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The Treachery of Perception: Evidence and Experience in Clarissa

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THE TREACHERY OF PERCEPTION: EVIDENCE AND EXPERIENCE IN *CLARISSA*

*Judy M. Cornett**

> Let us then suppose the Mind to be, as we say, white Paper, void of all Characters, without any *Ideas*; How comes it to be furnished? . . . Whence has it all the materials of Reason and Knowledge? To this I answer, in one word, From *Experience*: In that, all our Knowledge is founded . . . .
>
> John Locke, *An Essay Concerning Human Understanding*[1]

> She has a world of knowledge; knowledge *speculative*, as I may say; but no *experience*!
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> Robert Lovelace to John Belford, *Clarissa*[2]

I. INTRODUCTION

Just as Western epistemology "treats persons in some sense as *knowers*,"[3] so the Anglo-American law of evidence treats jurors as

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1. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 104 (Peter H. Nidditch ed., Clarendon Press 1975) (4th ed. 1700).

2. SAMUEL RICHARDSON, CLARISSA OR THE HISTORY OF A YOUNG LADY 789 (Angus Ross ed., Viking Penguin 1985) (1747-48). My reliance upon the Penguin edition of *Clarissa*, which is based upon the first edition of the novel, contravenes convention. Critics generally cite the Shakespeare Head Press edition, which is based upon the novel's third edition, published in 1759. *See* Florian Stuber, *On Original and Final Intentions, or Can There Be an Authoritative* Clarissa?, 2 TEXT: TRANSACTIONS OF THE SOCIETY FOR TEXTUAL SCHOLARSHIP 229, 229 (1985). *But see* TOM KEYMER, RICHARDSON'S *CLARISSA* AND THE EIGHTEENTH-CENTURY READER at xxii (1992) (explaining reasons for relying on the first edition). I have chosen to cite the Penguin edition in this Article, not because the first edition represents Richardson's "original" intentions, but because the first edition represents the text prior to Richardson's insertion, in the second and third editions, of more elaborate editorial devices and because the Penguin edition is readily available to general readers. *See id.* at 229-30. *See generally* T.C. Duncan Eaves & Ben D. Kimpel, *The Composition of* Clarissa *and Its Revision Before Publication*, 83 PROC. MOD. LANGUAGE ASS'N 416 (1968) (Richardson circulated the manuscript of the novel in at least three versions).

3. JAY WILLIAM HUDSON, THE TREATMENT OF PERSONALITY BY LOCKE, BERKELEY AND HUME 12 (1911).

knowers, who must gain their "knowledge of the events or situations about which they have to decide" solely from the evidence, "*information* from which further information is derived or inferred."[4] And just as, for Locke, the ultimate aim of knowledge is Truth,[5] so the law of evidence is grounded upon "the culture's general understanding of how we 'know' things to be true."[6] The link between epistemology and the law of evidence was forged explicitly by Sir Geoffrey Gilbert in the "first real treatise on evidence,"[7] *The Law of Evidence*,[8] published in Dublin in 1754.[9] Onto the body of early eighteenth-century English evidence law, which comprised a motley collection of rulings about the quantum and type of evidence required in individual cases,[10] Gilbert grafted a Lockean framework, organizing his treatise in terms of the "Degrees of Assent" set out in Book IV of Locke's *Essay on Human*

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4. William Twining, *Evidence and Legal Theory*, *in* LEGAL THEORY AND COMMON LAW 62, 66 (William Twining ed., 1986).

5. Locke explains his goal in the *Essay* by noting the skeptical propositions "[t]hat either there is no such thing as Truth at all; or that Mankind hath no sufficient Means to attain a certain Knowledge of it." LOCKE, *supra* note 1, at 44; *see also id.* at 527 ("There are several ways wherein the Mind is possessed of Truth; each of which is called *Knowledge*."). The *Essay* is itself a truth-seeking enterprise. *See, e.g., id.* at 65 ("I impartially search after Truth . . . ."); *id.* at 100 ("Truth has been my only aim . . . .").

6. BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE": HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 2 (1991).

7. *Id.* at 26. An earlier work on evidence, attributed to William Nelson, was published in London in 1717. [WILLIAM NELSON?], THE LAW OF EVIDENCE (London, Elizabeth Nutt & R. Gosling 1717). Presumably, this work has not been considered a "real" treatise because it was essentially a "Collection out of almost a hundred Books" of precedents relating to evidence. *Id.* *See generally* WILLIAM TWINING, RETHINKING EVIDENCE: EXPLORATORY ESSAYS 35 (1990) (describing Nelson's work as a "digest").

8. SIR GEOFFREY GILBERT, THE LAW OF EVIDENCE (Garland Publishing, Inc. 1979) (1754).

9. The treatise was published posthumously; it was written prior to Gilbert's death in 1726. *See* TWINING, *supra* note 7, at 35. Blackstone still cited Gilbert's treatise as authoritative in the 1760s, *see* 3 WILLIAM BLACKSTONE, COMMENTARIES *367, and "[n]ineteenth century evidence scholars appear to have viewed Gilbert's work as the starting point for analysis," Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 592 n.481 (1990). However, Landsman asserts, "[I]t is generally agreed that Gilbert's work reflects an understanding of evidence formed no later than the opening decade of the eighteenth century." *Id.* at 592.

10. *See, e.g.*, GILBERT, *supra* note 8, at 165.

> In Trespass for taking down a Pew, the Evidence was, that the Pew was fastened to the Pillar of the Church with a Chain; this is no good Evidence to prove the Declaration; otherwise it is if it had been fixed to the Pillar by a Nail; for in the one Case 'tis not fixed to the Freehold, but in the other it is . . . .

Id. Thus, in Ronald J. Allen's terms, Gilbert's treatise addressed both "the structure of proof"—"what must be proven"—and a "theory of evidence"—"how this is done, what counts as evidence and . . . how it is processed." Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 87 NW. U. L. REV. 604, 606 (1994).

Understanding.[11]

In recent years, scholars have shown renewed interest in "the topic of evidence, inference, probability and uncertainty."[12] Exemplary of this renewed interest is Barbara J. Shapiro's interdisciplinary study, *"Beyond Reasonable Doubt" and "Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence*,[13] in which she examines "the way in which religious and philosophical notions concerning the nature of truth and the appropriate methods of attaining it affect legal concepts of evidence and proof."[14] Literary scholars have also become interested in exploring evidentiary issues.[15] In *Strong*

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11. GILBERT, *supra* note 8, at 1-5. *See generally* SHAPIRO, *supra* note 6, at 26-27. Gilbert's scheme also engrafted the qualitative approach of the Romano-canon law system of proof. *See* Landsman, *supra* note 9, at 594; *infra* note 67. *See generally* SHAPIRO, *supra* note 6, at 115-27. Thus, Twining classifies Gilbert as an advocate of the "best evidence" principle, *see* TWINING, *supra* note 7, at 188; *infra* note 57, and sees his approach as a dead end in the evolution of the modern approach to evidence, which Twining traces to Thayer, *see* TWINING, *supra* note 7, at 188-89, 196. However, Twining does include Gilbert in the "rationalist tradition." *Id.* at 71-72.

12. Peter Tillers, *Introduction*, 66 B.U. L. REV. 381, 382 (1986). In 1986, William Twining complained that traditional evidence scholarship, which he termed the "Rationalist Tradition," *see* William Twining, *The Rationalist Tradition of Evidence Scholarship*, *in* WELL AND TRULY TRIED: ESSAYS ON EVIDENCE IN HONOUR OF SIR RICHARD EGGLESTON 211 (Enid Campbell & Louis Waller eds., 1982), was "homogenous, isolated, normative and optimistically rationalistic," Twining, *supra* note 4, at 71. He called for more "diverse and interdisciplinary" evidence scholarship that would "explore the implications of adopting more skeptical postures or a different conception of rationality" and would draw upon "other relevant but diverse fields." *Id.* at 70-71. Twining's call is being answered. Since 1986, at least three law review symposia have been devoted to evidence. Symposium, *Decision and Inference in Litigation*, 13 CARDOZO L. REV. 253 (1991); Symposium, *Does Evidence Law Matter?*, 25 LOY. L.A. L. REV. 629 (1992); Symposium, *Probability and Inference in the Law of Evidence*, 66 B.U. L. REV. 377 (1986). This renewed interest has generated what Richard Lempert calls "[t]he New Evidence Scholarship." Richard Lempert, *The New Evidence Scholarship: Analyzing the Process of Proof*, 66 B.U. L. REV. 439 (1986); *see* Peter Tillers, *Intellectual History, Probability, and the Law of Evidence*, 91 MICH. L. REV. 1465, 1466 n.16 (1993) [hereinafter Tillers, *Intellectual History*] (noting that Lempert "invented" this phrase) (reviewing SHAPIRO, *supra* note 6). Much of this new scholarship "relates theories of probability to theories of proof" and involves "largely a debate between those who advocate some role for Bayesian modes of inference . . . and those who criticize or reject this position." Lempert, *supra*, at 440. In Lempert's words, "Evidence is being transformed from a field concerned with the articulation of rules to a field concerned with the process of proof." *Id.* at 439.

13. SHAPIRO, *supra* note 6.

14. *Id.* at xiii.

15. Legal scholars are interested in the relationship of evidence and narrative. *See, e.g.*, BERNARD S. JACKSON, LAW, FACT AND NARRATIVE COHERENCE (1988); TWINING, *supra* note 7, at 219-61 (chapter entitled "Lawyers' Stories"); *see also* Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559 (1991); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 520 (1991) ("[A] central cognitive process in juror decision making is *story construction.*"). *See generally* Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994). In her article, Baron examines "[c]urrent interest in legal storytelling," *id.* at 255,

Representations: Narrative and Circumstantial Evidence in England,[16] literary critic Alexander Welsh examines legal sources for the eighteenth-century view that "[c]ircumstances cannot lie."[17] He concludes that, from the mid-eighteenth century, "narratives built on carefully managed circumstantial evidence,"[18] employing a third-person narrator who undertakes the task of "presenting and summarizing and evaluating the evidence,"[19] became the dominant novelistic form.

In this Article, I hope to continue the interdisciplinary work exemplified by Shapiro and Welsh by using Gilbert's treatise, with its Lockean framework, to examine the evidentiary issues raised in Samuel Richardson's epistolary novel, *Clarissa*.[20] Faced with a series of epistemological crises, the novel's heroine, Clarissa Harlowe, must evaluate the evidence of others' true natures and their intentions toward her. To an extent largely unacknowledged by previous critics,[21] Clarissa is presented as a "knower," and I will focus upon the aspects of the novel that move to the foreground when she is considered in that light.[22] Clarissa's story exposes the fundamental assumptions underly-

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and "the sudden, and rather vehement, resistance to legal storytelling," *id.* at 256. Conversely, literary scholars are interested in evidentiary issues: an issue of the *Proceedings of the Modern Language Association (PMLA)* will be devoted to a special topic, "The Status of Evidence." 108 PROC. MOD. LANGUAGE ASS'N 399 (1993).

16. ALEXANDER WELSH, STRONG REPRESENTATIONS: NARRATIVE AND CIRCUMSTANTIAL EVIDENCE IN ENGLAND (1992).

17. *Id.* at 24.

18. *Id.* at 17.

19. *Id.* at 63.

20. RICHARDSON, *supra* note 2.

21. There is a large body of criticism on the novel. Seminal criticism relevant to my focus includes TERRY CASTLE, CLARISSA'S CIPHERS: MEANING & DISRUPTION IN RICHARDSON'S "CLARISSA" (1982); TERRY EAGLETON, THE RAPE OF CLARISSA: WRITING, SEXUALITY AND CLASS STRUGGLE IN SAMUEL RICHARDSON (1982); WILLIAM BEATTY WARNER, READING *CLARISSA*: THE STRUGGLES OF INTERPRETATION (1979). Two recent studies shed light on law-related issues raised by the novel: KEYMER, *supra* note 2, and JOHN P. ZOMCHICK, FAMILY AND THE LAW IN EIGHTEENTH-CENTURY FICTION: THE PUBLIC CONSCIENCE IN THE PRIVATE SPHERE (1993). Terry Castle describes the "basic cognitive activity that characters in *Clarissa* perform" as "reading their experience." CASTLE, *supra*, at 50. She examines the way in which "Clarissa remains a 'cypher' to those who surround her in the fictional world, a subject for countless interpreters." *Id.* at 16. Thus, Castle is primarily concerned with Clarissa as an *object* of others' readings, although she does examine Clarissa as a "naive exegete" who is ultimately "a victim—of her own reading, and the readings of others." *Id.* at 57; *see also id.* at 95 ("Clarissa misreads the identity of virtually everyone she encounters."). I will focus exclusively on Clarissa as an epistemological subject.

22. Thus, in this Article, I do not attempt a full-scale reading of the novel, nor do I address the evidentiary issues created by Richardson's avowed didactic purpose. *See* RICHARDSON, *supra* note 2, at 36; *see also* EAGLETON, *supra* note 21, at 24 (referring to Richardson as a "properly didactic, propagandist writer"). As critics have implicitly recognized, Ian Watt's famous analogy between novel-reading and a jury trial, IAN WATT, THE RISE OF THE NOVEL: STUDIES IN DEFOE, RICHARDSON, AND FIELDING 31 (1957), is particularly apt with respect to

ing the Lockean framework of eighteenth-century evidence law and undermines the claim that "[c]ircumstances cannot lie."[23]

II. THE EIGHTEENTH-CENTURY ENGLISH LAW OF EVIDENCE

Attention to the origins of the Anglo-American law of evidence will assist us in eliminating the "artificial[] separat[ion]" between the law of evidence and the law of procedure,[24] because the law of evidence in eighteenth-century England can best be understood in light of the evolving nature of the jury.[25] Although the history of the jury is contested and, ultimately, inconclusive,[26] it seems clear that at some point early in the jury's history, jurors "were permitted and indeed expected to consider their personal knowledge of the facts in dispute in reaching a verdict."[27] Jurors were required to be from the same neighborhood

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Clarissa. *See* KEYMER, *supra* note 2, at 221 (stating that the novel is "the literary equivalent of a trial"); CASTLE, *supra* note 21, at 138-39 ("When we attempt to interpret the epistolary text, when we look for its 'Story,' we repeat the activity of characters attempting to decipher experience . . . ."); *see also infra* note 179.

23. WELSH, *supra* note 16, at 24; *see* SHAPIRO, *supra* note 6, at 217.

24. William Twining, *The Boston Symposium: A Comment*, 66 B.U. L. REV. 391, 396 (1986).

25. Peter Tillers has criticized Shapiro for "explain[ing] the emergence of rules of evidence . . . by reference to this transformation of the trial jury." Tillers, *Intellectual History*, *supra* note 12, at 1470. He suggests that consideration of other factors, including "procedural rules" and "the role of . . . the trial judge," would provide a "more satisfactory account of the origins and persistence of the rules of evidence." *Id.* at 1471. However, other scholars also account for the development of evidence law in terms of the jury's evolution. *See* TWINING, *supra* note 7, at 34. Attention to the relationship between the jury's role and the law of evidence was also sanctioned by Gilbert:

> Now this in the first Place, is very plain, that when we can't see or hear any thing ourselves, and yet are obliged to make a Judgment of it, we must see and hear by Report from others; . . . and this is the Original of Tryals, and all manner of Evidence.

GILBERT, *supra* note 8, at 3; *see also* [NELSON?], *supra* note 7, at 1-2 ("[I]t is call'd Evidence because thereby the Point in Issue is to be made evident to the Jury."). It would be wrong to oversimplify the role that transformation of the jury played in the development of the law of evidence, and the factors suggested by Tillers undoubtedly played a part; for my purposes, however, the "jury transformation" explanation is adequate.

26. *See* W.R. CORNISH, THE JURY 11 (1968); SHAPIRO, *supra* note 6, at 190-91. *See generally* SIR PATRICK DEVLIN, TRIAL BY JURY 5-14 (1956) (discussing the "Origins of the Jury System"); WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY (James A. Morgan ed., 2d ed. 1878) (1875) (discussing the history and nature of the jury system); THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800, at 3-20 (1985); 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 312-19 (3d ed. 1922); 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 616-32 (Boston, Little, Brown & Co., 2d ed. 1898) (discussing the history and nature of the jury system).

27. John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 201 (1988).

as the parties and were assumed to know the facts or to be capable of learning them.[28] Thus, it became "commonplace" to assert that " 'the jurors were the witnesses.' "[29] The transformation of jurors from "largely self-informing knowers of the facts into fact evaluators who reached verdicts on the basis of information and testimony introduced in the court"[30] has been characterized by Shapiro as "one of the big mysteries of English legal history."[31] This mysterious transformation gave impetus to the development of the law of evidence, because the presentation of evidence in the courtroom was needed only insofar as the jurors did not already know the facts.[32] The appropriate role of the jurors' own knowledge was at issue as late as 1670, in *Bushell's Case*,[33] where Chief Justice Vaughn ruled on a habeas corpus petition by one of the jurors who had acquitted William Penn and William Mead.[34] In holding that jurors could not be fined for reaching a sincere, though, in the eyes of the judge, an incorrect, verdict, Vaughn noted the requirement that the jury be drawn from the "vicinage" and declared that "the law supposeth them thence to have sufficient knowledge to try the matter in issue . . . though no evidence were given on

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28. 1 HOLDSWORTH, *supra* note 26, at 317. As Blackstone put it, "living in the neighbourhood, they were . . . supposed to know beforehand the characters of the parties and witnesses, and therefore they better knew what credit to give to the facts alleged in evidence." 3 WILLIAM BLACKSTONE, COMMENTARIES *359; *see also* 1 HOLDSWORTH, *supra* note 26, at 333 ("[I]t was perfectly clear that verdicts were not as a rule founded on first hand knowledge."); 2 POLLOCK & MAITLAND, *supra* note 26, at 624-25 ("[I]t is the duty of the jurors, so soon as they have been summoned, to make inquiries about the facts . . . ."); Mitnick, *supra* note 27, at 203-04 ("Although the jury was considered to speak from its collective personal knowledge, its role was in fact understood to be investigatory."). Tillers asserts that even the "self-informing" jury had to operate on the basis of evidence rules. Tillers, *Intellectual History*, *supra* note 12, at 1471. Thus, he contests the correlation between the denouement of the jury's self-informing status and the development of the law of evidence. *Id.* at 1471-72; *see also supra* note 25 and accompanying text. *See generally* 1 HOLDSWORTH, *supra* note 26, at 312-14 (examining jury's origin as royal commissions of inquiry).

29. 2 POLLOCK & MAITLAND, *supra* note 26, at 622. *But see id.* at 617-18 (warning that this statement oversimplifies the jury's role).

30. SHAPIRO, *supra* note 6, at 190.

31. *Id.*

32. *See* 1 HOLDSWORTH, *supra* note 26, at 333. "How a jury came by its knowledge was not *originally* a matter with which the law concerned itself." *Id.* (emphasis added).

33. Bushell's Case, 124 Eng. Rep. 1006 (C.P. 1670).

34. The two were accused of "causing an unlawful assembly and a disturbance of the peace." GREEN, *supra* note 26, at 222. *See generally id.* at 200-21; Mitnick, *supra* note 27, at 206-07; John A. Phillips & Thomas C. Thompson, *Jurors v. Judges in Later Stuart England: The Penn/Mead Trial and* Bushell's Case, 4 LAW & INEQUALITY 189 (1986). Following the "not guilty" verdict, the jurors, including Bushell, were fined by the court for bringing in a verdict that was "contrary both to the evidence ('in matter of fact') and to the instructions ('in matter of law')." GREEN, *supra* note 26, at 225; *see Bushell's Case*, 124 Eng. Rep. at 1007. Bushell was imprisoned when he refused to pay the fine. GREEN, *supra* note 26, at 236.

either side in Court."[35]

Although Gilbert noted that "the Jury of their own Knowledge may have further Light in the Fact than what they have from the Witnesses in Court,"[36] it is probable that the legitimacy of jurors' reliance on their own knowledge had completely eroded by the mid-eighteenth century.[37] The impropriety of jurors' reliance on their own knowledge in reaching a verdict gave greater epistemological leverage to the courtroom proceedings and greater salience to the law of evidence. With no occult sources available, jurors became solely dependent upon the evidence presented in court, and the law of evidence became one means of regulating jurors' knowledge and, by extension, the jury's verdict.[38]

The requirement that jurors have no personal knowledge of the facts intersected with the requirement of juror impartiality. From a very early date, it was recognized that the jury should be impartial. Fortescue defined the jury as "twelve good and lawful men of the neighbourhood where the fact is alleged, who stand in no relation to either of the parties at issue."[39] He stated that "either party can challenge these . . . by saying that the sheriff made the panel favourable to the other party, viz. of persons not altogether impartial."[40] Blackstone elaborated on the procedures for ensuring the impartiality of jurors.

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35. *Bushell's Case*, 124 Eng. Rep. at 1012. *See generally* GREEN, *supra* note 26, at 236-49; John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 298-300 (1978). Assumptions about the jury's potential extrajudicial knowledge were implicit in the abandonment of attaint as a means of jury control by the late seventeenth century and the concomitant development of the new trial. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *374-75; 1 HOLDSWORTH, *supra* note 26, at 337-47; Mitnick, *supra* note 27, at 209-18.

36. GILBERT, *supra* note 8, at 95.

37. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *375 ("[T]he practice . . . now universally obtains, that if a juror knows any thing of the matter in issue, he may be sworn as a witness, and give his evidence publicly in court."); *see also* Mitnick, *supra* note 27, at 222-23 (arguing that establishment of the rule that "jurors were limited to evidence presented in court" occurred in 1726, with Chief Justice Raymond's ruling that " 'if a jury man knows anything of his own knowledge he ought not to acquaint his fellows with it privately, but must be sworn in open court, for he is a witness . . . .' " (quoting Constable v. Nichols (K.B. 1726), Bound Manuscript Collection MS 1017 (fo. 83), Harvard Law School Library). *But see* Langbein, *supra* note 35, at 298-99 n.105 (dating prohibition of jurors' reliance on their own knowledge to 1650 and noting that "Vaughn was being willfully anachronistic in basing his result in *Bushell's Case* upon the self-informing character of the jury").

38. *See* Edward J. Imwinkelried, *The Worst Evidence Principle: The Best Hypothesis as to the Logical Structure of Evidence Law*, 46 U. MIAMI L. REV. 1069, 1072-74 (1992) (characterizing the "Jury Control Hypothesis" as the traditional explanation for the development of the law of evidence); *see also id.* at 1074-77 (discussing the "Best Evidence Hypothesis"); *id.* at 1077-99 (advocating a third explanation, the "Worst Evidence Principle"); *infra* text accompanying notes 57-65.

39. SIR JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIE 57 (S.B. Chrimes, ed. & trans., 1942).

40. *Id.*

The sheriff was disqualified from summoning the jury if he "[was] not an indifferent person; as if he [was] a party in the suit, or . . . related by either blood or affinity to either of the parties."[41] A party could challenge the array if the sheriff "array[ed] the panel at the nomination, or under the direction of either party."[42] And individual jurors could be challenged *propter affectum*, "for suspicion of bias or partiality."[43] So central had the principle of impartiality become by the mid-eighteenth century that Blackstone could praise the diminution of the vicinage requirement by noting that "jurors, coming out of the immediate neighbourhood, would be apt to intermix their prejudices and partialities in the trial of right."[44] For Blackstone, this partiality was a "very natural and almost unavoidable inconvenience" that outweighed any benefits from a first-hand knowledge of the facts.[45] The venerable goal of juror impartiality was enhanced, therefore, by the prohibition of jurors' reliance on their own knowledge.

Lacking either knowledge of the facts or an interest in the outcome of the litigation, English jurors by the eighteenth century had evolved, metaphorically, into Lockean blank slates, "white Paper, void of all Characters,"[46] prepared to have the truth inscribed upon them by the evidence presented in court.[47] This image connotes utter passivity. However, consistent with Locke's assertion that all knowledge derives from "Sensation" and "Reflection,"[48] Gilbert's formulation of the jury's role emphasized their mental processes. Jurors had to weigh the evidence and draw inferences from it; judging consisted of, first, perceiving the evidence and, then, interpreting it correctly.[49]

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41. 3 WILLIAM BLACKSTONE, COMMENTARIES *354.

42. *Id.* at *359.

43. *Id.* at *363. Challenges *propter affectum* could be either "principal" or "to the favour." *Id.* Principal challenges were proper "where the cause assigned carrie[d] with it *prima facie* evident marks of suspicion, either of malice or favour," such as the following:

> that a juror [was] of kin to either party within the ninth degree; that he ha[d] been arbitrator on either side; that he ha[d] an interest in the cause; that there [was] an action depending between him and the party; that he ha[d] taken money for his verdict; that he ha[d] formerly been a juror in the same cause; [or] that he [was] the party's master, servant, counsellor, steward or attorney, or of the same society or corporation with him.

Id. (footnote omitted). Challenges "to the favour" were proper where the party "object[ed] only some probable circumstances of suspicion, as acquaintance and the like." *Id.*

44. *Id.* at *359-60.

45. *Id.* at *359.

46. LOCKE, *supra* note 1, at 104.

47. *See* JACKSON, *supra* note 15, at 112-13 (stating that the juror "is supposed to come to the court like a *tabula rasa*, with no knowledge whatsoever of the situation—a blank space waiting to be filled by facts as constructed through the testimony of witnesses").

48. LOCKE, *supra* note 1, at 105.

49. This is not a precise Lockean description of the process. In Lockean terms, rendering a

According to Gilbert, the jury's duty was "to find the Truth of the Fact in Question, according to the Evidence brought before them."[50] To do this, the jury had to "range all Matters in the Scale of Probability, so as to lay most Weight where the cause ought to preponderate."[51] The "Scale of Probability," Gilbert explained, derived from Locke's principle that "there are several Degrees from perfect Certainty and Demonstration, quite down to Improbability and Unlikeliness, even to the Confines of Impossibility."[52] The quality of the evidence presented determined the likelihood of a fact sought to be proved. The most reliable evidence, Gilbert explained, was "Demonstration," which he defined as "[t]he way of Knowledge by necessary Inference [that] is founded on the View of a Man's own proper Senses, by a Gradation of clear and distinct Perceptions."[53] Because demonstration was rarely available to the jury, however, jurors usually had to rely on the less reliable forms of evidence, "testimony"—with written documents considered more reliable than oral testimony[54]—and "presumptions,"[55] which we would call factual inferences.[56]

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verdict would require, first, Sensation, and then the exercise of the various "Faculties and Operations of the Mind," *id.* at 161, including, at least, "perception," "retention," "discerning," and "abstracting," *id.* at 143-63. Juror passivity is also belied by eighteenth-century trial records showing that jurors questioned witnesses and communicated directly with the bench during the trial. *See* Langbein, *supra* note 35, at 288; *cf.* Pennington & Hastie, *supra* note 15, at 523 ("[J]urors engage in an active, constructive, comprehension process in which evidence is organized, elaborated, and interpreted by them during the course of the trial.").

50. GILBERT, *supra* note 8, at 32. Gilbert thus accepted a central tenet of the "rationalist tradition" of evidence, that adjudication involves "the pursuit of truth about particular past events through rational means." TWINING, *supra* note 7, at 78.

51. GILBERT, *supra* note 8, at 1-2.

52. *Id.* at 1.

53. *Id.* at 2-3. Gilbert apparently believed that the highest form of knowledge in Locke's system, "*intuitive Knowledge*," LOCKE, *supra* note 1, at 531, was unavailable in adjudication. *See* GILBERT, *supra* note 8, at 2.

54. GILBERT, *supra* note 8, at 4-5.

55. *Id.* at 112.

56. Although the civil law origin of the term "presumptions" may have led to a technical distinction between presumptions and inferences of fact, *see* SHAPIRO, *supra* note 6, at 200-06, I am referring to "presumptions" in the following sense: "Presumptions of fact are the inferences that followed from circumstantial evidence." *Id.* at 207. The 1729 edition of Giles Jacob's law dictionary uses the term "presumptive" evidence: "And though presumptive and circumstantial *Evidence* may be sufficient in Felony; it is not so in Treason." GILES JACOB, A NEW LAW-DICTIONARY (London, E. & R. Nutt et al. 1729). Wigmore noted: "An earlier term for this class [circumstantial evidence] was 'presumptive evidence.' The distinction between 'presumption' in the sense of a mere circumstantial inference and in the sense of a rule of procedure affecting the duty of proof has in modern times led to confusion." JOHN HENRY WIGMORE, THE SCIENCE OF JUDICIAL PROOF § 6, at 12 n.1 (3d ed. 1937). *See generally* Ronald J. Allen, *Presumptions in Civil Actions Reconsidered*, 66 IOWA L. REV. 843 (1981) (discussing confusion in the use of the term "presumption" and the various roles played by presumptions in civil actions). The modern definition of circumstantial evidence is as follows: "any fact (sometimes

Gilbert's hierarchy of evidence embodied the primary principle of evidence that had developed by the eighteenth century: the best evidence rule.[57] Although this rule has been attributed to "the common-law judges' fear that untrained jurors w[ould] attach undue weight to particular kinds of evidence,"[58] Gilbert's justification for the rule suggests a different rationale: "[T]he farther off a Thing lies from the first Original Truth, so much the weaker must the Evidence be . . . ."[59] Clearly, Gilbert here was influenced by Locke's view of knowledge acquisition, in which "the isolated, indivisible individual" is the "indecomposable epistemological unit."[60] Locke's "confidence in cognitive autonomy and self-sufficiency"[61] meant that anything that intervenes between the individual and the fact sought to be proved jeopardizes the individual's perception of truth, not so much because the individual's reasoning powers are suspect,[62] but because the evidence itself becomes subject to falsification.[63] Gilbert recognized this: "[I]f a Man offers a Copy of a Deed or Will where he ought to produce the Original, this carries a Presumption with it that there is something more in the Deed or Will that makes against the Party, or else he wou'd have produced it . . . ."[64] More specifically, Gilbert noted, "[T]he Deed is much bet-

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called an 'evidentiary fact', *factum probans*, or 'fact relevant to the issue') from the existence of which the judge or jury may infer the existence of a fact in issue (sometimes called a 'principal fact' or *factum probandum*)." JACKSON, *supra* note 15, at 9.

57. TWINING, *supra* note 7, at 188 ("Gilbert tried to subsume all the rules of evidence under a single principle, the 'best evidence rule' . . . ."). It is important to distinguish the modern best evidence rule, which applies only to written documents, *see* Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 256-63 (1988), from the eighteenth-century version of the rule, which applied to all types of evidence. As Blackstone phrased it, "the one general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required." 3 WILLIAM BLACKSTONE, COMMENTARIES *368. *See generally* Stephan Landsman, *From Gilbert to Bentham: The Reconceptualization of Evidence Theory*, 36 WAYNE L. REV. 1149, 1149-60 (1990).

58. Imwinkelried, *supra* note 38, at 1070; *see* Nance, *supra* note 57, at 278-79.

59. GILBERT, *supra* note 8, at 6-7.

60. JOEL C. WEINSHEIMER, EIGHTEENTH-CENTURY HERMENEUTICS: PHILOSOPHY OF INTERPRETATION IN ENGLAND FROM LOCKE TO BURKE 28 (1993).

61. *Id.* at 38.

62. *See* Imwinkelried, *supra* note 38, at 1072 ("[J]udges formulated the rules with a view toward restraining the irrational behavior of weak-minded jurors.").

63. When viewed in this light, perhaps, the best evidence rule simply assumes Imwinkelried's "worst evidence rule." *See supra* note 38 and accompanying text. Explaining his thesis, Imwinkelried notes, "[R]ather than primarily fearing the misevaluation of evidence by jurors, the judges were principally concerned about perjury by witnesses." Imwinkelried, *supra* note 38, at 1071. But Imwinkelried's two clauses may express, not alternative explanations for the best evidence rule, but, rather, a causal relationship: judges "fear[ed] the misevaluation of evidence by jurors" *because* they were "concerned about perjury by witnesses" and other forms of falsification of evidence.

64. GILBERT, *supra* note 8, at 13.

ter Evidence than the Copy of it, for the Rasure and Interlineation that might vacate the Deed, might appear in the Deed itself."[65] Thus, Gilbert's hierarchy of evidence goes not just to the subjective assent that each type of evidence commands, but also to the objective conditions for the jury's acquisition of knowledge. The best evidence rule implicitly recognizes the instability even of documents, their vulnerability to tampering that would cause misperception of their true nature.

Oral testimony, which Gilbert termed "Proofs from the Mouths of Witnesses,"[66] substitutes the report of one person's sense impressions for the juror's direct experience: "Probability arises from the Agreement of any Thing with a Man's own Thoughts and Observations from the Testimony of others who have seen and heard it."[67] In Gilbert's scheme, the least reliable form of evidence was hearsay, which indeed "is no Evidence," because "nothing can be more uncertain than the loose and wandering Witnesses that are taken upon the uncertain Reports of the Talk and Discourse of others."[68] In the absence of intuitive knowledge,[69] all evidence is substitutionary, but Gilbert emphasized this aspect of circumstantial evidence:

> When the Fact itself cannot be proved, that which comes nearest to the Proof of the Fact is, the Proof of the Circumstances that necessarily and usually attend such Facts, and these are called Presumptions and not Proofs, for they stand instead of the Proofs of the Fact till the contrary be proved.[70]

Apparently, Gilbert did not share the cautious attitude about circumstantial evidence that Shapiro attributes to Coke and Hale.[71] Although Gilbert rejected consideration of "light and rash Presumptions [that] weigh nothing,"[72] he valorized circumstantial evidence in explaining the low value of hearsay testimony: "That which renders his Testi-

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65. *Id.* at 69-70.

66. *Id.* at 86.

67. *Id.* at 104. Following the canon law, Gilbert ranked oral testimony according to the number of witnesses and the nature of their testimony. *See supra* note 11 and accompanying text; 9 HOLDSWORTH, *supra* note 26, at 203-11. He asserted that "[t]he first and lowest Proof is the Oath of one Witness only," GILBERT, *supra* note 8, at 106, and he discussed, under separate heads, "One Witness, Hearsay Evidence," "Two Witnesses," and "Two Witnesses, contrary Proofs," *id.* at 106, 108, 109.

68. GILBERT, *supra* note 8, at 107-08.

69. *See supra* note 53.

70. GILBERT, *supra* note 8, at 112.

71. Barbara Shapiro, *Circumstantial Evidence: Of Law, Literature, and Culture*, 5 YALE J.L. & HUMAN. 219, 232 (1993) (reviewing ALEXANDER WELSH, STRONG REPRESENTATIONS: NARRATIVE AND CIRCUMSTANTIAL EVIDENCE IN ENGLAND (1992)).

72. GILBERT, *supra* note 8, at 112.

mony doubtful is the Attestation of the several Circumstances, and yet no Proof of any one of those Circumstances to fall in with what he attests . . . ."[73]

Just as Locke implied a shared body of experience among his readers by consistently appealing to the reader's own "Experience" and "Observation,"[74] so Gilbert assumed that eighteenth-century jurors, who were generally required to be free, male, property-holding English subjects,[75] would share a common core of experience. Gilbert classified presumptions as either "violent" or "probable," "according as the several Circumstances sworn do more or less usually accompany the Fact to be proved."[76] He asserted that, in evaluating the proof of a single witness, jurors must refer to their own experience, "for if the Fact be contrary to all manner of Experience and Observation, 'tis too much to receive it upon the Oath of one Witness."[77] Thus, the image of a juror as a blank slate proved inapt, not only because jurors were not passive receptors of the evidence, but also because they were expected to bring to bear a store of knowledge deriving from observation and experience.[78]

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73. *Id.* at 106.

74. *See, e.g.*, LOCKE, *supra* note 1, at 91, 103, 162, 254.

75. 3 WILLIAM BLACKSTONE, COMMENTARIES *361-63. *But see* James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 167-72 (1983) (discussing special juries of aliens and matrons).

76. GILBERT, *supra* note 8, at 112-13. In *An Abstract of Mr. Locke's Essay on Human Understanding*, Gilbert recognized that determinations of probability are products of "Observation and Experience." JEFFREY GILBERT, AN ABSTRACT OF MR. LOCKE'S ESSAY ON HUMAN UNDERSTANDING 44 (Dublin, William Sandby 1752). After noting that "general and universal" experience yields the highest probability, *id.* at 45, Gilbert invoked Locke's hypothetical conversation between the Dutch ambassador and the King of Siam, *see* LOCKE, *supra* note 1, at 656-57, to illustrate the principle that "what may seem probable to one Man, or in some Places, seems improbable in others, according to the Difference of their Observation and Experience," GILBERT, *supra*, at 46-47. However, in his treatise on evidence, Gilbert did not find it necessary to discuss the implications of this insight.

77. *Id.* at 106.

78. The kind of "observation and experience" assumed by Locke and Gilbert may produce the "commonsense presumptions" that, in Cohen's view, "license" juror inferences. L. JONATHAN COHEN, THE PROBABLE AND THE PROVABLE 247-48 (1977); *see also id.* at 251 (explaining that the juror must assess inductive probabilities in evaluating both "direct" and "circumstantial" evidence). Cohen is generally acknowledged as the leading proponent of a Baconian (non-Pascalian) model of inferential reasoning. *See, e.g.*, Twining, *supra* note 24, at 392; *see infra* note 12. For a survey of four proposed models of juror decision making, see Reid Hastie, *Introduction* to INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 3, 10-28 (Reid Hastie ed., 1993). Lockean "observation and experience" may also correlate with Pennington and Hastie's "world knowledge." Pennington & Hastie, *supra* note 15, at 523 ("[S]tories are constructed by reasoning from world knowledge and from evidence."); *see also* Allen, *supra* note 10, at 618 & n.39 (asking the reader to "consult his or her own knowledge" as proof that "[p]eople do not carry around in their brains relative frequency or likelihood tables relevant to life in general").

III. *CLARISSA* AS EPISTEMOLOGICAL TRAGEDY

Clarissa's story[79] may be seen as the tragedy[80] that befalls a young

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Cohen's description of the information jurors need in order to assess inductive probabilities suggests congruence with Locke's concept of "observation and experience":

> The inductivist analysis . . . presupposes only that when a juryman takes up his office his mind is already adult and stocked with a vast number of commonplace generalizations about human acts, attitudes, intentions, etc., about the more familiar features of the human environment, and about the interactions between these two kinds of factor, together with an awareness of many of the kinds of circumstances that are favourable or unfavourable to the application of each such generalization. Without this stock of information in everyday life he could understand very little about his neighbours, his colleagues, his business competitors, or his wife. He would be greatly handicapped in explaining their past actions or predicting their future ones. But with this information he has the only kind of background data he needs in practice for the assessment of inductive probabilities in the jury-room . . . .
>
> . . . The main commonplace generalizations themselves are for the most part too essential a part of our culture for there to be any serious disagreement about them. They are learned from shared experiences, or taught by proverb, myth, legend, history, literature, drama, parental advice, and the mass media . . . .

COHEN, *supra*, at 274-75. Cohen's vocabulary is gender-specific, but he obviously intends this description to apply to all persons within a given culture. *See id.* at 275. He does admit that "there is still room for occasional disagreement, even within the same culture, about the kinds of circumstance that are favourable or unfavourable to the application of some particular commonsense generalization." *Id.* Presumably, given the sources Cohen identifies for the shared generalizations, differences inscribed within a culture will diminish the commonality of the generalizations. *Cf.* Pennington & Hastie, *supra* note 15, at 525 ("Because all jurors hear the same evidence and have the same general knowledge about the expected structure of stories, differences in story construction must arise from differences in world knowledge; that is, differences in experiences and beliefs about the social world."). *But cf.* Joan W. Scott, *The Evidence of Experience*, 17 CRITICAL INQUIRY 773, 779 (1991) ("[W]e need to attend to the historical processes that, through discourse, position subjects and produce their experiences. It is not individuals who have experience, but subjects who are constituted through experience.").

79. Clarissa Harlowe, the beautiful, virtuous daughter of a wealthy middle-class family, inherits estates from her grandfather. She attracts the attentions of a handsome, charming, but debauched aristocrat, Robert Lovelace. Her family's social ambitions and their distaste for Lovelace lead them to propose a wealthy but uncouth neighbor, Solmes, as her suitor. As a result of her family's increasingly oppressive behavior, Clarissa fears that they will force her assent to the marriage with Solmes. Consequently, she becomes receptive to Lovelace's proposal. Unable to persuade Clarissa to elope, Lovelace stages an "abduction" by her family, from which he "rescues" her. Clarissa leaves her home with Lovelace; her family disowns her; and when she hesitates to place herself under the protection of Lovelace's noble relatives, he installs her in a London brothel, which he misrepresents as the home of a respectable widow and her nieces. After months of confinement, in which her friend, Anna Howe, is her only regular correspondent, Clarissa escapes to Hampstead, where Lovelace finds her. He tricks her into returning to London by hiring two of his female friends to impersonate his noble aunt and cousin, who promise Clarissa their protection if she returns. Back in London, once again forcibly imprisoned in the brothel, Clarissa is raped by Lovelace. She finally escapes and takes up separate lodgings; she is never reconciled with her family; and she eventually withers away and dies.

Other readers have characterized the story differently. Hester Thrale Piozzi wrote, "There *is* no Story . . . A Man gets a Girl from her Parents—violates her Free Will, & She dies of a broken heart. That is all the Story." KEYMER, *supra* note 2, at 48 (quoting Piozzi's marginalia,

woman when she attempts to judge her own life according to Gilbertian principles. Evidentiary issues are raised in the very first letter of the novel. Writing to Clarissa, Anna Howe notes that, as a result of the "disturbances that have happened in [Clarissa's] family,"[81] she has "become the subject of the public talk."[82] Anna recounts the eyewitness testimony of Mr. Wyerley and Mr. Symmes about the duel between James Harlowe and Lovelace[83] and reports her friends' apprehensions for Clarissa and their opinion of Lovelace.[84] However, Anna is not satisfied with these sources. With respect to the "disturbances," she tells Clarissa, "I long to have the particulars from yourself . . . ."[85] Anna wishes, "on the authority of [Clarissa's] own information," to do her friend "occasional justice."[86] For this purpose, she demands direct evidence: "Write to me therefore, my dear, the whole of your story . . . ."[87] Perhaps sensing the role her grandfather's will plays in the family's animosity toward Clarissa, Anna also seeks documentary evidence, requesting "a copy of the preamble to the clauses in your

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British Library, 10856.ee.9). In Terry Eagleton's view, "*Clarissa* is the story of a young woman of outstanding kindness, virtue and intelligence who is made to suffer under a violently oppressive family, is tricked away from home by a notorious sexual predator, deceived, imprisoned, persecuted, drugged and raped, and finally impelled to her death." EAGLETON, *supra* note 21, at 63-64; *see also* RICHARDSON, *supra* note 2, at 1206 (Mr. John Belford's version of Clarissa's story).

Clearly, I read the novel as assuming the existence of an objective reality and having an "action" that is narrated by the letters. *See* JANET GURKIN ALTMAN, EPISTOLARITY: APPROACHES TO A FORM 200-01 (1982). Other critics have suggested that the novel represents no reality and tells no single story apart from the letters themselves. *See* CASTLE, *supra* note 21, at 21, 54-55; WARNER, *supra* note 21, at 5 ("[W]e shall find nothing in the novel that we can call neutral, objective, or true."). But the critics who take this position still speak as though there are real events underlying the letters, asserting, for instance, that Mrs. Sinclair's abode is a brothel. *See* CASTLE, *supra* note 21, at 94-101; WARNER, *supra* note 21, at 56-74; *see also* EAGLETON, *supra* note 21, at 66. The critics have also questioned the sincerity of Clarissa's version of events, *see* DAVID GOLDKNOPF, THE LIFE OF THE NOVEL 72-73 (1972); WARNER, *supra* note 21, at 10-14, 87-89, 95, but as I read her letters, and those of the other correspondents, the letters *taken together* are reliable testimony to the action of the novel. For example, Clarissa's early letters about Mrs. Sinclair's house do not convey the fact that it is a brothel, but the reader learns that from Lovelace's letters. Critics can and do discuss the nature of Mrs. Sinclair's house as a matter of *fact*. Thus, I agree with Keymer that the correspondents in *Clarissa* "agree on the basic facts" but "offer . . . radically adversarial constructions of them." KEYMER, *supra* note 2, at 230.

80. Terry Castle describes Clarissa's ordeal as a "hermeneutic disaster." CASTLE, *supra* note 21, at 59.

81. RICHARDSON, *supra* note 2, at 39.

82. *Id.*

83. *Id.*

84. *Id.* at 40.

85. *Id.* at 39.

86. *Id.* at 40.

87. *Id.*

grandfather's will."[88]

The novel is rife with legal metaphor, in which Clarissa is frequently presented, as in Anna's initial letter, as a party. With respect to her parents, she is the defendant, charged with undutiful behavior. She refers to "my power to plead my own cause";[89] she laments, "I am deprived of the opportunity of defending myself!"[90] After the abduction, Lovelace's object of "bring[ing] virtue to a trial"[91] once more casts her in the role of defendant. After the rape, she becomes the plaintiff or prosecutor of Lovelace.[92] But Clarissa also refers explicitly to her role as judge. Early in her relationship with Lovelace, she declares, "I would judge him . . . by his *actions*, not by his *professions*."[93] At Hampstead, she demands, "Let me judge for myself upon what I shall *see*, not upon what I shall *hear* . . . ."[94] Thus, although the trial analogy allows Clarissa to play many roles,[95] I will focus upon Clarissa as juror, attempting to discern from the evidence the truth of her situation.[96]

In many respects, Clarissa is the perfect eighteenth-century juror. Clarissa's story has been characterized as one of "compulsion and isolation,"[97] echoing the jury's situation: compelled to serve,[98] epistemologically isolated in the courtroom, and physically isolated during their

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88. *Id.*

89. *Id.* at 115.

90. *Id.* at 206.

91. *Id.* at 608.

92. *See* KEYMER, *supra* note 2, at 224. However, she rejects her friends' suggestion that she actually prosecute Lovelace. RICHARDSON, *supra* note 2, at 1251-57; *see* CASTLE, *supra* note 21, at 128; ZOMCHICK, *supra* note 21, at 96-99.

93. RICHARDSON, *supra* note 2, at 171.

94. *Id.* at 777.

95. Warner asserts that she is "at once defendant, prosecutor, and judge," WARNER, *supra* note 21, at 24, as well as her own advocate, who "shapes, tames, and controls her world," *id.* at 113, and the story of her life, *id.* at 75-76.

96. The analogy is imperfect in two important respects. First, Clarissa is not impartial, *see infra* text accompanying notes 111-18; she is vitally interested in the verdict. *But see* Gerard A. Barker, *The Complacent Paragon: Exemplary Characterization in Richardson*, 9 STUD. ENG. LITERATURE 503, 503 (1969) (Clarissa's story "is rooted ultimately in the Protestant scheme of salvation with its basic belief in the validity of self-judgment."). Second, the jury was required to judge *past* truth; Clarissa's judgment, for the most part, is directed to present events and motives. It may also be objected that Clarissa would not have been eligible to serve on an actual eighteenth-century jury because of her sex, *see* 3 WILLIAM BLACKSTONE, COMMENTARIES *362, and that the evidentiary principles articulated by Gilbert were intended for use only in a courtroom. However, Locke's theory of knowledge, which Gilbert adapted, does purport to apply generally, regardless of the knower's situation or gender.

97. Anthony Kearney, Clarissa *and the Epistolary Form*, 16 ESSAYS IN CRITICISM 44, 45 (1966).

98. 3 WILLIAM BLACKSTONE. COMMENTARIES *354.

deliberations.[99] Before the abduction, she grows increasingly estranged from her family, her friends, and her spiritual advisers, and, throughout the ordeal that follows the abduction, she is required to discern the truth on the basis of evidence presented to her by others. But Gilbert's hierarchy of evidence utterly fails as hearsay proves to be an important source of accurate information, written documents prove subject to tampering, and Clarissa's own perceptions betray her. Hearsay, completely disqualified from consideration under the rules of evidence, proves more reliable than the evidence of Clarissa's own eyes and ears. The tragedy of the virtuous heroine, who by definition can have no "experience," exposes the assumptions underlying these principles and the way in which "truth is always a matter of power and position."[100]

In the first part of the novel, Clarissa's task is to judge her parents' intentions with respect to her marriage to Solmes. The methods that her parents use to try to persuade Clarissa to accept Solmes place her in informational isolation analogous to that of the impartial eighteenth-century juror.[101] Very early on, her parents refuse to hear her objections to Solmes.[102] Whenever Clarissa attempts to state her position, she is accused of "prepossessions"[103] or "prejudices"[104] in favor of Lovelace. She is kept from attending church, forbidden to receive visits from her spiritual mentor, Mrs. Norton, and forbidden to correspond with anyone outside the house.[105] The household keys are taken from her, and her servant, Hannah, is discharged.[106] Eventually, she is forbidden to write to or to see any of her family,[107] and her pens and ink are removed.[108] In the period immediately preceding the abduction, her only legitimate sources of information are the maid, Betty Barnes, and her Aunt Hervey.[109] From the very inception of the novel, Clarissa is "epistemologically disadvantaged."[110]

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99. *Id.* at *375-76 (After retiring to deliberate, the jurors "are to be kept without meat, drink, fire, or candle" and cannot "speak with either of the parties or their agents" or "receive any fresh evidence in private.").

100. EAGLETON, *supra* note 21, at 79.

101. *Cf.* ZOMCHICK, *supra* note 21, at 74 ("[T]he Harlowes subject Clarissa to a kind of psychological *peine forte et dure* . . . .").

102. RICHARDSON, *supra* note 2, at 61.

103. *Id.* at 108.

104. *Id.* at 254.

105. *Id.* at 63, 82.

106. *Id.* at 116, 119.

107. *Id.* at 265.

108. *Id.* at 320.

109. *Id.* at 244, 325, 346-48.

110. KEYMER, *supra* note 2, at 177. Thus, Janet Altman misses the mark in asserting that the dominance of Clarissa's viewpoint early in the novel indicates that she is "the most omniscient observer at the time." ALTMAN, *supra* note 79, at 170.

Of course, the Harlowe family's purpose is not to render Clarissa impartial. On the contrary, they wish her to become partial to Solmes. But their insistence on depriving Clarissa of multiple sources of knowledge in an effort to make her solely dependent upon them, their attempt to telescope her frame of reference, simply renders Clarissa's judgment unreliable. Most importantly, the limitation of her legitimate sources of knowledge magnifies the reliability of Lovelace's illegitimate sources. Confined to her room, forbidden to communicate with her family or her spiritual advisers, Clarissa is forced to interpret the "hurry below-stairs" and Betty Barnes' "dark hints."[111] Clarissa exclaims in exasperation, "Something is working, I know not what. . . . Indeed I am quite heart-sick!"[112] In contrast to Clarissa, Lovelace "knows everything that is done here; and that as soon as done."[113] His declaration that she will be forced to marry Solmes,[114] a conviction Anna shares,[115] is repeatedly confirmed by everyone with whom Clarissa is allowed to communicate: her Uncle Antony,[116] her Aunt Hervey and Dolly Hervey,[117] and Betty Barnes.[118] Thus, the information that her family provides her supports Lovelace's veracity; his evidence weighs more heavily with Clarissa because it is consistent with the other, legitimate evidence. Despite her misgivings about Lovelace's character, Clarissa comes to trust the evidence with which he presents her.

The credit that her family's behavior unwittingly grants to Lovelace provides an unfortunate backdrop for her efforts to judge his actions and intentions. Clarissa's efforts to discover the truth about Lovelace's behavior challenge Gilbert's denigration of hearsay and valorization of written documents. For Clarissa and Anna, whose freedom of movement is limited by social convention, hearsay is an important source of information.[119] Throughout the novel, hearsay from Anna and Mr.

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111. RICHARDSON, *supra* note 2, at 328.

112. *Id.*

113. *Id.* at 366; *see also id.* at 325 ("[N]othing passes in this house, but he knows it; and that, as soon as it passes.").

114. *Id.* at 326.

115. *Id.* at 239.

116. *Id.* at 305.

117. *Id.* at 337, 364.

118. *Id.* at 339.

119. Gilbert treats hearsay as a species of oral testimony, but, of course, the information contained in the letters Clarissa receives is also hearsay: because the letters originate outside her presence, they are "out of court" statements, and Clarissa certainly treats the information conveyed as purporting to be truthful. Because the hearsay that proves reliable reaches Clarissa through letters, it is actually "double" hearsay. After the abduction, letters are Clarissa's only source of truth, because Lovelace orchestrates virtually everything that occurs in her presence. *See, e.g.*, RICHARDSON, *supra* note 2, at 681-97 (describing the Tomlinson episode, in which

Hickman generally proves accurate. For example, Hickman's report of what Lovelace's friends, Mowbray and Belton, say about his character is nothing but hearsay, yet it accurately portrays his lack of morals.[120] Anna's information about Lovelace's relationship with Rosebud is accurate.[121] Finally, Anna's account of Miss Lardner's assessment of Mrs. Sinclair's house is the quintessence of hearsay, yet it proves to be correct: "At last, she revealed it, but in confidence, to Miss Biddulph, by letter. Miss Biddulph, in like confidence . . . communicated it to Miss Lloyd; and so, like a whispered scandal, it passed through several canals [sic]; and then it came to me."[122]

Clarissa's tragedy is that she does not or cannot make use of these hearsay reports; she would have been better off, the novel suggests, had she relied on hearsay. Of course, not all hearsay is so reliable. The two most noteworthy instances of unreliable hearsay are the Singleton plot[123] and Rev. Brand's report of Clarissa's behavior after her escape from Lovelace.[124] These uses of hearsay by, respectively, an intentionally deceitful and a stupidly officious man do not, however, diminish the usefulness of hearsay from trustworthy sources.

Just as hearsay frequently proves valuable, so written documents in the novel often prove treacherous. Gilbert assigned documents "the first place in the Discourses of Probability," primarily because, unlike oral testimony, they are not "liable to the Imperfections of Memory."[125] The issue raised with respect to documents in the novel, however, is not their accuracy, but the condition precedent to accuracy, their authenticity.[126] According to Gilbert, authenticity was guaranteed by the "Hand and Seal" of the maker.[127] In the novel, of course, Lovelace makes short work of these safeguards, effectively imitating Anna's and Clarissa's handwriting and surreptitiously breaking and replacing seals.[128] At the critical Hampstead juncture, Lovelace forges three let-

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one of Lovelace's friends masquerades as a friend of Clarissa's uncle interested in promoting a reconciliation between her and her family). Of course, Lovelace also creates false hearsay in the letter from Doleman describing the "widow's" lodgings. *Id.* at 469-71.

120. *Id.* at 214.

121. *Id.* at 284-87.

122. *Id.* at 746.

123. *E.g., id.* at 640.

124. *Id.* at 1292-95.

125. GILBERT, *supra* note 8, at 5.

126. *Cf.* Twining, *supra* note 12, at 216 (noting Bentham's criticism of Gilbert for "confusing verity and authenticity of documents").

127. GILBERT, *supra* note 8, at 73.

128. *See* EAGLETON, *supra* note 21, at 50 ("Letters . . . are waylaid, forged, stolen, lost, copied . . . .").

ters: the warning letter from Anna to Clarissa,[129] Clarissa's response to this letter,[130] and the letter from "Lady Elizabeth Lawrance" informing Lovelace that "Miss Montague" has been taken ill.[131] Each of these letters contributes to Clarissa's decision to return to London and her eventual re-imprisonment and rape. Throughout the period following the abduction, Clarissa would have benefitted more from one face-to-face encounter with Anna than from all her letters.

Even the evidence from her own eyes and ears deceives Clarissa because she fails to draw the correct inferences from it.[132] The first major incident in which Clarissa draws the incorrect inference is, of course, the abduction itself. Clarissa vividly recounts both the facts and her inferences from them. She hears Lovelace's warning, "*They are at the door, my beloved creature!*" and someone's shouts from within the gate; she sees someone "bursting against the door," giving it "violent pushes."[133] She sees Lovelace draw his sword; she hears him urge her to "[f]ly" and predict, "Your brother!—your uncles! or this Solmes!—they will instantly burst the door!"[134] Her account of their flight to the chariot shows how each sense impression led to a chain of inferences supporting the interpretation that her family was attempting to restrain her by force:

> Now behind me, now before me, now on this side, now on that, turned I my affrighted face in the same moment; **expecting** a furious brother here, armed servants there, an enraged sister screaming and a father armed with terror in his countenance, more dreadful than even the drawn sword which I saw or those I **apprehended**. . . . I beheld a man, who must have come out of the garden door, keeping us in his eye, running backward and forward, beckoning and calling out to others, whom I **supposed** *he* saw, although the turning of the wall

129. RICHARDSON, *supra* note 2, at 811-14.

130. *Id.* at 815.

131. *Id.* at 880.

132. In this discussion, I deliberately conflate Gilbert's concept that direct sensory perception leads to "Knowledge by necessary Inference," GILBERT, *supra* note 8, at 2, which he termed "Demonstration," with his concept of circumstantial evidence, the notion that facts can be proved by "Proof of the Circumstances that necessarily and usually attend such Facts," *id.* at 112. This conflation reflects the fact that Gilbert's evidentiary hierarchy was premised, not only on the inherent characteristics of the evidence (written versus unwritten), but also on the relationship between the evidence produced and the fact to be proved. In Clarissa's case, the ultimate fact to be proved is Lovelace's villainy, which would be subject only to circumstantial evidence. But intermediate facts, such as the identity of the ladies at Hampstead, are also at issue in *Clarissa*, and these facts are subject to demonstration. The two categories of evidence are related by Gilbert's confidence in the "necessary" inferential relationship between the evidence and the fact to be proved. As we shall see, Clarissa's story critiques that confidence.

133. RICHARDSON, *supra* note 2, at 379-80.

134. *Id.* at 380.

> hindered *me* from seeing them; and whom I **imagined** to be my brother, my father and their servants.[135]

Although Clarissa quickly realizes that she was "cheated" into going with Lovelace,[136] she also realizes that, to her family, her flight must appear "preconcerted, forward, and artful."[137] And, of course, Lovelace has contrived the evidence at the scene so that her family will infer, as they do, that she went consensually.[138]

The second failure of direct sensory perception is Clarissa's residence at Mrs. Sinclair's. Her first information about the house comes via a letter from Doleman[139] and is therefore second-hand. But when she is introduced to the house, the "widow," and the "nieces," she still fails to judge accurately the nature of the place, even though she has more time and a calmer frame of mind in which to examine the evidence. Clarissa's closet contains Sally's and Polly's library, plus a few books of devotion that Lovelace adds.[140] Upon examining the books, which include Dryden, Pope, Swift, Addison, and Shakespeare, Clarissa draws an ironic inference about their owners: "[I] think the better of the people of the house for their sakes."[141] Other evidence about the character of the "non-apparents," as Lovelace calls them,[142] is ambiguous. Clarissa calls them "agreeable young women enough in their persons; but they seemed to put on an air of reserve."[143] Indeed, Clarissa sees evidence that their relationship with Lovelace is not congruent with the ostensible situation:

> Only that circumstances, and what passed in conversation, encouraged not the notion, or I should have been apt to think that the young gentlewomen and Mr Lovelace were of longer acquaintance than yesterday. For he, by stealth as it were, cast glances sometimes at them, which they returned; and, on my ocular notice, their eyes fell, as I may say, under my eye, as if they could not stand its examination.[144]

Clarissa does not specify the "circumstances" that failed to support her suspicion of the women. Here, ironically, she errs in devaluing her own perceptions, her "ocular notice," and relying too heavily on the

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135. *Id.* (emphasis in bold added).
136. *Id.* at 393.
137. *Id.* at 389.
138. *Id.* at 384-87.
139. *Id.* at 470.
140. *Id.* at 523.
141. *Id.* at 525.
142. *Id.* at 632.
143. *Id.* at 530.
144. *Id.* at 531.

absence of corroborating circumstances.

Clarissa also perceives discrepancies in Dorcas' appearance and behavior. Lovelace tells Belford that "Dorcas is a neat girl both in person and dress; a countenance not vulgar."[145] When introduced to Clarissa, she "behaved very modestly—overdid it a little perhaps!"[146] Yet Clarissa notes that "[s]he is very likely and genteel; too genteel indeed, I think, for a servant."[147] She also dislikes Dorcas' "strange sly eye . . . half-confident, I think."[148] Despite her reservations about Dorcas, Clarissa fails to detect Lovelace's lie about her illiteracy:

> She is not only genteel, but is well-bred, and well-spoken. She must have had what is generally thought to be the polite part of education: but it is strange that fathers and mothers should make so light, as they generally do, of that preferable part in girls, which would improve their minds and give a grace to all the rest.[149]

Neither does Clarissa detect Mrs. Sinclair. She cautions Anna, "[Y]ou must not ask me how I like the old gentlewoman. Yet she seems courteous and obliging."[150] She observes that, like Dorcas, the widow has an eye that gives cause for suspicion, "an odd winking eye."[151] Although Clarissa notes that Mrs. Sinclair's sentimental account of her late husband "moved me a good deal in her favour," she also notes that Mrs. Sinclair did not wet her handkerchief, although she wished Clarissa to believe she did.[152] A final ground for suspicion of Mrs. Sinclair is her too-respectful demeanor. When they first meet, Clarissa infers that "her respectfulness seems too much studied, methinks, for the London ease and freedom."[153] Later, Clarissa observes that Mrs. Sinclair behaves more respectfully toward her "than should be from distance of years, as she was the wife of a gentleman; and as the appearance of everything about her, as well house as dress, carries the marks of such good circumstances as require not abasement."[154] Again, Clarissa allows "circumstances" to neutralize the other evidence of Mrs. Sinclair's true nature.

Finally, Clarissa fails to recognize the impersonation of Lady Betty Lawrance and Miss Charlotte Montague. Clarissa describes the im-

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145. *Id.* at 522.
146. *Id.* at 523.
147. *Id.* at 524.
148. *Id.* at 525.
149. *Id.* at 529.
150. *Id.* at 524.
151. *Id.* at 525.
152. *Id.* at 531.
153. *Id.* at 525.
154. *Id.* at 529.

postors as "richly dressed and stuck out with jewels."[155] Consistent with their reputations, the putative Lady Betty is "a fine woman," and Charlotte is "a beautiful young lady, genteel and graceful, and full of vivacity."[156] Lady Betty appropriately chastises Lovelace and commiserates with Clarissa on her misfortunes.[157] From this evidence, Clarissa infers that the ladies are truly Lovelace's aunt and cousin. Yet there is other evidence from which Clarissa could have inferred the truth. The absence of arms on their coach could give rise to the inference that they were not members of Lovelace's family, but that inference is overborne by their explanation that the coach displaying the family arms was being repaired.[158] Clarissa "once saw this Lady Betty . . . take out a paper from her stays and look into it, and put it there again."[159] But she does not realize that the woman is consulting the script Lovelace has provided her.

The problem with circumstantial evidence, as Alexander Welsh realizes, is that "[e]ach inference supposes a possible sequence of events, but not necessarily the right one."[160] It is obvious that Clarissa perceives the evidence that should demonstrate the true nature of Lovelace and his schemes. Why, then, does she fail to discern the truth? One explanation is psychological. Locke characterizes "Inference" as "the great Act of the Rational Faculty . . . when it is rightly made."[161] But, he warns, "the Mind, . . . very apt to favour the Sentiments it has once imbibed, is very forward to make Inferences, and therefore often makes too much hast[e]."[162] Certainly, Clarissa's judgment about Lovelace is distorted by her undeniable attraction to him. She wants to believe the best of him; therefore, too hastily, she draws the inference that favors him. For example, Clarissa misinterprets one of the few untainted pieces of evidence with which she is presented. When Lovelace insists on accompanying her to St. Paul's, Clarissa recounts, "[H]e opened the street door, and taking my resisting hand led me, in a very obsequious manner, to the coach. People passing by, stopped, stared, and whispered . . . ."[163] The stares and whispers probably resulted from the neighbors' astonishment at seeing a lady exiting a brothel on Sunday and being handed into a coach by a gentleman. But Clarissa draws

155. *Id.* at 998.
156. *Id.*
157. *Id.* at 999.
158. *Id.* at 998.
159. *Id.* at 999.
160. WELSH, *supra* note 16, at 5.
161. LOCKE, *supra* note 1, at 672.
162. *Id.*
163. RICHARDSON, *supra* note 2, at 581.

quite a different inference: "[Lovelace] is so graceful in his person and dress, that he generally takes every eye."[164]

This psychological explanation for her erroneous judgment does not preempt an epistemological one. For Locke, the touchstone of Truth is always Experience, and in discussing the degrees of assent, he refers to the power of "common Experience."[165] Given the central role of experience in the Lockean reasoning process, Lovelace's exclamation, "She has a world of knowledge . . . but no *experience*!"[166] takes on an ominous tone. For Richardson, as for other eighteenth-century moralists, a woman's virtue existed in inverse proportion to her experience. But a woman's lack of experience, while ensuring her virtue in one sense, also jeopardized it when she was confronted with a handsome rake. Virtuous eighteenth-century women had no legitimate source of experience on which to draw in interpreting the evidence of their senses. Clarissa discounts the evidence that Mrs. Sinclair and her house are not what they seem because her lack of experience disables her from inferring that respectable surroundings and genteel, well-bred, well-read people could be associated with a brothel.[167]

Both Lovelace and Clarissa herself attribute her blindness to her lack of experience. As Lovelace puts it: "Silly little rogues! to walk out into by-paths on the strength of their own judgements!—when nothing but *experience* can teach them how to disappoint us, and learn them grandmother-wisdom!"[168] After discovering the imposture of Lady Betty Lawrance and Miss Charlotte Montague, Clarissa acknowledges to Anna her inability to imagine so thorough and dishonorable a deception: "She might oftener [have taken out a paper], and I not observe it; for I little thought that there could be such impostors in the world."[169] Recounting "Lady Betty's" commiseration with her, she asks rhetorically, "Could you have thought there was a woman in the world who could thus express herself, and yet be vile?"[170] Clarissa admits, "Inexperience and presumption . . . have been my *ruin*!"[171]

But what type of experience could have protected Clarissa from her own misinterpretations? Shortly before her death, analyzing her situa-

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164. *Id.*

165. LOCKE, *supra* note 1, at 667.

166. RICHARDSON, *supra* note 2, at 789.

167. *But see* John Allen Stevenson, *"Never in a Vile House": Knowledge and Experience in Richardson*, 34 LITERATURE & PSYCHOL. 4, 4 (1988) (arguing that Clarissa, while purportedly having no sexual experience, demonstrates "precocious knowledge" of sexual matters).

168. RICHARDSON, *supra* note 2, at 472.

169. *Id.* at 999.

170. *Id.*

171. *Id.* at 565.

tion, Clarissa writes to Anna:

> Oh, my dear, 'tis a sad, a very sad world!—While under our parents' protecting wings, we know nothing at all of it. Book-learned and a scribbler, and looking at people as I saw them as visitors or visiting, I thought I knew a great deal of it. Pitiable ignorance!—Alas! I knew nothing at all![172]

Clearly, Clarissa equates her book-learning and scribbling with the "knowledge *speculative*"[173] that Lovelace attributes to her, in contrast to the "experience" she lacks. This state of inexperience, Clarissa suggests, is the world of conventional social relationships, in which parents protect their daughters and others are encountered only "as visitors or visiting," when convention prescribes the range of permissible interactions. Because she had seen people only when their behavior was circumscribed by convention, she "knew nothing at all" of the "sad, very sad world" that she has now entered. The "sad world" and the world of "visitors and visiting" are contradistinguished. Thus, Clarissa suggests, social convention masks true human nature, which emerges only when social convention has been eluded or, in Clarissa's case, defied. As Clarissa discovers, the protections offered a young woman by social convention can be left behind, but the handicaps imposed by those conventions cannot. As Terry Castle puts it,

> The battles of interpretation, in the text, in the world, are seldom fair fights. In the case of *Clarissa*, it is true that Clarissa and Lovelace "collide and contend" in their efforts to affirm their "constructions" of experience and each other, but they are nowhere equal combatants in a political sense: Lovelace has available to him a kind of "force" Clarissa does not—all the institutionalized advantages of patriarchal power, including the power of sexual intimidation.[174]

If, as Clarissa suggests, experience involves the perception of human nature unalloyed by social controls, the sexual realm provides the most salient opportunity to gain that perception.

After her final escape from Mrs. Sinclair's, Clarissa discovers Lovelace's deceptions when she writes to Mrs. Norton, Lady Betty Lawrance, and Mrs. Hodges to confirm the Singleton plot, the impersonation at Hampstead, and the identity of Tomlinson.[175] She confronts Lovelace with the truth about the Hampstead episode:

> I have been contemplating [the impostors'] behaviour, their conversation, their over-ready acquiescencies [sic] to my declarations in thy

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172. *Id.* at 1194.
173. *Id.* at 789.
174. CASTLE, *supra* note 21, at 193.
175. RICHARDSON, *supra* note 2, at 978-86.

> disfavour; their free, yet affectedly reserved light manners: and now that the sad event has opened my eyes, and I have compared facts and passages together in the little interval that has been lent me, I wonder I could not distinguish the behaviour of the unmatron-like jilt whom thou broughtest to betray me, from the worthy lady whom thou hast the honour to call thy aunt: and that I could not detect the superficial creature whom thou passedst upon me for the virtuous Miss Montague.[176]

The eye-opening "sad event" that Clarissa refers to here could only be the rape. In Warner's view, this catastrophic event "gives Clarissa this advantage[:] Lovelace can no longer deceive her, for his final intentions have been exposed. . . . For Clarissa, the rape has unalterably fixed Lovelace's meaning—he simply *is* evil."[177] More generally, Robert Uphaus notes that Richardson "does not . . . protect his heroine from 'experience.' Rather he submits her to experience—dramatically represented by the rape—in order finally to celebrate her virtue."[178] The rape of Clarissa represents not just a physical violation and a spiritual subversion, but also a crisis of knowledge.[179] Only in losing her innocence does Clarissa gain epistemological competence. Her story suggests, therefore, that the "common Experience"[180] that can serve as the guarantor of correct judgment is the experience of human—or, perhaps, specifically male—depravity.

So depraved is Lovelace that he actually manufactures the evidence that successfully deceives Clarissa. Arguably, because the evidence is manufactured, it is not truly "circumstantial" evidence, which is characterized by "freedom from human deliberation at the origin."[181] But

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176. *Id.* at 902.

177. WARNER, *supra* note 21, at 72-73.

178. ROBERT W. UPHAUS, THE IMPOSSIBLE OBSERVER: REASON AND THE READER IN 18TH-CENTURY PROSE 79 (1979).

179. Warner also sees the rape as a crisis of knowledge for Lovelace: "The rape is also to be a moment of knowing—the moment when Clarissa will be undressed, seen, penetrated, and known." WARNER, *supra* note 21, at 50. Just as I am interested in Clarissa as the subject of her own interpretations, not just the object of others', *see supra* note 21, so I see Clarissa, in relation to the rape, as the knower, not just the known. Indeed, the progress of her tragedy may be marked by her progress from passivity to activity, *see* PATRICIA MEYER SPACKS, DESIRE AND TRUTH: FUNCTIONS OF PLOT IN EIGHTEENTH-CENTURY ENGLISH NOVELS 63-66 (1990), and by her development of a Lockean "self," *see id.* at 58 ("Once Lovelace has raped her, Clarissa, whose early life has passed in loving relationship to others, retreats into preoccupation with perfecting her self and her story."); *see generally* Susan H. Williams, *Feminist Legal Epistemology*, 8 BERKELEY WOMEN'S L.J. 63, 89 (1993) ("The subject, or knower, who emerges from the Cartesian assumptions is clearly separated from the external world that is the object of knowledge and possesses firm identity boundaries."). My insistence on Clarissa as an epistemological subject is congruent with my focus on her as a Lockean knower.

180. LOCKE, *supra* note 1, at 667.

181. WELSH, *supra* note 16, at 7.

no one interpreting the circumstances can know for certain whether they are authentic or not. The eighteenth-century proponents of circumstantial evidence answered this objection by asserting that "it is not within the reach and compass of human abilities to invent a train of circumstances which shall be so connected together as to amount to a proof of guilt, without affording opportunities of contradicting a great part, if not all of those circumstances."[182]

The validity of circumstantial evidence thus depends on the deceiver's human limitations and the judger's ability and willingness to interpret correctly the contradictory circumstances. However, in Clarissa's case, she is psychologically and epistemologically disabled from making use of the contradictory evidence,[183] while Lovelace, the "great plotter,"[184] uses his station, his wealth, and the social advantages of his sex to manipulate the evidence in almost superhuman fashion.[185] Only spiritually and intellectually is Clarissa Lovelace's equal. Despite her family's wealth, she is below Lovelace's rank socially; she does not enjoy Lovelace's freedom of movement; by leaving with Lovelace, she violates social convention; and, as a minor *femme sole*, she cannot make use of the wealth left to her by her grandfather.[186] Clarissa's impeccable literacy and the textual equality she enjoys with Lovelace, as her letters take their place alongside his in the novel, are misleading; represented by her letters, Clarissa appears more powerful than she is. As Patricia Meyer Spacks has shown, Lovelace's frantic plot-making enacts his desire for power over Clarissa.[187] Just as "power relations define significant action in the world,"[188] so do power relations define the interpretation of evidence. When power relations are unequal, when the plotter is superior to the judge in gender, social position, financial resources, and freedom of movement, there is no guarantee that the circumstances are authentic. In this sense, as Terry Eagleton notes,

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182. *Id.* at 28 (quoting JOSEPH GURNEY, THE TRIAL OF JOHN DONELLAN, ESQ. FOR THE WILFUL MURDER OF SIR THEODOSIUS EDWARD ALLESLEY BOUGHTON, BART. AT THE ASSIZE AT WARWICK, ON FRIDAY, MARCH 30TH 1781 (London, Kearsley & Gurney 1781)); *see also* SHAPIRO, *supra* note 6, at 219.

183. In Pennington and Hastie's terms, perhaps, the nature of Clarissa's "world knowledge" prevents her from constructing a story in which she is deluded, abducted, imprisoned, and raped by a gentleman. *See generally* Pennington & Hastie, *supra* note 15, at 521-23 (discussing the three types of knowledge from which a juror constructs a story that is ultimately "accepted by the juror as the best explanation of the evidence").

184. RICHARDSON, *supra* note 2, at 50.

185. *See* CASTLE, *supra* note 21, at 183 ("[B]eing party to traditional masculine prerogatives, [Lovelace] is free to exercise a set of social, economic, psychological, and sexual 'controuls' over [Clarissa].").

186. *See* ZOMCHICK, *supra* note 21, at 65-66.

187. *See* SPACKS, *supra* note 179, at 63-66.

188. *Id.* at 59.

"[T]ruth is always a matter of power and position."[189]

The kind of carefully managed narrative celebrated by Welsh depends for its truth on the strong voice of the omniscient narrator. But no such narrator exists in Clarissa's life. Clarissa's tragedy originates in her move from the realm of authority to the realm of experience. As Mrs. Howe puts it, "[S]ee what comes of disobedience to parents!"[190] Clarissa herself acknowledges her error in relying on perceptual rather than preceptual sources of knowledge: "But depending on my own strength; having no reason to apprehend danger from headstrong and disgraceful impulses, I too little, perhaps, cast up my eyes to the Supreme Director: in whom, mistrusting myself, I ought to have placed my whole confidence!"[191]

Entering into an evidentiary relationship with truth proves tragic for Clarissa, who has no beneficent, omniscient manager to guide her interpretation of the evidence. Like the letters themselves,[192] evidence inevitably marks an absence while attempting to bridge the gap between the present and the past. In Clarissa's life, as in Gilbert's scheme, that absence opens up an epistemological chasm into which human depravity can intrude.[193] The evidentiary realm, in which truth is a matter of inference, is not governed by Providential design;[194] instead, for Clarissa, the evidentiary realm is "a world in which evil is real and unconquerable, justice is guaranteed neither by human structures nor by supernatural intervention, and meanings remain vexed and obscure."[195]

The eighteenth-century law of evidence presupposed human depravity; until Clarissa gained experience of that depravity, she was unable to interpret the evidence correctly. Because the type of experience assumed by Gilbertian evidentiary principles was not neutral and universally available to all knowers, it inscribed culturally determined power relations within the eighteenth-century law of evidence. Thus, Clarissa's story exposes what Gilbert's scheme obscures: the inade-

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189. EAGLETON, *supra* note 21, at 79.

190. RICHARDSON, *supra* note 2, at 975; *see* KEYMER, *supra* note 2, at 126-28 (Clarissa's parents represent authority).

191. RICHARDSON, *supra* note 2, at 565.

192. ALTMAN, *supra* note 79, at 43 ("As an instrument of communication between sender and receiver, the letter straddles the gulf between presence and absence . . . ."); *see also* CASTLE, *supra* note 21, at 44 ("A letter is a text, and any text, Jacques Derrida claims, is . . . a sign of absence.").

193. For an alternative metaphorical reading, see WARNER, *supra* note 21, at 50 (In raping Clarissa, Lovelace " 'lays bare' the text, 'sees' its significance, 'penetrates' to its real meaning, and thus 'knows' it.").

194. *See* KEYMER, *supra* note 2, at 207-10. *See generally id.* at 199-214.

195. *Id.* at 214.

quacy of the Lockean model of cognitive self-sufficiency for knowers who are innocent and powerless.

IV. CONCLUSION

William Twining has complained:

> The general tendency of Anglo-American Evidence scholarship is not only optimistic, it is also remarkably unskeptical in respect of its basic assumptions. Hardly a whisper of doubt about the possibility of knowledge, about the validity of induction, or about human capacity to reason darkens the pages of Gilbert or Bentham or Best or Thayer or Wigmore or Cross or other, leading writers. Confident assertion, pragmatic question-begging or straightforward ignoring are the characteristic responses to perennial questions raised by philosophical skeptics.[196]

In Twining's view, even approaches that display skepticism about the judicial process are "directed at the design and the actual operation of a particular system and the claims that are made for it, rather than at the underlying philosophical assumptions and aspirations of the Rationalist Tradition."[197] As we have seen, however, *Clarissa* provided an eighteenth-century critique of the "underlying philosophical assumptions" inherent in Gilbert's scheme and expressed more than just a "whisper of doubt" about the optimistic rationalism that Twining attributes to Gilbert and his successors. Feminist critics of Western science and philosophy, like Evelyn Fox Keller,[198] Susan Bordo,[199] and Lorraine Code,[200] have embarked upon a project of asking whether socially constructed power relationships have been embodied in seemingly neutral scientific and philosophical systems.[201] In the legal sphere, the law of evidence purports to be such a neutral system. If we take Clarissa's story seriously as a critique of eighteenth-century evi-

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196. TWINING, *supra* note 7, at 75.

197. *Id.* at 76.

198. EVELYN FOX KELLER, REFLECTIONS ON GENDER AND SCIENCE (1985).

199. SUSAN BORDO, THE FLIGHT TO OBJECTIVITY: ESSAYS ON CARTESIANISM AND CULTURE (1987).

200. LORRAINE CODE, WHAT CAN SHE KNOW? FEMINIST THEORY AND THE CONSTRUCTION OF KNOWLEDGE (1991).

201. *See* Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1601 (1990) (examination of context can "expose how apparently neutral and universal rules in effect burden or exclude anyone who does not share the characteristics of privileged, white, Christian, able-bodied, heterosexual, adult men for whom those rules were actually written"); *see also* Baron, *supra* note 15, at 259 ("[S]tories are said to demonstrate something about how power works, especially how it can inhere invisibly in the most apparently 'neutral' of standards."); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990). *See generally* Williams, *supra* note 179.

dence law, we may be required to undertake a similar critique of modern evidence rules, examining how they operate in the lives of those for whom they were not written.