The section of *Before and After Gender* I have in mind is that in which Marilyn weaves an analysis of the husband/wife relation – as a particular kind of pair relationship - into the rehearsal of a scene from Wilkie Collins' *The Woman in White*; in this scene, Mr Gilmore, the solicitor to the Fairlie family, is trying to press Mr Fairlie to agree to a marriage settlement which will protect the property of his niece, Julia Fairlie, from appropriation by her husband to be, Sir Percival Glyde. In the end, of course, Mr Fairlie declines – or fails – to fulfil his role as the legal and moral guardian of his niece, and allows Sir Percival's lawyer to impose a settlement that divests Miss Fairlie of almost all that she has, and leaves her prey to the ploy of the 'forced impersonation', if that is the right way of putting it, of Anne Catherick by Laura Fairlie. Incidentally, the theme of substitution here works rather well with the analysis in Irigaray's *Ce sexe qui n'en est pas un*. In any case, all of this was a consequence of Mr Fairlie's inability to fulfil the conventional male role of managing family property; perhaps because, as Collins suggests, he was simply too feminine: '*He had a frail, languidly-fretful, over-refined look – something singularly and unpleasantly delicate in its association with a man*'.

The drama in this scene turns on those parts of nineteenth-century English property law that made of the married woman a *feme covert*, subordinated to the legal personality of her husband. Coverture, in the language of the legal treatises, consisted in the doctrine 'that a man and wife are one person in law for the purpose of acquiring rights in property, and of taking or defending legal proceedings'.[1] On marriage, a wife's personal property passed to her husband, as did the right to manage her real property; a married woman could make no contracts, other than as the agent of her husband, and she had no testamentary capacity. Feminists in the nineteenth century suggested that the common law rules of coverture 'extinguished' the legal personality of wives and allowed husbands to 'confiscate' their property. Marilyn's presentation of the texture of legal doctrine in *Before and After Gender* is at once economical and rich – I suspect that few property lawyers know any longer what a restraint on anticipation was, and how it worked in aristocratic society, but it is all here.

Property is of course a conceptually and politically privileged form of the nature/culture binary; it makes the difference between person and thing, in the modes of authorship, cultivation, and improvement, it spans the gradients of the processes through which man

1 Montague Lush, *The Law of Husband and Wife*, 3rd ed, (London: Stevens, 1910), at p 130.

'makes' culture, and so, more broadly, it articulates what, in NCG, Marilyn calls a 'dialectic of participation and objectivity'. With the legal doctrine of coverture one throws gender into the mix – the association of women with one pole of the binary: not person, object of the control of the man as family governor, deprived of the ability to 'cultivate' in the broadest sense, confined to the *oikos*, and so on…. That is precisely how Victorians saw the condition of the married woman. Recall the 'opinion' expressed in the first paragraph of John Stuart Mill's essay, *The Subjection of Women*: 'That the principle which regulates the existing social relations between the two sexes — the legal subordination of one sex to the other — is wrong itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other'.

Seventy years ago, Mary Beard pointed out that this image of the feme covert was a figment, but that the figment was so tenacious as to have generated the image of woman as 'a being always and everywhere subject to *male* man or as a ghostly creature too shadowy even to be real'. [2] Beard's argument is pithily summarised in a chapter sub–heading: `*Blackstone Extinguished the Married Woman's Personality*'. The Blackstone here is William Blackstone, the author of the Commentaries on the Laws of England, published in the 1760s, which was the first work to turn laws into law – to turn a disparate and to some extent unmotivated set of rules, forms and procedures into a social institution that was in a sense more than the sum of its parts. And one example is, precisely, his gloss on the laws of marital property: 'By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs every thing'.[3]

According to Beard, the fiction of marital unity looked at only one part of the picture, and it left out the counterpoint that makes the drama in this scene from the *Woman in White*: it took no notice of the fact that in practice the common law rules of coverture were played off against the rules of equity, which conveyancers used to construct separate property. Beard thought that there was a rather crude explanation for this. Blackstone's failure to be appointed to the chair of civil law at Oxford had fuelled a blind attachment to the common law. Had he been

2 Mary R Beard, *Woman as a Force in History. A Study in Traditions and Realities* (New York: Macmillan, 1946), at p 77.
3 Text of the ist vol of the institutes: ` (

successful at Oxford, he might have promoted what Beard regarded as the more equitable spirit of the Roman law of family property, rather than the rules of the common law taken in isolation.

The question matters because Beard points towards a basic historical truth about the English common law; that, as Peter Goodrich observes, 'women [were] not a legal category but rather a series of statuses spelled out in relation to specific property rights and transactions', so that 'the disabilities and incapacities as well as the rights of women were specific to occasions and transactions'.[4] Although eighteenth- and nineteenth-century treatises on the topic of husband and wife invariably began by reciting the legal status of coverture and setting out the proprietary disabilities of married women, these texts were basically repertories of transactions and of what one might call transactional personae. So one has, if you like, a toolbox – a set of devices or techniques for achieving certain conventionalised ends. And these devices are cognitive operators in the sense that they have always already disclosed the world in or on which they are going to operate. For the nineteenth-century property lawyer, people and their property were visible as a diffracted set of partial capacities and potential connections, which transected what one might have supposed to be person or thing. This is the point I want to pursue.

The latitude that Mr Gilmore has the lawyer has in constructing a settlement that might secure Miss Fairlie's property was based on the legal distinction that eighteenth and nineteenth century law made between the 'legal' and 'natural' capacities of women. It was said that although coverture extinguished a woman's 'artificial' legal powers it did not affect her 'natural' capacities:

> [A] woman covert hath no less judgment than discovert; ...her disability doth not arise for want of reason. ...But an infant's disability is altogether from want of capacity.[5]

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[4] Peter Goodrich, `Gynaetopia: Feminine Genealogies of Common Law= (1993) 20 *Journal of Law and Society*, 276, at pp 285 and 293, respectively.

[5] *Hearle* v. *Greenbank* (1749) 3 Atk. 695, at p 712. Thus, the observations of the nineteenth-cetury American commentator Kent, ostensibly made *contra* the common law, that women were in no way `incapable, indiscreet, or inferior=, and that a woman=s proprietary disabilities resulted not from any `want of discretion= but from the fact that she was `placed under the power and protection of her husband,= hardly represented an improvement on the attitude of the common law (citations from Basch, *In the Eyes of the Law*, p 62).

> A married woman is in a different state from an infant, an infant has no disposing mind; with respect to a married woman, the law says that she has a disposing mind, but not a disposing power. This Court gives her a disposing power, if the power in the settlement limits it so.[6]

Now the crucial word here is power, and here there is some virtue in noticing the technicalities. Remember that the form of marriage in law was predicated on a logic of power, responsibility and dependence, which meant that the husband was supposed to be the sole 'governor' of the family and its property (one can find this sort of theme going back to Locke). So in order to articulate the governmental and proprietary dimensions of marriage – or, more accurately, to articulate the household into the house of kinship – it was necessary to say that a wife's separate property wasn't property at all. In other words it was essential to proceed as if the wife didn't possess anything that should by marital right be the husband's. Most settlements worked by giving the wife what was called a power of appointment over the settled property, that is, a right to select – 'appoint' – the beneficiaries of the property. Now, in legal doctrine, a power of appointment was not categorised as a true property right: 'A power is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial: the general nature of the power does not make it property'.[7] The theory was that in exercising a power to select a beneficiary, the wife was acting as the agent of the person who made the settlement; she was, as the lawyers put it, 'a mere conduit pipe'. So the beneficiary derived their right from the document and not from the written instructions of the wife: `whoever takes under [such an instrumental act] takes by virtue of the execution of the power and by the power coupled with the writing, as if the limitation in that writing of appointment had been contained in [the] deed creating the power; for they take from the author of the power.'[8] Indeed, the writing made by the wife was treated as if it was already part of the deed that made the settlement.[9]

So this is complicated. We start with a reference to nature – the wife has a natural capacity to act juridically, and her incapacity is the effect of a cultural norm. And this difference mattered: so, for example, in a case in which a wife had exercised a power given by a settlement, her

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[6] *Sockett* v *Wray* (1794) 4 Bro. C.C. 483, at p 486.

[7] ` = (*Re Armstrong* (1896) 17 QBD 521, at 531, per Fry LJ).

[8] *Southby* v. *Stonehouse*, at p 612.

[9] The objects of the appointment would therefore take priority over interests limited after the grant of the power (see *Hall* v. *Carter* (1742) 2 Atk. 354).

attempt failed not because she was a feme covert but because she was under age. Notice that the measuring of natural capacity by reference to age is itself conventional. In any case, it turns out that the natural capacity of the wife is invoked only as the medium for the transmission of a power and an intelligence that is not her own; remember, the wife is 'a mere conduit pipe'. One might conclude that the agency of the wife is instrumental only, and that her natural 'disposing mind' had already been made up for her. But there is a further fold to be added here: the suppression of agency, or the theory of instrumental agency, is itself a fiction that is designed to avoid the implications of marital right. It was not unusual for women to make a settlement before marriage, with the peculiar result that, as a wife with separate property, she would be acting as the agent of her earlier, unmarried, persona. One final point about the form of separate property: from a legal perspective agency belongs to writing not to people; lawyers distinguished between 'substance' and 'shadow', between 'the *passing* of the estate which is the *substance* of the deed [and] the *manner how* which is the *shadow*...'[10]

How does this articulate the arguments of *Nature, Culture & Gender*? First, notice the characterization of nature/culture in Marilyn's contribution to that book: 'there is no consistent dichotomy, only a matrix of contrasts' (p 177); 'a prism that yields different patterns as it is turned', and notice also the proposition that 'depending on our philosophical standpoints we can employ various parts of this matrix in support of certain evaluations – and do so by reducing involute combinations to a series of oppositions' (at 179). What one sees even in this small example of the legal theory of powers is an illustration of precisely this sense of an interplay of 'involute combinations' and 'oppositions'. Property law consisted in a set of devices, techniques or conventionalised transactions, which recombined the terms of activity and passivity, competence and subjection, text and body, subject and object. Reciprocally, these terms cited, eclipsed, or, one might say, *actualized*, one another. Each moment of stasis – a married woman has natural capacity, a child does not – is an opposition that holds only for a particular transaction or moment.

[10] This allowed for `generosity= in construing a disposition which did not strictly conform to the prescriptions of the power. So, for example, in one case in which what was construed to be a bare power of appointment was exercised by means of a transfer which supposed a larger interest than that which was actually available, the judge invoked this distinction between substance and shadow so as to rescue the defective exercise (case cited in counsel's argument in *Tomlinson* v. *Dighton* (1711) 1 P. Wms. 149, at p 164).

So nature/culture and the gender binary function as models – as symbolic operators – but not with the cardinal importance that they have in political or theoretical commentary. Even in property law, in which the terms seem so foundational, person and thing – *nature, culture and gender* – are conclusions rather than premises. And, as we see in the example of married women's powers, these conclusions exist only performatively, in and for the moment. So one might almost foreground the matrix rather than the operators which transect it. So if one part of the strategy of *Nature, Culture & Gender* is to comment on the method of anthropology, on the way that symbolic forms are or were imputed to others, and ultimately to fold the perspectivism that makes these kind of imputations back into itself, then it is interesting to see an instance in which these symbolic operators are not naturalised, so to speak.