

England's Legal Monsters

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This article offers a history of the English legal category monster, a legal category that entered English law in the mid-thirteenth and survived until the mid-nineteenth century. The aim of the article is to provide a close textual analysis of an otherwise absent legal history and to locate law's monsters, and the anxieties that they suggest, within their appropriate contexts: social, political, religious and legal. However, while the principal aim of the article is to address a lacuna in legal historical scholarship, and perhaps precisely because of this fact, the history to be detailed offers a series of valuable insights for future study, particularly in the areas of legal history, philosophy and feminist theory. While full elaboration of these themes is beyond its ambit, the article will draw attention to four different and specific contexts in relation to which future scholarship might benefit from a historical study of England's legal monsters.

Keywords: monster; Foucault; bestial human; conjoined twins; hermaphrodite; abnormal individual

It hardly needs to be said that there is no longer any place in legal textbooks, for expressions (such as "Monster") which are redolent of superstitious horror.¹

I. Introduction

This article offers a history of the English legal category monster, a legal category that entered English law in the mid-thirteenth and survived until the mid-nineteenth century. The aim of the article is to provide a close textual analysis of an otherwise absent legal history and to locate law's monsters, and the anxieties that they suggest, within their appropriate contexts: social, political, religious and legal. However, while the principal aim of the article is to address a lacuna in legal historical scholarship, and perhaps precisely because of this fact, the history to be detailed offers a series of valuable insights for future study, particularly in the areas of legal history,

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1. *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] HRLR 721 at 818 *per* Walker LJ. For a general discussion of legal and ethical issues surrounding conjoined twins see S. Sheldon and S. Wilkinson, "Conjoined Twins: The Legality of Sacrifice," *Medical Law Review* (1997), pp. 149–171.

philosophy and feminist theory. While full elaboration of these themes is beyond its ambit, the article will draw attention to four different and specific contexts in relation to which future scholarship might benefit from a historical study of England's legal monsters.

First, the article provides a historical account that contests a view of the legal category monster as evidence of a legal Dark Age. Rather, and in addition to highlighting how this legal category persisted into the nineteenth century, the article will draw attention to the relatively more rational construction of the category that characterizes the approach of legal jurists of the late Middle Ages. Accordingly, the contemporary legal disavowal of monsters, evident in the opening quote by Walker LJ, should not induce uncritical acceptance of a characteristically pre-modern/modern divide where tolerance and rationality are viewed as replacing a less civilized past.² Moreover, a view of fragments of the legal past as superstitious and irrational, and as irrelevant to modern understandings, should be treated with caution. Indeed, a focus on monsters, perhaps, serves to disrupt or unsettle the very boundary between past and present.³

Second, the article will highlight how the privileging of mind over body in understanding humanness, a legacy of Western philosophy,⁴ is reversed in this corpus of the law. That is to say, in the context of a history of the English legal category monster, it is the body, not the mind, that proves to be the ultimate bedrock of what it means to be human. This fact might serve to inform theoretical scholarship, including feminist legal scholarship, focusing on embodied subjecthood. Indeed, in view of the gendering of the mind/body distinction within Western philosophy and law,⁵ the different articulation of this distinction evident within English law might prove fertile ground for feminist legal theory. In this regard, the legal category monster perhaps offers a site from which to launch a counter or reverse-discourse⁶ concerning the terms of a key legal and philosophical distinction.

Third, the article will highlight how within the law of England the hermaphrodite was never considered a monster. While it is true that clear legal statements to this effect reveal a degree of anxiety about the proper

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2. Indeed, Rosemary Garland Thomson has charted a linear history of monsters and freaks from medieval tolerance and curiosity to nineteenth century exclusion and vilification ("Introduction: From Wonder to Error – a Genealogy of Freak Discourse in Modernity," in R. Garland Thomson (ed), *Freakery: Cultural Spectacles of the Extraordinary Body* (New York: New York University Press, 1996), pp. 1–15 at pp. 2–4.
 3. B. Bildhauer and R. Mills, *The Monstrous Middle Ages* (Cardiff: University of Wales Press, 2003), p. 5.
 4. M. Gatens, *Imaginary Bodies* (London: Routledge, 1996); E. Grosz, *Volatile Bodies* (Sydney: Allen & Unwin, 1994); R. Porter, "History of the Body" in P. Burke (ed), *New Perspectives on Historical Writing* (Cambridge: Polity Press, 1991), pp. 206–232.
 5. As noted by Price and Shildrick, "the identification of woman with the body is a familiar idea in the Western tradition from Aristotle to postCartesian modernism" (J. Price and M. Shildrick, *Feminist Theory and the Body: A Reader* (Edinburgh: Edinburgh University Press, 1999), p. 17). See also E. Spelman, "Woman as Body: Ancient and Contemporary Views," *Feminist Studies* 8(1) (1982), pp. 109–131.
 6. M. Foucault, *The History of Sexuality vol 1: An Introduction* (New York: Pantheon, 1978), p. 101.

location of the hermaphroditic body within legal taxonomies, this legal finding remains significant. In the first place it is interesting to contrast legal understandings of the hermaphroditic body as being of indeterminate sex with contemporary medico-legal attempts to write hermaphrodites (inter-sex people) out of existence. Further, it is somewhat curious that law's monsters, though informed by human/animal and order/disorder distinctions, are not informed by a body that challenges sexual difference. Indeed, the fact that challenge to the binaries of sex and/or gender failed to register in legal constructions of the category monster, might serve as a provocation within feminist legal theory.

Finally, the legal history to be detailed will provide a vantage point from which Foucault's understanding of the figure of the abnormal individual and contemporary regimes of normalization might be qualified. For an English legal history of the category monster serves to call into question aspects of Foucault's genealogical treatment of the abnormal individual. However, it is important to note that the history of monsters Foucault offers is a French history.⁷ It is not my intention to call into question this history on account of differences established through a consideration of English law. To do so would fail to take into account historical and cultural differences that exist between England and France, as well as the different legal traditions that animate each nation. Rather, what is being challenged is the degree to which Foucault's history of monsters provides an adequate account for the emergence and comprehension of the abnormal individual. While Foucault's French history may be accurate, conclusions drawn from it that inform our understanding of contemporary regimes of normalization are open to a critique based on an analysis of English law. For the figure of the abnormal individual is not confined to France but is rather a figure of modernity. In challenging Foucault in this way it is necessary to recognize that Foucault has often been criticized within the humanities for his many generalizations concerning historical facts.⁸ Nevertheless, it is important to call into question Foucault's statements concerning monster archetypes and their chronological relationship because of the implications these statements have for our understanding of the abnormal individual.

Specifically, an English legal history of the monster unsettles Foucault's account concerning the trajectory of this key ancestor of the abnormal individual. According to Foucault each age had its "privileged

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7. M. Foucault, *Abnormal: Lectures at the College de France 1974–1975* (London: Verso, 2003). The lectures have been translated into English by G. Burchell. For work drawing on the *Abnormal* text see Stuart Elden, "The Constitution of the Normal: Monsters and Masturbation at the College of France," *Boundary 2* 28(1) (2001), pp.91–105 at p. 96; S. Cowan and S. Elden, "Words, Desires and Ideas: Freud, Foucault and the Hermaphroditic Roots of Bisexuality," *PLI (the Warwick Journal of Philosophy)* 13 (2002), pp.79–99 at p. 91.
 8. See A. Megill, "The Reception of Foucault by Historians," *Journal of the History of Ideas* 48(1) (1987), pp. 117–141; R. McGowen, "Power and Humanity, or Foucault Among the Historians," in C. Jones and R. Porter (eds), *Reassessing Foucault: Power, Medicine and the Body* (London: Routledge, 1994); R. Castel, "'Problematisation' as a Mode of Reading History," in J. Goldstein (ed), *Foucault and the Writing of History* (Oxford: Basil Blackwell, 1994), pp. 237–252.

monster."⁹ In chronological terms Foucault's account moves from a pre-occupation with the bestial human in the Middle Ages to a concern over conjoined twins in the Renaissance and ultimately to a focus on the hermaphrodite in the Classical Age.¹⁰ While this account does not fit the English context, the principal difficulty that English legal history raises for Foucault's history lies not in chronological accuracy. Rather, his sequencing of monsters presents a linear history in which the notion of the human monster as absolute difference takes on an increasingly relative character. That is to say, his historical account begins with the problem of human/animal hybridity. This problem is then exchanged for the conundrum of the human creature with two heads, and subsequently for the ambiguously sexed body.

This account implies a gradual lessening of the physical and psychological distance between human being and the figure of the monster. Accordingly, such an account enables Foucault to position the abnormal individual and contemporary regimes of normalization within this frame of historical continuity. Conversely, an English legal history of the category monster suggests a more complex relation between human and monster. Indeed, it would appear that the trend, implicit in Foucault's account, of a lessening of physical and psychological distance between human and monster, moves in the opposite direction within English law. Accordingly, and while further historical inquiry is required here, we might expect this legal history, and growing anxiety over the human/animal distinction which it suggests, to have insinuated itself into the figure of the abnormal individual to a greater degree, and possibly with different cultural consequences, than Foucault's analysis implies. It is toward mapping a history of the legal category monster that the article now turns.

II. The late Middle Ages: Inaugurating legal monsters

The term monster has a long history within English law as it does within civil law jurisdictions of Europe.¹¹ However, prior to the thirteenth century there appears to be no mention of the term in English legal texts. Thus no reference to the term can be found in English laws from Aethelberht, King of Kent to King John.¹² Moreover, there is no mention of monsters in the late twelfth century legal writings known as *Glanvill*.¹³ The first English legal texts to refer to monsters are the common law texts of Bracton¹⁴ and

9. Foucault, *Abnormal*, p. 66.

10. *Op cit.*, pp. 66-67.

11. See E.J.H. Schrage, "Capable of Containing a Reasonable Soul," in R. Feenstra, A.S. Hartkamp, J.E. Spruit, P.J. Sijpesteijn & L.C. Winkel (eds) *Colatio Iuris Romani*, vol 2 (Amsterdam: J.C. Gieben, 1995), pp. 469-488 at pp. 476-488.

Britton.¹⁵ In *On the Laws and Customs of England*, Bracton, in defining legal personhood, states that: “those procreated perversely, against the way of human kind, as where a woman brings forth a monster or a prodigy” shall “not [be] reckoned among children.”¹⁶ However, and in providing some sense of the parameters of thirteenth century legal monsters, Bracton notes that “an offspring who has a larger number of members, as one who has six fingers, or if he has but four [or only one], will be included among children.”¹⁷ Nor will a child be considered a monster because it is “crooked or humpbacked or has twisted limbs or otherwise has its members useless.”¹⁸ However, in a passage not directed toward addressing the question of monster status, Bracton expressed the view that the Church does not have

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12. For the laws of Kings Aethelberht (560–616); Hlothhare and Eadric (673–686); Wihtraed (690–725); Alfred (871–901); Edward the Elder (901–924) and Athelstan (924–939) see F.L. Attenborough, *The Laws of the Earliest English Kings* (New York: Russell & Russell, Inc, 1963), pp. 4–17. For the laws of Kings Edmund I (939–946); Edgar (959–975); Canute (1017–1035); William I (1066–1087) and Henry I (1100–1135) see A.J. Robertson, *The Laws of the Kings of England from Edmund to Henry I* (Lampeter: Llanerch Press, 1994), pp. 6–15. For a critical treatment of the laws of Henry I see L.J. Downer, *Leges Henrici Primi* (Oxford: Clarendon Press, 1996). As far as is known, Edward the Confessor (1042–1066) made no written laws (P. Wormald, *The Making of English Law: King Alfred to the Twelfth Century: Legislation and its Limits* (Oxford: Blackwell, 2001), p. 128). However, it should be noted there exists a legal text titled *Leges Edwardis Confessoris* that Wormald dates to c.1140. According to Wormald, “the image of Edward as lawgiver inspired” the production of this legal text (p. 128) but it was “not authentic legislation by this King” (p. 128). Henry II (1154–1189), Richard I (1189–1199), and John (1199–1216) did not issue law codes. They did however, issue legislation (*Statutes of the Realm* (New York: William S. Hein & Co, 1993)). It should be noted that the laws reproduced in the texts cited are translations into modern English from Anglo-Saxon (old English) or, in relation to those laws produced after the time of the Norman Conquest, Latin. This is also true for the twelfth and thirteenth century legal texts referred to below, footnotes 13–15).
13. *The Treatise on the Laws and Customs of the Realm of England Commonly called Glanvill* (c.1187) (London: Thomas Nelson & Sons Ltd, 1965).
14. Henry de Bracton, *On The Laws and Customs of England 1240–1260* vols 1–4 (trans. S.E. Thorne) (Cambridge, Mass: Harvard University Press, 1968). References to monsters are made in vol 2, 31, 203–204; vol 3, 151, 221 and vol 4, 198, 227, 361 and 362. It should be noted that there is some uncertainty regarding the authorship of this text. According to the Harvard Law School Library online it would seem that the bulk of the work was written during the 1220s and 1230s by persons other than Bracton. However, it was probably Bracton who made the later additions. Henry de Bracton was a judge of the court known as *Coram Rege* (later known as the King’s Bench) from 1247–1250 and 1253–1257 during the reign of Henry III. He was also a clergyman and in 1264 became Archdeacon of Barnstaple and Chancellor of Exeter Cathedral. (<http://hsl.law.harvard.edu/bracton/Common/index.htm> Date accessed: April 14, 2006.) For a discussion of Bracton’s work see H.G. Richardson, *Bracton: The Problem of his Text* (London: Selden Society, 1965).
15. There is considerably more uncertainty regarding the identity of Britton. However, it would seem that the Britton text was published around 1291 in the reign of Edward I and with the King’s express authority. According to Nichols, Edward I desired a comprehensive treatise on the law of England. It was in this context that legal texts by Britton, Fleta and an abridgment of Bracton by Gilbert de Thornton came into being. Only Bracton, however, came into general use (see F.M. Nichols, *Britton*, vol 1 (Holmes Beach, Florida: Wm. W. Gaunt & Sons, 1983)).
16. Bracton, *Laws and Customs*, vol 2, p. 31.
17. Op cit.

“several heads like a monster”¹⁹ thereby suggesting that he considered conjoined twins to be monsters.

In short, Bracton's classificatory scheme distinguished between monstrosity (and therefore bodies located outside the law) and deformity (where bodies were located within the law). The later thirteenth century common law writings of Britton replicate Bracton's taxonomy. Thus children born with a lesser or greater number of fingers than is usual are not reckoned monsters. In throwing further light on where the line is perhaps to be drawn, Britton states that children born with “three hands or feet . . . shall not be admissible to any inheritance, or accounted children” but rather are to be considered “beasts and monsters.”²⁰ With the exception of this latter reference, the bestial human, the figure Foucault places at the heart of the western psyche in the Middle Ages, appears noticeably absent in thirteenth century English legal texts. Rather, these texts appear confined to human bodies characterized by corporeal excess.

It is also clear from Bracton's writings, despite the view that in Medieval thought they constituted “a monster of identity of the most profound sort,”²¹ that hermaphrodites fell on the deformity side of the deformity/monstrosity distinction. Thus he states: “[m]ankind may also be classified in another way: male, female, or hermaphrodite” and that “[a] hermaphrodite is classed with male or female according to the predominance of the sexual organs.”²² This approach to hermaphrodites, one that persisted within English law,²³ is of interest. While requiring that a hermaphrodite take up a position in law's symbolic order as either male or female, law's understanding of the hermaphroditic body as existing in nature outside

18. *Op cit.*, vol. 4, p. 361.

19. *Op cit.*, vol. 3, p. 221. This reference to monsters emerges in the context of Bracton's discussion of the Assise of Darrein Presentment.

20. Nichols, *Britton*, para. 19.

21. D. Williams, *Deformed Discourse: The Function of the Monster in Medieval Thought and Literature* (Exeter: Exeter University Press, 1996), p. 160. There is considerable evidence supporting the claim that hermaphrodites were viewed as monsters in non-legal discourses of the medieval and early modern periods (see, for example, J. Epstein, *Altered Conditions: Disease, Medicine and Storytelling* (New York: Routledge, 1995), p. 83; M. Thornton Burnett, *Constructing 'Monsters' in Shakespearean Drama & Early Modern Culture* (Basingstoke: Palgrave, 2002), p. 11; R. Gilbert, *Early Modern Hermaphrodites: Sex and Other Stories* (Basingstoke: Palgrave, 2002); Foucault, *Abnormal*, p. 67; A.W. Bates, *Emblematic Monsters: Unnatural Conceptions and Deformed Births in Early Modern Europe* (Amsterdam: Rodopi, 2005).

22. Bracton, *Laws and Customs*, vol 2, p. 31. While Bracton cites Azo (*Summa Inst.* 1. 5, no 5), an Italian early thirteenth century glossator of Roman law (see F.W. Maitland, *Select Passages from Bracton and Azo* (London: Selden Society, 1894)), this understanding of the hermaphrodite is also rendered explicit by Ulpian (*Digest* 1. 5. 10). See A. Watson (ed), *The Digest of Justinian* (Philadelphia: University of Pennsylvania Press, 1985).

23. This understanding of the hermaphroditic body is reproduced as recently as 1724 in the writings of Thomas Wood (*An Institute of the Laws of England or the Laws of England in their Natural Order According to Common Use* (New York and London: Garland Publishing, 1979), p. 12).

that binary is apparent.²⁴ In other words, “there remained an awareness that hermaphroditic sexuality was inherently different from either male or female, that it formed its own unique nature.”²⁵ In this respect English law can be contrasted with the attempts of modern medicine and law to write hermaphrodites (intersex persons) out of existence.²⁶ It is somewhat curious that English legal monsters, though informed by human/animal and order/disorder distinctions, are not informed by a body that challenges sexual difference. Indeed, and though beyond the scope of this article, the fact that challenge to the binaries of sex and/or gender failed to register in legal constructions of the category monster might offer useful historical insights and prove fertile ground for explorations in feminist theory.

This distinction between deformity and monstrosity, articulated in thirteenth century English law, the practical import of which pertained primarily to inheritance law, represents an attempt to distinguish the human from the non-human. That is, deformity marks the limit of human being. It charts degrees of imperfection beyond which lies the absolutely other. In other words, the deformity side of the divide serves to highlight corporeal forms of human difference that the law can recognize and accommodate. In offering an account of the legal distinction between deformity and monstrosity Foucault notes that the monster represents “the transgression of natural limits.”²⁷ Yet, “[f]or Medieval thought, and definitely for seventeenth and eighteenth century thought” he notes “breach of natural law is not enough to constitute” the monster.²⁸ There must also be “an interdiction

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24. This did not necessarily mean that hermaphrodites were able to choose their gender. However, there is some support for the choice thesis in relation to the Middle Ages (M. Foucault, “Introduction” to *Hercule Barbin: Being the Recently Discovered Memoirs of a Nineteenth-Century French Hermaphrodite* (trans. R. McDougall) (New York: Pantheon, 1980), pp. vii–xvii; L. Daston and K. Park, “The Hermaphrodite and the Orders of Nature: Sexual Ambiguity in Early Modern France,” *GLQ: A Journal of Lesbian and Gay Studies* 1 (1995), pp. 419–438 at p. 428). The choice thesis appears more suspect in the Renaissance period and thereafter when court-recognized medical examination tended to determine ‘prevailing sex’ (L. Daston and K. Park, “Hermaphrodites in Renaissance France,” *Critical Matrix* 1(5) (1995), pp. 1–19; Epstein, *Altered Conditions*, p. 86). Canon law of the late Middle Ages may also provide some support for the choice thesis. Thus according to Peter the Chanter (d. 1197) “the church allows a hermaphrodite – that is, someone with the organs of both sexes, capable of either active or passive functions – to use the organ by which he is most aroused or the one to which he is most susceptible. If he is more active, he may wed as a man, but if he is more passive, he may marry as a woman” (*De Vitio Sodomitico*, cited by Boswell (J. Boswell, *Christianity, Social Tolerance and Homosexuality: Gay People in Western Europe from the Beginning of the Christian era to the Fourteenth Century* (Chicago: Chicago University Press, 1980), p. 376). See also Peter de la Palude (1277–1342), *Commentary on the Decretum*, C. 4, q. 3, c. 3 para. 22 (Paris edition, fol. 133 ra) (see A. Winroth, *The Making of Gratian’s Decretum* (Cambridge: Cambridge University Press, 2000). It would be mistaken, however, to overstate the case for choice within medieval law.
25. C. J. Nederman and J. True, “The Third Sex: The Idea of the Hermaphrodite in Twelfth-Century Europe,” *Journal of the History of Sexuality* 6(4) (1996), p. 497 at pp. 515–516.
26. See C. Chase, “Hermaphrodites With Attitude: Mapping the Emergence of Intersex Political Activism,” *GLQ: A Journal of Lesbian and Gay Studies* (The Transgender Issue) 4(2) (1998), pp. 189–211.
27. Foucault, *Abnormal*, p. 63.

of civil and religious or divine law” for the monster appears “only when confusion comes up against, overturns, or disturbs civil, canon, or religious law”²⁹ for “[t]he monster combines the impossible and the forbidden.”³⁰ While deformity or disability “may well be something that upsets the natural order” it does not lead to the designation monster because:

it has a place in civil or canon law. The disabled person may not conform to nature, but the law in some way provides for him. Monstrosity, however, is the kind of irregularity that calls law into question and disables it.³¹

Accordingly, Foucault understands the figure of the monster as structured by a double breach, of nature and law. The production of monsters it would seem requires both an extreme degree of morphological irregularity and transgression of the law. However, Foucault does not, contra Canguilhem,³² confine his understanding of breach of the law in this context to the transgressive act of bestiality or, indeed, to transgressive acts of any kind. Rather, his understanding also encompasses challenge to the categorical structure of law itself.³³ Thus, and by way of example, conjoined twins and human/animal creatures can be viewed as problematizing a variety of legal questions concerning baptism, marriage and inheritance, as well as challenging the core legal distinction between man and animal and the idea of the proper legal subject as a single embodied mind. This understanding of the concept of the monster as involving a double breach, of nature and law, is one that finds support within English law. Moreover, as we shall see, legal monsters, both in Bracton's time and consistently thereafter, involve a breach of law in both of Foucault's senses. That is to say, law's monsters represent both a challenge to legal taxonomy and express a concern over human/animal fornication.

This legal distinction between deformity and monstrosity has a much older history traceable to Roman law. Thus there are references to monsters in a number of specific contexts in the Digest and the Code. In particular the question of monsters is addressed in the writings of Paul,³⁴ Ulpian³⁵ and Justinian.³⁶ Moreover, Roman law bears an important relationship to constructions of monsters in the legal texts of Bracton and Britton. This claim is supported by direct references to Roman laws and to the writings of glossators of Roman law in their legal works. Thus Britton's text cites the

28. Op cit.

29. Op cit.

30. Op cit., p. 56.

31. Op cit., p. 64.

32. G. Canguilhem, “Monstrosity and the Monstrous,” *Diogenes* 40 (1964), pp. 27–42.

33. Foucault, *Abnormal*, p. 65.

34. D. 1. 5. 14.

35. D. 50. 16. 38; D. 50. 16. 135.

36. C. 6. 29. 3.

Digest³⁷ while Bracton cites Azo,³⁸ an Italian legal scholar and early thirteenth century glossator of Roman law. Indeed, in relation to Bracton, reliance on Roman law is especially apparent given that his monster text is substantially the same as, if not identical to, Paul's text contained within the Digest.³⁹ However, while Roman laws refer to monsters the decision by Bracton and Britton to incorporate such laws into their thirteenth century legal texts should not be viewed as determined by the mere discovery of such laws. As is well known the reception of Roman law was considerably more limited in England than in continental Europe. While resort to Roman law is quite extensive in the work of Bracton it is also apparent that his usage is selective rather than wholesale.⁴⁰ Thus on the subject of monsters there are elements of Roman law that are not incorporated as they were not considered compatible with English law. For example, Bracton did not incorporate the doctrine of the *ius trium liberorum*.⁴¹ Under Roman law even the birth of a monster was viewed as favoring the parents. Thus where childlessness precluded inheritance the birth of a monster counted as a child.⁴²

In any event, it may be that the appearance of monsters in thirteenth century legal texts was influenced by other contemporary factors. The problematization of monsters in thirteenth century English law needs to be understood in terms of "the ensemble of discursive and nondiscursive practices that makes something enter into the play of the true and the false and

37. Nichols, *Britton*, para 19.

38. Bracton, *Law and Customs*, vol 2, pp. 31–32.

39. D. 1. 5. 14. It is perhaps also likely that Bracton's monster text was influenced by canon law albeit he cites none. In the first place he was an Archdeacon. Moreover, his emphasis on "perverse procreation" in his definition of the monster suggests a preoccupation with sin that is less apparent in the Roman legal text he cites. Indeed, heightened anxiety concerning sin was a feature of the period (see, for example, R.I. Moore, *Formation of a Persecuting Society: Power and Deviance in Western Europe, 950–1250* (Oxford: Basil Blackwell, 1987); S.L. Waugh and P.D. Diehl (eds), *Christendom and its Discontents: Exclusion, Persecution and Rebellion 1000–1500* (Cambridge: Cambridge University Press, 1996); D. Elliott, *Fallen Bodies: Pollution, Sexuality and Demonology in the Middle Ages* (Philadelphia: University of Pennsylvania Press, 1999)).

40. There has been debate among legal historians as to the degree to which Bracton's text is Roman. While Guterbock places special emphasis on the importance of Roman law in Bracton's text (see K.E.G. Guterbock, *Bracton and his Relation to the Roman Law: A Contribution to the History of the Roman Law in the Middle Ages* (Littleton, Colorado: Rothman, 1979)), more recent legal scholarship has emphasized its Englishness adopting Maitland's view that though "Romanesque in form" it was "English in substance" being based on a vast amount of judicial experience, including some five hundred decisions (D.R. Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Cambridge, Mass: Harvard University Press, 1990), p. 167).

41. Bracton, *Laws and Customs*, vol 4, p. 360. The non-applicability of this Roman doctrine to English law is noted subsequently by William Blackstone writing in the mid-eighteenth century (*Commentaries on the Laws of England*, vols 1–4 (1765–1769), vol 2, Of the Rights of Things (Chicago: University of Chicago Press 1979), Chp 15, pp. 246–247). Blackstone's *Commentaries* can be accessed online through Yale University's Avalon project at <http://www.yale.edu/lawweb/avalon/avalon.htm> Date accessed: May 4, 2006.

42. This Roman law aimed to ensure that the birth of a monster did not serve to deny parents an inheritance they would otherwise receive. It did not operate to disturb the monster status of the creature born (see Schrage, "Reasonable Soul," p. 475).

constitutes it an object of thought.”⁴³ *On the Laws and Customs of England* is generally thought to have been written between 1220–60 and therefore during a significant period of historical change both within England and Europe more generally. The period from the late twelfth to the fourteenth century has been characterized in terms of a “quest for intellectual and institutional uniformity and corporatism throughout Europe.”⁴⁴ According to Boswell, the thirteenth and fourteenth centuries in particular were a time during which European societies were “bent on restraining, contracting, protecting, limiting and excluding.”⁴⁵ In these respects Bracton’s writings can be situated within the context of the emergence of a nascent English state. As Kantorowicz notes, the Bractonian age was a critical period when “the community of the realm’ became conscious of the difference between the king as a personal liege lord and the king as the supra-individual administrator of a public sphere.”⁴⁶ Bracton’s writings can also be juxtaposed with a drive toward orthodoxy within Christian theology and practice and located at a time when religious crusades, and their failure, weighed heavily in the West on the collective imagination.⁴⁷ It was a historical time in which Islam was perceived as representing a threat to Christendom from without and the sodomite⁴⁸ and the Jew⁴⁹ from within. Moreover, it is apparent that the terms Moor, Jew, sodomite and heretic operated as a kind of Nietzschean “sign-chain”⁵⁰ during the late Middle Ages. In short, Bracton wrote at a time in which anxiety concerning enemies of the state and/or the Church, real or imagined, came to the fore. As Cohen has noted, the successful disavowal of monsters at the societal level

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43. M. Foucault, “Le Souci de la Verite, Interview with Francois Ewald,” *Magazine Litteraire* 207 (1984), pp. 18–24 at p. 18.
44. Boswell, *Christianity*, p. 270. See also Moore, *Formation of a Persecuting Society*; R.I. Moore, “Heresy, Repression, and Social Change in the Age of Gregorian Reform,” in Waugh and Diehl (eds), *Christendom and its Discontents*, pp. 19–42.
45. Op cit.
46. E.H. Kantorowicz, *The King’s Two Bodies: A Study in Medieval Political Theology* (Princeton, New Jersey: Princeton University Press, 1957), p. 191.
47. In the period between the writings of Bracton and Britton Edward I returned from the failed crusade in the Holy Land and was crowned King in 1274. In relation to European antipathy toward Islam during the period of the crusades see N. Daniel, *Islam and the West: The Making of an Image* (Edinburgh: Edinburgh University Press, 1960); N. Daniel, *Islam, Europe & Empire* (Edinburgh: Edinburgh University Press, 1966); W.M. Watt, *The Influence of Islam on Medieval Europe* (Edinburgh: Edinburgh University Press, 1972); R.W. Southern, *Western Views of Islam in the Middle Ages* (Cambridge, Mass: Harvard University Press, 1978); M. Uebel, “Unthinking the Monster: Twelfth-Century Responses to Saracen Alterity” in J. Cohen (ed), *Monster Theory: Reading Culture* (Minneapolis: Minnesota University Press, 1996), pp. 264–291.
48. I use the term sodomite here because the relevant legislation targeted activity and because the notion of homosexuality as identity did not emerge until the sexological writings of the late nineteenth century. See Foucault, *History of Sexuality*.
49. See S. Grayzel, *The Church and the Jews in the Thirteenth Century* (New York: The Jewish Theological Seminary of America, 1989); E.A. Synan, *The Popes and the Jews in the Middle Ages* (New York: Macmillan, 1965); J. Marcus, *The Jew in the Medieval World* (New York: Macmillan, 1970); J. Mundy, *Europe in the High Middle Ages 1150–1300* (New York: Longman, 1973).
50. F. Nietzsche, *On the Genealogy of Morals* (New York: Vintage Books, 1969), p. 77.

requires both “a degree of cultural uniformity and relative social calm.”⁵¹ These features were absent in thirteenth century England. Thus references to monsters in English legal texts, and the figure of the monster more generally, might be viewed, as a vehicle for the expression of cultural anxiety about boundaries: national, religious, sexual and human. In this sense the monster functions as an object for the projection of that very anxiety.

Whatever the precise reasons for entry of the term monster into English law in the thirteenth century it should be recognized that Bracton’s articulation differs from Roman law in an important respect. Roman legal provisions dealing with monsters tend to be worded in descriptive fashion, that is, as descriptions of bodies that either are or are not monsters. Such provisions tend to be silent as to the etiology and/or teleology of the phenomenon of monsters. Where this is not the case it is the teleology of monsters that receives expression.⁵² Moreover, it is the teleological view of monsters that typified the non-legal literature of antiquity.⁵³ Within this historical period monsters were understood primarily as signs and portents, a view that remained dominant among the learned until after the time of Saint Augustine when the emphasis would be placed on signs. These different understandings find support in the etymology of the word monster. Thus the term derives from the Latin word *monstrare* (to show forth or demonstrate) and the French word *monere* (to warn).⁵⁴ The latter term placed the emphasis on God’s wrath and calamities to come while the former term emphasized the power and glory of God. In both of these understandings monsters appear as supernatural and therefore sublime phenomena.⁵⁵ This view was reinforced by Saint Augustine who made no clear conceptual distinction between marvels and miracles given his view that nature was the will of God realized.⁵⁶

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51. J.J. Cohen, *Of Giants: Sex, Monsters, and the Middle Ages* (Minneapolis: University of Minnesota Press, 1999), p. 4. It has also been noted that “each time the monster appears is, in some ways, the last, since the monster is, by definition, unique, one of a kind . . . each monster embodies a different cultural trauma” (E.J. Ingebreetsen, *At Stake: Monsters and the Rhetoric of Fear in Public Culture* (Chicago: Chicago University Press, 2001), p. 5).
 52. See, for example, A.S. Pease (ed), *Cicero, de Divinatione*, Lib. I and II (Urbana: University of Illinois, 1920).
 53. For a discussion of non-legal literature on monsters in antiquity see L. Brisson, *Sexual Ambivalence: Androgyny and Hermaphroditism in Graeco-Roman Antiquity* (Berkeley: University of California Press, 2002), Ch 1.
 54. See, for example, M.H. Huet, *Monstrous Imagination* (Cambridge, Mass: Harvard University Press, 1993); Epstein, *Altered Conditions*, p. 91; F. Cawson, *The Monsters in the Mind: The Face of Evil in Myth, Literature and Contemporary Life* (Brighton: Book Guild, 1995), p. 1; T. Beal, *Religion and its Monsters* (London & New York: Routledge, 2002), pp. 6–7; D.D. Gilmore, *Monsters: Evil Beings, Mythical Beast, and all Manner of Imaginary Terrors* (Philadelphia, University of Pennsylvania Press, 2003), p. 9.
 55. S.H. Monk, *The Sublime: A Study of Critical Theories in XVIII-Century England* (Ann Arbor: University of Michigan Press, 1960), p. 54.
 56. R. Wittkower, “Marvels of the East: A Study in the History of Monsters,” *Journal of the Warburg and Courtauld Institutes* 5 (1942), pp. 159–197 at p. 168; L. Daston, “Marvelous Facts and Miraculous Evidence in Early Modern Europe,” *Critical Inquiry* (1991), pp. 93–124 at p. 95; D. Gordon White, *The Myth of the Dog-Man* (Chicago: University of Chicago Press, 1991), p. 30.

After the time of Augustine the teleological view of monsters gradually declined. Katherine Park and Lorraine Daston have provided a three stage historical account of understandings of monsters. While perhaps paying insufficient attention to the fact that one form of understanding did not necessarily or immediately supplant others,⁵⁷ they depict the history of monsters in terms of a trajectory from divine prodigies, to natural wonders and ultimately to a modern and scientific understanding.⁵⁸ In other words, they chart a shift in readings of monsters from awful to awe to statistical anomaly or an historical process in which the idea of the monster is displaced and re-institutionalized. The work of Bracton emerges during the gradual transition from an understanding of monsters as divine prodigies to natural wonders.⁵⁹ The writings of Thomas Aquinas are significant in understanding this shift. In his theological writings, Aquinas effected a synthesis whereby then-recently rediscovered writings of Aristotle were fused with Church law.⁶⁰ In his *Summa Theologica* Aquinas reworked extant understandings of marvels and miracles.⁶¹ In particular, he supplemented the supernatural/natural understanding of things with a third term, the *preternatural*.⁶² A view of monsters as divine prodigies locates their origins within a supernatural framework as God's unmediated actions. For Aquinas, however, the preternatural captured events that "happen rarely, but nonetheless by the agency of created beings."⁶³

While Bracton's monster text precedes the writings of Aquinas, it can be grasped in terms of this relationship between rare events, human agency and causation.⁶⁴ Thus, and in contrast to Roman law, Bracton frames the question of monsters in causal terms.⁶⁵ His focus is not on what monstrosity predicts but on the nature of its production. That is, "where a woman brings forth a monster" it is because it has been "procreated perversely, against the way of human kind."⁶⁶ Here the word *perverse* bears its

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57. S. Pender, "No Monsters at the Resurrection: Inside Some Conjoined Twins," in J. Cohen (ed), *Monster Theory: Reading Culture* (Minneapolis: Minnesota University Press, 1996), pp. 145–167.
 58. See K. Park and L. Daston, "Unnatural Conceptions: The Study of Monsters in Sixteenth- and Seventeenth-Century France and England," *Past and Present* 92 (1981), pp. 20–54.
 59. However, an understanding of monsters as portents did not disappear from the cultural landscape. Moreover, and as we will see, this understanding re-emerged and found fertile soil in the sixteenth century.
 60. P.V. Spade, "Medieval Philosophy," in A. Kenny (ed), *The Oxford Illustrated History of Western Philosophy* (Oxford: Oxford University Press, 1997), pp. 55–105 at p. 89.
 61. Daston, "Marvelous Facts," pp. 96–97.
 62. *Op cit.*, p. 97.
 63. *Op cit.*
 64. In this regard, Bracton was, no doubt, influenced by scholastic thinkers who precede Aquinas.
 65. Thus, and while there is substantial similarity between Bracton's text and that of Paul (D. 1, 5, 14), Paul places emphasis on the abnormality of the birth. By way of contrast, Bracton places emphasis on his claim that such procreation is "against the way of human kind" (*Laws and Customs*, vol. 2, p. 31). For Bracton, the transgressive act of bestiality proves significant to his understanding of monsters and this is, no doubt, linked to the influence of canon law and an increased preoccupation with sin in the late Middle Ages.
 66. Bracton, *Laws and Customs*, vol. 2, p. 31.

pre-sexological meaning. As noted by Dollimore, perversion is a concept traceable to early Christian theology and involves deviation from the true or orthodox path.⁶⁷ Thus, unlike the modern sexological understanding, pre-modern understandings of perversion need to be situated within the context of sin. However, religious deviation should not be thought apart from sexual deviation. On the contrary, these two forms of transgression have been consistently interwoven within Christian theology. Moreover, this intersection is apparent in Bracton's etiological account of monsters. Thus it seems reasonably clear that Bracton's reference to "perverse procreation" implies bestiality, a vice that Aquinas placed at the apex of his hierarchy of vices "contrary to nature."⁶⁸

This reading is supported by the juxtaposing of the terms beasts and monsters in the contemporaneous legal text of Britton. It finds further support in a Bractonian passage that does not privilege the gaze. Thus he notes that: "a monster utters a roar" whereas "a true child a cry."⁶⁹ It is also consistent with the writings of Azo upon whom Bracton drew heavily in constructing provisions pertaining to monsters. In addressing the deformity/monstrosity dyad, Azo distinguished between births arising out of copulation between a mother and an animal and births arising due to the mother's intense preoccupation with animals. In the former case the child was viewed as a monster, though not in the latter.⁷⁰ In effect, the deformity/monstrosity distinction is, in the work of Azo, reworked into a dis-

67. J. Dollimore, *Sexual Dissidence: Augustine to Wilde, Freud to Foucault* (Oxford: Clarendon Press, 1991). According to Mary Douglas "[t]he word *perversion* is a significant mistranslation of the rare Hebrew word *tebhel* which has as its meaning mixing or confusion" (*Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (London: Routledge, 1966), p. 53).

68. See A.I. Davidson, "The Horror of Monsters," in J.J. Sheehan and M. Sosna (eds), *The Boundaries of Humanity: Humans, Animals, Machines* (Berkeley: California University Press, 1991), pp. 36–64 at pp. 41–42.

69. Bracton, *Laws and Customs*, vol 4, p. 361.

70. Azo, *Summa Codicis*, ad C. 6, 29, 2 (see Schrage, "Reasonable Soul," p. 478). The notion of the maternal imagination has a lengthy history within European literature (see, for example, M. Wright Bundy, *The Theory of Imagination in Classical and Medieval Thought* (Urbana: University of Illinois Press, 1927); Huet, *Monstrous Imagination*; R. Braidotti, "Signs and Wonder and Traces of Doubt: Teratology and Embodied Differences," in N. Lykke and R. Braidotti (eds), *Between Monsters, Goddesses and Cyborgs: Feminist Confrontations with Science, Medicine and Cyberspace* (London: Zed Books, 1996), p. 135. It dates from antiquity and persists until at least the eighteenth century when it became subjected to sustained scientific ridicule (see, for example, Issac Bellet, *Letters, on the Force of Imagination in Pregnant Women. Wherein it is Proved ... that it is a Ridiculous Prejudice to Suppose it Possible for a Pregnant Woman to Mark her Child* (1765). Based on information from English Short Title Catalogue. Eighteenth Century Collections Online. Gale Group. <http://galenet.galegroup.com/servlet/ECC>; James A. Blondel, *The Strength of Imagination in Pregnant Women Examin'd: and the Opinion that Marks and Deformities in Children Arise from thence, Demonstrated to be a Vulgar Error* (1727). Based on information from English Short Title Catalogue. Eighteenth Century Collections Online. Gale Group. <http://galenet.galegroup.com/servlet/ECC>. Indeed, the popularity of this idea in the eighteenth century helps account for the widespread belief that a woman gave birth to seventeen rabbits in Surrey, England in 1726 (see D. Todd, *Imagining Monsters: Miscreations of the Self in Eighteenth-Century England* (Chicago: University of Chicago Press, 1995).

inction between the maternal imagination and bestiality as respective cause. While the legal focus on bestiality as cause of monstrosity might make sense in terms of its place at the apex of a hierarchy of vices “contrary to nature,” it is at the same time curious that the maternal imagination presented a lesser problem. For both causes might be understood as preternatural in Aquinas’ sense; that is, what “happens rarely, but nonetheless by the agency of created beings.”⁷¹ Moreover, while bestiality bears a relationship to nature, not being completely outside nature, births understood in terms of the maternal imagination are products of art. In other words, it is of interest that Azo deploys the nature/artifice dyad in such a way as to privilege feminine art over nature in the construction of legal personhood and therefore the capacity to inherit and enjoy other legal rights. For as Huet contends, where “the progeny imitates a model that belongs to art rather than nature, it can be seen as the most illegitimate of offspring.”⁷²

Moreover, it seems clear that bestiality as cause in the legal writings of both Azo and Bracton is simply to be read off the body. That is, if the body is viewed as a monstrosity then bestiality is to be concluded and this appears to be so irrespective of whether a creature is considered to possess any specifically animal features. Indeed, Bracton’s text makes no reference to animal features. As will become clear this contrasts sharply with a number of more recent and fantastic legal texts. Moreover, it would seem that the absence of any reference to animal features is deliberate given that elsewhere, and in the context of his treatment of madmen and lunatics, Bracton refers to “brute beasts.”⁷³

Indeed, his treatment of madmen and lunatics is revealing more generally in relation to thirteenth century understandings of human status. Thus Bracton excused madmen and lunatics from criminal and civil liability, and excluded them from the right to inherit on the grounds that they “are not far removed from brute beasts which lack reason,”⁷⁴ a view shared by his contemporary Thomas Aquinas. Significantly, however, sharing the animal quality of non-reason was not sufficient to deny madmen and lunatics human status. Rather, for Bracton, it is through the body that the monster is to be known and designated. Accordingly, while western philosophy has privileged the mind over the body in understanding and constructing humanness, it would appear that it is the body that serves as the ultimate bedrock of what it means to be human in the legal imagination of thirteenth century England. Moreover, and as will become clear, this emphasis on the body in constructing the human/monster dyad persisted into the nineteenth century within English law. In the thirteenth century the legal distinction between human and monster was inextricably tied to the question of origins

71. Daston, “Marvelous Facts,” p. 97.

72. Huet, *Monstrous Imagination*, p. 23.

73. Bracton, *Laws and Customs*, vol. 2, p. 308. See also A. Platt and B.L. Diamond, “The Origins and Development of the ‘Wild Beast’ Concept of Mental Illness and its Relation to Theories of Criminal Responsibility,” *Journal of the History of the Behavioral Sciences* 1(4) (1965), pp. 355–367.

74. *Op cit.*

and the imagined practice of copulation between species. While the subsequent legal history of monsters differs from that of the thirteenth century in a number of respects, we will see that a preoccupation with determining where the boundary between animal and human lies persists.

III. The Renaissance: Flights of fantasy

After entering English law in the thirteenth century common law writings of Bracton and Britton the term monster did not reappear until the late-sixteenth century.⁷⁵ In 1590 in a canon law text titled *A Brief Treatise of Testaments and Last Wills*,⁷⁶ the first canon law work to appear in English,⁷⁷ the term is represented by Henry Swinburne, lawyer and part-time judge of the Consistory Court at York. While Swinburne belonged to a different legal tradition than Bracton, it should be appreciated that the medieval law of succession was characterized by a “complex mixture of canon law, common law and the principles of equity.”⁷⁸ In particular, church courts enjoyed “exclusive probate jurisdiction in most parts of England” and “proved all wills and testaments not involving freehold property.”⁷⁹ Moreover, despite the conflict between Church and state during the sixteenth century, “the English ecclesiastical courts were largely unaltered by the Reformation.”⁸⁰ In particular, “the scope of English ecclesiastical jurisdiction in 1570 stood pretty much where it had in 1529.”⁸¹ After 1570 “an indigenous literature of English ecclesiastical law” began to emerge.⁸² Swinburne’s text has been described as “the most practically useful book of this period.”⁸³ Nevertheless, and while he cited the common law writers, Bracton, Littleton and Dyer as sources,⁸⁴ Swinburne relied overwhelmingly on continental writers of the late medieval and early modern period as authority.

75. Thus there is no mention of monsters in the fifteenth century legal writings of Sir Thomas Littleton (c.1410–1481 and judge from 1466), *Tenures* (ed), E. Wambaugh (Washington, 1903) and Sir John Fortescue (c.1395–c.1477 and Chief Justice of the King’s Bench from 1442), *On the Laws and Governance of England 1468–1471* (ed), Shelley Lockwood (Cambridge: Cambridge University Press, 1997).

76. H. Swinburne, *A Brief Treatise of Testaments and Last Wills* (1590) (New York & London: Garland Publishing, 1978).

77. J.D.M. Derrett, *Henry Swinburne (?1551–1624) Civil Lawyer of York* (York: St Anthony’s Press, 1973), p. 3.

78. J. Ford, “The Decline in the Use of Latin for Will and Testament-making in Early Sixteenth-Century Bedfordshire,” <http://www.tyndale.org/Reformation/1/ford.html> Date accessed: August 18, 2006.

79. R.H. Helmholz, *Roman Canon Law in Reformation England* (Cambridge: Cambridge University Press, 1990), p. 1.

80. J.H. Baker, *An Introduction to English Legal History* (3rd Edition) (London: Butterworths, 1990), p. 151.

81. Helmholz, *Roman Canon Law*, p. 41. See also C. Kitching, “The Prerogative Court of Canterbury from Warham to Whitgift” in R. O’Day and F. Heal (eds), *Continuity and Change: Personnel and Administration of the Church of England 1500–1642* (Leicester: Leicester University Press, 1976), p. 213.

82. Helmholz, *op cit.*, p. 28.

83. W.S. Holdsworth, *A History of English Law*, vol 5 (London: Methuen and Co, 1924), p. 14.

84. Swinburne, *A Brief Treatise of Testaments*, p. 168.

However, while Swinburne does not form part of the common law tradition, and while Bracton's *Laws and Customs of England* persisted in their applicability, it is only Swinburne's text that constitutes a new English legal text appearing in the sixteenth century that deals with monsters. Accordingly, it provides us with a glimpse of English legal anxiety apparent within this important period of religious and political struggle. Moreover, the legal sources that Swinburne places particular emphasis on regarding monsters are primarily early to mid-sixteenth century continental writers.⁸⁵ This fact perhaps serves to reinforce the suggestion that Swinburne's text can be read in terms of the anxieties of the period rather than, or as well as, in terms of a different legal tradition. Let us now consider Swinburne's monster text. According to Swinburne:

where a wife do bring forth a monster, or misshapen creature, having peradventure a head like unto a dogs head, or to the head of an ass, or of a raven, or duck, or of some other beast, or bird: such monstrous creature, though it should live (as commonly none do) yet it is not accounted amongst the testators children, for the law doth not presume that creature to have the soul of a man, which hath a form and shape so strange and different from the shape of a man.⁸⁶

He continues:

[b]ut if the creature brought forth, do not vary in shape from a man or woman, but have somewhat more than God by the ordinary course of nature alloweth, as having six fingers on either hand, or one foot: such creature is not excluded, but is to be accounted for the testator's child.⁸⁷

Interestingly, Swinburne then poses the question: "[w]hat if there be duplication of notable members, as to have four arms, or two heads, or disorder in the principal members, as the face standing backwards, or in the breast?"⁸⁸ While he acknowledges that "writers seem to incline to th[e] opinion that they be monsters"⁸⁹ Swinburne answers: "[i]n this case I suppose much is to be attributed to the discretion of the judge."⁹⁰

A number of comments can be made about these passages. First, the broad distinction between deformity and monstrosity, introduced into English law by Bracton, is retained. Second, the view of Britton, that a child with three hands or three feet is *per se* a monster and Bracton's view that

85. Op cit., pp. 168–169. Thus Swinburne cites Andrea Alciati (1492–1550), Johannes Sichardt (1449–1552) and Johannes Oldendorpius (1480–1567).

86. Op cit.

87. Op cit., pp. 168–169.

88. The reference to creatures with their "face in their breast" in Swinburne's text might be viewed as informed by the ancient legend of the Blemmyai (see D. Higgs Strickland, "Monsters and Christian Enemies," *History Today* (Feb) (2000), pp. 45–51.

89. Swinburne, *A Brief Treatise of Testaments*, p. 169.

90. Op cit.

multiple-headed creatures are monsters is less clear-cut. Rather, a series of examples, exceeding the instance of digits on one hand, and which include the conjoined twin are presented as ambiguous. However, this seemingly more permissive stance toward embodied difference can be contrasted with Swinburne's colorful description of monsters. Thus in contrast to the more matter-of-fact monsters of Bracton and Britton, where monstrosity is understood in terms of an excessive body, albeit that bestiality is perhaps understood to be the cause, Swinburne foregrounds the visibility of human/animal hybridity as emblematic of monstrosity. For Swinburne, monstrosity is not confined to the excessiveness or disorder of bodies. Rather, it encompasses, and crucially so, creatures that resemble both animals and humans. That is, not merely creatures which are imagined to be the product of inter-species copulation, but creatures who bear the authorial mark or imprint of two different species.⁹¹

Moreover, and in this contrast, it would seem that Swinburne introduces a monster hierarchy. After all, his text makes clear, that human/animal hybrids, Swinburne's dog-, raven-and duck-headed creatures, are unquestionably monsters. Conversely, the excessive or disordered body is not necessarily considered a monster. That is, as he notes, a question for judicial discretion. Thus, in contrast to Foucault, who identifies the conjoined twin as the privileged monster of the Renaissance, Swinburne's text suggests that it was the bestial human who lay at the heart of late- sixteenth century English legal concern. Moreover, and again in opposition to Foucault, Swinburne's text serves to problematize a view of a linear history in which the notion of the monster as absolute difference takes on an increasingly relative character. For Swinburne's text moves toward rather than away from human/animal hybridity and therefore toward more absolute forms of difference. Conversely, the conjoined twin is at least potentially located outside the legal category, monster. In this latter respect, the contemporary view of law's past as legal Dark Age, is again in need of qualification.

An understanding of the bestial human as lying at the heart of late- sixteenth century English legal concern finds support in the fact that bestiality, a species of sodomy, was made a capital offense in 1534,⁹² a measure

91. It should be noted that Swinburne does allow for the possibility that monsters whose bodies are merely disordered or not properly arranged might be considered the product of two human parents. However, in relation to the creatures that lie at the centre of his text, namely, human-bodied/animal-headed hybrids, he refuses to countenance this possibility. In relation to these particular monsters bestiality as cause appears to be the only conclusion.

92. 25 Hen. VIII. c. 6. It should be noted that the practice of sodomy, including "with beast," had been made punishable by death in the late Middle Ages. Coke cites both Britton and Fleta in this regard (Sir E. Coke, *The Institutes of the Laws of England 1628-1644* (1832 ed), vol. 1-4 (New York & London: Garland Publishing, Inc, 1979), vol. 3, p. 58). The last reference to a law against sodomy, prior to Henry VIII, occurred in 1376. In that year the parliament unsuccessfully petitioned Edward III to banish foreign artisans accused of having brought sodomy to England's shores. Since that time common law pertaining to sodomy may have fallen into disuse. In any event, 1534 marks an important moment in the subjection of sodomy to state sanction.

renewed on four separate occasions during the reign of Henry VIII⁹³ and revived and confirmed by Elizabeth I.⁹⁴ That is, it has been suggested that the legislation was occasioned by fear of human/animal hybrid births and therefore “pollution of the species.”⁹⁵ However, in view of the fact that prosecutions for bestiality in England were rare during the Renaissance period⁹⁶ Boehrer has contended that “the rhetoric of bestiality” was more important than the transgression itself. As he puts it, the crime was really one against “a kind of abstract linguistic principle.”⁹⁷ It expressed a concern that a distinction between species be maintained whilst simultaneously revealing the fragility of that very distinction. In this respect, both the bestiality legislation and Swinburne’s representation of human/animal monsters might be understood in the context of a history in which the relationship between man and animal underwent transformation.

While it has been argued that “the paradigm of separation of species was breaking down” as early as the late Middle Ages,⁹⁸ this development had become considerably more pronounced by the sixteenth century. For there was, as Thomas notes, “a growing tendency in the early modern period for scientists and intellectuals to break down the rigid boundaries between animals and man which earlier theorists had tried to raise.”⁹⁹ In addition to the impact of “humanism, the Reformation and a new philosophy and science” growing uncertainty about man’s uniqueness was exacerbated by the discovery of “savages” which “tended to blur any sharply defined borders between man and animal and tended to unroot all consoling notions of a harmonious and well-ordered nature.”¹⁰⁰ Accordingly, the criminalization of bestiality might be viewed as reflecting “a change in the perception of the boundary which existed between humans and animals.”¹⁰¹ It might also be viewed as an attempt to suture the cut rendered in the cultural fabric by a narrowing of the gap between species. By the same token, Swinburne’s human/animal hybrids might be viewed in the context of this altered perception and as a projection of the anxiety that it aroused.

However, while human/animal hybridity is central to an understanding of the horror Swinburne’s dog-, ass- and raven-headed creatures evoked as

93. This legislation was renewed in 1536, 1540, 1548 and 1553.

94. 5 Eliz. c. 17. The death penalty for the offense remained in force until 1861.

95. K. Thomas, *Man and the Natural World: A History of Modern Sensibility* (London: Lane, 1983), p. 135.

96. B.T. Boehrer, “Bestial Buggery in A Midsummer Night’s Dream,” in D.L. Miller, S. O’Dair and H. Weber (eds), *The Production of English Renaissance Culture* (Ithaca, New York: Cornell University Press, 1994), pp. 123–150 at pp. 148–150; J.H. Baker, *Oxford History of the Laws of England 1483–1558*, vol. 6 (Oxford: Oxford University Press, 2003), p. 563.

97. Op cit., p. 148.

98. J.E. Salisbury, *The Beast Within: Animals in the Middle Ages* (London: Routledge, 1994), p. 2.

99. Thomas, *Man and the Natural World*, p. 122.

100. M. Pfister, “Man’s Distinctive Mark: Paradoxical Distinctions between Man and his Bestial Other,” in E. Lehmann and B. Lenz (eds), *Early Modern Texts in Telling Stories* (Amsterdam: B.R. Gruner, 1992), pp. 17–33 at p. 21.

101. E. Fudge, “Monstrous Acts: Bestiality in Early Modern England,” *History Today* 50(8) (2002), p. 20–26 at p. 23.

well as the place assigned to them within his taxonomy of monsters, it is not simply the fact of hybridity that signals alarm or upon which Swinburne dwells. Rather, and crucially, he locates the difficulty and visible sign of monstrosity in the head. This is significant in a number of respects. First, in Christian theological terms the head is considered to house the soul¹⁰² and, of course, Swinburne portrays animal-headed creatures as monsters precisely because they are considered to lack a soul. There is no reference to the soul in the thirteenth century writings on monsters by Bracton and Britton. Nor does their work delineate monsters on the basis of having animal heads or indeed on the basis of a head/body distinction.¹⁰³ An emphasis on the head might also be due to its being viewed as the seat of reason.¹⁰⁴ It is perhaps precisely this view that accounts for the theological location of the soul in the head. Certainly, both Augustine and Aquinas appear to have subscribed to the Stoic theory that animals have “no rational soul” and therefore “do not belong to the legally protected community, because they lack reason.”¹⁰⁵

In understanding Swinburne’s text it should be appreciated that the head was a powerful metaphor for society and its hierarchical ordering in the early modern period. As Shildrick notes “the human body in all its forms represented ... an index and analogy of the political state.”¹⁰⁶ It was quite literally “freighted with symbolic meaning.”¹⁰⁷ According to Scarry, and as noted by Pender, the monstrous body was seen as a “condensed approximation” of the body politic.¹⁰⁸ In this respect, creatures with animal heads might be understood as evidence of disorder and the inversion of the natural order of things. Equally, and for this reason, they might be comprehended in terms of signs of impending calamity. Certainly, it has been noted that Renaissance literature on monsters dwelt especially on their role as divine portents,¹⁰⁹ albeit that this development ran counter to a longer historical trajectory from the time of Augustine.

Crucially, in order to understand Swinburne’s preoccupation with the soul and with animal heads, and the teleological concerns that perhaps they both imply, it is necessary to place his text within the context of the

102. See Alphonzo Carranza, *Tractatus Novus et Accurtissimus de Partu Naturali et Legitimo, ubi Controversiae Iuridicae, Philologicae, Medicae Discutiuntur ad Fori Usus et Praxim* (1629) referred to by Schrage, “Reasonable Soul,” p. 487.

103. However, in a different context Bracton does refer to the wolf’s head in order to symbolize occupying a position outside the law. Thus he states: “An outlaw also forfeits everything connected with the peace, for from the time he is outlawed he bears the wolf’s head, so that he may be slain by anyone with impunity, especially if he resists or takes flight so that his arrest is difficult” (Bracton, *Laws and Customs*, vol. 2, p. 362).

104. Williams, *Deformed Discourse*, p. 127.

105. R. Sorabji, *Animal Minds and Human Morals: The Origins of the Western Debate* (London: Duckworth, 1993), p. 196.

106. M. Shildrick, *Embodying the Monster: Encounters with the Vulnerable Self* (London: Sage, 2002), p. 20.

107. Op cit.

108. E. Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York: Oxford University Press, 1985), p. 245. See also Pender, “No Monsters at the Resurrection,” p. 90.

109. Huet, *Monstrous Imagination*, p. 6.

prevailing relationship between the body and social order. That is to say, Swinburne's text needs to be situated within the political and theological context of the English Reformation and Counter-Reformation. During the period of the Reformation, both in England and in Europe, literature on monsters proliferated and was deployed by both sides of the religious struggle and for the purposes of that struggle.¹¹⁰ The contention that Swinburne's text is to be understood in this way finds support in the animal symbolism of the creatures he identifies. That is, his dog-, ass- and raven-headed creatures lend themselves to a set of contemporaneous meanings that revolve around religious themes. Thus in both the medieval and early modern periods the dog was associated with the devil and the ass with the Jew.¹¹¹ Indeed, the persistence of anti-Semitic animal symbolism in the Elizabethan period is evident in Edward Topsell's comment that Jews "like asses could not understand the evident truth of Christ in the plaine text of Scripture."¹¹² Swinburne's own anti-Semitism is rendered explicit in his commentary on apostasy. While noting that those committing apostasy, and indeed heresy, are incapable of making a valid will and testament, he describes Jews as "infidels" and their rites as "detestable."¹¹³ Equally, the figure of the raven pointed to (religious) war, death and the afterlife. As noted by Fleming, in Western Europe, "ravens appear almost exclusively as signatory animals for deities,"¹¹⁴ that is, as portents.

Accordingly, Swinburne's animal-headed monsters might be read as both prophetic and allegorical in much the same way as Luther's *Popish Monsters* from which they may well have taken their cue. In 1523 Martin Luther and Philip Melancthon published a pamphlet titled *Of Wonderful Popish Monsters*. The pamphlet, which was translated into English in 1579, only eleven years before the publication of Swinburne's text, characterizes two religious figures of the Catholic Church as monsters. The figures of the Pope-Ass (a depiction of a Pope with the head of an ass, a creature supposedly

110. Shildrick, *Embodying the Monster*, p. 12.

111. B. Rowland, *Animals with Human Faces: A Guide to Animal Symbolism* (London: Allen & Unwin, 1974), pp. 26, 60. The reference to dog-headed creatures in Swinburne's text might also be understood as an allusion to legends of the ancient world concerning dog-headed monsters (Cynocephali). These were believed to exist at the frontier of the then known world and, in particular, India and Ethiopia (see A. Douglas, "Monsters, Dog-Heads, and Old Irish Tales," in *The Beast Within: A History of the Werewolf* (London: Orion, 1992), Ch 6). Interestingly, Saint Christopher is, in several versions of the legend of his life, portrayed as a dog-head (see J. Tally Lionarons, "From Monster to Martyr: The Old English Legend of Saint Christopher," in T.S. Jones and D.A. Sprunger (eds), *Marvels, Monsters, and Miracles: Studies in the Medieval and Early Modern Imaginations* (Michigan: Western Michigan University, 2002), pp. 167–182; J. Fraser, "The Passion of St Christopher," *Revue Celtique* 34 (1913), p. 309).

112. E. Topsell, *The Historie of Foure-Footed Beasts and Serpents* 1607 (New York: W. Ley, 1967), (cited by Rowland, *Animals with Human Faces*, p. 26).

113. Swinburne, *A Brief Treatise of Testaments*, pp. 96–97.

114. S. Fleming, "Murders and Unkindness," *White Dragon* (Samhain issue) 19 (1998), p. 8. See also W. George and B. Yapp, *The Naming of the Beasts: Natural History in the Medieval Bestiary* (London: Duckworth, 1991), p. 170.

left on the banks of the River Tiber in 1496) and the Monk-Calf (a depiction of a monk with the head of a Calf supposedly born in Freiburg in 1522)¹¹⁵ are perhaps, best comprehended, as Graham has suggested, as “prodigious allegories of the corruption of the Church of Rome.”¹¹⁶ For the propagandists of the Reformation the Pope was the “follower of Antichrist” and “servant of the terrible king of Spain.”¹¹⁷ Moreover, and in a move that linked religious deviation with sexual deviation, the practice of sodomy was projected onto the Papacy. As Bray has noted, and as an indication of its moral fall, the Papacy was portrayed as “nothing but a cistern full of sodomy.”¹¹⁸ Thus and as Davidson remarks: “just as it is awful that a human body should have the head of an ass so it is horrible that the Bishop of Rome should be head of the Church.”¹¹⁹ By the same token human-bodied/animal-headed creatures were seen as “signs of God’s wrath against the Church, which prophesied its immediate ruin.”¹²⁰

In other words, and bearing in mind that Swinburne advanced the interests of the English Reformation, writing texts on English canon law after the break with Rome,¹²¹ his legal text can be understood in the context of the coincidence of a number of historical factors. In contrast to the Bractonian monster, Swinburne’s construction places particular emphasis upon human/animal hybridity, the head/body distinction and expresses teleological concerns. Moreover, in terms of animal symbolism, his choice of creatures serves perhaps to foreground a number of religious concerns. These differences are perhaps to be accounted for by a series of factors that both fuelled and were fuelled by the Reformation and Counter-Reformation: a growing perception that the gap between animal and human had become increasingly blurred, a resurgence of an understanding of monsters as divine portents, a greater theological preoccupation with the soul and a consolidation of a view of the body as metaphor for the body politic. In this last respect, the English Reformation had served to foreground and entrench the metaphoric relationship between the king’s body and England as a social and political body. As noted by Elton, the preamble to the Act in Restraint of Appeals 1533 amounted to “a fully-fledged theory of the state”¹²² declaring “this realm of England ... [to be] governed by one Supreme Head and King.”¹²³ In this context the metaphorical

115. See Davidson, “The Horror of Monsters,” p. 37.

116. E. Graham, *Representations of the Post-Human: Monsters, Aliens and Others in Popular Culture* (Manchester: Manchester University Press, 2002), p. 48.

117. A. Bray, *Homosexuality in Renaissance England* (London: Gay Mens’ Press, 1982), p. 19.

118. Op cit.

119. Davidson, “The Horror of Monsters,” p. 37.

120. Op cit.

121. Derrett, *Henry Swinburne*, p. 3. Indeed, the title page of Swinburne’s 1590 text on Testaments and Wills emphasized that his text was a compilation “of such lawes Ecclesiastical and Civile as be not repugnant to the lawes customes and statutes of this Realme nor derogatory to the Praerogative Royall.”

122. G.R. Elton, *England under the Tudors* (London: Methuen & Co, 1974), p. 134. See also G.R. Elton, “The Reformation in England,” in G.R. Elton (ed), *The New Cambridge Modern History vol II The Reformation 1520–1559* (Cambridge: Cambridge University Press, 1962), Ch VII, pp. 226–250.

123. Op cit.

power of a human-bodied/animal-headed monster might be viewed as expressing, as well as exacerbating, anxieties of the period.

The figure of the monster next appeared in English law in the legal writings of John Cowell and the distinguished common law jurist, Sir Edward Coke, both of whom cite Bracton.¹²⁴ In the first part of his *Institutes of the Laws of England*, written in the early seventeenth century, Coke states:

[a] monster, which hath not the shape of mankind, cannot be heire or inherit any land, albeit it be brought forth within marriage ... but although he hath deformity in any part of his body, yet if he hath human shape he may be heire.¹²⁵

While this passage offers little assistance as to where the line between deformity and monstrosity is to be drawn, John Cowell, writing in 1605, articulates more clearly a Bractonian understanding. That is, while “those who are brought forth contrary to the form of mankind ... as monsters and prodigies in nature” are neither legitimate or reputed children, “those which are irregular only in members, as having six fingers, or four, or only one, shall not for that be esteemed illegitimate.”¹²⁶ Nevertheless, the line between human and monster remains far from clear in these early seventeenth century legal texts. Moreover, while the conjoined twin, Foucault’s privileged monster of the Renaissance, might be viewed as falling on the monstrosity side of the deformity/monstrosity dyad, this is not rendered explicit. While there is some legal evidence to support such a view,¹²⁷ the conjoined twin is certainly not accorded a special place within seventeenth century legal constructions of the category monster.

Further, while both recite the deformity/monstrosity dyad, neither Coke nor Cowell express concern regarding the teleology of monsters. And yet, like Swinburne, Coke and Cowell wrote at a time when the Reformation and Counter-Reformation were within living memory. Was it the case then that their relatively constrained language was influenced by the trend in the seventeenth century toward the naturalization of monsters? Perhaps. However, as Pender has argued, “despite scientific advances, the notion of monsters was not emptied of political and theological resonance.”¹²⁸ In any

124. J. Cowell, *The Institutes of the Laws of England* (1605) (New York & London: Garland Publishing, 1978), p. 16; Coke, *Institutes*, vol. 1, p. 7b.

125. Op cit.

126. Cowell, *Institutes*, p. 16.

127. See *Herring v Walround* [1682] 2 Chan. Cas. 110 where the defendant was convicted for showing the live, and later dead and embalmed, bodies of conjoined twins for money. The birth of the two female children, named Aqlia and Priscilla, was described by the judge as “Monstrous, for they had two Heads, four Arms, four Legs, and but one Belly where their two Bodies were conjoined.” The case is referred to by Charles Viner as the sole entry under the heading ‘Monsters’ (*A General Abridgment of Law and Equity Alphabetically digested under Proper Titles with Notes and References to the Whole* (1742) Based on information from English Short Title Catalogue. Eighteenth Century Collections Online. Gale Group. <http://galenet.galegroup.com/servlet/ECC>. Date accessed: February 9, 2006.

128. Pender, “No Monsters at the Resurrection,” p. 147.

event, there is evidence that theological concerns informed Coke's writings. Thus immediately after his statement about monsters, he articulates a Bractonian understanding of hermaphrodites which he considered to be "both male and female", a seventeenth century legal fact that provides an interesting and perhaps favorable comparison with contemporary medico-legal regulation of intersex persons,¹²⁹ and as heirs "either as male or female, according to that kind of sex which doth prevail."¹³⁰ However, in contrast to Bracton's text, Coke adds "[a]nd accordingly [they] ought to be baptised."¹³¹ Here, it is apparent, not only that hermaphrodites fall on the deformity side of the deformity/monstrosity dyad, but that this fact is inextricably tied up with the possession of a soul.

Nevertheless, while a concern over the soul may have animated Coke's writings he otherwise remains silent regarding any relationship between the monster and teleology. Rather, his commentaries throw light only on the phenomenon's etiology. In particular, in Chapter Ten of the Third Part of the Institutes, which deals with "Of Buggery, or Sodomy,"¹³² Coke includes a subsection on buggery "by woman" which he notes to be "within the purview of"¹³³ a 1533 Act of Henry VIII.¹³⁴ While this might seem odd to modern readers it is clear that in sixteenth and seventeenth century England, the terms buggery and sodomy signified a wide variety of sexual practices which were not confined to anal intercourse, nor to exclusively male congress.¹³⁵ Thus Coke includes within the term buggery intercourse between a woman and a beast. More importantly, for present purposes, he imagines such acts to occasion monstrous progeny. That is, he notes "that somewhat before the making of the [1533] Act, a great Lady had committed buggery with a Baboon, and conceived by it."¹³⁶ Here

129. See Chase, "Hermaphrodites with Attitude," p. 69.

130. Coke, *Institutes*, vol. 1, p. 8.a.

131. Op cit. The view that monsters should not be baptized was articulated in the early seventeenth century by the famous canonist Alphonzo Carranza (see J. Block Friedman, *The Monstrous Races in Medieval Art and Thought* (Cambridge, MA: Harvard University Press, 1981), pp. 182–183). Moreover, it is a view that finds support within both Catholic and Protestant Christian Theology (see respectively W. Reany, *The Creation of the Human Soul* (New York: Benziger Brothers, 1932), p. 196; E.L. Mascall, *Christian Theology and Natural Science* (New York: Ronald Press, 1956), p. 283).

132. Op cit., vol. 3, pp. 58–59. For an extended discussion of this part of Coke's Institutes see L.J. Moran, *The Homosexual(ity) of Law* (London: Routledge, 1996), Chp 4.

133. Op cit., p. 59.

134. 1533–34, 25 Hen. 8.

135. For a detailed discussion of this point see Bray, *Homosexuality in Renaissance England*, Ch 1.

136. Coke, *Institutes*, vol. 3, p. 59. I would like to thank Professor Leslie Moran for drawing this portion of Coke's text to my attention. It should be noted that the view that acts of bestiality might produce monsters was common within the early modern period (see Thomas, *Man and the Natural World*, p. 135; E. Fudge, *Perceiving Animals: Humans and Beasts in Early Modern English Culture* (London: Macmillan, 2000), p. 136. Indeed, John Locke expressed the view that women were known to have conceived by apes, "if history lye not" (K.P. Winkler, *An Essay Concerning Human Understanding* Book III (Indianapolis: Hackett, 1996), pp. 199–200). Further, while prosecutions and executions for bestiality were rare during the period (see Boehrer, "Bestial Buggery") they did occur including after Coke's time. Thus in 1677 a woman was executed for having "prostituted herself to a dog" (Punishment Summary from Old Bailey Proceedings, July 11, 1677, 1–7 (Ref: s16770711–1) <http://www.oldbaileyonline.org> Date accessed: March 10, 2006.

monstrosity is tied explicitly to the practice of bestiality. However, in contrast to Swinburne, and consistent with Bracton, Coke does not articulate a monster whose corporeal surface expresses human/animal hybridity. Nor does he distinguish between human/animal hybridity and bodily excess or disorder in classifying monsters. While his reference to bestiality implies that the human/animal distinction is important to his understanding of what causes monsters, Coke's concern does not appear to move beyond the etiological and, like Swinburne's, encompass the horrifying visible embodiment or spectacle of human/animal hybridity. In this sense Coke's writings are closer to Bracton's in that, they seem, like Bracton's, to have as their object creatures that actually exist in the real world.

It is important to emphasize that, like their thirteenth century predecessors, legal jurists of the Renaissance looked to the body as the ultimate sign through which to determine human/monster status. Erica Fudge has pointed to two factors in attempting to explain Coke's somatic bias.¹³⁷ First, she contends that Coke's preference for the body can be understood in relation to his jurisprudential approach.¹³⁸ Thus, and as is well known, Coke articulated an understanding of the law as "artificial reason."¹³⁹ For Coke, artificial reason was external to the individual and necessary for justice to exist. In this way he placed the law above the claims of kings. The law was to be discovered by long study and experience and once discovered could be appreciated as "scientific and constant truth."¹⁴⁰ Thus, Coke drew attention to the incapacity of the human mind and the dangers of relying upon natural reason. For Coke it was "necessary that memorable things should be committed to writing ... and not wholly be taken to slipperie memory which seldome yeeldeth a certaine reckoning."¹⁴¹ For Fudge, Coke's emphasis on the fragility of the human mind finds a parallel in his emphasis on the body for the purposes of determining human status.¹⁴² As she puts it: "[i]f the law itself exists outside of the mind because the mind is so naturally incapable of making judgement then the status of the human must also be sought outside of the mind, in the body."¹⁴³ In other words, Coke's privileging of the human body over the human mind is paralleled and preceded by his privileging of the body of the law over the innate workings of the human mind. While Coke's jurisprudential method may help to explain his refusal to "look beneath the skin,"¹⁴⁴ it is, in my view, overstated to accord too much weight to this factor. After all, Coke's construction of the legal category monster has much in common with that of Bracton whom he cites. Moreover, the privileging of the body over the

137. Op cit., Ch 5.

138. Op cit., pp. 118–120.

139. Sir E. Coke, *The Reports* Parts 1–11 (1611) (London: Rivington, 1777).

140. Fudge, *Perceiving Animals*, p. 119.

141. Coke, *The Reports*, Part 7, sig. A5v.

142. Fudge, *Perceiving Animals*, p. 119.

143. Op cit.

144. Op cit., p. 116.

mind proves to be a consistent and central theme within English legal constructions of human/monster status whereas the concept of artificial reason is peculiar to Coke and his time.

However, Fudge also draws attention to another factor in seeking to explain Coke's preference for the body. She contends that it is to be explained through reference to the significance of laws dealing with the possession and status of animals.¹⁴⁵ Her argument takes the following form: ownership of an animal requires knowledge of the animal; knowledge leads to recognition of the individuality and mental capacity of the animal and therefore a "dangerous closeness"¹⁴⁶; this in turn leads to a narrowing of the gap between animal (owned) and human (owner).¹⁴⁷ Accordingly, within this frame a focus on the mind proves incapable of reproducing "human difference and superiority."¹⁴⁸ The general point here that the mind cannot be relied upon to determine human status on account of the closure of distance between human and animal in the seventeenth century is well made.¹⁴⁹ However, in my view, it would be going too far to single Coke out for such an analysis. Indeed, Coke appears to be situated chronologically between two legal jurists, Swinburne and Blackstone, whose monsters more graphically capture this concern. Moreover, it is in the context of the enlightenment that this concern receives perhaps its clearest expression.

IV. The Enlightenment: The final throes

The next significant English legal text referring to the legal category monster, and the last unique rendition of the category, is to be found in the mid-eighteenth century common law writings of William Blackstone.¹⁵⁰ According to Foucault the privileged monster of this period was the hermaphrodite. Yet, in Blackstone's *Commentaries on the Laws of England* the

145. Op cit., p. 117.

146. Op cit., p. 137.

147. Op cit., p. 117.

148. Op cit.

149. See Thomas, *Man and the Natural World*, p. 120.

150. Indeed, after Coke, with the exception of Charles Viner (*A General Abridgment of Law and Equity*), there appears to be no reference to monsters in English legal texts prior to Blackstone. Thus, for example, the category of monster does not appear in the work of William Noy, *The Grounds & Maxims of the English Law* (1641) (London: H. Linoth, 1757); John Selden, *Ad Fletam Dissertatio* (1647) (Buffalo: William S. Hein & Company, 1980); John Warr, *The Corruption & Deficiency of the Laws of England* (London: R. Dutton, 1649); Sir Matthew Hale, *The Analysis of the Law: Being a Scheme, or Abstract of the Several Titles and Partitions of the Law of England, Digested into Method* (1650) (Chicago: Chicago University Press, 1971); Roger North, *A Discourse on the Study of Laws* (1650) (London: White, 1824); John Brydall, *Enchiridion Legum: A Discourse concerning the Beginnings, Nature, Difference, Progress and Use of Laws in General; And in Particular of the Common and Municipal Laws of England* (1673) (New York & London: Garland Publishing, 1978); John Selden, *Jani Anglorum Facies Altera* (London: T. Bassett, 1683) or Wood, *An Institute of the Laws of England*.

figure of the hermaphrodite is completely absent.¹⁵¹ In relation to monsters Blackstone declared:

[a] monster, which hath not the shape of mankind, *but in any part evidently bears the resemblance of the brute creation*, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage: but although it hath deformity in any part of its body, yet if it hath human shape, it may be heir.¹⁵²

It is worth noting a number of features of his text on monsters. While it seems clear, as Williams notes, that Blackstone held the view that “a monster is the product of animal paternity,”¹⁵³ it would otherwise appear that the Blackstonian monster is less than an act of fidelity to his noted sources, namely Bracton and Coke.¹⁵⁴ In contrast to Bracton and Coke, Blackstone limits the legal category monster to those creatures that “bear the resemblance of the brute creation.” It is this element of animal resemblance that is absent in the legal monsters of both Bracton and Coke. The element is clearly present in Swinburne. Indeed, he locates human-bodied/animal-headed creatures at the apex of his monster hierarchy. Yet Swinburne does not confine an understanding of monstrosity to human/animal hybridity.

In Blackstone, we witness for the first time a focus on the human/animal hybrid as the exclusive locus of legal monstrosity and therefore a shift in legal understanding whereby the monster is comprehended as a more absolute form of difference from humanness. In this respect Blackstone's text represents a challenge not only to Foucault's chronology of monsters, but, and perhaps more importantly, to what is implicit within Foucault's account, namely, a linear history in which the notion of the monster as absolute difference takes on an increasingly relative character. Moreover, in Blackstone, legal monstrosity proves to be an effect of any degree of hybridity. This is clear from his insistence that resemblance of the brute creation “in any part” is sufficient to draw a conclusion of monstrosity. This can be contrasted with Swinburne's preoccupation with the status of the head. Indeed, the irrelevance of the head in Blackstone's representation of monsters is especially curious given the period of the Enlightenment in which he wrote and an understanding of the head as the seat of reason.

151. This absence is perhaps to be understood in terms of the claim that “sex as we know it was invented” in the eighteenth century (T. Laqueur, *Making Sex: Body and Gender from the Greeks to Freud* (Cambridge, MA: Harvard University Press, 1990), p. 149). That is, the erasure of hermaphroditism as a legal category, one distinct from male and female, is tied to the emergence of the two-sex medical model. According to this model for understanding bodies, all bodies fell into the categories male and female and in cases of uncertainty the task of medicine was to determine the correct sex within a binary division (Laqueur, pp. 154–163).

152. Blackstone, *Commentaries*, vol. 2, pp. 246–247 (my emphasis).

153. G. Williams, *The Sanctity of Life and the Criminal Law* (New York: Alfred A. Knopf, 1972), p. 21.

154. Blackstone, *Commentaries*, vol. 2, p. 247.

It is not clear how to account for the specificity of Blackstone's monster. It may be that Blackstone's monster, which "in any part . . . bears the resemblance of the brute creation," is to be understood in the context of anxiety occasioned by a perception that the gap between human and animal was narrowing. For this concern, apparent in the Renaissance period, and perhaps earlier¹⁵⁵ as already noted, "gained in strength in the seventeenth and eighteenth centuries."¹⁵⁶ By the time of Blackstone's Commentaries Locke's view that animals possessed sensibility, imagination and memory had been supplemented with Hume's view that animals possessed the power of "experimental reasoning."¹⁵⁷ Indeed, from the middle of the eighteenth century the human/animal distinction gradually yielded to a "new system of imperceptibly nuanced intermediate states."¹⁵⁸

In another regard, it may be that within Blackstone's legal imaginary the visible human/animal hybridity of the monster was informed by the Gothic literature with which it coincides,¹⁵⁹ a literary genre that, as Foucault has noted, served to foreground the notion of moral monstrosity.¹⁶⁰ It has been noted that the common law as a body might be viewed as Gothic given that it "appears as the archaic and the dark, a vestigial shadow that haunts the legal and social order of the enlightenment and of modernity characterized by rationalism and neo-classicism" and that it "threatens to destroy or delay the new bureaucratic order of modernity that demands rational institutional hierarchy, deductive reason and exhaustive expression according to the logic of codification."¹⁶¹ This is perhaps especially apparent in Blackstone's Commentaries. For, as Boorstin notes, Blackstone was a social conservative who saw the law as a "bulwark of existing society."¹⁶² By contrast, the scientific tendencies of his age "pointed the way toward dangerous inquiry."¹⁶³ Rather than a scientific approach to law Blackstone favored law's mystery. He preferred a veil "to protect ultimate values from the devouring gaze of reason."¹⁶⁴ To this end, and in contrast to Coke, he emphasized the authority of a rule over "its justice, moderation or expediency, for these latter concerns might imply a right of dissent."¹⁶⁵ His focus on precedent and the test of time is perhaps to be understood in the context of his reading of the history of the common law as one of inevitable

155. Salisbury, *The Beast Within*, p. 2.

156. Thomas, *Man and the Natural World*, pp. 121–136.

157. *Op cit.*, p. 125.

158. Pfister, "Man's Distinctive Mark," p. 29.

159. See, for example, V. Mishra, *The Gothic Sublime* (Albany: State University of New York Press, 1994); D. Punter, *Gothic Pathologies: The Text, The Body and the Law* (London: Macmillan Press, 1998); D. Punter (ed), *A Companion to the Gothic* (Oxford: Blackwell, 2000); E.J. Clery & R. Miles (eds) *Gothic Documents: A Sourcebook 1700–1820* (Manchester: Manchester University Press, 2000).

160. Foucault, *Abnormal*, p. 75.

161. L.J. Moran, "Gothic Law," *Griffith Law Review* 10(2) (2001), pp. 75–100 at pp. 77–78.

162. D. Boorstin, *The Mysterious Science of Law* (Gloucester, Mass: Peter Smith, 1973), p. 25.

163. *Op cit.*

164. *Op cit.*

165. *Op cit.*, p. 26.

progress. For Blackstone adopted the view that “through all legal history there ran a mysterious purpose which was of its own force improving institutions.”¹⁶⁶ Therefore “the student of the law should not meddle with institutions lest by his meddling he somehow disturb the beneficent processes of an all-wise Providence.”¹⁶⁷

This privileging of faith in the workings of law over reason appears to have been informed by a Gothic aesthetic. During the period in which Blackstone wrote there was, as Boorstin notes, “a great vogue for the concept of the sublime,”¹⁶⁸ a concept equated with complexity, disorder and obscurity. The concept of the sublime was contrasted with beauty, an eighteenth-century reference to simplicity, order and clarity.¹⁶⁹ In Blackstone's Commentaries these two ideas come together and find expression in the common law. For the law was both beauty and sublime. It was order and disorder, clarity and mystery, common, yet awe-inspiring. Blackstone's use of the concept of the sublime, and his characterization of law as possessing sublime qualities, is both deliberate and significant for “it is one thing to make an idea clear, and another to make it affecting to the imagination.”¹⁷⁰ Ultimately, for Blackstone, the common law is not about science or logic but experience and is constitutive of “affective life.”¹⁷¹ To this end Blackstone employed the Gothic “to describe the kind of aesthetic experience which had the ‘sublime’ elements of disorder and grandeur.”¹⁷² Thus he described the common law as resembling:

an old Gothic Castle, erected in the days of Chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless, and therefore neglected. The inferior apartments, now accommodated to daily use, are cheerful and commodious, though their approaches may be winding and difficult.¹⁷³

In this way Blackstone deployed the aesthetic appeal of the common law in order to curtail dangerous inquiry.¹⁷⁴ In this respect Blackstone's monster might be read as an allegory for the common law standing as it does in opposition to the dictates of the Enlightenment. That is, it is perhaps the fantastical

166. Op cit., p. 74.

167. Op cit., p. 83.

168. Op cit., pp. 99–100.

169. E. Burke, *A Philosophical Inquiry into the Origins of Our Ideas of the Sublime and the Beautiful* (Oxford: Oxford Paperbacks, 1998); Lord Kames, *Elements of Criticism* (Indianapolis: Liberty Fund, 2005); H. Blair, *Lectures on Rhetoric and Belles Lettres* (Carbondale: Southern Illinois University Press, 2002). For an analysis of Burke's ideas see M. Neocleous, *The Monstrous and the Dead: Burke, Marx and Fascism* (Cardiff: University of Wales Press, 2005), pp. 9–35.

170. Blair, *Lectures on Rhetoric* (cited in Boorstin, *The Mysterious Science of Law*, p. 103).

171. W. Morrison, *Introduction to Commentaries on the Laws of England* vol 1 (London: Cavendish, 2001), p. xciv.

172. Boorstin, *The Mysterious Science of Law*, p. 104.

173. Blackstone, *Commentaries*, vol. 3 (Of Private Wrongs), p. 268.

174. Boorstin, *The Mysterious Science of Law*, p. 105.

and unreal quality of human/animal hybrids in eighteenth century England, and therefore the inability of medical science and a rational order to gain access to, and thereby demystify, them that accounts for their monopolization of the monster category within Blackstone's Commentaries.

In any event, what is most significant about the Blackstonian monster is that it represents a retreat within law from equating bodily excess or disorder with monstrosity. Rather, by the time of the mid-eighteenth century the legal category monster no longer designates the corporeal difference of actual live births. Instead, it refers only to an imaginary space uncoupled from reality. Of course, the legal category monster can be said to evoke an imaginary space in Bracton, Swinburne and Coke. The difference is that in their writings the legal imaginary continued to bear a relation to embodied difference. In contrast, the Blackstonian monster appears to float free from human experience. Accordingly, Canguilhem's observation that while "initially a legal concept" the monster "was progressively turned into a category of the imagination"¹⁷⁵ needs to be supplemented by a recognition that this process in which the imagination triumphed was internal to as well as taking place outside law. It is also significant that on the eve of a transformation in "the economy of punitive power,"¹⁷⁶ at the approximate moment when regimes of normalization are inaugurated into being, law's monsters would appear, contra Foucault, to move toward, rather than away from, a notion of absolute difference from humanness.

While Blackstone was the last legal jurist to articulate, and give new form to, the legal category monster, his version appears to have survived within the common law until at least the mid-nineteenth century. Thus after Blackstone's death, over twenty editions of his Commentaries were published in England¹⁷⁷ each of which replicates his monster category. The most recent of these editions was published in 1876.¹⁷⁸ Lest it be thought that these texts, at the time of their publication, were nothing more than historical documents, it should be appreciated that Blackstone's Commentaries exerted an important influence on the subsequent development of English law. Moreover, subsequent editions of his Commentaries were not faithful reproductions. Rather, they note departures occasioned by changes in the law. The suggestion that inclusion of the monster category in subsequent editions spoke to its contemporary resonance finds particular support in Henry John Stephen's mid-nineteenth century *New Commentaries on the Laws of England*.¹⁷⁹ In these commentaries, which were partly founded on Blackstone, Stephen notes that his "deviations from the original work have . . . been frequent and extensive."¹⁸⁰ Indeed, he notes:

175. Canguilhem, "Monstrosity and the Monstrous," p. 31.

176. Foucault, *Abnormal*, p. 82.

177. Morrison, *Introduction to Commentaries*, pp. cxiv-cxviii.

178. *Commentaries on the Laws of England* vols 1-4 (entitled a new edition, adapted to the present state of the law: 4th Edn by R.M. Kerr) (London: John Murray, 1876).

179. *New Commentaries on the Laws of England* vols 1-4 (partly founded on Blackstone) 2nd Edn (London: Henry Butterworth, 1848).

180. *Op cit.*, vol. 1, p. viii.

I had prescribed to myself the rule of departing from Blackstone wherever I felt dissatisfied with his performance *as well as where any change in the law had made a departure indispensable*, it is seldom that I have been able to pursue the text for several pages in succession, without the introduction (more or less extensively) of matter from my own pen.¹⁸¹

Despite setting himself this task, and adopting this approach to interpretation of Blackstone's Commentaries, Stephen faithfully reproduces the Blackstonian monster.¹⁸² It is significant that the legal category monster survives the rigor and scrutiny that Stephen exercises in relation to Blackstone's text. It seems hard to avoid the conclusion that the figure of the monster continued to resonate within the English legal imaginary well into the nineteenth century.¹⁸³

V. Conclusion

This article has considered the lexicon of the English legal category monster from its point of entry in the mid-thirteenth century to its point of termination in the mid-nineteenth century. It has located law's monsters within their appropriate social, political, religious and legal contexts. In the process it has mapped specific cultural anxieties premised on the traversal of boundaries: national, religious, sexual and human. The historical account and the evidence provided have also served to call into question a view of the legal past as necessarily less tolerant and/or rational. On the contrary, a study of the legal category monster, if anything, points in the opposite direction. In the first place English law not only consistently refused to countenance the idea that the hermaphrodite should be considered a monster. It also viewed the hermaphroditic body as being of indeterminate sex. This can be contrasted with a contemporary medico-legal approach to intersex children that refuses third sex realities in favor of invasive surgery. In the same vein, the article contrasted the matter-of-fact emphasis on corporeal excess, characteristic of legal understandings of monsters in the late medieval period, with the hysterical monster fantasies

181. Op cit (my emphasis).

182. Op cit., vol. 1, p. 411.

183. Indeed, it was not until 2000 that the monster category was formally declared to no longer be part of English law (*Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] HRLR 721 at 818). However, prior to the twentieth century the category seems to have been abandoned. This may be explicable in terms of Foucault's historical account of a shift from body to soul as the target of legal regulation. That is to say, during the eighteenth century, an understanding of monstrosity as morphological irregularity, that is, as externality or materiality, was displaced and re-institutionalized as interiority or psyche (Foucault, *Abnormal*, pp. 68–75). With the arrival of the abnormal individual monstrosity does not disappear. Rather, it is internalized. Thus, while the legal category monster has no formal existence, the monster concept can be said to inform or structure contemporary understandings of the abnormal individual (Foucault, *Abnormal*, p. 57).

of later eras, including those of the Enlightenment. In another regard, the article has identified how the gendered hierarchy of mind/body, evident within legal and philosophical discourse, is upset within this area of English law. At least at the site of legal constructions of monsters it would seem that it is the body, not the mind, which serves as the crucial foundation of human status.

Finally, a history of the legal category monster serves to call into question the significance of particular aspects of Foucault's history of monsters and therefore an important part of his genealogy of the abnormal individual. Thus, in opposition to Foucault's account, English law has never included the hermaphrodite within the monster category. Nor, contra Foucault, does English law accord the figures of the bestial human and conjoined twins a special status in the late Middle Ages and the Renaissance period respectively. Further, the resilience of law's monsters, after the time of Blackstone brings into question Foucault's scripting of their death to the late eighteenth century.¹⁸⁴ However, perhaps the most striking disjunction between Foucault's account and that provided by English legal history lies in the fact that the importance of the bestial human within English law increases rather than decreases over time culminating in Blackstone's reduction of law's monsters to precisely this figure. Accordingly, England's legal monsters take on an increasingly fantastical quality over time.

In this respect, Blackstone's mid-eighteenth century legal text seems particularly significant, in that it calls into question what is implicit in Foucault's account, namely, the claim that the notion of the monster as absolute difference from humanness takes on an increasingly relative character. In other words, while Foucault's monster history suggests a gradual lessening of the physical and psychological distance between human being and monster, English law suggests the opposite conclusion. While Foucault's account enables the positioning of the abnormal individual and regimes of normalization within a frame of historical continuity, a history of the English legal category monster suggests a more complex relation between monsters and abnormal humans in the present. In particular, we might expect growing legal anxiety over human/animal hybridity, and the most profound of breaches of nature which it suggests, to have insinuated itself into the figure of the abnormal individual to a greater degree, and perhaps with different cultural consequences, than Foucault's analysis implies. This, however, remains a question for future historical inquiry.

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184. Foucault, *Abnormal*, pp. 63, 72.