romance. Mallory is a well-known historian and his conversations with Cosima and their shared goals and motivations testify to the connections between literature and history explored in the novel. Mallory speaks of reading novels as part of a historian's business:

"Novels, plays, letters, and memoirs are the modern historian's bricks and mortar....It is the life and thought and manners of a people that he desires to portray, the *vie intime* of a country and period. If he cannot reproduce the spirit, the very atmosphere of the age, he has failed."²⁶⁷

Encouraging Cosima to write from a woman's point of view, not to try to write like a man, he tells her how important that will be for history:

We have plenty of opportunities of getting at the masculine point of view, but it is only in comparatively recent times, that we have had female writers who possessed ideas of their own, and dared to express them. We laugh sometimes at their grammar and their logic, but it mustn't be forgotten that the work of those who thought for themselves will be invaluable documents for the social historian of the future. We, of the present day, would give our ears if the past were lighted up for us in the way the nineteenth century will be for him. We can follow the development of the thought of man from the first dawn of history, but the thoughts of woman are buried in her grave.²⁶⁸

When Cosima presses him, "[a]nd whose fault is that?," he responds that it is the fault of our fathers who found the pen an unfeminine weapon: "But prejudices never go unpunished, and the penalty of that prejudice is that we have lost half the history of the human race."²⁶⁹ He tells her, in the interest of future historians, "[t]ell us what you and your sisters think and feel, what you have seen and suffered."²⁷⁰

265. *Id.* at 257.

266. *See id.* at 259.

267. *Id.* at 123.

268. *Id.* at 144.

269. *Id.*

270. *Id.* at 145.

That is, in fact, what Paston does in and as *A Writer of Books*. While Cosima is honing her craft, real life is happening around her, interrupting and becoming part of her work and, according to Mallory, the historical record. There is the story of the Bartons, a seduced young girl who commits suicide,²⁷¹ her friend Bess' trial for stabbing a man to ward off his unwanted sexual advances,²⁷² and the tale of Cosima's own marriage. All of these stories become "the story" as the novel narrates what Cosima and the other women in the novel think and feel, what they have seen and suffered. Earlier in the novel, Cosima had explained to Mallory that she was not, like her friend Bess, a feminist reformer:

I feel that I was born to paint them [the times], not to set them right....It is much more amusing to live in a transitional age, when the fighting is at its height. Though I may only play the part of war correspondent, I like to smell the powder and hear the whizz of the bullets about my ears. I expect that in the history books of the future, the nineteenth century will be spoken of as another Hundred Years' War, the war for freedom. All the great movements have been in the direction of freedom, the freedom of knowledge and religion, of trades and slaves, and even of women and children.²⁷³

Mallory is surprised that she is content to "stand aside and observe and criticise."²⁷⁴ He tells her, "[y]our attitude reminds me of that of the sensible housewife, whose husband insists on managing the kitchen, the nursery and the school-room as well as the garden, the stable and the farm. She smiles at his blunders and bides her time."²⁷⁵ At the time that Cosima made the comment, she desperately was trying to be that sensible housewife, to fulfill her proper role out of a sense of obligation. But that was before she realized that her "duty was only rewarded by deceit and betrayal,"²⁷⁶ before Tom expected her to accept and forgive his feelings for Bess, but refused to live with her after learning of her feelings for Mallory, before she was forced to accept the injustice that her reputation (as a woman, as a writer of books) would be forfeited if she followed her heart.

In the last scene of the novel, Cosima heads toward her writing-table "to prepare the materials of war"; she is about ready to begin her "campaign."²⁷⁷ Rather than naming herself a war correspondent, she sees her writing as playing a much more active role in the war for freedom than

271. *Id.* at 189.

272. *Id.* at 196-99.

273. *Id.* at 225.

274. *Id.*

275. *Id.* at 225-26.

276. *Id.* at 242.

277. *Id.* at 259.

she had earlier acknowledged. While we aren't told what kind of novel she is sitting down to write, she has just won critical acclaim for a novel that was published by a top-rate firm after being rejected by her plot-oriented publisher for being "as dull as real life."²⁷⁸ Presumably, her next novel also will be based on real life, influenced by her historical muse, Mallory, for whom her "love was as true and as strong, though her suffering was considerably less, because, instead of saturating her pillow with useless tears, or consuming her heart in vain regrets, she was already beginning to think seriously about her next book."²⁷⁹ She hopes her campaign will help her "to conquer heart-sickness and win forgetfulness and peace";²⁸⁰ maybe this will be by imagining or working to re-create a world in which "crimes" that result from unjust laws and rules of society, such as those that kept Mrs. Barton from her child and Cosima from Mallory, are written out of the plot. Arnold Bennett wrote in a review of Paston's novels:

We do her no injustice when we say that she is not primarily interested in fiction. It happens to be the accepted vehicle for thought, and so she uses it—and uses it very cleverly....What does interest "George Paston" is the question of "woman's rights" — the inequality of women with men before the law and before social custom.²⁸¹

Maybe Cosima will write books like Paston, books that the critic Bennett characterized as "the best 'woman's rights' pamphlets ever written."²⁸² Victorians recognized fiction as a powerful vehicle for thought — a forum in which to make a case for a more just society. It is time to look back on these texts as the important pieces of advocacy that they were written and read to be.

V. CONCLUSION

Novels and other outlaw texts written by and about women bring perspectives and experiences to the study of law that are absent from official legal sources. Outlaw texts are sources from which we can learn about the agency and resistance of those whose voices have been excluded from dominant legal discourse. Austin Sarat argues that the law's power "is found in the countless negotiations of shared understandings that take place every day in various domains of law, and in the evasions, resistances, and

278. *Id.* at 232.

279. *Id.* at 257.

280. *Id.* at 259.

281. Arnold Bennett, *Some Younger Reputations*, ACADEMY, Dec. 24, 1898, reprinted in Anita Miller, *Afterword to A WRITER OF BOOKS*, *supra* note 43, at 263.

282. *Id.* at 264.

inventions that inevitably accompany such negotiations."²⁸³ Outlaw texts are sites where these negotiations took place and are documented; they are forums in which "evasions, resistances, and inventions" are expressed. A study of nineteenth-century outlaw texts, "domains of law" in which legal meanings were being contested and transformed, is a historical "shift in attention" that is key to a greater understanding of what and how the law signifies.²⁸⁴

In this Article, I have focused specifically on the contributions that outlaw texts have to make to our understanding of early women's advocacy and the historical performance of feminist jurisprudence. In this way, a study of these texts will make a valuable contribution to our understanding of women's legal history. A study of outlaw texts also has the potential to reinvigorate the law and literature movement. Jane Baron has identified a need in this field for a critical analysis of "how we categorize knowledge and why."²⁸⁵ A more interdisciplinary approach to law and literature — one that is self-reflexive about the boundaries of disciplines and texts — could greatly benefit the field.

I conclude with the suggestion, however, that the study of outlaw texts has broader implications for the study of law than its potential impacts on certain specialized fields. Whether a judge is relying on precedent, a legal scholar is engaging in doctrinal analysis, or a law student is preparing for tomorrow's class, it is important that all of us who study law be aware of and critically analyze the significance of the historical exclusion of certain voices and experiences from traditional legal texts. It also is crucial to study the signifying practices that have been used to challenge and resist official legal doctrine. In *Storytelling For Oppositionists and Others: A Plea for Narrative*, Richard Delgado writes, "Stories, parables, chronicles, and narratives are powerful means for destroying mindset — the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place. These

283. Austin Sarat, *Redirecting Legal Scholarship in Law Schools*, 12 YALE J.L. & HUMAN. 129, 137 (2000) (reviewing KAHN, *supra* note 26).

284. Sarat and Simon argue:

[W]hile legal studies has shown a growing interest in popular culture, it remains occasional, episodic, and isolated. Thus, few legal scholars writing on rape or capital punishment would assume that it is relevant, let alone essential to review the leading contemporary films that have imagined these experiences; yet most would almost certainly consult the leading Supreme Court opinions on those topics, even if their primary interest lay elsewhere. Cultural analysis and cultural studies encourage such shifts in attention.

Sarat & Simon, *supra* note 28, at 12–13. Sarat and Simon's comments relating to popular culture are particularly relevant to the consideration of nineteenth-century novels as outlaw texts in that novels were such an influential form of popular culture at that time.

285. Baron, *supra* note 135, at 1061.

matters are rarely focused on."²⁸⁶ Outlaw texts shift the focus to these matters, both in connection with the historical record and with present-day reality.

286. Delgado, *supra* note 30, at 2413.

NOTES

