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CREDITING WOMEN

Women's testimony was valued in eighteenth-century English property disputes. Women provided lengthy depositions that were entered into official court records, women filed bills and gave answers in pleadings before the equity courts that heard so many of these cases, and women sometimes appeared in court to serve as witnesses who could be examined and cross-examined. Women not only provided testimony regarding marriage settlements, wills, rent charges and other elements of landed property disputes, but they also shared information about mortgage loans and merchant agreements, bank annuities and stock investments, in proceedings that helped to shape the development of commercial law. This was a period of dramatic commercial growth and financial innovation in England and other parts of the British empire, when advances in both public and private finance hastened the evolution of a credit economy. It was also a period in which women's control over different kinds of property, and access to commercial opportunities, was expanding. Women were participants in eighteenth-century credit markets and their words had not only epistemic but also monetary value.

But how *much* was a woman's testimony worth? And what factors influenced the determination of her credibility and competency? Social standing and reputation were important for women as well as men. Gendered assumptions about female dependence, irrationality, and corruption played a part. Yet so too did newer ideas about consent and contract in legal theory and legal practice. The language of natural law allowed, at times, for the definition of women as free and rational human beings, while litigation challenging the protections of coverture, for example, led to recognition of women as accountable economic agents. How should we understand these contradictions and tensions? Why was women's testimony simultaneously relied upon, and discounted or ignored?

This essay will suggest several reasons why these limits to crediting women endured, and even intensified, at the same time that women's economic and testimonial power was growing. Key arguments deployed by jurists and philosophers of natural law played a part, but economic, cultural and procedural

developments were equally important. First, I will argue, changes in the law of evidence, associated with the rise of the adversarial trial, contributed to ongoing concern about bias and heightened concern about witness manipulation, which only amplified suspicion about women's independence. Second, as English commercial law became increasingly focused on problems of fraud in this era of economic growth and market volatility, misogynist ideas and images were used to describe the dangers of treachery and deceit. In controversies regarding investor manipulation or predatory lending, for example, fears about the link between commerce and corruption were expressed in gendered terms that reinforced negative, and contradictory, images of female corruption and helplessness. Finally, such images were effectively spread in the periodicals, novels, newspapers, encyclopedias and other kinds of texts that proliferated as part of England's burgeoning print culture. And yet these texts also included depictions of women as competent and credible economic agents who understood the operation of law and finance. Indeed, since different kinds of legal literature – including treatises on “the lady's law” and fictionalized criminal biographies like Defoe's *Moll Flanders* – were among the most popular forms of print circulating in the eighteenth century, these publications furthered such contradictory depictions of women, and so shaped ideas about the importance of, and limits to, crediting their testimony.

The limits to crediting women merit discussion because they are a significant part of the construction of a modern law of evidence. While some scholarship has focused on this phenomenon in the history of criminal law, little attention has been paid to its development in other areas of law.<sup>1</sup> After an opening section synthesizing evidence of women's active engagement in new commercial opportunities, and their participation in cases litigated before a variety of English courts, this essay will focus on the history of limitation in the history of law. The kind of systematic “credibility discount” experienced by women, recently described by a legal scholar like Deborah Tuerkheimer, has an extensive history that must be examined in order to understand the artificial construction of legal rationality – and related failures of justice – in modern democratic regimes.

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1. A.E. SIMPSON, « The “Blackmail Myth” and the Prosecution of Rape and its Attempt in Eighteenth-Century London: The Creation of a Legal Tradition », *The Journal of Criminal Law and Criminology*, vol. 77, n° 1, Spring 1986, p. 101-150; K.J. KESSELING, « Bodies of Evidence: Sex and Murder (or Gender and Homicide) in Early Modern England, c.1500-1680 », *Gender & History*, vol. 27, n° 2, Aug. 2015, p. 245-262; J. RUDOLPH, « Gender and the Development of Forensic Science: A Case Study », *English Historical Review*, vol. 123, n° 503, 2008, p. 924-946; D. TUERKHEIMER, « Incredible Women: Sexual Violence and the Credibility Discount », *University of Pennsylvania Law Review*, vol. 166, n° 1, Dec. 2017, p. 1-58.

## WOMEN'S AGENCY IN MARKETS AND COURTS

Women were active participants in trade and credit networks throughout the early modern period in England, and other parts of Europe.<sup>2</sup> As the scope of economic activity widened, and the pace of private and public finance quickened in eighteenth-century England, many women shared in widespread excitement about acquiring wealth through new investment opportunities. Married and unmarried women became independent investors in this credit economy, and their portfolios included a range of stakes and shares, including company stocks, state lotteries, government annuities and private mortgage loans. Numerous new publications aimed to educate these new and inexperienced female, and male, investors by providing advice on accounting and investment strategy.<sup>3</sup> Women, like men, also worked with brokers and bankers in making investment decisions. These brokerage relationships connected women to a variety of networks, thus expanding their credit beyond a more limited circle of kin.<sup>4</sup>

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2. C. MULDREW, « "A Mutual Assent of her Mind?" Women, Debt, Litigation and Contract in Early Modern England », *History Workshop Journal*, 55, 2003, p. 49-52; M.R. HUNT, *The Middling Sort: Commerce, Gender and the Family in England, 1680-1780*, Berkeley, University of California Press, 1996, p. 125-146; B. LEMIRE, R. PEARSON and G. CAMPBELL (eds), *Women and Credit: Researching the Past, Refiguring the Future*, Oxford, Berg Publishers, 2002.

3. A.M. FROIDE, *Silent Partners: Women as Public Investors During Britain's Financial Revolution 1690-1750*, Oxford, Oxford Scholarship, 2016, p. 14-26; A.M. FROIDE, « Learning to Invest: Women's Education in Arithmetic and Accounting in Early Modern England », *Early Modern Women: An Interdisciplinary Journal*, vol. 10, n° 1, 2015, p. 3-26; A.M. CARLOS and L. NEAL, « Women Investors in Early Capital Markets », *Financial History Review*, vol. 11, n° 2, 2004, p. 197-224; N. GLAISYER, « Calculating Credibility: Print Culture, Trust and Economic Figures in Early Eighteenth-Century England », *Economic History Review*, vol. 60, n° 4, 2007, p. 685-711.

4. J. RUDOLPH, « A Broker's Advice: Credit Networks and Mortgage Risk in the Eighteenth-Century Empire », in M. LOBBAN and I. WILLIAMS (eds), *Networks and Connections in Legal History*, Cambridge, Cambridge University Press, forthcoming; J. RUDOLPH, « Property and Possession », in R. PROBERT and J. SNAPE (eds), *A Cultural History of Law in the Age of Enlightenment*, London, Bloomsbury, 2019, p. 107-110; A. LAURENCE, « The Emergence of a Private Clientele for Banks in the Early Eighteenth Century: Hoare's Bank and some Women Customers », *Economic History Review*, vol. 61, n° 3, 2008, p. 565-586. A. SHEPARD, « Minding their Own Business: Married Women and Credit in Early Modern London », *Transactions of the Royal Historical Society*, vol. 25, 2015, p. 53-74; A. SHEPARD, « Crediting Women in the Early Modern English Economy », *History Workshop Journal*, vol. 79, 2015, p. 1-24. I came across the latter essay by Shepard, also entitled « Crediting Women », late in this project. Shepard's valuable studies of married women's role as "asset managers" in early modern England mainly focus on women's activities in pawnbroking and local lending rather than their engagement with banking or investment. Moreover, while Shepard's essay does rely on records of women's testimony in several ecclesiastical courts, she does not address questions about witnessing or credibility that are the focus of this essay.

Since women were active participants in the credit economy, it is not surprising that they were active in the courts as well. Several legal historians have established women's "conspicuous presence in English law courts," and underscored the particular importance of equity courts as a key venue for women's legal actions.<sup>5</sup> Margaret Hunt, for example, has estimated that there were more than 135,000 women operating as litigants and respondents in the eighteenth-century English Chancery and Exchequer courts.<sup>6</sup> These included wives, as well as single women and widows, who were involved in a range of lawsuits over trade, contracts, mortgages, and other kinds of agreements or activities essential to the growing economy. The English equity courts have long been recognized in modern scholarship as a jurisdiction that was particularly favorable to women's legal agency because of equity's more flexible procedures and extensive remedies. In protecting, and at times even promoting, women's legal interests, these courts also helped to spur the development of different kinds of legal and financial instruments.<sup>7</sup>

Some women, like the wealthy spinster Eleanor Curzon, were involved in notable controversies over stock market fraud. In the aftermath of the bursting of the South Sea Bubble, Curzon brought a suit against the South Sea Company seeking restitution of wealth. She refused to accept company shares which were now much reduced in value, and sought the return of £1000, the original value of her intended investment. Curzon's suit rested on the claim that an error in company records meant there was no proof that her purchase of South Sea stock had ever been completed. The barons of the Exchequer accepted Curzon's arguments, and the court's ruling in her favor was upheld on appeal to the House of Lords.<sup>8</sup> Curzon's suit was surely extraordinary since it was part of a dramatic

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5. M. FINN, « Women, Consumption, and Coverture in England c. 1760-1860 », *The Historical Journal*, vol. 39, n° 3, Sept. 1996, p. 706.

6. M.R. HUNT, « Wives and Marital "Rights" in the Court of Exchequer in the Early Eighteenth Century », in P. GRIFFITHS and M. JENNER (eds), *Londinopolis: Essays in the Cultural and Social History of Early Modern London*, Manchester, Manchester University Press, 2000, p. 110-111.

7. A.L. ERICKSON, « Coverture and Capitalism », *History Workshop Journal*, vol. 59, Spring 2005, p. 5. See also T. STRETTON, *Women Waging Law in Elizabethan England*, Cambridge, Cambridge University Press, 1998, p. 25-29, and T. STRETTON, « Married Women and the Law in England Since the Eighteenth Century », *L'Homme: Europäische Zeitschrift für Feministische Geschichtswissenschaft*, vol. 14, n° 1, 2003, p. 124-130; J. RUDOLPH, *Common Law and Enlightenment in England 1689-c.1750*, Woodbridge, Boydell, 2013, p. 149-157. On Exchequer's equity jurisdiction see H. HORWITZ, « Chancery's "Younger Sister": The Court of Exchequer and its Equity Jurisdiction 1649-1841 », *Historical Research*, vol. 77, n° 178, June 1999, p. 160-182.

8. L.L. PECK, *Women of Fortune: Money, Marriage and Murder in Early Modern England*, Cambridge, Cambridge University Press, 2018, p. 268-269; A.M. FROIDE, *Silent Partners, op. cit.*, p. 195-198; *South Sea v Curzon (1722)*, 1 *English Reports*, p. 1092-1094.

public controversy in the 1720s over speculation and commercial corruption exposed by the South Sea Bubble. However, there was also a good deal of ordinary litigation throughout the century that similarly involved women in disputes over credit, debt and investment. Historians have focused attention on women like Hester Pinney and Johanna Cock: successful investors, lenders and financial advisors for family and friends, these women were engaged in controversies over their administration and inheritance of shares.<sup>9</sup> Other ordinary women were also involved in the administration of family property, and were drawn into litigation. For example, the widow Grace Randolph served as respondent to Chancery bills inquiring into rent payments, tax collection and other elements of estate management.<sup>10</sup> Similarly, women like Margaret Hare were entangled in litigation over debts owed to their late husbands. Well into her second marriage Hare continued to serve as administrator of her late husband's estate, providing depositions, detailing monies borrowed and owed in the course of her own or others' business activities, and producing evidence such as promissory notes and account books in support of her claims.<sup>11</sup> "Both men and women clearly recognized the capabilities of their wives, daughters or sisters," Christine Churches explains, "as they chose them almost routinely to be executors of their wills."<sup>12</sup> The courts, and their legal personnel, also recognized these women's capabilities and accepted their authority and arguments.

Women were involved in another regular arena of litigation in the eighteenth and nineteenth centuries having to do with the "law of necessities" and the status of "married women as consumer debtors."<sup>13</sup> In these suits married women testified about their capacity to contract debts, and at times denied liability for those debts they accrued, during a separation from their husbands. These suits were

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9. A.M. CARLOS and L. NEAL, « Women Investors in Early Capital Markets », *op. cit.*, p. 205-208; A.M. FROIDE, *Silent Partners*, *op. cit.*, p. 181-196.

10. *Brockman v Randolph* (1730), Court of Chancery: Six Clerks Office: Pleadings 1714 to 1758, C 11/237/2, National Archives, London. See also A.L. ERICKSON, *Women and Property in Early Modern England*, London, Routledge, 1997, and P. LANE, « Women, Property and Inheritance: Wealth Creation and Income Generation in Small English Towns, 1750-1835 », in J. STOBART and A. OWENS (eds), *Urban Fortunes: Property and Inheritance in the Towns 1700-1900*, Aldershot, Ashgate, 2000, p. 172-194.

11. *Depositions of Several of the Creditors of Thomas [Fynn] (1773)*, Clayton and Morris Collection, CLC/B/050/A/170, London Metropolitan Archives.

12. C. CHURCHES, « Putting Women in their Place: Female Litigants at Whitehaven, 1660-1760 », in N.E. WRIGHT and M.W. FERGUSON (eds), *Women, Property and the Letters of the Law in Early Modern England*, Toronto, Toronto University Press, 2004, p. 53. See also C. MULDREW, « "A Mutual Assent of her Mind?" Women, Debt, Litigation and Contract in Early Modern England », *op. cit.*, p. 52.

13. M. FINN, « Women, Consumption, and Coverture in England c. 1760-1860 », *op. cit.*, p. 707.

often heard in courts of requests where oral witness testimony was more regularly accepted than in other courts, affording women an opportunity to appear, negotiate, and be heard.<sup>14</sup> Married women also provided critical information in debt disputes over colonial investment and plantation management. For example, wives were consulted about colonial estates, established by their natal families in places like St Kitts and Barbados, that were used to secure the debts of husbands in financial difficulty. These wives were also asked about properties they had inherited in England that were mortgaged in order to raise funds for their husbands' new investments in possessions overseas. Judges who oversaw such loan agreements were required to conduct private oral interviews with women who were parties to these agreements; judges were expected to elicit the testimony of these wives in order to ensure that the women had not been coerced to consent to the mortgage of their separate properties or jointures.<sup>15</sup> Women's testimony was not only vital in securing credit but, in the event that creditors brought suit for nonpayment, women also provided crucial information regarding ongoing contracts, loans and expenditures. For example, in the 1770s the married woman Jane Kemeys was intensely engaged with the numerous lawsuits that resulted from her husband's failed investments in a Jamaican plantation. Kemeys demonstrated her extensive knowledge about estate management, loan agreements and ongoing legal process, in correspondence with her husband and his trustees, and in her response to a lengthy Chancery suit brought by creditors against those trustees.<sup>16</sup> Finally, some wives used this kind of knowledge to initiate their own suits over the mismanagement of family assets. Married women brought complaints in the Exchequer and other courts against their estranged husbands, submitting specific details about husbands' unfair seizure of wives' "wages or trading profits," as well as broader accounts of failure in household economy.<sup>17</sup>

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14. *Ibid.*, p. 711-716. Other scholars have also studied challenges to coverture in cases before the Kings Bench and Admiralty courts: J. OLDHAM, « Creditors and the Feme Covert », in M. DYSON and D. IBBETSON (eds), *Law and Legal Process: Substantive Law and Procedure in English Legal History*, Cambridge, Cambridge University Press, 2013, p. 217-45; M.R. HUNT, « The Sailor's Wife, War, Finance and Coverture in Late Seventeenth-Century London », in T. STRETTON and K.J. KESSELRING (eds), *Married Women and the Law: Coverture in England and the Common Law World*, Montreal, McGill-Queen's University Press, 2013, p. 139-162.

15. Deed between Lord James, Lady Sophia and William Cranstoun and John Banister, James Hammond and William Manning of London, Gen MSS 1412, Box 3, Folder 35, Beinecke Rare Book and Manuscript Library, Yale University; *Eddleston v Collins* (1853) 43 *English Reports* 1-8.

16. *Mackreth v Clitherow*, Court of Chancery: Six Clerks Office: Pleadings 1758 to 1800, C 12/433/23, National Archives, London; Jane Gardiner Kemeys to James Clitherow, 1774-1786, Kemeys Trust, Clitherow Family Papers, ACC/1360/669, folders 1-4, London Metropolitan Archives.

17. M.R. HUNT, « Wives and Marital "Rights" in the Court of Exchequer in the Early Eighteenth

Some forms of women's testimony, such as courtroom statements or correspondence, offered what we would recognize as more direct expressions of women's ideas and concerns. Most testimony, however, involved mediation. Female litigants, like male, brought their complaints to lawyers who were paid to craft compelling narratives, and to submit admissible arguments that would be convincing to the court. Respondents to litigation and deponents were similarly advised by counsel or guided by court officials who recorded their replies. This involvement of clerks, lawyers and "next friends" does not mean, however, that the language and interests of women were either fabricated or ignored.<sup>18</sup> Even more, the fact of mediation does not indicate a failure to accept or value women's testimony. Popular practice books and lawyers' manuals that proliferated in this period demonstrate a robust concern with the proper collection and use of testimony by and about women. Texts like Maynard Walker's *The Equity Pleader's Assistant* or Richard Boote's *The Solicitor's Practice in the High Court of Chancery Epitomized* also confirm that women's actions and arguments were credited in a wide range of property disputes. Established formulas for questioning deponents "about the value of houses belonging to a woman and sold" or "about a woman being unduly influenced to execute deeds" were designed to elicit knowledge about conflicts over landed property.<sup>19</sup> Numerous other interrogatories were focused on women's purchase of stocks, evaluation of annuities, and participation in varied aspects of the commercial economy.<sup>20</sup> Other more informal records, like correspondence among parties to a case, lawyers' notes, and account books, offer similar indications of women's economic activities and knowledge of law. These records also show that women were active in guiding litigation, and confirm that women were taken seriously as advocates and opponents.<sup>21</sup>

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Century », *op. cit.*, p. 118-121.

18. *Ibid.*, p. 113; C. CHURCHES, « Putting Women in their Place: Female Litigants at Whitehaven, 1660-1760 », *op. cit.*, p. 50-51, 55. On reading fragmentary and mediated archives see, for example, A. FARGE, *The Allure of the Archives*, trans T. Scott-Railton, New Haven, Yale University Press, 2014, especially p. 79-113.

19. M.C. WALKER, *The Equity Pleader's Assistant*, Dublin, 1796, p. 249-250; Old Solicitor, *A Collection of Interrogatories for the Examination of Witnesses in Courts of Equity*, Dublin, 1791, p. 274-275.

20. *Ibid.*, p. 164-166; M.C. WALKER, *The Equity Pleader's Assistant*, *op. cit.*, p. 161, 206-208.

21. C. CHURCHES, « Putting Women in their Place: Female Litigants at Whitehaven, 1660-1760 », *op. cit.*, p. 50-51, 55-56; Jane Gardiner Kemeys to James Clitherow, ACC/1360/669, *op. cit.*, and James Clitherow to Jane Gardiner Kemeys 6 February 1779 and 25 February 1779, Kemeys Trust, ACC/1360/678, fols 25-26, London Metropolitan Archives; Melmoth-Lee Account Book 1730-1739, Sir William Lee Family Papers, Box 6, OSB 52, Beinecke Rare Book and Manuscript Library, Yale University.

## NATURAL LAW JURISPRUDENCE AND AMBIVALENCE

Women were deemed to be credible not only because they could be recognized as competent and knowledgeable in estate financing or asset management, but also because they could be defined as rational human actors who operated according to natural law. The philosophy of natural law was influential throughout the eighteenth century in England. Theorists developed increasingly sophisticated analyses of human rationality, and pursued inquiries into sentiment and sociability, in order to explain human knowledge of and obligation to that law. English jurists, judges and lawyers engaged with these philosophical trends: their libraries were filled with the works of major natural law theorists like Hugh Grotius, Samuel Pufendorf and John Locke, and their notebooks, correspondence and case reports made frequent reference to these authorities.<sup>22</sup> Since reflection on natural law was often articulated in the course of debate about the jurisdiction of equity – and since the equity courts were so important to the development of legal protections for women – it is not surprising that these jurists developed ideas about women’s adherence to natural law, understood as a law of reason, at the same time. Women were afforded recognition as rational and free individuals as the language of natural law, social contract and consent advanced in the late seventeenth and eighteenth centuries.<sup>23</sup>

Like other jurists, William Blackstone was influenced by natural law jurisprudence. Indeed, his multi-volume *Commentaries* was part of an eighteenth-century institutional literature that aimed to elucidate the relationship between the law of nature and English law.<sup>24</sup> The first chapter of the first book of Blackstone’s magnum opus evaluated the force of natural rights, and reviewed the content of natural law, before describing the social contract formed to preserve those rights.<sup>25</sup> Blackstone also expressed interest in women’s agency at law, their capacity for rational action, and ability to express consent. It is widely noted that Blackstone signaled this interest at the opening of the fifteenth chapter of this first book with this claim: “Our law considers marriage in no other light than a

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22. J. RUDOLPH, *Common Law and Enlightenment*, *op. cit.*, p. 164-200, 215-230; D.J. IBBETSON « Natural Law and Common Law », *Edinburgh Law Review*, vol. 5, 2001, p. 4-20.

23. J. RUDOLPH, « Rape and Resistance: Women and Consent in Seventeenth-Century English Legal and Political Thought », *Journal of British Studies*, vol. 39, n° 2, April 2000, p. 161, 167-169.

24. J.W. CAIRNS, « Blackstone, An English Institutor: Legal Literature and the Rise of the Nation State », *Oxford Journal of Legal Studies*, vol. 4, n° 3, Winter 1984, p. 318-360; D. LEMMINGS, « Editor’s Introduction », in W. BLACKSTONE, *Commentaries on the Laws of England*, Book I, *Of the Rights of Persons*, D. Lemmings (ed.), Oxford, Oxford University Press, 2016, p. xxxi-xxxii; J. RUDOLPH, *Common Law and Enlightenment*, *op. cit.*, p. 166-167, 184-185.

25. W. BLACKSTONE, *Commentaries on the Laws of England*, *op. cit.*, p. 84-86.

civil contract.” In describing marriage as a “civil contract” in English law, scholars explain, Blackstone emphasized marital consent, and rejected ideas about the natural subordination of women to men.<sup>26</sup> It is less frequently noticed, however, that Blackstone further emphasized the significance of female consent towards the end of this same chapter, in a passage concerned with the question of women’s ability to testify in court. In the course of explaining limitations on wives’ capacity for separate legal action – to “sue and be sued” – Blackstone pointed to an important exception to such restrictions. Although “in trials of any sort [husband and wife] are not allowed to be evidence for, or against, each other,” Blackstone explained, in cases “where the offense is directly against the person of the wife,” such as abduction and forcible marriage to her “ravisher,” she is permitted to testify. The abducted women did not fit the definition of a wife “because a main ingredient, her consent, was wanting to the contract,” Blackstone concluded, and so her testimony would not contradict the principle of legal unity of person established by the doctrine of coverture.<sup>27</sup>

It is telling that Blackstone turned to this example. Recognition of a woman’s right to resist abduction and rape had long been seen as a fundamental argument for woman’s inclusion within the law of nature. Theorists like Hugo Grotius made a clear connection between self-preservation, understood as the first law of nature, and defense against sexual violation. Later thinkers, like John Locke and James Tyrrell, endorsed this connection, and made further claims about women’s natural reason and freedom in the course of developing their theories of social contract. Yet despite this recognition of women’s humanity and adherence to the law of nature, these theorists did not allow for women’s full equality and independence. Instead they articulated ideas about sexual difference, and theorized about women’s necessary consent to an unequal marriage contract in the state of nature, in order to justify women’s exclusion from the social contract.<sup>28</sup> There was a fundamental ambivalence in these theorists’ simultaneous recognition of female agency and insistence on female dependence, and this ambivalence is reproduced in William Blackstone’s work. Although Blackstone emphasized marital consent, described marriage as a “civil contract” in English law, and rejected ideas about the

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26. *Ibid.*, p. 279; M. SOKOL, « Blackstone and Bentham on the Law of Marriage », and T. STRETTON, « Coverture and Unity of Person in Blackstone’s Commentaries », in W. PREST (ed.), *Blackstone and his Commentaries: Biography, Law, History*, Oxford, Hart Publishing, 2009, p. 94-96, 120-127.

27. W. BLACKSTONE, *Commentaries on the Laws of England*, *op. cit.*, p. 285-286. It is likely that Blackstone drew upon Geoffrey Gilbert’s treatise on evidence when including this example. See *infra*, fn. 43.

28. J. RUDOLPH, « Rape and Resistance: Women and Consent in Seventeenth-Century English Legal and Political Thought », *op. cit.*, p. 167-171.

natural subordination of women to men, he also recognized and endorsed what he termed the “disabilities, which the wife lies under” after the marriage contract was sealed since these were “for the most part intended for [the wife’s] protection and benefit.” This insistence upon dependence as “benefit” was reinforced in another one of Blackstone’s well-known phrases that ended his chapter: “So great a favourite is the female sex of the laws of England.”<sup>29</sup> In this way, Blackstone and other eighteenth-century theorists, like those of the century before them, remained tied to assumptions about male authority and female dependence, if not natural subordination. They simply assumed “that contract conferred an unequal sort of freedom based on sexual difference,” Amy Dru Stanley concurs. “Though they thought of contract as a universal right,” she concludes, “they understood marriage as the sovereignty of husbands over wives.”<sup>30</sup>

Early nineteenth-century legal writers also reflected on women’s agency, and even envisaged women’s capacity to engage in legal reasoning, but they simultaneously endorsed the “benefits” of female dependence. For example, the barrister and politician John Eardley Eardley-Wilmot – grandson of Blackstone’s friend, and prominent eighteenth-century judge, John Eardley Wilmot – specifically aimed to cultivate women’s reason and legal acumen when he produced an abridgment of Blackstone’s *Commentaries* for female readers. In introducing his *Abridgment of Blackstone’s Commentaries on the Laws of England in a Series of Letters from a Father to his Daughter Chiefly Intended for the Use and Advancement of Female Education*, Wilmot admitted the dangerous potential of his project to educate women in the law, but emphasized the value of a general knowledge of England’s law and its constitution as part of a “liberal and polite education.” Wilmot also claimed that his legal abridgment would be of real practical benefit to women by giving “insight into those institutions customs, and regulations, which are constantly presenting themselves to your notice.”<sup>31</sup> Moreover, he provided a detailed account of major areas of the law of property, and invited his female reader to consult Blackstone’s original text for more information on this complex and important topic.<sup>32</sup> This confidence in women’s reason and capacity might

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29. W. BLACKSTONE, *Commentaries on the Laws of England*, *op. cit.*, p. 287. Tim Stretton argues that Blackstone regarded coverture as “the ultimate expression of the common law’s benevolent paternalism.” (T. STRETTON, « Coverture and Unity of Person in Blackstone’s Commentaries », *op. cit.*, p. 124-125).

30. A.D. STANLEY, *From Bondage to Contract: Wage Labor, Marriage and the Market in the Era of Slave Emancipation*, Cambridge, Cambridge University Press, 1998, p. 11.

31. J.E. EARDLEY-WILMOT, *An Abridgment of Blackstone’s Commentaries on the Laws of England in a Series of Letters from a Father to his Daughter Chiefly Intended for the Use and Advancement of Female Education*, London, 1822, p. 5, 8.

32. *Ibid.*, p. 135-178.

have been an outgrowth of Wilmot's commitment to principles of equity and justice that he expressed in other ways, such as in his advocacy of abolition and emancipation.<sup>33</sup> His grandfather Judge Wilmot had also demonstrated interest in equity and natural law: Judge Wilmot was not only a respected authority on common law, having served on both the courts of Kings Bench and Common Pleas from the 1750s to the 1770s, but he also had strong training in civil law, experience in equity, and was twice considered for the lord chancellorship.<sup>34</sup> Yet neither Judge Wilmot nor his grandson questioned male authority and female dependence. In that explanatory preface to his abridgment of Blackstone, John Eardley Eardley-Wilmot insisted that the work was not intended to promote women's independence since they "have a father, a brother, or a husband to assist, advise or control" their interactions with the law.<sup>35</sup> Rather, Wilmot sought to "adorn" his female reader's "mind with useful knowledge, and with such literary acquirements, as will eventually render [her] a cheerful companion, and an accomplished woman" filled with "justice" and "pity."<sup>36</sup>

## DISCOUNTS IN LAW, ECONOMY AND PRINT

This tension between agency and dependence was a central feature of women's experience in the eighteenth and nineteenth centuries. Even as women were increasingly active in law and economy, questions were raised about their competency and attacks on their credibility intensified. This was due, in part, to the enduring influence of theorists like Blackstone and, more broadly, to this powerful contradiction within natural law philosophy. It was also due to changing legal process, and to the emergence of particular problems in the law of credit and debt that developed over the course of the eighteenth century.

In the early part of the eighteenth century, limits to crediting women's testimony can be understood as part of a general concern about witness competency and bias. "That pillar of the older law" of evidence, John Langbein explains, was "the

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33. P. CHAPMAN, « Sir John Eardley Eardley-Wilmot, first baronet (1783-1847) », *Oxford Dictionary of National Biography*.

34. J. OLDHAM, « Wilmot, Sir John Eardley (1709-1792) », *Oxford Dictionary of National Biography*. See also, for example, Judge Wilmot's discussion of natural law principles of reason and morality, and citation of the work of Hugo Grotius, in his ruling on a breach of marriage case. *Low v Peers*, 97 *English Reports* 141.

35. J.E. EARDLEY-WILMOT, *An Abridgment of Blackstone's Commentaries on the Laws of England in a Series of Letters from a Father to his Daughter Chiefly Intended for the Use and Advancement of Female Education*, *op. cit.*, p. 5, 7.

36. *Ibid.*, p. 3, 8-9.

testimonial disqualification of parties for interest.”<sup>37</sup> Geoffrey Gilbert’s influential treatise on *The Law of Evidence* betrays this concern. Gilbert, a prominent judge on the Irish Kings Bench, Irish Exchequer, and English Exchequer courts, composed this text on evidence, as well as several other legal treatises, in the first two decades of the eighteenth century. It is likely that Gilbert’s work on evidence, like his other texts, circulated in manuscript before it was published in multiple editions in the second half of the century.<sup>38</sup> At the outset of his work, Gilbert determined that methodical analysis of the different kinds of testimony, as well as their force, was essential to understanding the operation of evidence, and so he divided testimony into “two sorts”: written and unwritten.<sup>39</sup> The majority of Gilbert’s treatise focused on the authenticity of written evidence, such as depositions, answers, wills and deeds. Although, as we know, women were involved in providing these kinds of evidence, Gilbert did not address the question of female credibility in these sections of the work.<sup>40</sup> In his consideration of “unwritten evidence, or the proofs from the mouths of witnesses,” however, Gilbert provided a brief discussion of women’s testimony. Here Gilbert included women in his explanation of the reasons for disqualification, or exclusion from testimony, “for want of integrity and discernment.”<sup>41</sup> In outlining general rules aimed at disallowing testimony tainted by interest, Gilbert elucidated the ways in which English law defined bias in cases involving trusts, contracts, injury and assault, and forgery of deeds, among other examples. According to this reasoning, women, as wives, were deemed not competent to testify:

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37. J.H. LANGBEIN, *The Origins of Adversary Criminal Trial*, Oxford, Oxford University Press, 2005, p. 246.

38. M. MACNAIR, « Sir Jeffrey Gilbert and his Treatises », *Legal History*, vol. 15, n° 3, 1994, p. 258-261; J. RUDOLPH, *Common Law and Enlightenment*, *op. cit.*, p. 257-258; J.H. LANGBEIN, « Historical Foundations of the Law of Evidence: A View from the Ryder Sources », *Columbia Law Review*, vol. 96, June 1996, p. 1172-1173.

39. G. GILBERT, *The Law of Evidence*, 4th ed., London, 1777, p. 5.

40. In a section of the text concerned with credibility in depositions Gilbert discussed male deponents only; in sections on written evidence in deeds and bills of exchange Gilbert occasionally recognized a wife’s involvement in generating documents, but not in providing such evidence (*ibid.*, p. 57-64, 88, 116.)

41. *Ibid.*, p. 119. Women had long been primarily associated with oral rather than written testimony, Bronach Kane has shown, and while there was a tradition of misogynist critique of “unruly” and irrational female memory there was also recognition of women’s memorial authority, particularly regarding local customs, family histories, marriage, sexuality, and defamation (see B. KANE, « Women, Memory and Agency in the Medieval English Church Courts », in B. KANE and F. WILLIAMSON (eds), *Women Agency and the Law, 1300-1700*, London, Pickering & Chatto, 2013, p. 44, 49-50).

Husband and wife cannot be admitted to be witnesses for or against each other, for if they swear for the benefit of each other, they are not to be believed, because their interests are absolutely the same, and therefore they can gain no more credit when they attest for each other, then when any man attests for himself.<sup>42</sup>

Gilbert did point to two possible exceptions to this exclusion of a wife's testimony. In cases of high treason, he explained, interest in guarding public safety would take precedence over concern about potential bias in her testimony. And in cases of abduction, a woman was a valid witness since she should only be considered a wife "*de facto*," Gilbert asserted, "for a contract obtained by force has no obligation in law, and therefore she is a witness in this case as well as in any other case whatsoever."<sup>43</sup>

Like Locke before him and Blackstone after him, Gilbert apparently recognized women's agency and capacity for reason in this instance of resistance to violation. However, he did not reflect further on the credibility of women's testimony in "any other case." Gilbert's main focus on the disqualification of wives because of bias, and lack of independence, was conventional and was a key part of the development of a "credibility discount."<sup>44</sup> Moreover, the fundamental contradiction in all of these theorists' works exemplifies and historicizes the related concept of "epistemic injustice" analyzed by modern scholars. "Epistemic injustice is a distinctive type of injustice," Deborah Tuerkheimer explains, citing the influential work of Miranda Fricker, "in which a person is wronged in her capacity as a knower." When testimony is discredited because of generalized prejudice against women, it causes a "primary harm" since "a speaker whose capacity as a knower is undermined has been, in important respects, dehumanized."<sup>45</sup> By simultaneously validating and foreclosing women's humanity, natural law theorists documented the prejudice at the heart of disbelief.

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42. G. GILBERT, *Law of Evidence*, *op. cit.*, p. 133.

43. *Ibid.*, p. 133-135. Throughout this section, Gilbert cites earlier authorities for these rules, including influential works by Sir Edward Coke and Matthew Hale.

44. See other examples such as *The Lady's Law: Or A Treatise of Feme Coverts Containing All the Laws and Statutes Relating to Women*, London, 1737, p. 109; *Baron and Feme: A Treatise of the Common Law Concerning Husbands and Wives*, London, 1719, p. 365.

45. D. TUERKHEIMER, « Incredible Women: Sexual Violence and the Credibility Discount », *op. cit.*, p. 42-46; M. FRICKER, *Epistemic Injustice: Power and the Ethics of Knowing*, Oxford, Oxford University Press, 2007; K. MANN, *Down Girl: The Logic of Misogyny*, Oxford, Oxford University Press, 2018, p. 185-196. Scholars' continued reliance on Lockean texts and terminology in their analyses of credibility is one indication of the need for more attention to the history of these ideas. See for example, D. TUERKHEIMER, « Incredible Women: Sexual Violence and the Credibility Discount », *op. cit.*, p. 13, fn. 59 and p. 15 fn. 74.

When Geoffrey Gilbert's treatise on evidence law was published in the mid-eighteenth century, trial procedure had already begun to change in England. As John Langbein has shown, the adversary criminal trial developed in this period and was a major factor in the formation of modern principles in evidence law. While adversarial practice had been followed in English civil trials before the eighteenth century, in those civil cases the preference for written evidence and exclusion of much witness testimony comported with traditional rules. As defense counsel was gradually admitted in eighteenth-century criminal matters the adversarial system began to be used in criminal as well as civil cases, and its significance expanded. Jury trial was increasingly dominated by lawyers who engaged in vigorous cross-examination, new kinds of evidence were admitted and new concerns emerged, and new rules, regarding the exclusion of hearsay or the privilege against self-incrimination, began to take shape.<sup>46</sup> There was clearly greater importance placed on what Gilbert had termed "proofs from the mouths of witnesses," and this may have encouraged more questions, and doubts, about the credibility of women's testimony. Since women had already been considered – and largely excluded – from providing oral testimony in the earlier system, it is not surprising that new efforts to police the oral testimony of witnesses in the adversarial trial would involve policing women as well.

William Hutton's compilation of cases from the courts of requests provides just one example of these efforts. Hutton, a commissioner of the Birmingham court of requests, composed a popular and didactic account of the practice of this court that "drew particular attention to the agency of women."<sup>47</sup> That attention was largely negative, as Hutton criticized female parties to litigation for being outspoken partisans and bemoaned their frequent appearance as weak mouthpieces for others' interests. Hutton expressed suspicion that women's greed and anger motivated their actions, and he pointed to the difficulty judges had in controlling women's testimony. Recounting a suit against a widow for her deceased husband's debts, for example, Hutton opined:

A particular attention is due to the fair sex; weak and lovely, they demand it. Their connexions with this Court are very frequent, and very loud, and though their fondness for speaking is a stagnation to business, for a riotous tongue is beyond the power of art to reduce, yet the Bench never retaliate, but give judgment with mildness; as we could not live without the winds, why then should we quarrel with them for roaring; we consider it is their nature.<sup>48</sup>

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46. J.H. LANGBEIN, *The Origins of Adversary Criminal Trial*, *op. cit.*; T.P. GALLANIS, « The Rise of Modern Evidence Law », *Iowa Law Review*, vol. 84, n° 3, March 1999, p. 499-560.

47. M. FINN, « Women, Consumption, and Coverture in England c. 1760-1860 », *op. cit.*, p. 715.

48. W. HUTTON, *Courts of Requests: Their Nature, Utility and Powers Described, With a Variety of Cases Determined in that of Birmingham*, Birmingham, 1787, p. 294, cf. p. 111.

This statement typifies the kind of condescension and misogyny that Hutton expressed throughout this work, but it also indicates the sense of worry he may have felt about admitting misleading testimony in his courtroom. Hutton and the other commissioners presided over disputes and could still direct witnesses, and exert some control, in this small-claims court. In the lawyer-dominated adversarial trial that was spreading to other courts, however, judges played an increasingly passive role. Now competing lawyers directed male and female witnesses to present testimony that was advantageous to one side or the other. This “subordination of truth-seeking” to partisan interest is a “defining shortcoming of adversary trial” John Langbein argues, as “each side operates under an incentive to suppress and distort unfavorable evidence, however truthful it may be.”<sup>49</sup> In this new combative process, would a woman be more easily manipulated in cross-examination? Was she generally less independent and more subject to bias and capture? Those older concerns about interest persisted and may have intensified as trial practice shifted from disqualifying testimony to policing it.

Contemporaries were aware of this potential for deceit in legal process. Even more, they recognized the prospects for fraud in new economic practices. The South Sea Bubble was only the most notorious example of deceit, misinformation, investor manipulation and destructive speculation that emerged during this period of rapid expansion of the credit economy. Personal credit and public debt were topics of concern not only because this was a society in which borrowing was a main engine of economic growth, but also because recurring patterns of booms and bubbles underscored troubling features of the new economy.<sup>50</sup> As credit was extended across imperial networks, borrowers and investors found that conventional norms regarding status and reputation provided insufficient protection against deceit. Novel investment opportunities and complex financial instruments created anxiety, and demonstrated the need for accurate information as well as effective conditions for building trust. Legislators and jurists made varied attempts to regulate credit and commerce so as to address these problems and eradicate fraud. For example, early eighteenth-century Irish and English statutes focused on frauds committed by debtors by criminalizing clandestine conveyance and mortgage agreements. Imperial legislation, like the *Act for the More Easy Recovery of Debts in His Majesties Plantations and Colonies in America*, aimed to protect British merchant creditors by applying uniform rules against

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49. J.H. LANGBEIN, *The Origins of Adversary Criminal Trial*, *op. cit.*, p. 103.

50. J. HOPBIT, « Attitudes to Credit in Britain 1680-1790 », *Historical Journal*, vol. 33, n° 2, 1990, p. 306-307; J. HOPBIT, *Risk and Failure in English Business 1700-1800*, Cambridge, Cambridge University Press, 1987, p. 18-41; C. MULDREW, *The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England*, New York, Palgrave, 1998, p. 199-312; N. GLAISYER, *The Culture of Commerce in England 1660-1720*, Woodbridge, Boydell, 2006.

debtors throughout the British empire.<sup>51</sup> There was also legislation that bolstered protections for debtors against unethical creditors in different parts of the empire: for example, later eighteenth-century legislation in Jamaica focused on the need for regular and transparent accounting by attorneys, executors, trustees and mortgagees, to make sure that plantation profits were accurately recorded and awarded.<sup>52</sup>

Such legislative, political and popular discourses about honesty and transparency are also important contexts for understanding attitudes towards women's testimony. Economic and legal change, as well as the formation of public opinion, determined the historical evolution of a "credibility discount." These contexts shaped, and bolstered, that familiar tension between the recognition of female agency and insistence on female dependence. First, since more women were involved in trade, investment and credit networks, some lawyers and judges perceived that there was a growing need to protect women against fraud. In this new economy women, like men, might fall prey to predatory lenders or they might agree to unconscionable bargains. But while men who found themselves in these situations were often accused of greed, profligacy or gambling, women were frequently depicted as ignorant victims. A set of interrogatories about a woman contracting for annuity payments in Maynard Walker's *Equity Pleader's Assistant* is one example of this sensitivity to the perils of female ignorance. This lengthy series of questions was premised on doubt about female rationality and competence; they highlighted uncertainty about woman's knowledge of "the method of computing annuities" and her ability to be a "proper and competent judge of what sum of money was a fair and reasonable price."<sup>53</sup> In 1796, Walker's instructions for the pleader's assistant echoed the advice the *Spectator* journal had offered to male patrons of female-owned shops in 1711: "A Woman is naturally more helpless than the other sex;" the editor reminded readers, "and a man of honor should have this in his view in all manner of commerce with her."<sup>54</sup>

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51. P. HAMBURGER, « The Conveyancing Purposes of the Statute of Frauds », *The American Journal of Legal History*, vol. 27, n° 4, October 1983, p. 380; G. JACOB, *A Review of the Statutes*, London 1715, p. 80-81; *An Act to Prevent Frauds by Clandestine Mortgages*, Dublin, 1697; *Acts and Statutes made in a Parliament begun at Dublin*, Dublin, 1731, p. 99-104; Irish Legislation Database, 1733 session [http://www.qub.ac.uk/ild]; S.D. SMITH, *Slavery, Family and Gentry Capitalism in the British Atlantic*, Cambridge, Cambridge University Press, 2006, p. 166.

52. ST JAGO DE LA VEGA, *The Laws of Jamaica*, 2nd ed., vol. 2, Jamaica, 1802, p. 306-311.

53. M.C. WALKER, *Equity Pleader's Assistant*, *op. cit.*, p. 206-208. Compare a similar controversy in *Chesterfield v Janssen* (1750-1751) 28 *English Reports*, p. 82-103. In this case, L.C. Hardwicke critiqued the avarice, rather than the ignorance, of both the male lender and the male borrower.

54. *Spectator*, No. 155, Tuesday, August 28, 1711, in E. MACKIE (ed.), *The Commerce of Everyday Life: Selections from the Tatler and the Spectator*, New York, Bedford-St. Martin's, 1998, p. 216.

A similar kind of emphasis on the vulnerability of women and culpability, or at least liability, of men appeared in other practice books and case reports. For example, Master of the Rolls Joseph Jekyll underscored female dependence in his ruling on the case of *Banks v Sutton* (1732), a dispute over mortgage and dower rights. “The relation of husband and wife, as it is the nearest so it is the earliest, and therefore the wife is the proper object of the care and kindness of the husband;” Jekyll insisted, “the husband is bound by the law of God and man to provide for her during his life, and after his death, the *moral obligation* is not at an end but he ought to take care of her provision during her own life.”<sup>55</sup> This claim about men’s moral obligation to care for their wives was easily associated with the more general premise that Chancellors were bound to uphold equity as a kind of adjunct of moral law or natural law.<sup>56</sup> Finally, female dependence was also a feature of popular literature: depictions of gallant men rescuing helpless women in legal or financial jeopardy appeared as a plot device on the London stage, and as a concluding lesson in didactic poems and stories.<sup>57</sup> This emphasis on women’s ignorance, helplessness, and dubious independence encouraged uncertainty about women’s testimony, and furthered suspicions about women’s reliability.

At the same time however, suspicions about female corruption and an emphasis on women’s greed also developed in significant ways. This was part of a recognition, and critique, of female agency within these new economic and legal contexts. As more women became active lenders and borrowers the likelihood increased that they too might commit fraud, but women’s fraud was understood to take particular forms. One possibility was that women would trade on their reputation for ignorance and vulnerability so as to evade economic responsibility. In married women’s debt litigation, for example, some wives were accused of feigning ignorance, and of exploiting creditors’ uncertainty about married women’s status and liability in order to escape from debt repayment.<sup>58</sup> Here judges and lawyers recognized women’s rationality, their capacity to contract and consent to economic agreements, and their capacity for deceit. The suspicions that began to attach to claims about female rationality and consent were not new, but they found new expression in this period. “Women constituted both an essential

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55. *Banks v Sutton*, 24 *English Reports* 923.

56. T. WOOD, *A New Institute of Imperial or Civil Law*, London, 1704, p. 2; H. BALLOW, *A Treatise of Equity*, London, 1737, p. 2-3.

57. J. RUDOLPH, « Property and Possession », *op. cit.*, p. 114-115. In many of these works the male gallant was contrasted with the profligate husband and the prodigal son, signaling that honor and good husbandry were defining features of eighteenth-century masculinity. K. HARVEY, *The Little Republic: Masculinity and Domestic Authority in Eighteenth-Century Britain*, Oxford, Oxford University Press, 2012, p. 24-63, 169-189.

58. J. OLDHAM, « Creditors and the Feme Covert », *op. cit.*, p. 218-221.

and a particularly dynamic sector of the new population of consumers that stoked and reshaped western markets in the eighteenth century,” Margot Finn avers, “but their perceived independence in this capacity was freighted with alarming connotations for contemporaries.”<sup>59</sup> One “alarming connotation” was sexual: contemporaries often made an association between debt and female prostitution, and it is worth noting that an implication of this association was that credit (or credibility) must be linked to female sexual continence.<sup>60</sup>

Images of female incontinence, inconstancy, excessive consumption and desire were prevalent throughout eighteenth-century English texts. These images of women appeared in the novels, newspapers and magazines that were published in greater numbers, and that circulated more widely, over the course of the century.<sup>61</sup> The notorious image of “Lady Credit,” broadcast by the moralizing tales of the *Spectator*, and by Daniel Defoe’s economic essays, encapsulated early eighteenth-century ideas about the alluring and volatile nature of modern finance.<sup>62</sup> Sentimental novels like Richardson’s *Pamela*, so popular in the second half of the century, dramatized the threat that debt posed to female chastity. The seriousness of this threat was reinforced by the trial narratives about seduction, breach of promise and debt payments that appeared in English newspapers. Newspapers were especially important sources for information about law since they not only included sensational crime stories, but also “contained a surprising amount of information about court proceedings,” James Oldham explains, including “non-notorious” trials about debt payments or the delivery of goods.<sup>63</sup> Male and female authors amplified fears about the changes wrought by an expanding market-oriented culture by tying them to fundamental suspicions about female

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59. M. FINN, « Women, Consumption, and Coverture in England c. 1760-1860 », *op. cit.*, p. 704.

60. D. DEFOE, *The Fortunate Mistress: Or, A History of the Life and Vast Variety of Fortunes of.. Roxana*, London, 1724; L.J. ROSENTHAL, *Infamous Commerce: Prostitution in Eighteenth-Century British Literature and Culture*, Ithaca, Cornell University Press, 2006.

61. J. RAVEN, « The Book as a Commodity », in M.F. Suarez SJ and M.L. TURNER (eds), *The Cambridge History of the Book in Britain*, vol. 5, 1695-1830, Cambridge, Cambridge University Press, 2004, p. 83-117.

62. *Spectator* No. 3, Saturday March 3, 1711, in E. MACKIE (ed.), *The Commerce of Everyday Life: Selections from the Tatler and the Spectator*, *op. cit.*, p. 188-191; L. BROWN, *Fables of Modernity: Literature and Culture in the English Eighteenth Century*, Ithaca, Cornell University Press, 2001, p. 103-131; M. DE GOEDE, « Mastering “Lady Credit” », *International Feminist Journal of Politics*, vol. 2, n° 1, 2000, p. 62-66.

63. J. OLDHAM, « Law Reporting in the London Newspapers, 1756-1786 », *American Journal of Legal History*, vol. 31, n° 3, July 1987, p. 177, p. 190-191; D. LEMMINGS, « Henry Fielding and English Crime and Justice Reportage, 1748-52: Narratives of Panic, Authority, and Emotion », *Huntington Library Quarterly*, vol. 80, n° 1, Spring 2017, p. 71-97; S.S. HEINZELMAN, *Riding the Black Ram: Law, Literature and Gender*, Palo Alto, Stanford University Press, 2014, p. 72-91.

sexuality. But some eighteenth-century authors also pointed out the ways in which women soberly deployed credit, negotiated obligation, and pursued new economic opportunities. Writers like Eliza Haywood, Catherine Ingrassia argues, “explored in specific terms a woman’s ability to negotiate sexual and financial economies.”<sup>64</sup> If men’s gallantry was a popular plot device for eighteenth-century novelists, essayists and dramatists, so too was women’s agency: women’s knowledge of financial practices, and clever use of law in adversarial environments, were often presented as the keys to economic prosperity and social order.<sup>65</sup> Finally, although female authors like Eliza Haywood or Mary Wollstonecraft were subject to misogynist attacks on their chastity and credibility, the prominence of such women – and the sheer numbers of female authors among the novelists, journalists and critics of this period – surely furthered readers’ appreciation for female agency. These women’s words clearly had monetary as well as epistemic value.

All of these factors help to explain why limits to crediting women endured in eighteenth-century England. These elements of the history of philosophy, economic change, commercial law, and print culture are essential to understanding these limits and, more generally, to recognizing the artificial construction of legal rationality. A fundamental contradiction in jurists’ understanding of women’s humanity influenced the development of legal process and legal doctrine. In case reports and legal treatises, including important works on evidence law, we find that familiar ambivalence about female agency and dependence. This history of the ways in which women have been recognized but doubted, viewed as rational but suspect, can illuminate the broader evolution of the modern law of evidence.



## Abstract

This essay examines the value attached to women’s testimony in eighteenth-century English property disputes during a period in which women’s control over different kinds of property, and access to commercial opportunities, was expanding. Women were participants in eighteenth-century credit markets and

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64. C. INGRASSIA, *Authorship, Commerce and Gender in Early Eighteenth-Century England: A Culture of Paper Credit*, Cambridge, Cambridge University Press, 1998, p. 12.

65. J. RUDOLPH, « Property and Possession », *op. cit.*, p. 123-124; M.C. FINN, *The Character of Credit: Personal Debt in English Culture, 1740-1914*, Cambridge, Cambridge University Press, 2003, p. 25-34, 46-49.

their words had not only epistemic but also monetary value. But how *much* was a woman's testimony worth? And what factors influenced the determination of her credibility and competency? The essay explores key changes in English evidence law and British commercial law, as well as developments in eighteenth-century print culture, in order to explain how and why women's testimony was simultaneously relied upon and discounted, or ignored. This history sheds new light on the construction of legal rationality, and demonstrates the significance of gender in the formation of a modern law of evidence.