Articles

Criminal Law, Female Virtue, and the Rise of Liberalism

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INTRODUCTION

The contemporary Law and Literature movement has revolved around a central question, the question of interpretation, offered not only as its analytic focus but also as its conjectural problematic: as a well-defined point of convergence between the two disciplines.[1] In this essay I want

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1. For accounts of the law and literature movement, see Robert Weisberg, "The Law-Literature Enterprise," *Yale Journal of Law & the Humanities* 1 (1988): 1-67; Brook Thomas, "Reflections on the Law and Literature Revival," *Critical Inquiry* 17 (1991): 510-39. On the liberties and hazards of interpretation, see Owen Fiss, "Objectivity and Interpretation," *Stanford Law Review* 34 (1982): 739-63. For arguments that emphasize the analogy between law and literature, see Ronald Dworkin, "Law as Interpretation," *Critical Inquiry* 9 (1982), reprinted in *The Politics of Interpretation*, ed. W. J. T. Mitchell (Chicago: Univ. of Chicago Press, 1983), 249-70; James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison, Wis.: Univ. of Wisconsin Press, 1985); Sanford Levinson, "Law and Literature," in *Interpreting Law and Literature*, ed. Sanford Levinson and Steven Mailloux (Evanston: Northwestern Univ. Press, 1988), 155-74. For arguments against a simple conflation of law and literature, see Gerald Bruns, "Law as Hermeneutics: A Response to Ronald Dworkin," in *The Politics of Interpretation*, 315-20; Walter Benn Michaels, "Against Formalism: Chickens and Rocks," in *Interpreting Law and Literature*, 215-28; Joseph Vining, "Generalization in Interpretive Theory," *Representations* 30 (1990): 1-12.

to explore a different point of convergence, somewhat less well-defined, marked not by the overlapping concerns of legal and literary hermeneutics but by the interlocking relations of legal and literary history. This focus—on the historical and historically shifting relations between law and literature—opens up a different set of questions: questions about the alignment of institutions within a cultural order, about the evolving boundaries between adjacent domains, and about the possibility of residual formations supplementary to emergent ones. Focusing more specifically on the nineteenth-century novel, on its language of gender—a language not only robustly punitive on the subject of female virtue, but also robustly figurative in its ability to shadow forth the broadly prescriptive within the narrowly punitive—I analyze this signifying latitude both as a residual supplement to the contracting boundaries of the criminal law and as an index to the more general problems of polity and morality in the transition from classical republicanism to modern liberalism.

I. Criminal Law and the Nineteenth-Century Novel: Jurisdictions and Semantics

In 1703, Adam Latham, a laborer, and Joan Mills, wife to another laborer, were brought before the county court in Kent County, Delaware, charged with fornication and adultery. For punishment, Joan Mills was publicly whipped, twenty-one lashes on her bare back, well applied, followed by one year in prison at hard labor. Adam Latham was sentenced to twenty lashes. This was not the first time the two had gotten into trouble. Adam, indeed, had been charged once before with the same crime, "the Sin of Incontinency and fornication," but he had been acquitted then; the court ordered him only to post bond guaranteeing good behavior. Now that he had broken his word, he had to endure not only physical punishment but also the public disgrace of "wear[ing] a Roman T on his left arme on the Outside of his uppermost garment . . . for the space of six months next."[2]

As a forerunner of Hester Prynne, and a male one to boot, Adam Latham has some claim to our attention, although we should also note that his ordeal was in no way out of the ordinary. Indeed, for all its colorful pathos, the trial of this unfortunate but apparently unpenitent couple was, in fact, relatively unremarkable, as trials of this type were one of the most familiar sights in the colonial courtroom. In the seventeenth and eighteenth centuries, offenses against morality (which meant sexual offenses, for the most part) were classified as *criminal* offenses; they came under the jurisdiction of penal statutes and were routinely

2. Court Records of Kent County, Delaware, 1680-1705, at 234-35, 270-71 (L. de Valinger ed. 1959), recounted in Lawrence Friedman, "Notes Toward a History of American Justice," *Buffalo Law Review* 24 (1974): 111.

prosecuted. In eighteenth-century Pennsylvania, the penalty for the third adultery conviction was twenty-one lashes, seven years in jail, and marking with an "A" on the forehead.[3] Even harsher measures prevailed elsewhere. The Massachusetts Code of 1648 made adultery a capital offense.[4] The Duke's Laws of 1665 in New York had a similar provision.[5] The death sentence was in fact rarely invoked—the harsh penalty being a matter of some dispute—but lesser punishments such as whipping, forfeiture, fines, and imprisonment were standard measures, because, according to the legal thinking of the seventeenth century, moral offenses carried a criminal liability, appropriately enforceable by courtroom action.[6] William Nelson, studying judicial government in colonial Massachusetts, reports that between 1760 and 1774, a total of 2,784 prosecutions came before the Superior and General Sessions Courts, and that among these, 1,074 were for sexual misconduct (the bulk of which were fornication). In other words, offenses against morality accounted for as much as 38 percent of all prosecutions and made up the single largest category of crime.[7] This astonishing fact had something to do, no doubt, with the proverbial zealotry of the Massachusetts Bay colony, but, as we can see in the trial and tribulation of Adam Latham and Joan Mills, even in Delaware (as well as in New York, Pennsylvania, Maryland, and Virginia), crimes against morality were arraigned in the courtroom no less than in the pulpit. At once reprehensible and indictable, they were subject not only to divine retribution, but also to criminal prosecution.[8]

The lack of separation here between morality and legality, or, as was more often the case, between immorality and criminality, points to a judicial universe recognizably different from our own. What has transpired in the three hundred and fifty years separating us from colonial America is nothing less than a transformation of the legal paradigm, a transformation reflected not merely in the content of the law, but, more

3. Lawrence H. Gipson, *Crime and Punishment in Provincial Pennsylvania* (Bethlehem, Pa.: Lehigh Univ. Press, 1935), 7.

4. *The Laws and Liberties of Massachusetts, 1641-1691*, ed. John D. Cushing, 3 vols. (Wilmington, Del: Scholarly Resources, 1976), 1: 12.

5. *The Colonial Laws of New York from the Year 1664 to the Revolution* (Albany: J.B. Lyon, State Printer, 1894), I: 21. Cited in David H. Flaherty, "Law and the Enforcement of Morals in Early America," *Perspectives in American History* 5 (1971): 213.

6. Flaherty, "Law and the Enforcement of Morals," 203-53.

7. William E. Nelson, *The Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (Cambridge, Mass.: Harvard Univ. Press, 1975), 37. For a discussion of Nelson (along with Morton Horwitz and John Phillip Reid) in the context of the new legal history, see Hendrik Hartog, "Distancing Oneself from the Eighteenth Century: A Commentary on Changing Pictures of American Legal History," in *Law in the American Revolution and the Revolution in the Law*, ed. Hendrik Hartog (New York: New York Univ. Press, 1981), 229-57.

8. For findings that support Flaherty's and Nelson's, see Michael S. Hindus, *Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina, 1767-1878* (Chapel Hill: Univ. of North Carolina Press, 1980), 48-51; George Dargo, *Law in the New Republic* (New York: Knopf, 1983), 25-27.

fundamentally still, in its range of enforceable meanings, in its designated sphere of operation, and in its infrastructural relation to other mechanisms of justice. In the field of criminal law, this transformation of the legal paradigm changes the way "crime" itself is defined. What counts as a crime, what suffices as punishment, who is charged with its administration, and how that specific penalty must accord with the general prohibition—these taxonomic and jurisdictional changes are the very ground upon which the criminal law might be said to have a history.

Writing about a comparable shift in taxonomy and jurisdiction in seventeenth-century English law, Christopher Hill has described the abolition of church courts as an "intellectual and moral revolution."[9] What ensued, according to Hill, was a growing sensitivity about the question of boundaries, a growing separation between legal and ecclesiastical discipline, and a growing distinction between sin and crime. Hill's focus here on the question of boundaries—on the shifting lines of demarcation between adjacent jurisdictions, and between overlapping categories of offense—is crucial in any historical theorizations about the law: theorizations about the shape it comes to take, the place it comes to occupy, and the neighboring forms with which it comes to be affiliated in an institutional landscape. Following his lead, we too might want to direct our focus, not on the legal domain as it is currently composed, but on the changing contours of its composition: on the fit (or the lack of fit) between categories of the law and categories of ethical judgment. Between the reprehensible and the prosecutable, between what is condemned as sin and what is punished as crime, there is a margin of discrepancy, historically variable and historically significant.[10] The history of such variations casts light not only on the law and its functions and limits at any particular moment, but also on the larger social structure of that particular moment, within which the law comes to acquire such functions and limits.

Indeed, what we witness in the colonial courtroom is precisely the absence (or at least the minimal presence) of such a margin of discrepancy. Sin and crime were more or less synonymous in colonial America, synonymous and coextensive. Because sin was readily translatable into and enforceable as crime, the problem of jurisdictional boundaries was neither very acute nor even very meaningful. Thus, when a Massachu-

9. Christopher Hill, *Society and Puritanism in Pre-Revolutionary England* (New York: Schocken Books, 1964), 343.

10. Douglas Hay has argued, for example, that a margin of discretion in eighteenth-century English law enabled the ruling classes to demonstrate magnanimity to and exact deference from the lower orders. See his "Property, Authority, and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon Books, 1975), 17-54. But see also John H. Langbein's critique of such a concept, in his "*Albion*'s Fatal Flaw," *Past and Present* 98 (1983): 96-120. For the uses of discretion in the late nineteenth and early twentieth centuries, see Lawrence Friedman, "History, Social Policy, and Criminal Justice," in *Social History and Social Policy*, ed. David Rothman and Stanton Wheeler (New York: Academic Press, 1981), 204-15.

setts law of 1665 referred to fornication as "a particular Crime, a shameful Sin, much increasing amongst us,"[11] the apposition of the two words—"Sin" and "Crime"—reveals no uneasiness, no sense of possible incompatibility, but rather the assurance of a clear connection, so clear that it seemed not a connection at all, but an identity.

By contrast, the modernity and liberalness of our own legal culture resides in the collapse of that assurance. The connection between sin and crime, so calmly assumed by the Massachusetts lawmakers of 1665, is now a subject that inspires anything but calmness. In the context of homosexual practices, for example, passions have flared up on just this point. "What is the connexion between crime and sin and to what extent, if at all, should the criminal law of England concern itself with the enforcement of morals and punish sin or immorality as such?" This was the question put forth by Lord Devlin, a distinguished writer on criminal law and a leading protagonist in the contemporary debate about law and morals.[12] The question was loaded, for its occasion was the controversial appearance of the 1957 Report by the Committee on Homosexual Offenses and Prostitution (commonly known as the Wolfenden Report), which, in no uncertain language, had denounced any attempt "to equate the sphere of crime with that of sin." "There must be a realm of morality and immorality," the Report said, a realm "which is, in brief and crude terms, not the law's business."[13] Lord Devlin disagreed. He strongly objected to the Report's separation of "crime and sin, the divine law from the secular, and the moral from the criminal." For him, "the criminal law [must] overlap the moral law," because the two "happen to cover the same area."[14]

Such a position has not gone unchallenged. Indeed, Lord Devlin himself has subsequently emerged as an object of criticism in the hands of some formidable opponents, including H. L. A. Hart and Ronald Dworkin.[15] Behind these critics stands the venerable tradition of analytical jurisprudence—from Jeremy Bentham to John Stuart Mill and John Austin—a tradition whose central tenet (in the words of Austin) is that "[t]he tendency to confound law and morals is one of the most prolific

11. *The Colonial Laws of Massachusetts, reprinted from the edition of 1672*, ed. William H. Whitmore (Boston, 1887), 54-55. Quoted in Flaherty, "Law and the Enforcement of Morals," 209.

12. Patrick Lord Devlin, *The Enforcement of Morals* (London: Oxford Univ. Press, 1959), 2. Delivered as the Maccabaean Lecture in Jurisprudence at the British Academy, this was first published in 1959.

13. *The Wolfenden Report*. Quoted in Devlin, *Enforcement*, 3.

14. Devlin, *Enforcement*, 3, 5.

15. H. L. A. Hart, *Law, Liberty, and Morality* (Stanford: Stanford Univ. Press, 1963), 16-19, 28-70; for a less strong claim, see Ronald Dworkin, "Lord Devlin and the Enforcement of Morals," *Yale Law Journal* 75 (1966): 986-1005. The relation between law and morality is important not just for criminal law but also for constitutional law. See "Symposium: Law, Community, and Moral Reasoning," *California Law Review* 77 (1989): 475-594, for a discussion occasioned by *Bowers v. Hardwick*, 478 U.S. 186 (1986) (constitutional right of privacy not extended to homosexual practices).

sources of jargon, darkness and perplexity."[16] The determination not to succumb to such jargon, darkness, and perplexity was one of the impulses behind legal change in the nineteenth century, and, by and large, it was an impulse that prevailed. By the time Oliver Wendell Holmes set out, in his celebrated 1897 essay, "The Path of the Law," to "dispel a confusion between morality and law," he was speaking from a mainstream position. "The law is full of phraseology drawn from morals," Holmes said, and "continually invites us to pass from one domain to the other." He wished that "every word of moral significance could be banished from the law altogether," so that we might "rid ourselves of an unnecessary confusion." Conceding that there might be "some plausibility to the proposition that the law, if not a part of morality, is limited by it," he insisted, nonetheless, that "this limit of power is not coextensive with any system of morals."[17]

Indeed, in the course of the nineteenth century, the coextension of law and morality—and the coincidence of sin and crime—was effectively brought to an end. Criminal prosecutions for moral offenses declined sharply after the Revolution—to an average of 11 cases per year between 1786 and 1790, and to fewer than 5 cases per year in the four decades thereafter.[18] The moral domain was quietly slipping out from under the law's jurisdiction, now increasingly construed as a limited arena. It is a telling sign that, during this period, the law was frequently described as a bounded enclosure, as a "sphere," a "realm," an "area," or a "province," the last word figuring conspicuously in the title of John Austin's influential lectures, *The Province of Jurisprudence Determined*. The law was spatialized in the nineteenth century; it had a specific locale and a specific set of boundaries. Henceforth its sphere of operation was to be narrow, precise, and sharply delimited. Its enforceable meanings were to be "compressed to the smallest possible compass [its] language would bear."[19] Against this background—against this contraction in semantics as in applicability—it is not surprising that, in his celebrated essay, Oliver Wendell Holmes should choose the word "path" to characterize the legal domain, for narrowness and linearity were indeed the defining

16. John Austin, *The Province of Jurisprudence Determined, and The Uses of the Study of Jurisprudence*, ed. H. L. A. Hart (New York: Noonday Books, 1954), 371. For a twentieth-century elaboration of Bentham's and Austin's positions, see H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958): 593-629; for a response to Hart, see Lon Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart," *Harvard Law Review* 71 (1958): 630-72. For a Kantian (as opposed to utilitarian) argument for the separation of law and morals, see George P. Fletcher, "Law and Morality: A Kantian Perspective," *Columbia Law Review* 87 (1987): 533-58.

17. Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review* 10 (1897): 459, 464, 460.

18. Nelson, *Americanization of the Common Law*, 110.

19. Lawrence Friedman, *A History of American Law*, 2nd. ed. (New York: Simon & Schuster, 1985), 291.

attributes of "the law [taken] as a business with well understood limits, a body of dogma enclosed within definite lines."[20]

The contracting boundaries of the law gave rise to an interesting gray area, no longer covered by the rigor of penal statutes, but not without an alternative form of prohibition. If penal justice would henceforth limit itself to the specifically criminal, rather than to the generally immoral, how was the latter to be maintained as an intelligible category? What persuasive or corrective instruments must it summon forth? And, if sin no longer provided the legal basis for criminalization, what other functions might it continue to perform? In what context, and with what resonances, would such a concept continue to have meaning?

After all, we in the late twentieth century are all familiar with the boldly advertised "sinfulness" of rich desserts, a usage that points to a dramatic shift in reference—at once a spreading out and thinning out of meaning—which completely transforms a word whose semantic contents had once been narrow, literal, and unambiguous. This semantic transformation, I argue, had its roots in the nineteenth century, in the growing separation between judicial and nonjudicial categories, especially the growing separation between sin and crime. This, together with the relaxation of religious discipline, effectively dislodged sin from its customary moorings. No longer anchored to a formal system of punishment, sin became, instead, a floating signifier. It became the bearer of an extralegal set of meanings and lent its weight to an extralegal structure of prohibition.

This extralegal area—newly removed from the purview of the law, but residually connected to it, and perhaps continually supplementary to it—ought to be of special interest to literary critics; for it is in this gray area, this unofficial realm of prohibition, partly overdetermined but partly indeterminate, that we might be able to observe some of the most important functions of the novel. Here I have in mind the recent hypothesis, advanced by D. A. Miller, John Bender, and Richard Brodhead, among others, about the possibility, amenability, and efficacy of the novel as an instrument of social discipline.[21] I want to test this hypothesis by focusing on a set of (admittedly speculative) genetic conditions for the novel, conditions having to do with the redrawing of boundaries and the transfer of jurisdiction from law to literature. To summarize my argument briefly, what concerns me here is something like a division of signifying labor: on the one hand, the impulse toward precision in the criminal law gave it an ever-diminishing range of reference; on the other hand, the

20. Holmes, "The Path of the Law," 459.

21. D. A. Miller, "The Novel and the Police," *Glyph* 8 (1981): 127-47; also *The Novel and the Police* (Berkeley: Univ. of California Press, 1987); John Bender, *Imagining the Penitentiary* (Chicago: Univ. of Chicago Press, 1987); Richard Brodhead, "Sparing the Rod: Discipline and Fiction in Antebellum America," *Representations* 21 (1988): 67-96.

impulse toward amplitude in the novel gave it a continuing (or perhaps even expanding) capacity for symbolization. Unlike criminal justice, whose operative terms were to become specific and explicit, without nuance or ambiguity, the novel's poetic justice remained allusive. And, unlike the canon of strict construction in criminal law, which limits the "punishable" to its narrowest possible meaning, poetic justice in the novel—a canon of the broadest construction—works in almost exactly the opposite way, incorporating under the category of the "punishable" deeds that would not be so considered by any jurists and devising for their penance an entire repertoire of afflictions.

The relation between law and literature that I am suggesting here, then, is tangential (and perhaps even antithetical) to the ones more customarily proposed, including those offered by the early commentators on the novel. When Hazlitt said of Richardson that "he sets about describing every object and transaction, as if the whole had been given in on evidence by an eye-witness," and when Charles Lamb said that reading Defoe "is like reading evidence in a court of Justice,"[22] what they had in mind was the palpable affinity between two descriptive surfaces: between the minute details of legal evidence and the minute details of novelistic portraiture. What concerns me, however, is not so much the affinity between the two surfaces as a discrepancy between what is inscribed or intimated in each. It is this discrepancy—between their figurative width or density, between the self-imposed singularity of reference in criminal law and the self-flaunting multiplicity of reference in the novel—that makes law and literature two different enterprises, two different signifying environments, generating different meanings for what counts as a crime and what is deemed an appropriate punishment.

To put this another way, by the early nineteenth century, criminal law had become (or was trying to become) a nonsymbolic field, its action restricted to "the unvarnished meaning of its words," so that "only those acts ought to be crimes which were plainly so labeled."[23] The desymbolization of the law—and the new, invisible forms of discipline that it occasioned—is of course the subject of Michel Foucault's *Discipline and Punish*,[24] a work that has inspired literary critics to see narrative fiction as one such form of discipline, a form roughly homologous to that of the school, the prison, and the police. This approach—one that emphasizes the converging functions of the social and the literary—is certainly one plausible account of the novel's cultural work; and yet,

22. William Hazlitt, *Lectures on the English Comic Writers* (1819; rpt. New York: Wiley and Putnam, 1845), 138; Charles Lamb, letter to Walter Wilson, Dec. 16, 1822, in the latter's *Memoirs of the Life and Times of Daniel Defoe*, 3 vols. (London: Hurst, Chance, 1830), III: 428. Both are quoted in Ian Watt, *The Rise of the Novel* (Berkeley: Univ. of California Press, 1957), 34.

23. Friedman, *A History of American Law*, 291.

24. Michel Foucault, *Discipline and Punish*, trans. Alan Sheridan (New York: Vintage Books, 1979).

there is no necessary reason why such cultural work should inhere in a relation of homology. It is equally possible to argue the opposite, I think, locating the novel's function not in the extent to which it replicates social forms, but in the extent to which it complements, and hence diverges from, those forms. What is especially worth investigating, from this perspective, is the possibility of an alternative form of justice in the novel: one that maintains a different referential relation between a specific offense and its range of culpable associations, and between a specific penalty and its range of vicarious prohibitions.

In short, what I want to emphasize here is a functional discrepancy between the jurisdiction of law and the jurisdiction of literature, a functional noncoincidence of boundaries. Because "crime" retains a semantic fluidity in the novel, what prevails here is definitely not the path of the law, but something more like a "field": a field of punitive conventions, accommodating and interconnecting a range of signifying registers. Like an echo chamber, these conventions set into motion a far more complex series of resonances than do their counterparts in criminal law. They body forth an entire spectrum of prescriptions and proscriptions, some having to do with the law and others not. They speak to anxieties explicit and implicit. And, as they pass judgment on the culpable, they also symbolically reconstitute a normative ground, inferable from the culpable but not simply the obverse of it, since the normative ground is wider than any specific act it deems blameworthy.

Given this expansive normative horizon, the justice that the novel dispenses is "justice" most liberally constructed; justice not only in the narrow sense of retributive justice, an order affecting one particular person, but also in the broadest sense, what political philosophers call "distributive justice," an order affecting many diverse persons. Distributive justice is in fact the operative grounds of an entire polity, regulating its general apportionment of burdens and benefits.[25] Indeed, as I will try to argue, the novel's signifying latitude is most crucial in the symbolic exchange it facilitates between these two senses of justice: between an ethics of distribution and an ethics of retribution, between a general problem of commensurability in collective life and a specific problem of commensurability in personal conduct.

II. Gendered Justice

The penal field in the novel is a symbolic field in which a range of discourses are substituted for and sometimes superimposed one another. Multiplicity (rather than linearity) marks the novel's referential network, and, within this circulatory medium, it is difficult (and unwise) to impute

25. For the centrality of distribution to a concept of justice, see John Rawls, *A Theory of Justice* (Cambridge: Harvard Univ. Press, 1971), 4-11.

a *telos* to the signifying process. Still, it is not hard to see that gender is one of the busiest routes of reference in the novel. The language of gender, Nancy Armstrong has argued, might be the novel's supreme invention, at once its signatory voice and its regulatory instrument.[26] This is especially true in the field of punitive conventions, where we find a language not only explicitly sexualized, but sexualized in such a way as to dramatize the bounds of propriety as well as its overt or covert infractions. The language of gender conveys not just the usual symbolic freight, but symbolic freight of a particularly incriminating nature. In fact, we need only look at the harsh fate visited upon the heroines of the nineteenth-century novel, from Hester Prynne to Hetty Sorrel, to be impressed not only by the centrality of crime and punishment, but also by the extent to which this phenomenon is sexually predicated, the extent to which poetic justice is gendered justice.

Within this tradition, James Fenimore Cooper's *The Deerslayer* must stand as an exceptionally salient example, closing resoundingly with the word "crimes."[27] The fate of the criminal, Judith Hutter, is no less resounding: she is emphatically punished by being denied Natty Bumppo, the one man she wants. As Cooper's many authorial comments suggest, that punishment is not at all an afterthought, a mechanical contrivance, or a random occurrence, but the central burden of the novel. In the Preface, he characterizes his heroine as one "filled with the pride of beauty, erring, and fallen." His hero, Natty Bumppo, on the other hand, is known "principally for his sincerity, his modesty, and his unerring truth and probity." Between the "erring" woman and the "unerring" man, one manifestly "fallen" and the other manifestly not, the outcome seems predictable enough: "beauty, delirious passion, and sin" will all come to naught, and the retribution visited upon them, the author assures us, will "be sufficiently distinct to convey its moral."[28]

The unabashed presence of the word "sin" (and its conspicuous placement in the Preface) gives more than a hint of the novel's punitive flavor. We get another hint at the end of the book, in the penultimate paragraph, when Cooper proceeds to sum up what he calls the "history of crime"—by which he apparently means the miscellaneous misdeeds of the Hutters:

> Time and circumstances have drawn an impenetrable mystery around all else connected with the Hutters. They lived, erred, died,

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26. Nancy Armstrong, *Desire and Domestic Fiction: A Political History of the Novel* (New York: Oxford Univ. Press, 1987).

27. The last sentence of *The Deerslayer* reads as follows: "We live in a world of transgressions and selfishness, and no pictures that represent us otherwise can be true, though, happily for human nature, gleamings of that pure spirit in whose likeness man has been fashioned are to be seen, relieving its deformities and mitigating if not excusing its crimes." James Fenimore Cooper, *The Deerslayer* (1841; reprint, New York: Signet Books, 1963), 534.

28. Ibid., v.

> and are forgotten . . . . The history of crime is ever revolting, and it is fortunate that few love to dwell on its incidents. The sins of the family have long since been arraigned at the judgment seat of God, or are registered for the terrible settlement of the last great day.[29]

With a semantic latitude strikingly reminiscent of colonial usage, Cooper puts on trial not only "crimes" but also "sins," as if the two were synonymous (and throwing in, for good measure, the word "err," clearly a favorite of his, and apparently to be equated with "sin" and "crime"). The imprecision here is telling, and tellingly evocative of a judicial universe in which the boundaries between the moral and the legal, between "sin" and "crime," remain as yet undefined, as yet unproblematic. Crime is a hospitable category here. Within its precincts we find not a single individual (as Cooper's account of his heroine might have led us to believe), but the Hutters as a unit, the whole family evidently guilty of some misdeed. Not just Thomas Hutter, a former pirate, but also his wife, a fallen woman like her daughter Judith, and not just Judith herself, but also her half-witted sister, Hetty—these four figures, otherwise quite distinct, are nonetheless united in their joint culpability, in what Cooper generically calls "the sins of the family."

In what sense might the Hutters be understood as a collectivity, as a family of sinners? Since it is their kinship that the novel emphasizes, we might do well to ponder their crimes in generic terms. To be sure, Thomas Hutter was once a pirate and his sins might have been crimes even in a legal sense; and Judith, a fallen woman, has of course sinned in the most time-honored fashion. Still, beyond these discrete categories of offense, something more encompassing, and perhaps more deep-seated, remains. Indeed, given the Hutters' kinship in crime (not to say kinship in punishment), we should perhaps be alert to a curious coincidence here between the kind of "sins" the Hutters are said to have committed and the kind of family they represent: a coincidence between their profile as sinners and their profile as a familial unit.

What kind of family are the Hutters? Once we put the question that way, it becomes immediately clear that something is wrong, not just with the Hutter family but with the Hutters *as a family*. This family turns out not to be a family after all, as Thomas Hutter is revealed to be quite unrelated to his putative daughters. Judith, one of those daughters, is overjoyed at this turn of events. "I scarce know by what name to call myself now!" she exclaims with some delight. "I am Judith, and Judith only, until the law gives me a right to another name. Never will I use that of Thomas Hutter again." Judith's name and, by extension, her family, are now matters of her own choosing. As she explains to Hetty: "*You* and you only are my sister . . . and Mother was my mother—of

29. Ibid., 533.

that, too, am I glad and proud, for she was a mother to be proud of—but Father was not father!"[30]

For Judith, the unfathering of Thomas Hutter brings only elation. Hetty, on the other hand, is quite distressed. If fathers can stop being fathers—if one familial identity can dissolve so completely into thin air—what is there to prevent other identities from following suit? What is there to prevent sisters, for example, from turning into total strangers?

> "How do I know, Judith, that you wouldn't be as glad to find that I am not your sister as you are in finding that Thomas Hutter, as you call him, was not your father? I am only half-witted, and few people like to have half-witted relations; and then I'm not handsome—at least, not as handsome as you—and you may wish a handsomer sister."[31]

Hetty's worries here are local and personal, but they give voice as well to a general anxiety regarding the modern form of life, with its emphasis on elective identities and voluntary attachments. This modern form of life, based not on lineage but on inclination, not on blood but on "wishes," challenges the very foundations of the traditional order, its grounds for both classification and association. In the Hutter family that ceases to be a family, we see, dramatized in caricature, the historical shift from parental control to filial autonomy, from a classical world of hereditary edicts to a liberal society of individual preferences.[32] What Cooper collectively condemns in the Hutters—what he labels the "sins of the family"—might, then, also be understood as their sin against the family, that is, their sin against a traditional social order.

Sins of this sort do not go unpunished, and, in this case, the wages of sin suitably mirror the sins themselves. Having disowned one parent, however undesirable, and repudiated one identity, however inauthentic, Judith is now in danger of being left with no father at all, and no identity to speak of. Nor is she without forewarning. Her lack of filial regard has shocked even Hurry Harry, the most mindless of characters, into a kind of blind prophecy: "Not Thomas Hutter's darter! Don't disown the old fellow in his last moments, Judith, for *that's* a sin the Lord will never overlook. If you're not Thomas Hutter's darter, whose darter be you?"[33]

The question is ominously put. And lest we miss the point, Cooper hastens to tell us, even more ominously, that, "in getting rid of a parent whom she felt it was a relief to find she might own she had never loved,

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30. Ibid., 403, 361.

31. Ibid., 361.

32. See, for example, Lawrence Stone, *The Family, Sex, and Marriage in England, 1500-1800* (New York: Harper & Row, 1977); Jay Fliegelman, *Prodigals and Pilgrims: The American Revolution against Patriarchal Authority, 1750-1800* (New York: Cambridge Univ. Press, 1982); Jan Lewis, *The Pursuit of Happiness: Family and Values in Jefferson's Virginia* (New York: Cambridge Univ. Press, 1983), 187-203.

33. Cooper, *The Deerslayer*, 349.

[Judith] overlooked the important circumstance that no substitute was ready to supply his place." One might point out, of course, that it is not Judith's fault that she has not found a substitute for Thomas Hutter; she certainly tries hard enough. Her mother has made it impossible for her, having made sure that "[a]ll the dates, signatures, and addresses had been cut from the letters. . . . Thus Judith found all her hopes of ascertaining who her parents were defeated."[34]

But the mother has "defeated" the daughter in a less tangible way as well. Judith's problem, after all, is not so much that she has failed to *find* a father as that she has never had one she can *claim*. Her problem is not unverifiable genealogy, but all too verifiable bastardy. Still, this handicap notwithstanding, it is conceivable that Judith could have found a substitute for Hutter, not by discovering a true father, but by acquiring a true husband, who, in giving her his name, would have bestowed upon her that which her own father had neglected to bestow. But, as we know, this "substitute" too is not Judith's to have. In the last paragraph of the book, we are treated to a curious bit of rumor about Sir Robert Warley, Judith's old paramour, that he now "lived on his paternal estates and that there was a lady of rare beauty in the lodge who had great influence over him, though she did not bear his name."[35]

Judith's crime is the crime of anonymity. She is the leading offender, but she is not alone. Indeed, her crime is such that we can safely assume a host of accomplices and a host of precursors. The illegitimate daughter of one man, Judith will in time become the illegitimate consort of another. She is the daughter of a sinning mother, and she will grow up to sin in exactly the same fashion. Sin here is generic and periodic, a family romance, a phenomenon hereditary and repeating. Such a criminal sequence rests on a kind of generational fungibility, equating father and husband, givers of names who withhold what they have to give, and mother and daughter, bearers of names who fail to receive what they are socially obliged to bear. It is surely appropriate (if not downright heavy-handed) that Judith should be named after her mother: she is a *second* Judith, a reincarnation of the first.

Judith's sin, then, is neither local nor unique. It is exemplary and synecdochic, it beckons backward and outward, compounding and compressing into its orbit the sins of others. Nor is the transgression here purely sexual, however convenient a label that might afford. Indeed, just as Judith stands in for a family of sinners, so her misdeed encompasses a spectrum of the reprehensible. No longer a maiden but not yet a wife, she has forfeited not just a proper sexual identity, but any identity at all. As the novel administers to her a suitable dose of punishment, it also

34. Ibid., 349-50, 400.
35. Ibid., 534.

chastises, through her example, a cluster of offenses having generally to do with the problem of identity: not just the misadventures of the sexual persona but also the vicissitudes of the social persona, not just deviation from sexual purity but also ambition in social mobility.

III. Symbolic Punishment: Figurations of Gender and Class

Judith's sexual failing is thus a metaphor, a pivotal juncture, where punishment is meted out both literally and figuratively, both to a specific crime plainly so labelled and to an unspecified range of guilty cognates. We might think of it as a point of symbolic inscription, and it is useful to remind ourselves of its substitutive and supplementary relation to other signifying categories. Eve Sedgwick has observed that "[t]he subject of sex [is] an especially charged leverage-point, or point for the exchange of meanings, between gender and class."[36] Eva Kittay, writing more generally about metaphor as a cognitive principle, has argued that the exchange of meaning that it brings about is not just between two discrete terms, but between two semantic fields, two domains of meanings, the structural relations of one transposed upon the other.[37] This "field theory" of metaphor usefully sums up the punitive workings of the novel, for in the novel it is the exchange of meaning across fields—the symbolic transfer of cause and culpability—that constitutes not only the character of the "criminal" but the very ground for punishment.

It might seem odd to speak of the punitive as a metaphoric field, yet Emile Durkheim, linking penal law to a residual religiosity, has alerted us to just this "metaphorical" dimension (although, as he also says, "the metaphor is not without truth").[38] Durkheim argues that a crime is always "an offense against an authority in some way transcendent" and, in avenging a wrong, in demanding that "the culpable ought to suffer because he has done evil and in the same degree," we are propelled by "an echo in us of a force which is foreign to us, and which is superior to that which we are."[39] As the enforcement of an "echo," punishment is symbolic and projective; it bespeaks a metaphoric frame of mind.[40] This is certainly true of the "retributionists," who justify punishment on the ground of expiation; and, with slight modification, it is true even of the

36. Eve Kosofsky Sedgwick, *Between Men: English Literature and Male Homosocial Desire* (New York: Columbia Univ. Press, 1985), 11.

37. Eva Feder Kittay, *Metaphor: Its Cognitive Force and Linguistic Structure* (New York: Cambridge Univ. Press, 1987).

38. Emile Durkheim, *The Division of Labor in Society*, trans. George Simpson (New York: Free Press, 1964), 101.

39. Ibid., 85, 88, 100.

40. For more recent discussions of the punitive and the symbolic, see Joel Feinberg, "The Expressive Function of Punishment," *The Monist* 49 (1965): 397-408; Joseph Gusfield, "Moral Passage: The Symbolic Process in Public Designation of Deviance," *Social Problems* 15 (1968): 175-88. For an interesting argument in favor of "blaming" as a mode of communal signification, see James Boyd White, "Criminal Law as a System of Meaning," in *Heracles' Bow*, 192-214.

secular-minded utilitarians, who justify punishment on the ground of deterrence.[41] As "deterrence," punishment is understood not as an end in itself, not as an infliction of pain for the sake of inflicting pain, but as a means to an end, an infliction of pain to make all further inflictions unnecessary. As Bentham puts it, the "first object" of punishment is "to prevent, in as far as it is possible, and worth while, all sorts of offences whatsoever; in other words, so to manage, that no offence whatsoever may be committed."[42] On this view, punishment is not so much an act of reprobation as an act of preemption: it addresses not the accomplished deed but contemplated misdeeds, not the actual criminal but potential offenders. Bentham thus insists on the "exemplarity" of punishment, for "[e]xample is the most important end of all, in proportion as the *number* of the persons under temptation to offend is to *one*." And, as he further argues, "there is not any means by which a given quantity of punishment can be rendered more exemplary, than by choosing it of such a sort as shall bear an *analogy* to the offence."[43] Translating this into the terms of our discussion, we might say that for advocates of deterrence, the criminal is punished primarily as a sign—a personified analogy between deed and consequence—and that this sign is posted for the benefit of others, held up to serve them due warnings.

As Bentham is the first to recognize, however, exemplary punishment can lead to excesses, to a profligacy in signification. It is not surprising that, immediately after his discussion of exemplarity, Bentham should include a section on "frugality" (on the importance of not "produc[ing] any such superfluous and needless pain"), followed by another section in which he gingerly considers "exemplarity and frugality, in what they differ and agree."[44] Indeed, for all its talk about the salience of example, *The Principles of Morals and Legislation* is deeply committed to frugality as the law's operative principle. Bentham begins his discussion of penology with a chapter on "Cases Unmeet for Punishment," and concludes with a chapter on "The Limits of the Penal Branch of Jurisprudence"—thus anticipating, by more than a century, Oliver Wendell Holmes's recommendations in "The Path of the Law."[45] In the course of that intervening century, as criminal law became more and more frugal in its semantics, the luxury of signification became defined more and more as a

41. For general discussions of the traditional rationales for punishment, see Jerome Hall, *General Principles of Criminal Law*, 2nd. ed. (Indianapolis: Bobbs-Merrill, 1960), 296-324; H. L. A. Hart, "Prolegomenon to the Principles of Punishment," in his *Punishment and Responsibility* (New York: Oxford Univ. Press, 1968), 1-27.

42. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789; reprint, Oxford: Oxford Univ. Press, 1907), 178.

43. Ibid., 171, 194. Italics in original text.

44. Ibid., 194-95.

45. For the relation between Holmes and Bentham, see H. L. Pohlman, *Justice Oliver Wendell Holmes and Utilitarian Jurisprudence* (Cambridge: Harvard Univ. Press, 1984).

feature of the novel, as its generic privilege or attribute.[46] Yet such a transfer of jurisdiction is not absolute. Against the novel's symbolic latitude, so manifestly in evidence, we should remind ourselves of a residual latitude in the criminal law, a residual capacity for textualization, which suggests that, even within its austere precincts, a "crime" is never strictly a given, never wholly external or prior to the verdict by which it is judged, but rather a textual effect, formed in the very process of judgment.

This is not simply a fanciful way of putting things. Some material consequences result from seeing crime as a textual phenomenon, shaped by the processes through which it is apprehended and represented. Indeed, if the debate among legal scholars is any indication, the very authority of criminal law—its claim to neutrality and rationality—rests on whether "crime" is to be understood as a substantive or interpretive category, as an autonomous given or a procedural effect. Mark Kelman has argued, for example, that legal reasoning in criminal law is both propelled and constrained by its "interpretive constructs." By adopting a variably broad or narrow time frame with regard to causal antecedents, and a variably broad or narrow compass with regard to intent, these "interpretive constructs" in fact prejudge the issue, since the verdict arrived at is a foregone conclusion given the choice of certain criminal law categories.[47] Kelman does not use the word "narrative," but he implies that the criminal law can assign blame only by constructing a narrative about its putative object, an interpretive construct whose temporal and spatial boundaries determine not just the gravity of the offense but its very content and character. Given the controlling power of such interpretive constructs, the attribution of fault would appear to be procedurally weighted, procedurally overdetermined, and the entire system of criminal justice might begin to look like something that is itself criminally unjust.[48]

I mention Kelman at some length, partly to indicate the high stakes

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46. In his classic study, *The American Novel and its Tradition* (Garden City, N.Y.: Doubleday Anchor Books, 1957), Richard Chase has identified the luxury of signification as the unique feature of the American novel, for which he reserves the distinguishing label, "romance." Here I use "novel" as the more encompassing category.

47. Mark Kelman, "Interpretive Construction in the Substantive Criminal Law," *Stanford Law Review* 33 (1981): 591-673. Kelman's essay is part of a larger effort, associated with Critical Legal Studies, to deconstruct the putative neutrality of legal reasoning. His argument has implications outside the criminal law as well. See, for example, the responses to him in the "Symposium on Causation in the Law of Torts," *Chicago-Kent Law Review* 63 (1987): 397-680.

48. Stanley Fish, for example, has objected to Kelman on the grounds that "what Kelman is really complaining about is that there is a criminal law at all." But that seems to me to be precisely Kelman's point. See Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham, N.C.: Duke Univ. Press, 1989), 392-98. For a more sustained, if implicit, response to Kelman, see Michael S. Moore, "The Moral and Metaphysical Sources of the Criminal Law," in *Criminal Justice. Nomos XXVII. Yearbook of the American Society for Political and Legal Philosophy*, eds. J. Roland Pennock and John W. Chapman (New York: New York Univ. Press, 1985), 11-51.

involved in speaking of crime as a textual phenomenon, but partly also to distinguish my approach from his. Kelman is primarily concerned with the ground of adjudication (or the lack thereof); by focusing on the "interpretive constructs" of criminal law, he calls into question the foundational neutrality of judicial decisions. My essay builds on his insight but reverses his direction of inquiry. Conceding at once that judgment is interpretive, that it is exercised through a process of textualization, I want to focus, all the same, not so much on its arbitrary *ground* as on its abundant *figures*. What concerns me is the range of symbolic inscriptions brought into play by a particular act of judgment, the wealth of referents encoded in a seemingly discrete offense. Such a focus might seem unduly aesthetic, in a context where perhaps ethics alone ought to matter. Still, by emphasizing the figurative in the assignment of blame—by studying the punitive, the proscriptive, and the prescriptive as a series of symbolic relations—I mean to suggest that, in law as in literature, the ethics of punishment might not be so readily distinguishable from its aesthetics.

This much said, we can return to Judith, that symbolic criminal, and to her symbolic crime, the crime of anonymity. If Judith is indeed a synecdoche, for what family of crimes does she stand? What patterns of prohibition are adumbrated by her specific instance of punishment, what cluster of social meanings are encoded, elaborated, rendered intelligible? As it happens, the "crime of anonymity" is not altogether unique to Judith. Indeed, E. P. Thompson has discussed an entire category of offenses under that label, and it is helpful here to recall the sense of his initial usage. By the "crime of anonymity," Thompson refers to a phenomenon common in eighteenth-century England, the writing and sending of anonymous letters, usually from the lowly to the exalted, letters variously salacious, rambunctious, or simply extortive. According to Thompson, such crimes were especially prevalent in a stratified society, a society of ascriptive estates which, "in myth if not in actuality, rested upon relations of paternalism and deference." In such a world, where social distinctions were both customary and compulsory, norms of conduct depended entirely on the denomination of identity. Proper names not only indicated who one was, they also indicated what was proper to one's social station. Crimes of anonymity were deeply unsettling (and were treated as a capital offense) for that very reason. As Thompson says, "anonymity was of the essence of any early form of industrial or social protest," because (or so it seemed to eighteenth-century Englishmen) to refuse denomination was to reject the norms of social estate.[49]

Judith is neither so political nor so purposeful in *her* crime of anonym-

49. E. P. Thompson, "The Crime of Anonymity," in *Albion's Fatal Tree*, 255-308. Quotations from 272.

ity. Yet even in her case, names are intimately bound up with social station and social entitlement. She is glad to be temporarily without a name—to be "Judith, and Judith only"—because Hutter's name seems so clearly beneath her. He is a "coarse and illiterate" man; his marriage to her mother was a "horror," the two being "an ill-assorted pair," she being in "every way so much his superior."[50] The name "Hutter" ill becomes the mother, and, by the same token, it ill becomes the daughter as well. Judith's problem, a lifelong one apparently, is to find a last name that would equitably consort with the first, a last name that would finally give her a denotative parity.

Judith is not altogether without choice in this matter. Indeed, at various points, the narrative teases us with the possibility of her finding a nomenclatural partner, even going so far as to couple her name with another name, holding up the compound as if to test for fit. The fit is not always ideal, however, as Judith is the first to notice. "No—no—Judith without a name would never consent to be called Judith March! Anything would be better than *that!*" she exclaims at one point. She can afford to be firm here, because a more suitable name seems to be awaiting her, and she is not too shy to tell the owner, "the name is a good one; either Hetty or myself would a thousand times rather be called Hetty Bumppo or Judith Bumppo than to be called Hetty or Judith Hutter."[51]

Natty is not so sure. He points out, reasonably enough, that the proposed names are "a moral impossible, unless one of you should so far demean herself as to marry me." And, so as not to be uncivil, he adds, "There's been handsome women, too, they tell me, among the Bumppos, afore now, and should you take up with the name, oncommon as you be, in this particular, them that knows the family won't be altogether surprised." In spite of such encouragement, however, the name "Judith Bumppo" is actually unthinkable, and for obvious reasons. Natty, however, offers a kinder and gentler excuse: "Judith, you come of people altogether above mine in the world, and onequal matches, like onequal friendships, can't often tarminate kindly."[52]

Judith and Natty would have been an "ill-assorted pair," not unlike Judith's mother and Hutter. Since she too is "in every way so much his superior," the name "Judith Bumppo" would have been doomed, like the name "Judith Hutter," by a nomenclatural incommensurability. Of course, Judith is not the one to raise any objections now, but the objections are raised for her and, we might add, against her. She is too good for the name Bumppo—this being not so much a compliment as a critique—and it is incumbent upon her to find a name that she is not "altogether above," but perfectly equal to.

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50. Cooper, *The Deerslayer*, 399.
51. Ibid., 409, 405.
52. Ibid., 405, 411.

Judith's search for a proper name is not just a search for legitimacy in marriage—a search conducted under the auspices of sexual propriety—but also a search for a proper place in the social hierarchy, a search conducted, surprisingly, under the auspices of marital equality. Equality is the ideal invoked here as the basis for conjugality. Nor is Cooper alone in this particular, for, as Jan Lewis points out, the ideal of a "symmetrical marriage"—a marriage of equal partners—was widely held in the late eighteenth and early nineteenth centuries. An integral part of republican thought, it was linked to weighty matters of state and pondered by men of substance.[53] John Witherspoon, President of Princeton and a frequent contributor to *Ladies Magazine* and *Pennsylvania Magazine* (edited by Tom Paine), counseled, for example, that "a parity of understanding and temper [is] as necessary towards forming a good marriage, as an equality of years, rank, and fortune."[54] Numerous other magazine articles agreed with him. It is not surprising, then, that in *The Deerslayer*, inequality is held up as the principal obstacle to a proposed marriage. In fact, on those grounds Natty is compelled to reject, not one, but two such unacceptable proposals: not just an "onequal match" with Judith, but another match, also unequal, with Sumac, widow of the recently killed Le Loup Cervier, who demands marriage even more stridently. But, as Hetty observes, "Sumac is old and you are young," and, as Natty himself observes, "she's red and I'm white." Such a flagrant violation of equality makes death "more nat'ral like, and welcome, than wedlock with this woman."[55]

Equality, invoked as a marital ideal, foregrounds race as one ground of incommensurability.[56] It also foregrounds class. The social rankings of the marriage partners are very much at issue here, for, paradoxically, it is only by settling the question of rank—only by fixing upon one particular class to which both partners belong—that the marriage can be judged equal. To give the paradox an even sharper edge, we might say that the ideal of marital equality proceeds from the fact of social hierarchy. It does not so much eliminate the concept of social station as accentuate it. Equality is a classifying principle here—it matches like with like—and, as such, it sets the protocol not only for gender relations, but also for social distinctions. It is in this context, in the convergence of gender and class under the norm of equality, that proper names come to occupy such an important place in the story. Designating not only what is proper to a sexual persona but also what is proper to a social station, proper names

53. Jan Lewis, "The Republican Wife: Virtue and Seduction in the Early Republic," *William and Mary Quarterly*, 3d ser., 44 (1987): 707-13.

54. John Witherspoon, "On Conjugal Affection," *Ladies Magazine* (Philadelphia), Sept. 1792, 176. Quoted in Lewis, "Republican Wife," 710 n. 79.

55. Cooper, *The Deerslayer*, 473.

56. For a discussion of marriage in the context of race, see Philip Fisher, *Hard Facts* (New York: Oxford Univ. Press, 1987), 22-86.

range across two semantic fields, conflating gender and class, binding both to a common purpose, mapping the lineaments of one onto the countenance of the other.

Thus proper names in *The Deerslayer* are the "leverage-points," where categories of gender and class exchange burdens of meaning and, in this case, exchange burdens of guilt. It is not Judith's fault, after all, that she cannot be Judith Hutter; her lack of a maiden name comes from her mother's transgressions against class. It is very much Judith's fault, however, that she cannot be Judith Bumppo; her lack of a married name comes from her own transgressions against gender. Judith would seem to be a criminal only in one category; as a symbolic criminal, however, she is guilty on both counts. Gender here serves as a negative alibi for class, doing for class what it cannot do for itself. Interestingly—and the point is worth emphasizing—Judith's crimes against gender and class are correlated here, not in exact symmetry, but in inverse ratio, making her "onequal" to Natty in two opposing senses. As a fallen woman, she is clearly not good enough for him; as the offspring of people "altogether above [him] in the world," she is clearly too good for him. Sexual propriety and social decorum are inversely symmetrical here, in such a way as to bring about a curious alignment between being "too good" and being "not good enough." Both are offenses against equality; together they carry the double weight of prohibition.

IV. The Problem of Equality

For Judith, the insistence on equality has definite punitive consequences, and this punitive usage is not only at work in the name Bumppo: Judith is deemed unequal to another name as well. Captain Warley, the owner of that name, suggests as much. She is "a lovely creature, this Judith Hutter," he confesses, but, as he hastens to add, "I do suppose there *are* women in the colonies that a captain of light infantry need not disdain, but they are not to be found up here on a mountain lake." The dalliance between Warley and Judith, Cooper tells us, has all the marks of an "association between superior and inferior." And so it is that, at the end of the book, there should be "a lady of rare beauty in [Warley's] lodge . . . though she did not bear his name."[57]

Indeed, "Judith Warley" is an unimaginable name in *The Deerslayer*. Unlike the other two names, "Judith March" and "Judith Bumppo," names tantalizingly held up for our appraisal, this one is not even allowed to materialize on the page. The boundaries of class are unquestionably prohibitive here—even more so, for Cooper, than the boundaries of sex. Judith's sexual failing is the most tangible, certainly the most admissible, cause of her anonymity. And yet, inscribed into this literal

57. Cooper, *The Deerslayer*, 511, 151, 534.

offense is a densely packed symbolic universe, a universe of normative boundaries that she has likewise transgressed, both in her less than nameable sexual identity and in her less than nameable social identity.

Judith, though, is by no means an uncouth or ill-favored person vainly aspiring to a social station that is manifestly beyond her. If she is indeed an "inferior," as we are told, that inferiority is not at all self-evident. Quite the contrary. Judith is polished, perhaps overly polished, both in appearance and in demeanor. "Her language [is] superior to that used by her male companions, her own father included," displaying no "mean intonation of voice, or a vulgar use of words." Indeed, "the officers of the nearest garrison [had] often flattered [her] with the belief that few ladies of the towns acquitted themselves better than herself in this important particular."[58]

Judith's refined speech is an enviable asset, and Cooper, for one, is not likely to overlook its social significance. In *The American Democrat*, he had suggested that "[a] just, clear and simple expression of our ideas is a necessary accomplishment for all who aspire to be classed with gentlemen and ladies."[59] By his own criterion, Judith would seem to merit being "classed with gentlemen and ladies." She is an inferior who unforgivably commands a superior manner of speech. In being such "marked exceptions to all the girls of their class," she and Hetty make themselves utterly unclassifiable.[60]

Judith's crime, to put it most generally, is a crime against classification itself.[61] She is either above someone or beneath someone, either superior or inferior, but never achieves the magical state of equality. It is tempting here to describe her in the vocabulary of Arnold van Gennep and Victor Turner: she is a "liminal" character, caught "betwixt and between all the recognized fixed points . . . of structural classification," someone who is "neither one thing nor another," "neither here nor there," "at once no longer classified and not yet classified."[62] The vocabulary of liminality *almost* describes Judith, but, in one crucial respect, it does not, and it is instructive to see why this is so. The liminal person, for van Gennep and Turner, is not so much a deviant as a truant, a figure caught in transit, as it were, between normative states, but whose progress is

58. Ibid., 134, 135.

59. James Fenimore Cooper, *The American Democrat: Or, Hints on the Social and Civic Relations of the United States of America* (1838; reprint, New York: Knopf, 1931), 110.

60. As Nina Baym says, "the crucial thing about both Hutter girls is their lack of social position." See her "The Women of Cooper's Leatherstocking Tales," *American Quarterly* 23 (1971): 705.

61. For an interesting discussion of class and classification, see Richard Terdiman, "Is There a Class in this Class?" in *The New Historicism*, ed. Aram Veeser (New York: Routledge, 1989), 225-30.

62. Victor Turner, "Betwixt and Between: The Liminal Period in *Rites de Passage*," first published in *The Proceedings of the American Ethnological Society* (1964), reprinted in *The Forest of Symbols* (Ithaca: Cornell Univ. Press, 1967), 96-97. Turner draws on Arnold van Gennep, *The Rites of Passage* (Chicago: Univ. of Chicago Press, 1960).

such as to ensure an eventual restitution of the boundaries momentarily ruptured. Judith's truancy has no such terminal limit, and no such teleological guarantee. She will always remain "betwixt and between," always "no longer classified and not yet classified."

Judith is not a liminal person. She cannot be, because there is no final resting place for her, no stable hierarchy into which she might be inducted, no encompassing "structure that defines status and establishes social distance."[63] To say this is also to say that there is a world of difference between the society Judith inhabits and the stable tribal society described by van Gennep and Turner. Indeed, that which van Gennep and Turner take to be a structural aberration is, in her world, the very structural norm. Pervading *The Deerslayer* is an intense anxiety over uncertain classification: the anxiety of constantly having to establish one's identity, to rank oneself above someone or beneath someone, to ascertain who is equal to whom. The verdict of superiority and inferiority afflicts not just Judith, but everyone else as well; and, since the verdict changes from moment to moment, and indeed from judge to judge, its sentencing power resides not so much in its conclusiveness as in its ceaseless fluctuation. The problem of equality is a problem for more than just Judith.

A casual conversation between Hutter and Hetty, for example, illustrates just how severe the problem of equality is, and how intimately it structures every person's sense of self as well as sense of others:

> "[Y]ou're by no means ugly, though not as comely as Jude."
>
> "Is Judith any happier for being so handsome?"
>
> "She may be, child, and she may not be. But talk of other matters, now, for you hardly understand these, poor Hetty. How do you like our new acquaintance, Deerslayer?"
>
> "He isn't handsome, Father. Hurry is far handsomer than Deerslayer."[64]

In the space of this brief exchange, two different sets of people have been brought forward to be compared, and two different sets of criteria have been invoked as the basis for comparison. "Not as comely," "happier," "far handsomer"—these invidious gradations make up the cognitive frames by which one sees oneself as well as everyone else. Hutter uses beauty, first of all, as the standard of measurement, which puts Judith considerably ahead of Hetty. Hetty, however, counters with a different standard—happiness—and, on *that* scale, Judith does not fare quite so well. Yet when Hetty herself proceeds to compare Hurry Harry and Natty, she abandons happiness as a criterion and returns to the pre-

63. Turner "Betwixt and Between," 110.
64. Cooper, *The Deerslayer*, 83.

vious standard, beauty, in order to pronounce Hurry the better of the two.

Social relations in *The Deerslayer* are governed by a ubiquitous calculus of tangible and intangible merits. The ubiquity of such a calculus makes ranking not easier but shakier. To return to the vexed question, for example, about the relative standing of Judith and Natty, how is one to decide? Natty, of course, has announced that Judith is "altogether above" him, but things are actually not so clear. Judith herself, for instance, far from supposing that she is above him, fancies herself quite his inferior. "But we are not altogether unequal, sister—Deerslayer and I?" she asks Hetty. "He is not altogether my superior?" Equality—between herself and Natty—is a burning question for Judith, and, working herself into a frenzy, she will go on to ask that question three more times in the course of the same conversation. "Why do you think me the equal of Deerslayer?" she asks Hetty again. And then again, "Tell me what raises me to an equality with Deerslayer." And finally, not satisfied with Hetty's answer, she asks yet again, "But I fear you flatter me, Hetty, when you think I can be justly called the equal of a man like Deerslayer. It is true, I have been better taught; in one sense more comely; and perhaps might look higher; but then his truth—his truth—makes a fearful difference between us."[65]

Judith is comically obsessed here, but, in a way, she is simply doing to herself (and to Natty) what everybody else has been doing throughout the book. She is defining herself through terms of comparison—"better taught," "more comely," "look higher." What is striking here, however, is the utter arbitrariness of the scale on which comparisons are made. On Judith's scale, for example, literacy and good looks carry some weight, but "truth" carries infinitely more, so much more that it tips the balance altogether. On Hetty's scale, however, a very different picture emerges. Hetty is flabbergasted, in fact, that Judith would even entertain the thought of not being equal to Natty. "To think of you asking me this, Judith!" she exclaims with great indignation:

> "Superior, Judith!" she repeated with pride. "In what *can* Deerslayer be *your* superior? Are you not Mother's child—and does he know how to read—and wasn't Mother before any woman in all this part of the world? I should think, so far from supposing himself *your* superior, he would hardly believe himself *mine*. You are handsome, and he is ugly—"
>
> "No, not ugly, Hetty," interrupted Judith. "Only plain. But his honest face has a look in it that is far better than beauty. In my eyes Deerslayer is handsomer than Hurry Harry."

65. Ibid., 302.

> "Judith Hutter, you frighten me! Hurry is the handsomest mortal in the world—even handsomer than you are yourself."[66]

Who is equal to whom? The question obsesses everyone, but Natty, Judith, and Hetty all have different answers. With breakneck speed, the terms for comparison shift and the partners for comparison multiply. It is not just Judith and Deerslayer who are being compared now, but also Hurry and Deerslayer, and then Judith and Hurry. One thing is clear, though, in this pandemonium: there will always be a riot of opinions here, strong opinions, conflicting opinions, and nothing more than opinions. Using the same taxonomic terms but arriving at sharply different conclusions, Judith and Hetty only bewilder one another. Both in their obsession with ranking and in their inability to agree about the ranking, they point to a larger cultural moment—something like a crisis of equality—in which personal identities, normative standards, and social distinctions are all endlessly negotiable, endlessly in flux. What is liminal here is not so much particular individuals as the entire social structure.[67]

V. Classical Republicanism and Modern Liberalism

The "liminality" of nineteenth-century America is a commonplace among historians.[68] Here I want to associate it, more specifically, with a moment of transition from the eighteenth to the nineteenth century, from the world of republican polity to the world of liberal individualism. Such a transition singled out and conferred upon the idea of equality a new and strongly individualistic aspect and, in detaching it from the fabric of republican thought, strained the concept almost to its breaking point. Gordon Wood has described this transition, in a celebrated phrase, as "the end of classical politics." "The eighteenth century had sought to understand politics," Wood writes, by appealing to "a graduated organic chain in the social hierarchy."[69] Eighteenth-century classical republicanism celebrated social differences, and celebrated them not as the distinguishing mark among individuals, but as the operative condition for a civic order; for, as J. G. A. Pocock points out, a healthy polity could come about only with organic gradations, only with a "naturally differen-

66. Ibid., 301. Emphasis in original text.

67. Turner himself has suggested that, in contrast to the localized and terminal liminality of tribal society, liminality in modern societies might be universal and permanent: "What appears to have happened is that with the increasing specialization of society and culture, with progressive complexity in the social division of labor, what was in tribal society principally a set of transitional qualities . . . has become itself an institutionalized state." See *The Ritual Process: Structure and Anti-Structure* (Ithaca: Cornell Univ. Press, 1969), 107.

68. Karen Halttunen uses the word "liminality" specifically and extensively. See her *Confidence Men and Painted Women: A Study of Middle-Class Culture of America, 1830-1870* (New Haven: Yale Univ. Press, 1982), 1-32. See also Jean-Christophe Agnew, *Worlds Apart: The Market and the Theater in Anglo-American Thought, 1550-1750* (New York: Cambridge Univ. Press, 1986), 195-203.

69. Gordon Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: Univ. of North Carolina Press, 1969), 606-07.

tiated people," "performing complementary roles and practicing complementary virtues."[70]

Classification was not a problem in classical politics because, rather than sowing the seeds of contention, it furnished the structural grounds for a civic order. In this world of organic distinctions, equality was, paradoxically, not a problem either. Indeed, as Pocock also points out, equality had an important place in classical republicanism, being conceived as "an equal subjection to the *res publica*." There was no contradiction between the idea of equality and an operating polity of formal differentiation, for, even "though by any standard but one the shares accorded each were commensurate but unequal, there was a criterion of equality (in ruling and being ruled) whereby each remained the other's equal."[71] To simplify Pocock's complicated argument (and bedeviling prose), we might say that, in classical republicanism, differentiation was understood as a participatory category rather than as a distributive category, as a function of the polity rather than as a function of individual benefit. So, far from being an affront to equality, differentiation was actually the precondition for it.

What Wood calls the "end of classical politics" registers the breakdown of this comfortable symbiosis. J. R. Pole sums this up with admirable cogency: "[t]he American Revolution introduced an egalitarian rhetoric to an unequal society."[72] The seamless relation between equality and differentiation, once taken for granted, now became the fault line along which the entire republican polity threatened to come apart. The egalitarian rhetoric which had united the "oppressed" colonies against the "tyranny" of their British rulers now turned back upon itself and, redirecting its scrutiny to the domestic front, it quickly discovered, within the new nation itself, the same drama of hierarchy and oppression. Civil society was now envisioned not as a harmonious order dedicated to a common good, but as a factious aggregate plagued by incipient tyrannies. To be "different" was now a dubious benefit, and James Madison, in his famous entry to *The Federalist*, gave the word a noticeably diabolical cast, linking it to conflicting "interests" on the one hand and to unavoidable "inequality" on the other. "From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results," Madison wrote. "A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity

70. J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton Univ. Press, 1975), 516.

71. Pocock, *Machiavellian Moment*, 469; J. G. A. Pocock, "Virtues, Rights, and Manners: A Model for Historians of Political Thought," *Political Theory* 9 (1981): 353-68; reprinted in his *Virtue, Commerce, and History* (New York: Cambridge Univ. Press, 1985), 42-43.

72. J. R. Pole, *The Pursuit of Equality in American History* (Berkeley: Univ. of California Press, 1978), 13.

in civilized nations, and divide them into different classes, actuated by different sentiments and views," in such a way that "the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts."[73] Alexander Hamilton, meanwhile, worried about the "differences that neighborhood occasions," and warned of "ruinous contentions" resulting from "impulses of rage, resentment, jealousy, avarice, and other irregular and violent propensities."[74]

Hamilton was writing in the aftermath of the 1786 Shays's Rebellion, which he identified by name.[75] That rebellion seemed to epitomize the natural tendency of democracies towards "ruinous contentions," for its participants, to the horror of all, were revealed not to be dyed-in-the-wool ruffians, but ordinary farmers in distress, led by none other than a former militia captain. The rebels were put down, but, again to the horror of all, they were able to recoup, in a matter of months, under a new tactic, namely, by "promot[ing] their views under the auspices of constitutional forms," as Madison bitterly observed.[76] Those constitutional forms proved so hospitable that they were soon in a position "to establish iniquity by Law."[77] The public dismay occasioned by the rebellion illustrated the extent to which a "naturally differentiated people" was now seen not as a pillar of the republic, but as a keg of dynamite beneath it.[78] It also illustrated the extent to which the idea of equality had been transformed from a classical to a liberal concept: from a participatory category to a distributive category, from a structural feature of the civic polity to a local feature of individual benefit, a feature which led inevitably to "different classes, actuated by different sentiments and views."

The exact nature of the political changes in the late eighteenth and early nineteenth centuries is of course a much disputed issue. Inspired by the work of Bernard Bailyn, J. G. A. Pocock, and Gordon Wood, historians have engaged in a long and heated debate over the relative centrality of classical republicanism and Lockean liberalism in the early republic.[79]

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73. James Madison, *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), no. 10.

74. Alexander Hamilton, *The Federalist Papers*, no. 6.

75. Ibid.

76. Madison to Jefferson, April 23, 1787. Quoted in Wood, *The Creation of the American Republic*, 413.

77. Theodore Sedgwick to Governor Bowdoin, April 8, 1787. Quoted in Wood, *The Creation of the American Republic*, 467.

78. Some historians take Shays's Rebellion to be the cause (or at least the pretext) of the 1787 Constitutional Convention in Philadelphia. For more qualified views, see Robert A. Feer, "Shays's Rebellion and the Constitution: A Study in Causation," *New England Quarterly* 42 (1969): 388-410; Gordon Wood, "Interests and Disinterestedness in the Making of the Constitution," in *Beyond Confederation: Origins of the Constitution and American National Identity*, ed. Richard Beeman et al. (Chapel Hill: Univ. of North Carolina Press, 1987), 69-109.

79. Aside from already-cited works by Wood and Pocock, see Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Harvard Univ. Press, 1967), and *The Origins of American Politics* (New York: Knopf, 1968). Bailyn, Wood, and Pocock all argue, implicitly or

Without being unduly partisan, it is possible to argue for a new orientation beginning in the 1780s, moving away from the "republican" view of the polity as differentiation for the common good towards a modern "liberal" view, with its emphasis on differentiation as an individuating principle, a principle of centrifugal desires. Liberalism, John Rawls writes, affirms a "plurality of distinct persons with separate systems of ends."[80] This plurality makes liberalism compelling and problematic in the twentieth century, as it was compelling and problematic in the nineteenth. "A naturally differentiated people" has a very different connotation in a liberal universe than it did in the republican. And so too does the concept of equality. As a distributive category—distributing unequal benefits through equal opportunity—the liberal idea of equality embodied at its very core a self-perpetuating discrepancy, thrown into ever sharper relief by a growing plurality of claims.[81] Far from being a presumptive corollary to differentiation, equality has become a logical casualty.

Modern liberalism was, to be sure, neither full-blown nor even fully articulated at the end of the eighteenth century. Yet, in 1794, the problem of equality—and the contradiction between equality and differentiation—had become so acute that Samuel Williams, historian of Vermont, was moved to offer the following attempt at reconciliation:

> [Americans] all feel that nature has made them equal in respect to their rights; or rather that nature has given to them a common and an equal right to liberty, to property, and to safety; to justice, government, laws, religion, and freedom. They all see that nature has made them very unequal in respect to their original powers, capacities, and talents. They become united in claiming and in preserving the equality, which nature has assigned to them; and in availing themselves of the benefits, which are designed, and may be derived from the inequality, which nature has also established.[82]

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explicitly, against the "liberal tradition" posited by Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace, Jovanovich, 1955). For summaries of the debate, see Robert Shalhope, "Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in Early American Historiography," *William and Mary Quarterly* 29 (1972): 49-80; Dorothy Ross, "The Liberal Tradition Revisited and the Republican Tradition Addressed," in *New Directions in American Intellectual History*, eds. John Higham and Paul K. Conkin (Baltimore: Johns Hopkins Univ. Press, 1979), 116-31; Isaac Kramnick, "Republican Revisionism Revisited," *American Historical Review* 87 (1982): 629-64; Lance Banning, "Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the American Republic," *William and Mary Quarterly* 43 (1986): 3-19; Joyce Appleby, "Republicanism in Old and New Contexts," *William and Mary Quarterly* 43 (1986): 20-34. Appleby and Kramnick, I should point out, continue to argue for the centrality of liberalism in American political thought. For a debate about the contemporary usefulness of classical republicanism, see "Symposium: The Republican Civic Tradition," *Yale Law Journal* 97 (1988): 1493-1723.

80. Rawls, *A Theory of Justice*, 29.

81. See, for example, Bernard Williams, "The Idea of Equality," in *Problems of the Self* (Cambridge: Cambridge Univ. Press, 1973), 230-49.

82. Samuel Williams, *The Natural and Civil History of Vermont* (Walpole, N.H., 1794), 330. Quoted in Wood, *Creation*, 607.

Nature, that time-honored oracle, seemed more than a little confused here, wavering as it did between an egalitarian theory of rights and a hierarchic theory of talents. No wonder the author, Samuel Williams, wrote with some confusion himself. Paying his respects, on the one hand, to the newly sanctified tenets of individual equality, Williams had one foot firmly planted in the liberal landscape. Convinced, on the other hand, that "benefits" were to be "derived from inequality," he was looking backward to a republican universe, "a graduated organic chain in the social hierarchy." Judging from this spectacle of divided allegiance, we can only agree with Lance Banning that, "[l]ogically, it may be inconsistent to be simultaneously liberal and classical. Historically, it was not."[83] Even this formulation does not quite settle the problem, however, for to be "simultaneously liberal and classical" must entail a peculiar set of dynamics and a peculiar set of tensions. It must give rise, that is, to a uniquely unstable notion of equality, at best invigorating, at worst untenable.

Cooper had no pronouncements as delicately balanced or as visibly perplexed as Williams's. Still, equality was important enough to merit two chapters in *The American Democrat*, a work haunted no less than Williams's by the exigencies of being simultaneously liberal and classical. In keeping with classical ideals, Cooper observed, quite bluntly, "[t]he celebrated proposition contained in the declaration of independence is not to be understood literally. All men are not 'created equal,' in a physical, or even in a moral sense." And he went on (in language worthy of *The Deerslayer*) to enumerate those items that made for organic distinctions: "one has a good constitution, another a bad; one is handsome, another ugly; one white, another black . . . one possessing genius, or a natural aptitude, while his brother is an idiot."[84]

Cooper's world remained the world of a naturally differentiated people, a graduated organic chain in the social hierarchy. If this sounds quintessentially classical, it is important to note that this was classical thought geared to a liberal problematic. Indeed, his pronouncements on organic differences notwithstanding, Cooper emerged ultimately as an advocate of equality—equality defined, however, not as a natural fact pertaining to the individual, but as an artificial arrangement pertaining to the polity. Equality, he argued, is simply the consequence of "a new governing principle for the social compact," so that "as regards all human institutions men are born equal." He was also careful to add, however, that "human institutions are a human invention, with which

83. Lance Banning, "Jeffersonian Ideology Revisited," 12. In this context, we must also entertain the possibility that liberalism and republicanism had *always* comprised a hybrid formation. See, for example, Thomas L. Pangle's discussion of Montesquieu's "liberal republicanism" in *Montesquieu's Philosophy of Liberalism* (Chicago: Univ. of Chicago Press, 1973).

84. Cooper, *The American Democrat*, 41.

nature has had no connection."[85] In fact, for him, the natural inequalities of individuals did not so much challenge as justify the political institution of equality, since the need for the latter became all the more evident in light of the former. Cooper's liberalism (like Madison's) was thus liberalism with a republican heart: a liberalism that, beginning with equality as an individuating principle, nonetheless ended up repositing its hopes in the structural efficacies of a political order. Here, then, was an alternative way to be simultaneously liberal and classical, although, much like Samuel Williams's pious invocation of nature, Cooper's rudely denaturalized polity also ushered in a set of problems. After all, if equality is an artificial institution, not grounded in nature, but contracted by man, what is there to give it a foundation, a sanctifying ground beyond its stipulated provisions? And, if equality is "not to be understood literally," but to be taken rather as a consensual metaphor—a relation of identity maintained by a "social compact," an agreed upon signifying process—what is there to make that consensus absolute?[86] What is there to stop one particular individual from doing some signifying on her own? What is there to stop someone like Judith, for example, from claiming that she is metaphorically equal to Natty Bumppo and therefore marriageable to him?

VI. The Feminization of Virtue

On this point, however, *The Deerslayer* stands equipped with an answer. It is crucial then—crucial not just for the plot, but for a general problematics of equality—that Judith should be, as the Preface says, "erring, and fallen." Where all else fails, the category of the fallen woman remains infallible. The strength of that category restores to the novel a signifying foundation—a consensual ground that is not provisional but absolute, not artificial but natural—and makes it possible to say, with recomposed certitude, who is marriageable to whom and who is equal to whom. To say this is also to suggest that, in *The Deerslayer* as in mid-nineteenth-century America, gender is a field of symbolic order: a field where meanings are affixed, identities clarified, distinctions sustained. Female sexuality is not just a sign; it is a sign whose referent has become so integral and self-evident that it commands the stability almost of a natural fact. The distinction between a virtuous maid and a fallen woman is absolute, and absolutely guaranteed, biology adduced here as an epistemological ballast.

The great symbolic value of the field of gender, then, stems from its capacity for naturalizing signs, and hence its compensatory relation to

85. Ibid.

86. For the centrality of consensus to American culture, see Sacvan Bercovitch, *The American Jeremiad* (Madison, Wis.: Univ. of Wisconsin Press, 1978), and *The Office of "The Scarlet Letter"* (Baltimore: Johns Hopkins Univ. Press, 1991).

other fields, notably the field of class, where signs are becoming newly unstable, newly denaturalized.[87] Within the conjunction of classical republicanism and modern liberalism, gender does its symbolic work primarily by restoring a natural order to a newly denaturalized political order. Against the shakiness of political institutions, gender works with the solidity of a natural fact. One knows exactly what it takes to be a fallen woman, what it means to be a fallen woman, and what will eventually happen to a fallen woman. Thus it is not surprising that in *The Deerslayer*, it is within this stable semantic field that the idea of equality is displayed, incorporated, and given its fullest expression. It does not matter that Judith and Natty are actually found to be unequal; this regrettable fact is acknowledged, even proclaimed, since its very regrettableness is a tribute to the idea of equality, all the more honored for being unattained. Just as equality is affirmed here in its absence, what is affirmed in absence as well is an organic universe, in which human institutions and human nature exist in an integral unity rather than in a disjunction between sign and referent. Such a universe no longer existed in the mid-nineteenth century, and no doubt never truly existed in that dreamed-of perfection; but, through the agency of gender, it can at least be intimated, legitimated, symbolically restored.[88] In this context, Raymond Williams's idea of the "dominant, residual, and emergent" must be broadened to include gender as a primary site of residual formation.[89] In *The Deerslayer*, what is residually invoked is the idealized world of classical republicanism, as yet untouched by its accommodating encounters with modern liberalism, and as yet pristine in its natural harmony: a world once political in focus, but now shadowed forth only through the relations between the sexes.

If sexual purity is ritually invoked, as Mary Douglas argues, to repair the perceived damage to the body politic, the figure of the fallen woman has a high degree of symbolic universality, indigenous to any society at war against itself.[90] Still, at the particular historical juncture I am investigating—the transition from classical republicanism to modern liberalism—the figure of the woman, fallible whether in potential or in fact, occupied a special place in her culture's symbolic landscape. Historians of the early republic have written primarily on the experiential status of women.[91] To their work we might want to add a symbolic supplement, a

87. Indeed, as Michael McKeon points out, the emergence of the very category of "class" already signaled a destabilized traditional order. See his *The Origins of the English Novel, 1600-1740* (Baltimore: Johns Hopkins Univ. Press, 1987), 162-67, 255-65.

88. Christine Stansell has arrived at a similar conclusion in her study of working-class women. See her *City of Women: Sex and Class in New York, 1789-1869* (New York: Knopf, 1986), 19-37.

89. Raymond Williams, *Marxism and Form* (Oxford: Oxford Univ. Press, 1977), 121-27. For a more extended discussion of gender as the site of residual formation, see my "Feminism, New Historicism, and the Reader," *American Literature* 63 (Winter 1991): 601-22.

90. Mary Douglas, *Purity and Danger* (Harmondsworth, England: Penguin, 1970), 137-95.

91. See especially Linda K. Kerber, *Women of the Republic: Intellect and Ideology in*

focus on the ways by which the figure of woman, her integrity or lack of integrity, is made to answer to (and perhaps to answer for) the integrity or lack of integrity of the body politic.

This political symbolism is not altogether fortuitous. Classical republican thought has never been gender-neutral—although, traditionally it was gendered in a way almost directly contrary to its later avatar. Virtue, that cornerstone of the republican polity, had for centuries been figured as masculine, manifesting itself in military heroism and civic activism. The word virtue "derives from the Latin *virtus*," Hanna Pitkin points out, "and thus from *vir*, which means 'man.' *Virtú* is thus manliness." Meanwhile, *fortuna*, which puts *virtú* at such hazards, is figured primarily (though not exclusively) as feminine. "Fortune is a woman," Machiavelli memorably observes, and, as Pitkin adds, "while he sometimes calls fortune a goddess, the means of coping with her that he suggests are not those usually applied to divinities."[92] The figure of woman has other meanings as well. In *De l'esprit des Lois*, Montesquieu associates her with "luxury," a disease fatal to the republic. He cautions "good legislators" against the "public incontinence" that "causes women to corrupt even before being corrupted."[93]

Judith, whose love of luxury is copiously documented, is conceived very much in the spirit of Montesquieu. Still, love of luxury alone is not the cause of her indictment. Her capital offense lies elsewhere. Virtue—and Judith's much decried loss of it—puts her completely beyond the pale of Natty Bumppo and disqualifies her forever as a claimant of names. Simply to state that is also to note the enormous distance the word has traveled, not only from its classical Renaissance roots, but also from its more immediate precursor in Revolutionary America. To the Founding Fathers of the republic, virtue was still masculine, still political; and if there was some doubt about its availability, there was no doubt at all about its gender.[94] As the foundational attribute of the republic, the word had a magical charm, as we can see in the ritual invo-

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Revolutionary America (Chapel Hill: Univ. of North Carolina Press, 1980), and Mary Beth Norton, *Liberty's Daughters: The Revolutionary Experience of American Women, 1750-1800* (Boston: Little, Brown, 1980).

92. Hanna Fenichel Pitkin, *Fortune is a Woman: Gender and Politics in the Thought of Niccolo Machiavelli* (Berkeley: Univ. of California Press, 1984), 25, 144.

93. Baron de Montesquieu, *The Spirit of the Laws*, trans. Anne Cohler, Basia Miller, & Harold Stone (New York: Cambridge Univ. Press, 1989), 104.

94. Gordon Wood and J. G. A. Pocock have done much to elevate "virtue" into the key term of Revolutionary thinking. See Wood, *The Creation of the American Republic*, 65-70; Pocock, *Machiavellian Moment*, 462-552. Numerous other accounts have followed. See especially John T. Agresto, "Liberty, Virtue, and Republicanism, 1776-1787," *Review of Politics* 39 (1977): 473-504; John P. Diggins, *The Lost Soul of American Politics: Virtue, Self-Interest, and the Foundations of Liberalism* (Chicago: Univ. of Chicago Press, 1984); James T. Kloppenberg, "The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse," *Journal of American History* 74 (1987): 9-33; Lance Banning, "Some Second Thoughts on Virtue and the Course of Revolutionary Thinking," in *Conceptual Change and the Constitution*, eds. Terence Ball and J. G. A. Pocock (Lawrence, Kansas: Univ. of Kansas Press, 1988), 194-212.

cations by even a skeptic like James Madison: "I go on this great republican principle: that the people will have virtue and intelligence to select men of virtue and wisdom."[95] Against that great republican principle, the prurient focus in *The Deerslayer* must seem like a cruel joke. From being a civic ideal, conducive to the public good, virtue has come to denote a sexual standard, conducive to the acceptability of a marriage. And, from being embodied by the manly citizen, virtue is now perilously lodged within the feminine subject.

The feminization of virtue might turn out to be the most important semantic transformation attendant upon the rise of a liberal political culture. Ian Watt has long ago alerted us to this "tremendous narrowing of the ethical scale, a redefinition of virtue in primarily sexual terms."[96] More recently, Ruth Bloch has related this semantic transformation to structural changes newly effected in the liberal polity, with its emerging party system, its conception of politics as a sphere of expediency, and, complementing that development, its emphasis on private morality and its relegation of the ethical domain to female tutelage.[97] In short, the feminization of virtue registered, in the broadest sense, a cognitive revolution, a revolution in the way conceptual categories were organized and differentiated. It had everything to do with the liberal philosophy of separate spheres, a philosophy which distinguished between the sexes even as it distinguished among the moral, the economic, and the political, organizing each into a discrete domain, setting apart a realm of spiritual uplift, a realm of competitive self-interests, and a realm of partisan alliances.[98]

Generalizing further, nineteenth-century liberalism not only believed in separate spheres of life; it also attributed to each of those spheres a high degree of autonomy, which is to say, a high degree of internal resolution and internal equilibrium, making each self-sufficient on its own terms, each propelled by its own systemic integrity. The Invisible Hand behind the self-regulating market is only the most dramatic example of such internal equilibrium. There are other examples as well. The moral domain, I argue, also came into its own under the aegis of modern liber-

95. *The Debates in the Several State Conventions*, ed. Jonathan Elliot, 5 vols. (Washington, D.C., 1854), III: 536-37. Quoted in Banning, "Second Thoughts on Virtue," 194.

96. Ian Watt, *The Rise of the Novel* (Berkeley: Univ. of California Press, 1957), 157.

97. Ruth Bloch, "The Gendered Meanings of Virtue in Revolutionary America," *Signs* 13 (1987): 37-58. This is also Ann Douglas's general point in *The Feminization of American Culture* (New York: Knopf, 1977). But see also Jan Lewis, who argues that the emphasis on chastity was already pervasive in classical republicanism ("Republican Wife," 716-21), and Nancy Cott, who sees chastity as an ideal consciously advocated by women as a means of empowerment. See her "Passionlessness: An Interpretation of Victorian Sexual Ideology, 1790-1850," *Signs* 4 (1978): 219-36.

98. For the emergence of political parties and partisan politics as a feature of political life, see Lee Benson, *The Concept of Jacksonian Democracy* (Princeton: Princeton Univ. Press, 1961); Joel Silbey, *The Partisan Imperative: The Dynamics of American Politics Before the Civil War* (New York: Oxford Univ. Press, 1985).

alism, and did so primarily through a declaration of independence—through a cognitive separation from the polity and the economy, as well as from the path of the law—becoming, in the process, a fully autonomous domain, discretely conceptualized and reflexively consolidated. So here, too, a systemic integrity governs the structure of the moral agent, matching deed and consequence, character and desert, making the field internally referential and internally accountable.[99]

VII. Retribution and Distribution

Natty Bumppo, Cooper's prime exhibit in the way of the moral agent, offers a good illustration of its workings. As John P. McWilliams has persuasively argued, and as we see most vividly in *The Pioneers*, Natty embodies the moral law, as opposed to the civil law embodied by the lesser characters.[100] The moral law, in *The Deerslayer*, is summed up by one word, "honesty," an epithet Natty virtually personifies. "I'll answer for his *honesty*, whatever I may do for his valor in battle"—this is Harry March's backhanded compliment, and for the rest of the book, we are never allowed to lose sight of Natty's "honest face and honest heart." "All proclaim your honesty," Judith tells him, "your honest countenance would be sufficient surety for the truth of a thousand hearts." She adds, "The girl that finally wins you, Deerslayer, will at least win an honest heart—one without treachery or guile."[101]

Honesty, understood as an antidote to "treachery or guile," harkens back to the eighteenth century, to what Gordon Wood has called its "paranoid style," a mode of thinking preoccupied with intrigue and deceit, plots and cabals. Cooper's *The Pathfinder* (published in 1840, just one year before *The Deerslayer*) was an extravagant exercise in just that genre.[102] However, as Wood also argues, the paranoid style must be seen not as a collective delusion or illusion, but as a "mode of causal attribution" which, in supposing that "every social effect, every political event, had to have a purposive human agent as a cause," implicitly emphasizes "persons rather than processes," and "presumes a world of autonomous, freely acting individuals who are capable of directly and deliberately bringing about events through their decisions and actions, and who thereby can be held morally responsible for what happens." The paranoid style, then, turns out to be a theory of moral accountabil-

99. Elsewhere I have discussed this as a model of "personified accounting." See my *Empire for Liberty: Melville and the Poetics of Individualism* (Princeton: Princeton Univ. Press, 1989), 176-214.

100. John P. McWilliams, *Political Justice in a Republic: James Fenimore Cooper's America* (Berkeley: Univ. of California Press, 1972), 237-97. In *The Pioneers* Natty is put on trial for violating the civil law.

101. Cooper, *The Deerslayer*, 63, 74, 128, 126, 130.

102. Prominently featured in *The Pathfinder* is Lieutenant Muir, the Quartermaster, whose unseemly desire for Mabel Duncan and whose treacherous alliance with the French make him doubly objectionable.

ity. Assuming as it does an exact symmetry between cause and effect, between motive and consequence, it sustains not just a style of political discourse but also a style of moral reasoning. And, as Wood also points out, this mode of causal attribution has not died with the eighteenth century: "its assumptions still permeate our culture, although, as our system of criminal punishment shows, in increasingly archaic and contradictory ways."[103]

Natty is not about to become a recipient of such criminal punishment. Still, his much touted honesty must be seen against a universe of moral causation, in which the attribution of character is potentially also the attribution of blame. Natty, of course, is attributed with a good character, one that has incorporated the symmetry of cause and effect into its very structure of being. As Judith says, "Your honest face and honest heart tell us that what you promise you will perform."[104] Face and heart, promise and performance—these terms are causally linked, and linked in such a way as to ensure a commendable symmetry. Natty's moral character rests on this, and it is not surprising that the litmus test for him should be the act of promise-keeping, an act which, if performed, establishes just such a symmetry between originating deed and consequent end. Promise-keeping is central to Cooper (as it was more generally to nineteenth-century thought) as the criterion for a morality grounded within the person,[105] and here Natty's conduct is exemplary. Captured by the Hurons, he is allowed to leave on a "furlough." Judith thinks it is "extraordinary self-destruction and recklessness" to return voluntarily, but Natty disagrees. For him, a furlough is a "thong that binds tighter than any chain. . . . Ropes and chains allow of knives, and desait, and contrivances, but a furlough can be neither cut, slipped, nor sarcumvented."[106]

Bound reflexively to himself—word to deed and face to heart—Natty achieves a perfectly integrated selfhood, a selfhood that is itself a causal sequence or, to be more precise, a causal circle, ending where it begins, the terminal effect being fully encompassed by the original intention. He is as good as his word. Here, then, is a principle of equality that will actually hold fast. Ever problematic as a distributive principle, ever endangered by competing claims, equality works best as a reflexive principle, underwriting the integrity of the moral agent, matching motive and consequence, and so arriving at a state of equilibrium where causal attri-

103. Gordon Wood, "Conspiracy and the Paranoid Style: Causality and Deceit in the Eighteenth Century," *William and Mary Quarterly*, 3d ser., 39 (1982): 409, 430, 411, 409.

104. Cooper, *The Deerslayer*, 74.

105. For a history of the changing status of promises (especially in relation to contractual obligations), see P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford Univ. Press, 1979), 139-218, 652-59. For a contemporary statement, see Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge: Harvard Univ. Press, 1981).

106. Cooper, *The Deerslayer*, 370, 445.

bution can be translated into moral judgment. On the strength of that equilibrium, Natty is able to go through a succession of names—"Straight-tongue," "Pigeon," "Lap-Ear," "Deerslayer," "Hawkeye"—without failing always to be equal to himself. Also on the strength of that equilibrium, the novel ends, having rejected various unequal matches, with that curious, seemingly tautological, but by no means unexpected union: between a man named Deerslayer and a gun named Killdeer.

Equality—internalized as a principle of systemic integrity, as a relation within oneself and between oneself—governs not only the morality of Natty's reward, but also the morality of Judith's punishment. Judith, as we know, is someone on whom equality does not sit comfortably, since she is always above or beneath someone else. Such a difficulty, however, is not without its remedy. The remedy is suggested, in fact, by Hurry Harry, in an oddly prescient remark to Thomas Hutter. Judith, he says, "hasn't her equal on the frontiers for good looks, whatever she may have for good behavior. . . . Give me Jude, if her conduct was only equal to her looks!"[107] Hurry begins by stating the problem—Judith, once again, has failed to be equal to anyone—but he quickly moves from the problematic to the optative, turning from the unequal distribution of beauty among persons to a more congenial topic, namely, the maintenance of equality between "looks" and "conduct" within a single person. As with Natty, equality is relocated here within the structure of the self—relocated, in fact, through an initial fracturing of the self: a worrisome division between "looks" and "conduct." This division, however, puts the self at the center of a moral universe, for only within a divided self can a principle of reflexivity be maintained. Charles Taylor has linked this "radical reflexivity" to "self-objectification" in Lockean liberalism.[108] Here, I want to relate it to a different set of liberal problematics, more specifically, to the problematics of equality. The reflexive, I argue, transposes, redresses, and recasts as a disciplinary proposition what is problematically unstable as a distributive proposition. In this view, the structure of the moral agent would seem to be constituted out of a relocated axis of equality, now placed within a single individual rather than between individuals, and so turning a distributive relation into a retributive relation. Judith is equal to herself in just this retributive sense, her desert matching her character, Judith-without-a-name always remaining Judith-without-a-name.

The intimate link between retribution and distribution suggests that penal philosophy and political theory might have more in common than

107. Ibid., 73.

108. Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge: Harvard Univ. Press, 1989), 159-76.

we ordinarily suppose.[109] In Cooper, those connections are certainly striking, although, we should also add, not entirely unprecedented. Indeed, the peregrination of "equality"—its movement from between persons to within a single person—had shown up even more dramatically in Kant, in that critical moment in *The Philosophy of Law*, when, arguing for the death penalty, he justifies it by invoking the "Equalization of Punishment with Crime":

> What is the mode and measure of Punishment which Public Justice takes as its Principle and Standard? It is just the Principle of Equality, by which the pointer of the Scale of Justice is made to incline no more to the one side than the other . . . . There is no *Likeness* or proportion between Life, however painful, and Death; and therefore there is no Equality between the crime of Murder and the retaliation of it but what is judicially accomplished by the execution of the Criminal . . . . This ought to be done in order that every one may realize the desert of his deeds, and that bloodguiltiness may not remain upon the people. . . . The Equalization of Punishment with Crime, is therefore only possible by the cognition of the Judge extending even to the penalty of Death, according to the Right of Retaliation . . . . It is only thus that a Sentence can be pronounced over all criminals proportionate to their internal *wickedness*.[110]

Kant begins, uneventfully enough, with the familiar notion of equality under the law, placing equality distributively among juridical subjects. This initial placement, however, is not meant to be permanent. Almost immediately, equality begins its journey inward, taking up residence within a single individual: as a relation between "deed" and "desert," between crime and punishment. Once again, distribution modulates into retribution and, in this case, it is retribution with a vengeance, complete with pronouncements on "internal wickedness," even "bloodguiltiness."

Kant was moved to such vehemence in part by the phenomenal success of Cesare Beccaria, whose treatise on penal reform, *Dei delitti e delle pene*, first published in Tuscany in 1764, was translated into French in 1766—translated by Morellet, annotated by Diderot, and prefaced by Voltaire. Beccaria was hailed as the "Socrates of our epoch,"[111] winning the rapt attention not only of the Paris intelligentsia, but also of a

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109. Unfortunately, as J. Roland Pennock points out, "[b]ooks on 'justice' usually have relatively little to say about 'criminal justice.' " See his introduction to *Criminal Justice*, 1.

110. Immanuel Kant, *The Philosophy of Law*, trans. W. Hastie (1887; reprint, Clifton, N.J.: A. M. Kelley, 1974), 196-98. This is the Edinburgh edition of Kant's *Metaphysische Anfangsgrunde der Rechslehre* (1796). Italics in original text. The Hastie translation is more complete than the 1965 Ladd translation, under the title of *The Metaphysical Elements of Justice*. While Kant is best known for his extreme view here, his pronouncements elsewhere are actually more complex. See, for example, Jeffrie G. Murphy, "Does Kant have a Theory of Punishment?" *Columbia Law Review* 87 (1987): 509-58; B. Sharon Byrd, "Kant's Theory of Punishment," *Law and Philosophy* 8 (1989): 151-200.

111. Peter Gay, *The Enlightenment: The Science of Freedom* (New York: Norton, 1977), 438.

number of monarchs, including Frederick II of Prussia, Maria Teresa of Austria, Grand Duke Leopold of Tuscany, and Catherine the Great of Russia, who called upon the author to reside at her court and supervise the necessary reforms in person. In less exalted circles, Blackstone was similarly impressed and featured Beccaria prominently in his *Commentaries on the Laws of England*. Bentham (who detested Blackstone) likewise acknowledged his debt to Beccaria by name. Meanwhile, in the American colonies, John Adams, as a young lawyer in 1770, saw fit to invoke "the words of the marquis Beccaria" to defend the British soldiers implicated in the Boston Massacre—to such effect that none of them was found guilty of murder. Jefferson, too, copied into his *Commonplace Book* long passages from Beccaria to guide future legal reform in Virginia.[112]

Beccaria argued, in the spirit of the Enlightenment, that the primary aim of the criminal law ought to be reform and deterrence, not retribution:

> [T]he purpose of punishment is neither to torment and afflict a sensitive being, nor to undo a crime already committed . . . . Can the shrieks of a wretch recall from time, which never reverses its course, deeds already accomplished? The purpose can only be to prevent the criminal from inflicting new injuries on its citizens and to deter others from similar acts.[113]

Since deterrence was the goal here, the proper focus of the criminal law was not the criminal himself, but "those who are the witnesses of punishment," and it is "for their sake rather than the criminal's" that punishment ought to be inflicted at all. Beccaria argued against the death penalty for just that reason. Capital punishment was less efficient, he said, than a life sentence "among fetters or chains, under the rod, under the yoke, in a cage of iron," since the latter would "inspire terror in the spectator more than in the sufferer."[114] In short, for Beccaria, the treatment of crime ought to be directed away from the individual offender toward an infinite number of potential offenders. The criminal was unimportant in and of himself: he was neither the embodiment of moral desert, nor the recipient of collective vengeance. Only within a general scheme of crime prevention would he matter. Utilitarian philosophy of this sort was of course anathema to Kant, who set out to refute both

112. In Book IV of the *Commentaries*, Blackstone wrote, for example, that punishment is "not by way of atonement or expiation for the crime committed . . . but as a precaution against future offences of the same kind," quoted in Richard Posner, *The Economics of Justice* (Cambridge: Harvard Univ. Press, 1981), 28 n. 35; John Adams, *The Works of John Adams* (Boston: Little, Brown, 1856), 2: 238, quoted in Henry Paolucci, "Translator's Introductor" to Cesare Beccaria, *On Crimes and Punishments*, trans. Henry Paolucci (Indianapolis: Bobbs-Merrill, 1963), xxi; Garry Wills, *Inventing America* (New York: Vintage Books, 1978), 152.

113. Beccaria, *On Crimes and Punishments*, 42.

114. Ibid., 47-48.

Beccaria's "sophistry" and his "compassionate sentimentality."[115]

Yet, in the next century, it was Beccaria's philosophy, rather than Kant's, that would come to dominate the field of penal justice.[116] The early nineteenth century was the age of the penitentiary, with its environmental view of crime, its rehabilitative zeal toward the criminal, and its grand ambition to achieve the twin goals of reform and deterrence through the agency of the prison sentence.[117] New York and Pennsylvania spearheaded the movement, and new-style prisons soon sprang up: in Auburn between 1819 and 1823, in Ossining (familiarly known as Sing-Sing) in 1825, in Pittsburgh in 1826, and in Cherry Hill in 1829. By the 1830s, the American penitentiary had become world famous, attracting visitors such as Alexis de Tocqueville, Gustave Auguste de Beaumont, Harriet Martineau, and Charles Dickens.

In relinquishing its claim to retribution, the penitentiary stood as a visible monument to the separation of law and morals. And yet, for all its public glamour, the penitentiary was in some sense only a minor ornament in a legal system whose center of gravity was clearly somewhere else. Nineteenth-century American law was overwhelmingly economic in focus, the bulk of it occasioned by the needs of an expanding and industrializing nation. Laws regulated the enforcement of contract, the sale and transfer of land, the granting of corporate charters, the authorization of turnpikes, canals, bridges, and railroads. Distribution—not retribution—was the law's business in the nineteenth century, and, in the complex reshuffling of filiations within the liberal landscape, it was to the economy that the law owed its primary allegiance.[118] As Lawrence Friedman says, nineteenth-century law emphasized "the protection of property rather than morality," and, for that reason, "criminal justice and civil justice alike ceased to be concerned with the individual."[119] In this climate, Kant's rhetoric about "bloodguiltiness" and "internal wickedness" must sound increasingly remote, increasingly archaic, though not without its peculiar resonances. Those resonances are most richly orchestrated, I have tried to argue, in the nineteenth-century novel, a

115. Kant, *The Philosophy of Law*, 202, 201.

116. Marcello Maestro, *Cesare Beccaria and the Origins of Penal Reform* (Philadelphia: Temple Univ. Press, 1973); Leon Radzinowicz, *Ideology and Crime* (New York: Columbia Univ. Press, 1966), 1-28.

117. David Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Little, Brown, 1971); Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850* (New York: Columbia Univ. Press, 1978). See also an important critique of Foucault, Rothman, and Ignatieff, by Ignatieff himself, "State, Civil Society, and Total Institutions: A Critique of Recent Social Histories of Punishment," in *Crime and Justice: An Annual Review of Research*, eds. Michael Tonry and Norval Morris (Chicago: Univ. of Chicago Press, 1981), 3: 153-92.

118. This position is most influentially argued in James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: Univ. of Wisconsin Press, 1956), and Morton Horwitz, *The Transformation of American Law, 1789-1860* (Cambridge: Harvard Univ. Press, 1977).

119. Friedman, "Notes Toward a History of American Justice," 125.

genre residually devoted to morality and residually centered on the individual. In the richness of that orchestration, though, we hear as well echoes not altogether Kantian. Distribution and retribution make virtually interchangeable noises here; so the justice that the novel dispenses is finally a complex, multivocal kind of justice: a verdict not just about sexual propriety but also about social equality, played out over the registers of gender and class, polity and morality. In the middle of it all is the figure of a woman, newly released from the path of the law and testifying now under the broad mantle of novelistic justice. Her testimony, however, is not entirely about herself.