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This paper examines the of courts in Restoration London who were called upon, in the aftermath of civil war and amidst the flood of royal exiles returning to claim lands and titles, to determine the truth about a person's identity and social position. The case I will present as exemplary in this regard is that of Mary Carleton, the self-styled "German Princess," who was brought to trial for bigamy in 1663. Ultimately, I will claim that this development – courts being asked to determine people's identities - represents an overlooked chapter in the genesis of the novel. My approach is holistic: I examine the law as one of many discourses which make up the culture of a given period, along with literature, philosophy, biography and other forms of expression. Ultimately, I will argue that the role of courts in seeking to establish fixed identities for the defendants before them - thief, bigamist, murderer, or innocent - conflicted with an emerging trend in this period of self-serialization, that is, the tendency to create a succession of new identities as changing circumstances around the individual required. This conflict, in turn, was related to a trend in contemporary philosophical discourse, as writers like Locke and Hume struggled to construct a coherent, rational and self-authorizing identity which

could seem separate from society, history, class and gender. The novel presents a contest between, on the one hand, the readers' attempts to gather "evidence" to establish the "truth" of the characters before them, as did the juries and the philosophers, and, on the other, the characters' self serialization, which again and again, like that of the shape-shifting defendant, resisted these attempts. While other readers have noted the Carleton narrative's place in the history of the novel, none has connected its role in that history with the changing nature of the criminal trial, as I do here.¹

The examination of evidence to determine an unfamiliar defendant's "true" character had not always been the jury's role. The call to evaluate conflicting evidence of who a person was represented a divergence from the original role of judges and juries in the common law. The traditional trial at common law proceeded from the jury members' personal familiarity with the defendant, a resident of the same community. By the sixteenth century, however, due to increased urbanization and mobility, this role had changed.² Juries in urban areas with high mobility relied more and more on evidence, as opposed to community familiarity with the accused, likely someone they had never met.³ The two functions, however, remained in tension: As late as 1670, a judge irately told a jury that they had to deliver a verdict even though "no evidence was given on either side in court" – that was why they had been chosen from the neighborhood in which the crime had occurred.

This evolution in the role of judges and juries coincided with the particular circumstances attending the return of Charles II. In the Restoration London of the 1660s,

¹ See, e.g., Michael McKeon, *The Rise of the Novel*; Ernest Bernbaum, *The Mary Carleton Narratives: A Missing Chapter in the History of the English Novel*.

² Barbra J. Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence* 1 (1991).

claims to aristocratic lineage, wealth, and social status, were both common and hard to verify. The country was still recovering from the chaos of the civil war and a component of that chaos was social: it was hard to know who everyone was. This uncertainty, combined with the return of self-proclaimed cavalier exiles from Europe, engendered anxiety about people's identity that courts were often called upon to resolve. These years saw a dramatic increase at the Old Bailey of indictments of people for going in disguise. Indeed, the Old Bailey Sessions Papers record the indictment of a man accused of "going in disguise" when he had done nothing more than change his waistcoat. Early issues of the London Gazette contained many reports like one of the arrest of a man who was known to have gone by four different names and who was found to have "suitable to his four names . . . four periwigs of four several colors."³

Disguise was alarming because, perhaps in combination with the new ideas which had seethed around the civil war, it threatened the social order. It seemed to offer the possibility of crossing barriers of class and rank heretofore thought impregnable. At a time when the King was re-imposing monarchical order on the country, such possibilities may have harked alarmingly back to revolutionary ideas about equality. Another factor that contributed to anxiety about identity was the period's extensive migration. A common experience for both upper and lower classes, and for women as well as men, migration from country to town and from town to city was some times a quest for betterment, sometimes simply enforced vagrancy, when servants were let go or failed to find work.

³ Id.

Whatever the reasons, people were nervous about establishing identities, and at times asked the courts to help adjudicate them. Indeed, the criminal trial was a crucial site for the re-establishment of social order: in many senses, it put people in their place. The criminal indictment itself abhorred indeterminate identities: to be legally valid, it required an accurate and precise statement of the accused's name, occupation and residence.⁴ Without these specifics, it could fail on a technicality. In reality, however, clerks seem to have freely falsified names and occupations to create acceptable legal forms.⁵ For example, felons whose only surnames were obviously aliases or underground nicknames, such as "Shakebag," "Black Will," etc., were given fabricated surnames for the indictment.⁶ Moreover, because it was illegal to list someone's occupation as "vagrant," "dicer," "heretic" or other illegal activity, clerks at times even made up job titles for those accused.⁷

Gender added a twist to this legal fiction making: the information necessary to indicting a woman was not her occupation but her marital status.⁸ Legal scholars of the period debated whether, and to what extent, a married woman could be held responsible for certain crimes. All agreed that she was not indictable for crimes her husband forced her to commit, but other fact patterns were more ambiguous. What if her husband merely knew of her trespass? What if he suggested, but did not force her, to break the law? The

⁴ Mary Jo Kietzman, *The Self Fashioning of An Early Modern Englishwoman: Mary Carleton's Lives* 2111 (2004).

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records contain numerous references to “married spinsters,” in an attempt, Carol Weiner suggests, to resolve this predicament. The term “married spinster” created a legal fiction that allowed for the possibility of criminal culpability in a woman who might otherwise have escaped under the veil of coverture. Female offenders were also indicted as a rule under both their maiden and married names, as well as under other aliases they might have used. Thus female offenders compounded the problem of identity by raising questions about the very nature of culpability and agency. In sum, then the social context of the time suggested that identity was indeterminate and constructed, but judges and juries sought to make it fixed and monolithic. Adding gender to this mix exacerbated the anxiety. The Carleton trial reveals the clash of these two notions of identity in a gendered context, a clash Mary Carleton expertly manipulated.

Mary Carleton’s story, in brief, is this: she was born in Canterbury in 1634 or 1635; her father’s name was Moders. She married a shoemaker there, but ran away from him and from Canterbury in 1658, and married a second husband in Dover. She escaped punishment for bigamy for this second marriage through her first husband’s failure to appear in court against her, and apparently fled to the continent where she worked as a lady’s maid and picked up a smattering of several languages. In 1663 she re-emerged in London, alighting from a river barge at Gravesend, and took lodgings at the Exchange Inn, where she presented herself as an aristocratic German heiress, Henrietta Maria de Wolway, fleeing a forced marriage. Her performance convinced the innkeepers, who hatched a successful plot to marry the apparently wealthy princess to the wife’s brother, John Carleton.

Of course, the intimacy of marriage – helped along by an anonymous letter from Canterbury - uncovered the sham, and the enraged family had Carleton charged with the crime of bigamy based on her previous marriages – a felony warranting the death penalty. Carleton became a *cause celebre* in London, and crowds gathered for her trial on June 4, 1663. Although the charge was bigamy, the whole question of her identity was at stake. But the Carleton family’s attempt at unmasking failed: the jury found her not guilty. Between this acquittal and her execution ten years later for theft, Carleton became one of the most popular figures of Restoration London, the subject of at least twelve popular narratives, innumerable ballads and poems, and at least one play, in which she herself played the starring role. As Samuel Pepys records on June 7, 1663, she was indeed the talk of the town: “After church, to Sir Batten’s; where my Lady Batten inveighed mightily against the German Princess, and I as high in the defense of her wit and spirit, and glad that she is cleared at the Sessions.” Finally, as others have observed, her story bears a striking resemblance to the plots of Defoe’s prototype novels of fifty years later, *Moll Flanders* and *Roxanna*. It is this nexus, and its relationship to the changing nature of criminal trials, that I wish to explore.

In her autobiographical narrative, *The Case of Madam Mary Carleton*, Carleton incorporates the transcript of her trial into the story of her life, claiming to reproduce “the

autobiography – the defense.⁹ Moreover, her narrative shows how the constructed identity vanquishes the legal one.

Both Carleton’s adversaries at the trial, the judge, and presumably the jury, assume identity is something that can be established and fixed by physical evidence. John Carleton’s family present witnesses to “prove” her previous marriage, but the judge, using the same rationale, instructs the jury that “the proof doth depend on one witness [who cannot remember] the particulars or the manner of the marriage” and “if she were born [in Canterbury, as her accusers claimed], married there, had two children there, and lived there so long, it were easy to have brought some body to prove this.” The jury apparently agreed that the evidence was insufficient, and found her not guilty.

The criminal trial, however, was not just a forum for the evaluation of evidence of specific acts. Judges and juries also passed judgment on the accused’s character and integrity, and judged her based on the quality, not just the substance, of her replies. The assumption was that if the accused were innocent, she should be able to prove it by the quality of her answers and her overall demeanor. Thus, the criminal trial rewarded performance. Indeed, the justice system paradoxically encouraged self serialization by exhibiting leniency to those accused of low level property crimes, those who, in the language of the time, “colour[ed] vagrancy with affectation of industry.”¹⁰ The Old Bailey proceeding itself resembled as much as anything else a carefully arranged and scripted drama: the script was the law, the whispers of the audience and the jurors, and the replies of the defendant.¹¹ Blackstone himself wrote that “personal liberty consist in

¹⁰ Middlesex Count Records, iv: 1-li.

¹¹ Peter Linebaugh, *The London Hanged: Crime and Civil Society on the Eighteenth Century* 75.

the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due process of law."¹² This encouragement of performance was a feature Carleton exploited to the fullest extent, presenting herself as an injured lady of gentle birth, bewildered and innocent in a foreign land. She seems to have convinced the court as much by exhibiting the manner of the person she claimed to be as by the lack of evidence against her. In other words, her performance was as compelling as, or more so than, tangible facts.

The prefatory verse of Carleton's narrative asserts in a similar vein that there is no knowing the "truth" about identity. She writes,

Behold my innocence after such Disgrace
Dares show an honest and a noble face
Henceforth there needs no mark of me be known
For the right counterfeit is herein shown

What can the phrase "the right counterfeit" possibly mean? The word "counterfeit" meant, as early as Chaucer, the forged imitation of an original. Yet here, Carleton insists that that very original – her identity – is forged as well, that there is in fact no genuine original where identity is concerned, but merely – if "merely" is the right word – a series of forgeries. Indeed, Carleton's narrative of the trial demands the same conclusion.

She explains her decision to write by saying that the legal trial is part of her vindication, but not the whole story. She says that she has so far suffered the accusations against her to go unrefuted "further than by a legal trial," but that the calumny has finally become so unbearable that it has "extorted this narrative from" her, a narrative which she hopes will lend credence to her "case." She presents the trial and the narrative as layered proof in authenticating her identity: she repeats her assertion that she was born at

¹² Blackstone, V. 1, Bk 1134.

“Cullen” in Germany, just as she “declared it before that honorable Judicature in the Old Bailey whose grave and reverend authority I hate to profane and abuse with a lie.”

Later in the text, however, she seems to admit to a sham: “What harm,” she asks, “have I done in pretending to great titles? Ambition and Affection of greatness to good and just purpose was always esteemed and accounted laudable and praiseworthy . . . I think I do rather deserve commendation than reproach . . . if the best things are to be imitated.” She then offers her performance in court and with her husband, rather than her innocence, as proof: “if by any misbecoming act unhandsome and unbefitting such a person, I had profaned that quality, and betrayed and discovered any inconsistent meanness therewith (as it was very difficult to personate greatness for so long a time without slips or mistakes I had deserved to be severely punished and abominated by all gentlemen.” As she pulled it off, however, she seems to say, we should grant her the identity she claims as her own: rather than being abominated, she observes, she “enjoys . . . the loves and good estimation” of many well bred people. In other words, she says, by acting the part so well, she has earned the right to live it.

In this way Carleton offers both court record and personal narrative as evidence for the proposition that identity is indeterminate and constructed, not subject to confinement or verification in categories of class, nationality or gender. This was precisely the concern – or hope – of Restoration England: that identity could be produced by acts of self-construction and appropriation. This hope or worry was left over from the radical egalitarianism which found voice among the Levellers and their kindred in the early days of the revolution: the turbulent 1640s had freed people through poverty, war, and religious nonconformity to create their own lives, beliefs and

communities. This freedom was ironically brought back to life by the social dislocation of the Restoration.

Elizabeth Ermarth argues that jurors evaluate character the same way as novel readers do: by circumstantial evidence. Both garner material facts to make judgments about people, whether defendants in court or characters in a plot. In particular, seventeenth century judges and jurors, without many rules of evidence to guide them, were forced to glean an accused's character from her self presentation in court. In dynamic tension with this tendency to establish a fixed identity from evidence was the self-construction of defendants like Carleton and the many other male and female criminals who performed new selves into existence at every trial and with every alias. The system encouraged this kind of self serialization by pardoning or mitigating the sentences of offenders, thus giving them repeated chances to reform, transgress again, and perform new identities in the process.

This tension between these two versions of identity – a fixed truth or a good performance - appears in Pepys's defense of the German Princess quoted earlier. Lady Batten may have wanted the imposter's pretenses uncovered, but Pepys's supports "the German Princess" for her "wit and spirit" and is "glad she is cleared" on those grounds. The truth about identity or the perfect performance of it? These were the sides in the debate and the two possibilities in court. It is my contention that the novel expresses this tension, and that it is not mere accident that Defoe's prototype novels present us with female criminals who challenge the readers evidence-gathering with their ongoing self – serializing performances. Rather than seeing the jurors' evaluation of evidence as a precursor to the reception of the novel, I suggest that the novel itself originated in

precisely this tension, between the need to glean human character from objective facts and the ultimate indeterminacy of that character.

Thus, while other scholars have called the Carleton narratives “the missing chapter in the history of the novel,” I counter that Carleton herself, not her narrative, is the missing chapter. She speaks of the many visitors who came to see her in prison as seeking her out for her “novelty;” she complains that the public looks upon her as a “notorious and notable person.” This is exactly the case: like Roxanna and Moll Flanders, she presented the public with a peculiarly modern puzzle about identity; she was both “novel” and “a novel;” something worthy of note, yet resistant to noting.

ⁱ *London Gazette* 21-24 Feb. 1669, 2.