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BEAUTY IN THE DARK OF NIGHT[†]: THE PLEASURES OF FORM IN CRIMINAL LAW

Martha Grace Duncan^{*}

*Our need for beauty springs from the gloom and pain which we
experience from our destructive impulses . . . ; our wish is to find in
art evidence of the triumph of life over death.*

—John Rickman, *Selected Contributions to Psycho-Analysis*¹

PROLOGUE

In a noisy Italian restaurant, over low bowls of steaming eggplant parmigiana, an old friend startled me one evening by saying, “I just don’t know how you can work in that field.” By “that field,” I realized my friend meant criminal law, though I still don’t understand why she condemned it so harshly. It’s the goriness, I suppose, all the grisly facts—neighbors attacking each other with a hatchet and carving knife in a dispute over a doorstep; a man stabbing his wife nineteen times after she taunted him for his passivity; and castaways slaying a boy to consume his flesh when adrift on the high seas. I expect that is what she meant by her surprising remark.

She would not have thought my work unethical, as some people believe it is to represent those accused of crimes, for I neither defend nor prosecute

[†] Beauty, an elusive and perhaps ineffable concept, has been the subject of numerous attempts at definition. For purposes of this essay, I am adopting the following definition: “That perfection in the sensuous order, and, by extension, in the spiritual order, which excites admiration or delight for itself rather than for its uses” WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 241 (2d ed. 1947).

The phrase *dark of night* is a common literary reference to criminality. See MARTHA GRACE DUNCAN, ROMANTIC OUTLAWS, BELOVED PRISONS: THE UNCONSCIOUS MEANINGS OF CRIME AND PUNISHMENT 123–29 (1996); see also *infra* text accompanying notes 255–266.

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¹ JOHN RICKMAN, *On the Nature of Ugliness and the Creative Impulse*, in SELECTED CONTRIBUTIONS TO PSYCHO-ANALYSIS 68, 88 (1957).

defendants. I am a law professor, and my contact with flesh-and-blood criminals extends only so far as visiting prisons and interviewing convicts for research purposes. Some of the prisoners I've interviewed have become my friends; others, my long-term correspondents, through the process of my learning and writing about them. Mostly, though, I work not with criminals but with criminal law—a field I adore. You could say, following Max Weber, that I live *for* as well as *off* my chosen field.²

I. “FRAUGHT WITH BACKGROUND”³: CRIMINAL LAW AS A “LANGUAGE EVENT”⁴

My favorite crime is depraved heart murder. It boasts the most poetic name and the most poetic definition as well. At common law, this form of homicide is defined as murder committed with an “abandoned and malignant heart”⁵—as lovely and evocative a phrase as you will find anywhere. To be sure, this formula sometimes deteriorates into a dead metaphor, losing its rich connotations and retaining only a precise meaning stipulated by code. But now and then a judge or jury resuscitates the image, reviving its original, eloquent poetry.

This happened in the 1928 case of *Commonwealth v. McLaughlin*, where the twenty-year-old defendant struck a male pedestrian and the pedestrian's

² See MAX WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 84 (H. H. Gerth & C. Wright Mills eds., 1948) (distinguishing between living “for” politics and living “off” politics).

³ See ERICH AUERBACH, *MIMESIS: THE REPRESENTATION OF REALITY IN WESTERN LITERATURE* 18 (Willard R. Trask trans., Princeton Univ. Press 1953) (1946).

⁴ See NORTHROP FRYE, *THE GREAT CODE: THE BIBLE AND LITERATURE* 60 (1982). With its focus on criminal law as a “language event,” this Essay falls into the “law as literature” sub-genre of the law-and-literature movement. Unlike “law in literature,” which explores legal themes in fiction, “law as literature” examines legal documents—testimony, jury instructions, judicial opinions, and the like—to analyze their literary qualities. See, e.g., RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 269–316 (1988); RICHARD WEISBERG, *POETHICS AND OTHER STRATEGIES OF LAW & LITERATURE* 5–34 (1992); JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985); JAMES B. WHITE, *THE LEGAL IMAGINATION* (1973); Guyora Binder, *Aesthetic Judgment and Legal Justification*, 43 *STUD. L. POL. & SOC'Y* 79 (2008). I am indebted to these and other law-and-literature scholars for their inspiration and insights. My own approach differs from theirs in its exclusive focus on criminal law and in its use of literary criticism to contribute to the debate over the respective merits of the Model Penal Code and the common law. See *infra* text accompanying notes 211–239.

⁵ SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES* 428 (8th ed. 2007); 2 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 14.4 (2d ed. 2003) (quoting GA. CODE ANN. § 16-5-1 (2009)); see also JOHN KAPLAN ET AL., *CRIMINAL LAW* 384 (5th ed. 2004) (referring to “an abandoned and malignant heart” as “one of the commonest verbal formulations of the state of mind necessary to establish non-intentional murder”). Another beautiful common law definition of depraved heart murder is “a heart void of social duty and fatally bent on mischief.” *Id.* (quoting *Mays v. People*, 806 Ill. 306 (1883)).

wife and baby while driving recklessly.⁶ As a result of the accident, the husband and baby died, and a jury convicted the defendant of murder.⁷ On appeal, the Supreme Court of Pennsylvania reversed the conviction, noting that the defendant's compassionate behavior after the collision—specifically, his assistance in transporting one of the victims to the hospital—“negative[s] the idea of wickedness of disposition or hardness of heart” required for depraved heart murder.⁸

This opinion is astonishing because, typically, only behavior leading up to and including the crime “counts” to establish the crime's elements. But here the court considered acts occurring *after* the crime was over—after the *mens rea* (guilty mind) and the *actus reus* (guilty act) had been established. In so doing, it seems the judges were influenced by the metaphorical language of *depraved heart*, which caused them to assess the defendant's character instead of merely his criminal act. Upon finding that the defendant lacked the elusive quality the metaphor suggests, albeit based on his behavior *after* the crime, the court reversed the conviction of murder.⁹

Another poetically-named doctrine is *heat of passion*, a formula that reduces murder to manslaughter when a “killing, though intentional, [is] committed under the influence of passion or in heat of blood.”¹⁰ Just as with *depraved heart*, so too with *heat of passion*: the words cannot be dismissed as mere embellishment—a decorative phrase added to the core meaning for literary effect. Rather, the name *heat of passion* is central to the meaning itself—essence, not accident; a leitmotif rather than a chance image. The name has driven the doctrine, spinning off two other legal metaphors: *cooling off* and *rekindling*. The cooling off doctrine states that even when the defendant's

⁶ Commonwealth v. McLaughlin, 142 A. 213, 214–15 (Pa. 1928).

⁷ *Id.*

⁸ *Id.* at 215.

⁹ *Id.* at 216. On rare occasions, other judges have likewise resurrected the metaphorical meaning of depraved heart. This is particularly striking in a New York case because New York's penal code closely follows the Model Penal Code. See *People v. Roe*, 542 N.E.2d 610, 618 (N.Y. 1989) (Bellacosa, J., dissenting) (citing defendant's anguish and despair after the crime as a sign that there was no “evidence beyond a reasonable doubt of that hardness of heart . . . qualifying as depraved indifference” (internal quotation marks omitted)). For an example of a court reverting to the metaphorical meaning of “malice aforethought,” see *State v. Myers*, 510 N.W.2d 58, 62 (Neb. 1994) (holding that both intent and “malice” are required for second degree murder). However, this holding was reversed four years later when the court held that the word “malice” is basically superfluous. See *State v. Burlison*, 583 N.W.2d 31, 36 (Neb. 1998).

¹⁰ *Maier v. People*, 10 Mich. 212, 218 (1862).

blood has been “kindled by fire,”¹¹ he may not avail himself of the heat of passion defense if his blood had time to “cool[.]” before he inflicted the fatal blow.¹² Nonetheless, the cooling-time limitation can sometimes be overcome by the theory that a fresh incident occurring right before the homicide “rekindled” the prior provocation.¹³

A number of jurisdictions have modernized their codes, rejecting the ancient phrase *heat of passion* in favor of the doctrine of Extreme Emotional Disturbance (EED). But several of these states reverted to the old formula after a brief experience with the new,¹⁴ and a few high courts in states that adopted and kept the modern wording found it impossible to abandon the traditional metaphor completely.¹⁵ In explaining how the new standard allowed for more time to elapse before “cooling off” would negate the defendant’s “hot blood,” one court said, “[I]t may be that a significant mental trauma has affected a defendant’s mind for a substantial period of time, *simmering* in the unknowing subconscious and then inexplicably coming to the fore.”¹⁶

Like depraved heart and heat of passion, malice aforethought is an ancient doctrine of criminal law that evades precise definition. I treasure the doctrine’s mellifluous rhythms, its mysteriousness, and its resonance with times long past. As powerful as it is beautiful, the metaphor of *malice aforethought* determines the difference between intent-to-kill murder and heat-of-passion voluntary manslaughter, and between depraved heart murder and criminal negligence. It has been called “the grand criterion” of murder.¹⁷ Yet, if you

¹¹ Richard Singer, *The Resurgence of Mens Rea: I—Provocation, Emotional Disturbance, and the Model Penal Code*, 27 B.C. L. REV. 243, 275 (1986) (quoting the great jurist Sir Edward Coke at 3 EDWARD COKE, INSTITUTES 51, 55 (1628)).

¹² LAFAVE, *supra* note 5, at § 15.2(d)–(e).

¹³ KADISH ET AL., *supra* note 5, at 399–400.

¹⁴ See Singer, *supra* note 11, at 293–94 (discussing the mixed experience with the Code’s formulation in Ohio, Washington, Maine, and Wisconsin).

¹⁵ See, e.g., *State v. Kaddah*, 736 A.2d 902, 911 (Conn. 1999) (using the words “simmered” and “simmering” to describe extreme emotional disturbance); *Boyd v. State*, 389 A.2d 1282, 1288 (Del. 1978) (citing with approval the language “simmering in the unknowing subconscious” to interpret extreme emotional disturbance); *McClellan v. Commonwealth*, 715 S.W.2d 464, 469 (Ky. 2006) (employing the term “inflamed” to clarify extreme emotional disturbance); *People v. Patterson*, 347 N.E.2d 898, 908 (N.Y. 1976) (employing the phrase “simmering in the unknowing subconscious” to describe an act that caused extreme emotional disturbance); *People v. Walker*, 473 N.Y.S.2d 460, 466 (N.Y. App. Div. 1984) (using the words “smouldering” and “ignited” to explain that the jury could have found evidence of extreme emotional disturbance).

¹⁶ *Patterson*, 347 N.E.2d at 908 (emphasis added).

¹⁷ *Commonwealth v. Malone*, 47 A.2d 445, 447 (Pa. 1946) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *198–99).

were to ask what *malice aforethought* means, you would learn that it has little to do with the words that comprise it.¹⁸

Sometimes I warn my students, “The term *malice aforethought* is a false friend, a misleading cognate, like the Spanish word *embarasada*.” I pause. “What does *embarasada* *appear* to mean?”

A few students call out, “Embarrassed.”

“What *does* it mean?”

Someone yells “Pregnant!,” and the class laughs.

Other times, I remind my students of Voltaire’s witticism about the Holy Roman Empire being “neither holy, nor Roman, nor an Empire.”¹⁹ Similarly, I explain, *malice aforethought* requires neither *malice* nor *forethought*. Rather, *malice aforethought* can be satisfied by an unintentional killing with a “depraved heart” or by felony murder when an accidental death occurs in furtherance of another felony.

The divergence between the lay and legal meanings of *malice aforethought* has existed for a long time. As early as 1887, in what has since become a classic statement, a distinguished English jurist named James Fitzjames Stephen alerted jurors to the risk of misunderstanding:

The definition of murder is unlawful homicide with *malice aforethought*; and the words *malice aforethought* are technical. You must not, therefore, construe them or suppose that they can be construed by ordinary rules of language. The words have to be construed according to a long series of decided cases, which have given them meanings different from those which might be supposed.²⁰

That last sentence, with its refreshing candor, always makes me laugh.

Judge Stephen’s jury instruction highlights a point that students of the law often miss, namely, that *malice aforethought* (like criminal law generally) is a

¹⁸ See Suzanne Mounts, *Malice Aforethought in California: A History of Legislative Abdication and Judicial Vacillation*, 33 U.S.F. L. REV. 313, 313 (1999) (characterizing “the meaning of ‘malice aforethought’ [as] one of law’s great mysteries”); Rollin M. Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L.J. 537, 537 (1934) (stating that neither “malice” nor “aforethought” has the meaning indicated by “the face value of these words”).

¹⁹ JOHN BARTLETT, *FAMILIAR QUOTATIONS* 417 (Emily Morison Beck ed., 14th ed. 1968) (quoting Voltaire).

²⁰ *R. v. Serné* (1887) 16 Cox Crim. Cas. 311, 312 (Central Crim. Ct).

“language event[.]”²¹ In other words, *malice aforethought* alludes to the language of past cases as much as to events in the “real” or external world. This implicit referencing of other parts of the canon is what literary critic Northrop Frye has called the “centripetal”—as distinct from the “centrifugal”—meaning of a verbal structure.²² In the Bible, for example, some New Testament stories are meant to be read not merely as parables, nor as descriptions of actual events, but also as the fulfillment of Old Testament prophecies.²³ To read a text oblivious to its centripetal meaning, warns Frye, is to read incompetently.²⁴ By the same token, to read the phrase *malice aforethought* oblivious of its embedment in a legal canon is to miss an essential part of its meaning.

Not long ago, I chanced upon a phrase that exquisitely describes malice aforethought. It appears in Erich Auerbach’s classic work, *Mimesis: The Representation of Reality in Western Literature*.²⁵ In his opening chapter, Auerbach explains that the Homeric poems, despite their linguistic and intellectual sophistication, are actually much *less* sophisticated than the Old Testament stories in terms of the characters’ psychological development.²⁶ “Odysseus on his return,” he writes, “is exactly the same as he was when he left Ithaca two decades earlier.”²⁷ In contrast, “what a road, what a fate, lie between the Jacob who cheated his father out of his blessing and the old man whose favorite son has been torn to pieces by a wild beast!”²⁸ The Old Testament patriarchs evolved over time, and when we see them in old age, at their most complex, they are, in Auerbach’s wonderful phrase, “fraught with background.”²⁹ Like these patriarchs, the term *malice aforethought* has changed through time—not decades, but centuries—and when we study the doctrine now, we find that it is laden with accreted meaning and emotion—that it too is “fraught with background.”

²¹ See FRYE, *supra* note 4, at 60 (emphasis added).

²² *Id.* at 61.

²³ *Id.* at 78–79.

²⁴ *Id.* at 58.

²⁵ See AUERBACH, *supra* note 3.

²⁶ See *id.* at 13.

²⁷ *Id.* at 17.

²⁸ *Id.*

²⁹ *Id.* at 12.

II. THE MYSTERY OF CHARACTER IN CRIMINAL LAW

You meet some intriguing characters in Criminal Law. Consider, for instance, the mathematician named Edmund Beauclerc Staples who, one autumn in 1967, when his wife was away, decided to become a bank robber. In pursuit of his plan, he leased an office above a bank in Hollywood, moved some tools onto the premises, and drilled holes in the floor directly above the vault. Feeling tired and afraid after this exertion, he covered the holes with a rug and drifted off to sleep. In the ensuing weeks, apart from returning to the office a few times, he took no further steps toward robbing the bank. In fact, he allowed his lease to lapse at the end of the first month, whereupon his landlord discovered the holes in the floor and called the police. Staples was later charged with attempted burglary.³⁰

In a remarkable confession, Mr. Staples described the epiphany that led him to abandon his criminal scheme: “The actual [*sic*] commencement of my plan made me begin to realize that even if I were to succeed a fugitive life of living off of stolen money would not give me the enjoyment of the life of a mathematician however humble a job I might have.”³¹ Nevertheless, Staples’s belief in his insight wavered. Even after his realization that the life of a criminal was not for him, he went back to the room he had leased and contemplated going forward with the robbery. He confessed to feeling that he had made a “certain investment of time, money, effort and a certain psychological [*sic*] commitment to the concept.”³² Ultimately, his better judgment prevailed. As he explained, “My wife came back and my life as a bank robber seemed more and more absurd.”³³

I love the anti-heroic character of Edmund Staples,³⁴ who—seemingly tired of a humdrum existence and temporarily without the structure his marriage provides—conceives the romantic notion of becoming a criminal, and not just any criminal, but a bank robber. I identify with his yearning to be something “great” and with his humorous indecisiveness, so different from the stereotype of the lawbreaker. I also appreciate the way this case fits its locale,

³⁰ People v. Staples, 85 Cal. Rptr. 589, 590 (Cal. Dist. Ct. App. 1970).

³¹ *Id.*

³² *Id.* at 591.

³³ *Id.*

³⁴ See DAVID SIMMONS, THE ANTI-HERO IN THE AMERICAN NOVEL: FROM JOSEPH HELLER TO KURT VONNEGUT 4 (2008) (describing the “incongruity between mundane circumstance and heroic ideal” that the anti-hero embodies (quoting Louis D. Rubin Jr., *The Great American Joke*, in WHAT’S SO FUNNY? HUMOR IN AMERICAN CULTURE 107, 113 (Nancy A. Walker ed., 1998))).

California—the state where, back in the fifties and sixties, people moved to reinvent themselves.³⁵ The bank Mr. Staples planned to rob was even located in Hollywood, the city of “make-believe.”

This case is interesting from a legal point of view as well. It raises the question of whether the culpable mental state, *mens rea*, must be, as it is usually considered, an all-or-nothing concept. In my own life, certainly, there have been occasions when I took quite a few steps toward a goal to which I was not fully committed.³⁶ I think of the time when I was in love with Pavel, my first serious boyfriend. A citizen of what was then Czechoslovakia, Pavel had come to this country on a student visa to earn his doctorate. But a year into our love affair, his visa expired, and—out of loyalty to his brother, a Communist Party official—he returned to his own country. Soon afterwards, he wrote a letter asking me to move there and marry him.

At first, I acted as though I were willing to go. I gave up my rented room in Manhattan, sold my typewriter and cherished books, and reserved a seat on a flight to Prague. Then I traveled to Washington, D.C., and applied for a visa at the Czechoslovakian embassy. But when it proved impossible to obtain one—Pavel said his brother had blacklisted me—I balked at taking the final step. In letter after letter, Pavel begged me to fly to Paris and get a visa there, but I couldn't bring myself to go. By that time, my family had weighed in with fear,

³⁵ See, e.g., HOWARD KUSHNER, SELF-DESTRUCTION IN THE PROMISED LAND 163 (1989) (describing migrants as “people in search of self-transformation”); LAURENCE RICKELS, THE CASE OF CALIFORNIA (1991) (discussing California as the state of self reinvention); Ramón A. Gutiérrez, *Contested Eden*, in CONTESTED EDEN: CALIFORNIA BEFORE THE GOLD RUSH 1 (Ramón A. Gutiérrez & Richard J. Orsi eds., 1998) (“In the Golden State, one generation after another has found a tangible place on which to project its myths and fantasies of utopic possibility.”); Moses Rischin, *Immigration, Migration, and Minorities in California: A Reassessment*, 41 PAC. HIST. REV. 71, 75 (1972) (providing statistics for California's population growth between 1950 and 1970).

³⁶ The use of personal narrative in scholarly writing has become increasingly popular in recent decades. For a good summary of this trend as of the early 1980s, see Fredericka Randall, *Why Scholars Become Storytellers*, N.Y. TIMES, Jan. 29, 1984, § 7 at 1, 31. For a thoughtful argument supporting the use of personal stories in scholarship, see ROBERT J. NASH, LIBERATING SCHOLARLY WRITING: THE POWER OF PERSONAL NARRATIVE (2004). For examples of personal narrative in legal scholarship, see STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991); KEVIN R. JOHNSON, HOW DID YOU GET TO BE MEXICAN? (1999); JUDY SCALES-TRENT, NOTES OF A WHITE BLACK WOMAN (1995); Martha Grace Duncan, “*So Young and So Untender*”: *Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469, 1470 (2002); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1087–89 (1986); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1710–11 (1993); and Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002). For general assessments of storytelling in legal writing, see Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991); and Daniel A. Farber & Suzanne Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

worry, and frantic questions about what would happen to my graduate school fellowship if I were to leave the country. I realized I wasn't willing to give up my studies and freedom in the United States to join Pavel in an uncertain future behind the Iron Curtain. What's more, I think I knew this all along.

In the same way, I suspect that Mr. Staples's *mens rea* for bank robbery was not full-blown; rather, as one distinguished criminal law treatise has suggested, he could be viewed as a "Walter Mitty type who fantasized about the perfect crime but never really formed an intent to burglarize the bank."³⁷ Notwithstanding the ambiguity about his intent and his change of heart about the robbery, Staples's conviction was upheld.³⁸ While this result may seem shocking, it has a bona fide explanation in law. At trial, the court apparently refused to believe that Staples had desisted from the crime voluntarily and instead concluded that he had been motivated by the threat of detection.³⁹ On appeal, the Supreme Court of California held that, regardless of motive, abandonment is no defense at common law.⁴⁰ After the crime of attempt has been completed, regrets are irrelevant. They have no more bearing on guilt for attempt than they have on guilt for the target offense, once the crime has been consummated.⁴¹

III. DREAMING OF SIMPLER TIMES: ROMANTIC THEMES IN CRIMINAL LAW

If some cases inspire a fascination through their remarkable defendants, others take your breath away with their stately eloquence. I think immediately of *Morissette v. United States*.⁴² A David-and-Goliath story, this Michigan case involves a scrap-iron collector who, in the autumn of 1948, removed some spent bomb casings from Air Force property. The rusted casings had been lying out in the weather for years, and Joe Morissette, thinking they had been discarded, took them away and sold them for eighty-four dollars.⁴³

The Air Force brought charges, urging that it made no difference whether Mr. Morissette thought the junk abandoned inasmuch as the relevant statute was silent on the culpable mental state.⁴⁴ In contrast, counsel for the defense

³⁷ LAFAVE, *supra* note 5, § 11.5(b)(1).

³⁸ *Staples*, 85 Cal. Rptr. at 595.

³⁹ *Id.* at 594.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 342 U.S. 246 (1951).

⁴³ *Id.* at 247–48.

⁴⁴ *Id.* at 264.

argued that “the taking must have been with a felonious intent.”⁴⁵ The case was appealed all the way to the U.S. Supreme Court, which held it necessary for the prosecution to show that Morissette had a guilty mind—that he believed the property still belonged to someone else—to convict him of theft.⁴⁶ Based on this holding, the Court exonerated Morissette.⁴⁷

Morissette’s victory over the Air Force, like David’s over Goliath, evokes a certain Oedipal delight. Yet, to me, the most moving aspect of this case is not Morissette’s exculpation but rather the contrast between the petitioner’s low status and relatively trivial acts, on the one hand, and the elegant grandeur and high significance of the opinion, on the other. The Supreme Court itself highlights this discrepancy in its opening sentence: “This would have remained a profoundly insignificant case to all except its immediate parties had it not . . . raise[d] questions both fundamental and far-reaching”⁴⁸

The opinion, written by Justice Jackson, contains some of the most gorgeously crafted language in all of criminal law. I especially admire the following lines, with their masterful use of antithesis and cadenced rhythms:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.⁴⁹

Here, in just two sentences, the Court transforms a case concerning a junk dealer and an alleged theft of eighty-four dollars into something solemn and majestic.

The sentence that begins the next paragraph is equally melodic: “Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.”⁵⁰ Here again, Justice Jackson expertly employs rhetorical devices—in particular, alliteration and synecdoche—to create beauty and persuasive power. Instead of the usual terms of art, *mens rea* and *actus reus*, Justice Jackson uses the more concrete

⁴⁵ *Id.* at 249.

⁴⁶ *Id.* at 247–73.

⁴⁷ *Id.* at 276.

⁴⁸ *Id.* at 247.

⁴⁹ *Id.* at 250.

⁵⁰ *Id.* at 251.

expressions, “an evil-meaning mind” and “an evil-doing hand.” And, after numerous Latinate terms, he achieves the sense of an ending by using monosyllabic Anglo-Saxon words in the phrase “deep and early root in American soil.” This final image, drawn from nature, announces a Romantic motif that runs throughout the opinion, most strikingly in Justice Jackson’s history of *mens rea*, the requirement of the guilty mind.⁵¹

In that history, Justice Jackson explains that as urban life and industrial jobs supplanted an agrarian lifestyle, a new category of crimes evolved to protect people in this more interdependent world. Because of the difficulty in proving intent on the part of a corporation president whose company sells adulterated food, or a landlord who maintains substandard housing, the new crimes dispensed with the traditional *mens rea* requirement. As Justice Jackson writes: “The industrial revolution multiplied the number of workmen exposed to injury *Congestion of cities and crowding of quarters* called for health and welfare regulations *undreamed of in simpler times*. . . . Such *dangers* have engendered increasingly numerous . . . regulations”⁵²

Idealizing preindustrial times, Justice Jackson presents them as a simpler era when people could not even dream of the highly regulated lives we lead today. He associates this “simpler” era with the doctrine of *mens rea* that the Court wishes to uphold. Conversely, the opinion links the new criminal offenses—those that dispense with the need to show an “evil-meaning mind”—with the complexities and dangers of modern life. While some might contend that cities and industries facilitate levels of happiness and fulfillment superior to those that were possible in an agrarian era, Justice Jackson evokes the Romantic motif of the Golden Age to enhance the appeal of the Court’s holding.⁵³

Having explained how it came about that some offenses lack the *mens rea* requirement, Justice Jackson goes on to argue that the state should be obliged to prove intent whenever the crime carries a substantial moral opprobrium, or

⁵¹ For discussions of nature as a Romantic theme, see J.A. CUDDON, A DICTIONARY OF LITERARY TERMS AND LITERARY THEORY 813, 815 (3d. rev. ed. 1991) (defining *Romanticism*); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1970 (2002) (describing *Romanticism* as “marked esp[ecially] in English literature by . . . an appreciation and often a worship of external nature”).

⁵² *Morissette*, 342 U.S. at 253–54 (emphasis added).

⁵³ See generally HANS BIEDERMANN, DICTIONARY OF SYMBOLISM 155 (James Hulbert trans., Penguin Books 1994) (1989) (describing *golden age* as a “symbol” based on “the conviction that in earlier times humanity had immediate access to the sources of knowledge” and suggesting that this symbol stems from the greater intensity of childhood experience).

stigma. Once again, Justice Jackson uses alliteration to deepen his words' effectiveness: "Stealing, larceny, and its variants and equivalents . . . stir a sense of insecurity in the whole community and . . . the infamy is that of a felony, which . . . is 'as bad a word as you can give to man or thing.'"⁵⁴ Playfully, Justice Jackson employs the Latinate words *infamy* and *felony*, then repeats the concept of infamy in plain Anglo-Saxon: "as bad a word as you can give to man or thing."

In the opinion's penultimate sentence, the Court returns to the theme of stigma. If the jury had been correctly instructed in the law, Justice Jackson writes, it might have "refused to *brand* Morissette as a thief."⁵⁵ And thus we come full circle, back to the scrap dealer whose fate was at stake when this seminal opinion began.

IV. REPETITION AND CONTRAST: THE ELEGANT RHYTHM OF CRIMINAL LAW

Criminal law can make you feel smart and competent. And the doctrine that is likely to make you feel smartest and most competent is the felony-murder rule. This rule allows a person to be convicted of murder without any intent to kill, knowledge that death will occur, or even recklessness. If the prosecutor can establish that the death occurred in furtherance of another felony (usually a dangerous one), then the malice required for murder can be posited rather than proved. In this way, the felony-murder rule dispenses with the centuries-old *mens rea* requirement and can lead to punishment disproportionate to the crime.⁵⁶

Although I disapprove of the felony-murder doctrine, I enjoy teaching and discussing it. I like its wrinkles upon wrinkles and exceptions upon exceptions, its obscure rules known only to the initiates, the cognoscenti. So esoteric are the doctrines of felony murder that even my fellow law professors have usually forgotten them unless they work in criminal law. When I feel left out of their discussions about corporate finance and sports antitrust, I simply

⁵⁴ *Morissette*, 342 U.S. at 260 (quoting 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 465 (1899)).

⁵⁵ *Id.* at 276 (emphasis added).

⁵⁶ For criticisms of the felony-murder rule, see Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 478–85 (1985) (arguing that if the felony-murder rule eliminates malice, it violates the Eighth Amendment requirement of proportionality); James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces That Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1457 (1994) (referring to the felony-murder rule's "infringement of our fundamental philosophy of fault and punishment").

bring up the agency limitation to felony murder⁵⁷ and the shield exception to the agency theory.⁵⁸ Sometimes, I'll ask them, "Do you think the merger doctrine should limit felony murder when the predicate felony is burglary and the 'felony therein' is assault with a deadly weapon?"⁵⁹ They won't have a clue that such a sophisticated issue even exists. I tell my students, "This is great for impressing your friends at cocktail parties!"

The felony-murder case I like best is *People v. Taylor*,⁶⁰ a 1970 California case involving a getaway driver, Alvin Taylor, whose accomplices, James Daniels and John Smith, attempted to rob a liquor store owned by Mr. and Mrs. West. During the holdup, Smith reportedly "looked intent and apprehensive," while Daniels "chattered insanely . . . telling Mr. West 'Put the money in the bag. Put the money in the bag. . . . Don't move or I'll blow your head off. . . . Get down on the floor.'"⁶¹ While the robbery was in progress, the store owners inflicted fatal gunshot wounds on Smith. Mrs. West shot Daniels as well, but he managed to leave the store and survived. Throughout these events, Taylor remained in the car. Under the felony-murder doctrine, the state charged both Taylor and Daniels with murder for the death of Smith at the hands of the store owners.⁶² Although Daniels was tried separately, the jury's decision in his trial would affect Taylor's fate.⁶³

What makes *Taylor* an absorbing case is its aesthetic richness of repetition and contrast as the state charges Taylor again and again, always with a different legal argument, until the case is finally resolved. In the first round, on appeal from the murder charge, the Supreme Court of California rejects the

⁵⁷ For the classic explanation of the agency theory, see *Commonwealth v. Campbell*, 89 Mass. (7 Allen) 541, 544 (1863): "No person can be held guilty of a homicide unless the act is either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by someone acting in concert with him or in furtherance of a common object or purpose."

⁵⁸ According to the shield exception, the agency theory is "inapplicable to a case where defendants forced deceased to occupy a place of danger in order that they might carry out the crime." *State v. Canola*, 374 A.2d 20, 26 (N.J. 1977).

⁵⁹ To serve as a predicate felony to bootstrap up to murder under the felony-murder rule, a crime must have an independent felonious purpose. See *People v. Ireland*, 450 P.2d 580, 590 (Cal. 1969). There is no problem using burglary as the predicate felony where the "felony therein" that the burglar contemplates is a property offense. However, if the "felony therein" is an assault with intent to kill, a California court has held that the burglary merges with the murder and thus cannot be used to support a felony-murder conviction. See *People v. Wilson*, 462 P.2d 22, 26 (Cal. 1969). Other courts have held to the contrary. See, e.g., *People v. Miller*, 661 N.E.2d 1358, 1363 (N.Y. 1995).

⁶⁰ *Taylor v. Super. Ct.*, 477 P.2d 131 (Cal. 1970) (en banc).

⁶¹ *Id.* at 132 (internal quotation marks omitted).

⁶² *Id.* at 132-33.

⁶³ See *infra* text accompanying notes 70-72.

felony-murder doctrine based on the agency-theory exception that California had previously adopted; neither Taylor nor his agent (accomplice) did the shooting.⁶⁴

But the prosecutors do not give up easily. Rather, they then propose another legal justification for charging Taylor with murder: a combination of depraved-heart doctrine and accomplice liability. In other words, they argue that Taylor could be held vicariously responsible for the “conscious disregard for life” shown by his two accomplices in their attempt to rob the store.⁶⁵ The prosecution faces a problem here because, in a previous case involving a *silent* robber, the same court held that mere armed robbery, without additional provocation, was *not* sufficient to establish “wanton disregard for human life” such that the robbers would be guilty of murder if someone died.⁶⁶ The court has to overrule the earlier case or somehow distinguish the facts in *Taylor*.

It opts for the latter. The court stresses that the two felons in the store, Smith and Daniels, went further than the silent robber in the earlier case by doing things that made the robbery exceptionally dangerous. In particular, the court emphasizes Smith’s “nervous apprehension” and Daniels’s “coercive conduct toward Mr. West and his repeated threats.”⁶⁷ Having distinguished *Taylor* from the “silent robber” case, the court finds that Taylor can be charged with murder based on the “conscious disregard for human life” shown by his two accomplices.⁶⁸ Following this ruling, Taylor is tried by a jury and convicted of both robbery and murder.⁶⁹ The prosecution wins, and there is no reason to think that further developments will be forthcoming.

Nevertheless, Taylor’s murder conviction is eventually overturned, and for an unusual reason. It so happens that Taylor’s accomplice, Daniels, when tried separately for the same murder, was acquitted.⁷⁰ Based on this inconsistent verdict—and the doctrine of collateral estoppel⁷¹—Taylor again appeals, and this time he wins. The California Supreme Court reasons that it would “compromis[e] . . . the integrity of the judicial system” to allow Taylor’s conviction to stand when that conviction was based on the behavior of an

⁶⁴ *Taylor*, 477 P.2d at 133.

⁶⁵ *Id.* at 134–35.

⁶⁶ *Id.* at 134; *see also id.* at 138–39 (Peters, J., dissenting).

⁶⁷ *Id.* at 134–35 (majority opinion).

⁶⁸ *Id.* at 135.

⁶⁹ *People v. Taylor*, 527 P.2d 622, 623 (Cal. 1974) (en banc).

⁷⁰ *Id.* at 624.

⁷¹ For a discussion of collateral estoppel as applied to this case, *see id.* at 625–27.

exonerated accomplice.⁷² When I teach this case in class, I foreshadow this reversal of fortune by telling my students that Taylor gets off on the murder charge. Aiming for a cliff-hanger, I don't tell them why—until next time.

V. *IN FLAGRANTE DELICTO*: THE SENSUALITY OF CRIMINAL LAW

Criminal law is sensual. It stirs all the senses—touch, smell, taste, sight, and sound—but in me it excites the auditory sense most of all. I like the hard “k” sound of words like *exculpate* and *culpable* and the definitive, flattening sound of the word *quashed*, the last word in any British case where a conviction is overturned. Though now used to mean “make void” or “annulled,” the word *quashed* derives from a root meaning “shatter.”⁷³ To highlight the onomatopoeia, I pronounce it with fanfare, as if I were literally shattering the guilty verdict: “Quashed!”

Another term in criminal law that affords auditory pleasure is *in flagrante delicto*. Literally, the expression means “in the blaze of the transgression”;⁷⁴ however, it is used broadly to mean “[i]n the very act of committing a crime or other wrong.”⁷⁵ In judicial opinions, the phrase typically appears when a man has been charged with murder for killing his wife, her lover, or both. To mitigate the crime, the man may claim that he acted in “heat of passion” after discovering his wife *in flagrante delicto*.⁷⁶ No matter how often we hear the expression, my students and I can't help giggling at the courts' referring to adultery with these quaint Latin words.

A word you seldom see outside of law these days is *wanton*. I smile at its unabashed judgmental quality and the sounds of the two syllables that are almost, but not quite, identical—a sort of internal “slant” rhyme, as they say in

⁷² *Id.* at 628.

⁷³ WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note †, at 2035.

⁷⁴ JOSEPH T. SHIPLEY, THE ORIGINS OF ENGLISH WORDS 32 (1984).

⁷⁵ BLACK'S LAW DICTIONARY 794 (8th ed. 2004) (defining *in flagrante delicto*).

⁷⁶ *See, e.g.,* Grant v. Dalsheim, 535 F. Supp. 1382, 1385 (S.D.N.Y. 1982) (describing an attorney's “emotional plea on behalf of [the] petitioner based upon finding his wife in *flagrante delicto*”); State v. Larkin, 157 S.W. 600, 608 (Mo. 1913) (stating that “even if the deceased had discovered his wife . . . in *flagrante delicto*, . . . he would not go acquit” (emphasis added)); State v. Thornton, 730 S.W.2d 309, 315 (Tenn. 1987) (where a man killed his wife's paramour after discovering the couple in *flagrante delicto*, the crime was held “a classic case of voluntary manslaughter”); Williams v. State, 165 S.W. 583, 588 (Tex. Crim. App. 1914) (using the phrase *in flagrante delicto* only in a West headnote but also holding that where “appellant's mind was so aroused by the act of intercourse he had seen, . . . and he killed his wife . . . he might not be guilty of anything higher than manslaughter”).

poetics.⁷⁷ The unexpected stress on the first syllable gives me a chance to joke with my students: “It’s pronounced ‘wanton,’” I tell them. “Not like the Chinese soup.” As to the word’s meaning, my favorite definition is that provided by the Massachusetts Supreme Judicial Court: “The words ‘wanton’ and ‘reckless’ are practically synonymous . . . although the word ‘wanton’ may contain a suggestion of arrogance or insolence or heartlessness that is lacking in the word ‘reckless.’”⁷⁸

To me, the mental states of wantonness and recklessness are more intriguing than the rather straightforward *mens rea* of intent and knowledge. This may be because I have personally witnessed many reckless and even wanton acts committed by a basically good, generous person—my father. One of these acts happened when I was a toddler, during our family’s three-year sojourn on a dairy farm in Northeast Pennsylvania. Winters were terribly cold there, and one morning in February, upon discovering the water pipes frozen in the barn, my father decided to thaw them with a blowtorch. Stacks of hay lined the inside walls of the barn to keep the cows warm, and my mother worried that a spark from the blowtorch might land in the hay, causing a fire. But when she expressed her fears, my father became furious at her lack of faith in him and proceeded with his plan.

On the afternoon of that same day, our barn caught on fire and burned to the ground. In the blaze, our cat, horse, and small herd of dairy cows died. I had named those cows, and my father had loved them, but now, with the help of a hired man, he had to drag their carcasses to a trench for burial. That night, my mother found my father crying in the attic. “It was horrible for him,” she says, “horrible.” This is what I think about when teaching the wanton and reckless crimes.

VI. TAPPING THE BASIC STREAM: ALLUSIONS TO POLITICAL THEORY IN CRIMINAL LAW

“Before the beautiful,” writes theologian Hans Urs von Balthasar, “no, not really *before* but *within* the beautiful—the whole person quivers.”⁷⁹ Criminal law can make you quiver with its beautiful language and concepts. Take for

⁷⁷ Also known as an “off rhyme,” a slant rhyme is defined as an “imperfect rhyme, often using assonance or consonance only.” THE AMERICAN HERITAGE DICTIONARY 1256 (3d ed. 1992).

⁷⁸ Commonwealth v. Welansky, 55 N.E.2d 902, 910 (Mass. 1944).

⁷⁹ I HANS URS VON BALTHASAR, THE GLORY OF THE LORD: A THEOLOGICAL AESTHETICS (SEEING THE FORM) 247 (Joseph Fessio S.J. & John Riches eds., Erasmo Leiva-Merikakis trans., 1982) (1969).

instance *In re Gault*,⁸⁰ a case about a fifteen-year-old boy who allegedly made some lewd phone calls to a neighbor, asking her, “Do you give any?,” “Are your cherries ripe today?,” and “Do you have big bombers?”⁸¹ Based on this incident, along with a few other nuisance phone calls and the alleged theft of a baseball glove that never materialized into a formal accusation, the juvenile judge found Gault to be a “delinquent child” and committed him to a state industrial school until age twenty-one.⁸²

Following a lengthy appeals process, the case went up on a habeas corpus petition to the U.S. Supreme Court, which ruled in favor of Gault.⁸³ In its revolutionary opinion, the Court granted certain procedural rights to minors who are charged with a crime and threatened with a loss of liberty. Specifically, it granted the rights to notice, counsel, confrontation and cross-examination of witnesses, and the privilege against self-incrimination.⁸⁴ Written by Justice Fortas, the majority opinion runs fifty-nine pages; one paragraph, in particular, fills me with awe.

The paragraph appears in the Court’s discussion of the Fifth Amendment privilege against self-incrimination.⁸⁵ At the beginning of this passage, Justice Fortas tips his hat to the conventional explanation of the privilege: “The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth.”⁸⁶ He then contrasts this popular view with what he sees as a truer understanding: “The roots of the privilege are, however, far deeper. They tap the basic stream of religious and political principle because the privilege reflects the limits of the individual’s attornment to the state and—in a philosophical sense—insists upon the equality of the individual and the state.”⁸⁷

One of the most moving passages in all of criminal law, this paragraph works subliminally through its numerous Romantic images. Some of these

⁸⁰ *In re Gault*, 387 U.S. 1 (1967).

⁸¹ PAUL OMOJO OMAJI, RESPONDING TO YOUTH CRIME 66 (2003) (quoting the boy’s alleged language, which is not included in the Supreme Court opinion) (internal quotation marks omitted).

⁸² *In re Gault*, 387 U.S. at 7–8.

⁸³ *Id.* at 59.

⁸⁴ *Id.* at 33, 41, 55–56.

⁸⁵ *Id.* at 47.

⁸⁶ *Id.*

⁸⁷ *Id.*

images derive from nature, such as *fruits*, *roots*, and *stream*. Another comes from the feudal past: the lovely word *attornment*, which means “the act of a feudatory, vassal, or tenant by which he consents upon the alienation of an estate to receive a new lord or superior and transfers to him his homage and service.”⁸⁸ This euphonious, largely forgotten word enchants me, as does the way Justice Fortas revives the metaphor, comparing the relationship between serf and lord in the medieval era to the relationship between citizen and state in our own time. Like the pastoral imagery of fruits, roots, and stream, the word *attornment*, too, reflects the Romantic ethos, for it was the Romantics who expressed a wistfulness for the past and for the Middle Ages in particular.⁸⁹

The exquisite language of the passage quoted above fits its remarkable idea: that the individual and the state are, “in a philosophical sense,” equal.⁹⁰ Justice Fortas elaborates on this point at the end of the paragraph: “One of [the] purposes [of the Fifth Amendment privilege] is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.”⁹¹

These words are, of course, solidly founded on seventeenth- and eighteenth-century political philosophy, in particular, the social contract theory.⁹² According to this theory, individuals are the primal unit, preceding both society and the state. Originally existing in a “state of nature,”⁹³ their lives are “solitary, poore, nasty, brutish, and short”;⁹⁴ to protect themselves they enter into a contract, surrendering some freedom in exchange for security. And, since the whole point of the contract is self-preservation, they are under

⁸⁸ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 141 (3d ed. 1986).

⁸⁹ See ALICE CHANDLER, *A DREAM OF ORDER: THE MEDIEVAL IDEAL IN NINETEENTH-CENTURY ENGLISH LITERATURE* 7 (1970) (describing “medievalism” as “a part of that vast intellectual and emotional response to change which we . . . denominate Romanticism”); see also *id.* at 51 (referring to medievalism’s “Romantic origins”); H. W. JANSON, *HISTORY OF ART* 453–54 (1969) (describing the “late-eighteenth-century vogue for medieval tales of adventure,” “the long-neglected ‘Gothick’ past,” and the Romantic “worship[]” of the Middle Ages).

⁹⁰ *In re Gault*, 387 U.S. at 47.

⁹¹ *Id.*

⁹² Earlier in the opinion, Justice Fortas explicitly uses the term “social compact” when explaining the importance of due process. *Id.* at 20. For a discussion of the social contract in Hobbes, Locke, and Rousseau, see 14 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 376 (David L. Sills ed., 1968).

⁹³ C.B. Macpherson, *Introduction* to LEVIATHAN 9, 42, 43 (C.B. Macpherson ed., 1968) (1651).

⁹⁴ THOMAS HOBBS, LEVIATHAN 107 (Oskar Piest ed., 1958) (1651).

no obligation to obey the state when it no longer protects them.⁹⁵ Even Hobbes, who, after living through the English Civil Wars, had become an ardent proponent of authoritarianism, bows to this logic. In *Leviathan*, he writes, “[I]f the sovereign command a man, though justly condemned, to kill, wound, or maim himself, or not to resist those that assault him, . . . yet has that man the liberty to disobey.”⁹⁶ As a graduate student in political science, I imagined the man “disobeying” by running desperately for his life while an army pursued him. Re-reading Hobbes today, decades later, I am surprised to find no such scene in the text, so deeply is it engraved in my own mind.

VII. OF JOURNEYS AND LABYRINTHS: THE USES OF ARCHETYPE IN CRIMINAL LAW

At first blush, the crime of attempt may appear a little dull. And it is true that attempt crimes (being, by definition, unconsummated) often lack the drama of, say, a premeditated murder or voluntary manslaughter. In one case, a man merely walking along a street and leaning on a stop sign opposite a woman’s house was convicted of “attempt to commit an assault with intent to rape.”⁹⁷ In another illustration, Father Daniel Berrigan was convicted of attempting to smuggle letters into and out of prison “without the knowledge and consent” of the warden.⁹⁸ However, his conviction was overturned on appeal because the warden had known of the smuggling all along.⁹⁹

While the facts of attempted crimes are often pedestrian, their required elements tend to be murky. The doctrine states that defendants are innocent when their behavior constitutes “mere preparation” but guilty when their acts take them across an imaginary line into attempt.¹⁰⁰ To determine whether the defendant has crossed this line, judges and legislators employ a variety of tests. Depending on the jurisdiction, defendants may be found guilty if they are in “dangerous proximity”¹⁰¹ to the target crime, if they have taken the “last

⁹⁵ See GEORGE H. SABINE, A HISTORY OF POLITICAL THEORY 435, 494 (4th ed. 1973) (describing the conditional character of obedience in Hobbes and Locke).

⁹⁶ HOBBS, *supra* note 94, at 176.

⁹⁷ McQuirter v. State, 63 So. 2d 388 (Ala. Ct. App. 1953).

⁹⁸ United States v. Berrigan, 482 F.2d 171, 188–89 (3d Cir. 1973).

⁹⁹ *Id.*

¹⁰⁰ See King v. Barker, [1924] 43 N.Z.L.R. 865, 873 (C.A.) (discussing the distinction between “acts of attempt and acts of preparation”).

¹⁰¹ People v. Rizzo, 158 N.E. 888, 889 (N.Y. 1927) (quoting with approval Justice Holmes’s language from Hyde v. United States, 225 U.S. 347, 388 (1912), “There must be dangerous proximity to success” (Holmes, J., dissenting)).

step,”¹⁰² or one “substantial step,”¹⁰³ or if they no longer retain a “*locus poenitentiae*,” a place of repentance.¹⁰⁴ In a graceful explanation of the *locus poenitentiae* test, a Missouri court writes, “Anywhere between the conception of the intent and the overt act toward its commission, there is room for repent[an]ce; and the law in its beneficence extends the hand of forgiveness.”¹⁰⁵

Because of its elusiveness, the doctrine of attempt tends to be an acquired taste, if it becomes a taste at all. Personally, I have learned to *savor* attempt, in part by thinking about its *actus reus* in terms of Jungian archetypes. Implicitly, all the tests rely on the archetype of the *journey*,¹⁰⁶ but instead of knights on a quest for the Holy Grail, the protagonists here are would-be criminals on a quest for property to steal or a victim to rob, rape, or kill. A particular variant of the journey archetype is that of the labyrinth or maze, the image of the “wandering path,”¹⁰⁷ and this variant, too, appears in the law of attempt—for example, in the classic 1927 case of *People v. Rizzo*.¹⁰⁸ *Rizzo* concerns four men who drive around the Bronx all day looking for a man named Rao.¹⁰⁹ The men plan to rob Rao of a payroll, and two of them carry firearms for this purpose.¹¹⁰ However, their erratic behavior attracts the attention of the police, who follow and arrest them. Eventually, all four men are found guilty of attempted robbery.¹¹¹

Addressing the appeal of *Rizzo*’s conviction, the New York Court of Appeals first compliments the police force for its “excellent work,” and then adds, perhaps tongue-in-cheek, “It is a great satisfaction to realize that we have such wide-awake guardians of our peace.”¹¹² Almost immediately, however,

¹⁰² *Barker*, 43 N.Z.L.R. at 873.

¹⁰³ MODEL PENAL CODE § 5.01(1)(c) (1962).

¹⁰⁴ *Barker*, 43 N.Z.L.R. at 875.

¹⁰⁵ *State v. Hayes*, 78 Mo. 307, 317 (1883).

¹⁰⁶ See NORTHROP FRYE, ANATOMY OF CRITICISM 118 (1957) (describing the “quest or journey” as one of the symbols whose “communicable power . . . is potentially unlimited”).

¹⁰⁷ See PENELOPE REED DOOB, THE IDEA OF THE LABYRINTH: FROM CLASSICAL ANTIQUITY THROUGH THE MIDDLE AGES 98 (1990) (internal quotation marks omitted); see also M. L. von Franz, *The Process of Individuation*, in MAN AND HIS SYMBOLS 158, 170 (Carl G. Jung ed., 1964) (describing the “maze of strange passages, chambers, and unlocked exits . . . [as] a well-known symbol of the unconscious with its unknown possibilities”). For a detailed discussion of the “labyrinth” as a literary symbol, see MICHAEL FERBER, A DICTIONARY OF LITERARY SYMBOLS 102–04 (1999).

¹⁰⁸ 158 N.E. 888, 888 (N.Y. 1927).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

the court begins to reason that there *was* no attempt because the four men were still too far away from the target crime. Highlighting the absurdity of prosecuting these defendants for their bootless venture, the court says, “The defendants had not found or seen the man they intended to rob. . . . The four men intended to rob the payroll man, whoever he was. They were looking for him, but they had not seen or discovered him up to the time they were arrested.”¹¹³ In the end, the appellate court exonerates Rizzo,¹¹⁴ but despite the happy outcome, the case leaves me with a bleak feeling. The four men’s vain expedition reminds me of Beckett’s line in *Waiting for Godot*: “Nothing happens, nobody comes, nobody goes, it’s awful!”¹¹⁵

On first acquaintance, attempt comes across as an esoteric offense, less familiar than murder, robbery, or burglary. But, on reflection, we see that this crime is all around us, even in the Bible. One of the most moving biblical stories, the testing of Abraham, could be seen as an attempted murder. As recounted in the book of *Genesis*, God tests Abraham’s faith by ordering him to kill his first-born son, Isaac.¹¹⁶ We are told that Abraham had “laid the wood in order, and bound Isaac his son, and laid him on the altar upon the wood.”¹¹⁷ He even “took the knife to slay his son”¹¹⁸ before the angel of the Lord intervened, saying, “Lay not thine hand upon the lad, neither do thou any thing unto him: for now I know that thou fearest God, seeing thou hast not withheld thy son, thine only son from me.”¹¹⁹ Impressive as Abraham’s devotion is by a theological standard, by any legal standard, Abraham went beyond “mere preparation” and fulfilled the *actus reus* of attempted murder. And whereas a good defense attorney might argue “abandonment”—a defense available in some jurisdictions that have modernized their codes—this argument would be unlikely to prevail because the abandonment must be voluntary,¹²⁰ whereas here it was coerced by the angel.

Psychologically, an even more complex tale of attempt is the story of David and King Saul, which appears in *The First Book of Samuel*.¹²¹ At the beginning of the narrative, King Saul dearly loves David, the shepherd boy

¹¹³ *Id.* at 888–89.

¹¹⁴ *Id.* at 890.

¹¹⁵ SAMUEL BECKETT, *WAITING FOR GODOT* 28 (Samuel Beckett trans., Grove Press 1954).

¹¹⁶ *Genesis* 22:1–:19 (King James).

¹¹⁷ *Id.* at 22:9.

¹¹⁸ *Id.* at 22:10.

¹¹⁹ *Id.* at 22:12.

¹²⁰ MODEL PENAL CODE § 5.01(4) (1962).

¹²¹ 1 *Samuel* 16:1–31:13 (King James).

who plays the lyre to soothe Saul's "evil spirit."¹²² In time, however, the King becomes jealous and afraid of his protégé.¹²³ Driven by the evil spirit, he throws a javelin at David and repeatedly orders his servants to kill him.¹²⁴ After each of these attempts, the King renounces his criminal purpose, but the evil spirit always comes upon him again.¹²⁵ In the end, Saul, ashamed, vows to let David live,¹²⁶ but after so many reversals David doubts the permanence of the King's change of heart.¹²⁷ This story illustrates the risk courts face in allowing an abandonment defense—namely, that the defendant who has once shown his dangerousness may decide to try again.¹²⁸

I myself was once the victim of an attempted crime. The incident happened in two countries, Venezuela and Colombia, soon after my twenty-first birthday. At the time, I was living and studying in Bogotá on a research fellowship from my college in the United States. Being required to renew my visa from outside the country, I had flown to San Antonio del Táchira, an unbearably hot, dry Venezuelan border town overrun with mosquitoes and seemingly devoid of culture. After completing the paperwork for my visa renewal, I saw no reason to remain on the barren frontier and wanted to return immediately to Bogotá. I was low on cash, as was usual with me in those days, and I started looking for a bus or other inexpensive transportation to the airport in Cúcuta, on the Colombian side.

At a taxi stand, one of the drivers whom I approached for information offered me a free ride, and though I should have known better, my need to hold onto my dwindling funds overpowered my judgment. He urged that I sit in front with him instead of in back, and I foolishly acquiesced. The next thing I remember is that we were traveling fast on the highway, and he was talking in a leering tone about my lips, "*Tiene unos labios . . .*" I turned away and grasped the handle of the door, as though about to jump from the moving cab. But he, immediately reading my thoughts, grabbed my upper arm and held it in a strong grip. "*¡No se bote; no se bote!*" he said. "Don't throw yourself out!"

¹²² *Id.* at 16:21 to :23.

¹²³ *Id.* at 18:5–11.

¹²⁴ *Id.* at 18:11, 19:1, 19:10, 19:11.

¹²⁵ *See id.* at 19:4 to :11, 24:1 to :19, 26:21.

¹²⁶ *Id.* at 26:21.

¹²⁷ *Id.* at 27:1.

¹²⁸ MODEL PENAL CODE § 5.01(4) (1968) (stipulating that the renunciation is incomplete if "motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim"); *see also* GEORGE FLETCHER, RETHINKING CRIMINAL LAW 195 (1978) ("[W]here the defense is operative, it is critical that the actor definitively abandon his criminal plan.").

We had been riding for what seemed like fifteen or twenty minutes when he exited the highway and turned onto a dirt road. After driving about 150 feet into an orange grove, he stopped the car. He pulled me toward him with a rough gesture and started to kiss me.

My response was instinctive: I bit him hard on the lips, causing him to shriek with surprise and pain. In that moment, he loosened his grip. Taking advantage of my chance, I opened the door and fled to the main street, where I shouted, “¡Auxilio! ¡Auxilio! ¡Ayúdame por favor!” until a lady stopped for me.

The lady took me to a cattle ranch where the owners offered me a place to stay until my passport and other belongings could be recovered. Each day, in the searing heat, my hosts drove me to the headquarters of DAS, the Colombian police, to discuss the progress of the investigation. On one occasion, an officer sat me down at a table to search through mugshots of known criminals in the area, but I could find no match for my assailant. Had his photograph been there, I would surely have spotted it, for he had a countenance that was striking in its unsightliness—a face as “ugly as sin.” But perhaps ugliness, like beauty, is in the eye of the beholder,¹²⁹ and my attacker’s supposedly hideous visage was merely my own fear and revulsion projected onto him.

VIII. LETTERS FROM PRISON: BEAUTY AS MEANS OF TRANSCENDENCE IN CRIMINAL LAW

As we view the sense of beauty through the psychoanalytic lens, we see in it man’s search for perfection, transcendence, and hope.

George Hagman, *Aesthetic Experience*¹³⁰

From the fifth century, B.C.E., until the eighteenth century, A.D., most philosophers regarded beauty as objective—a quality that inhered in the thing observed, with ideal proportions that could be studied and known.¹³¹ Beginning in the Romantic era, however, this “Great Theory,”¹³² gradually

¹²⁹ For discussions of ugliness from a psychoanalytic perspective, see GEORGE HAGMAN, *AESTHETIC EXPERIENCE* 103–22 (2005); and RICKMAN, *supra* note 1, at 68–89.

¹³⁰ HAGMAN, *supra* note 129, at 101.

¹³¹ See Władysław Tatarkiewicz, *The Great Theory of Beauty and Its Decline*, 31 *J. AESTHETICS & ART CRITICISM* 165, 167 (1972).

¹³² *See id.*

yielded to the view that beauty is both objective and subjective—a quality of the object, yes, but also of the person observing¹³³ or, as George Hagman has written, something “in the space between . . . the potential space . . . ‘the area of yearning’ in which we attempt to conjure up the sense of an ideal world and an ideal self.”¹³⁴

For confirmation of this theory that beauty is partly subjective, the expression of a “yearning” for perfection and transcendence, we need search no further than the letters of my friend Ed. Although Ed and I have never met in person, or even spoken on the telephone, I feel I know him through the long letters he has written me, the photographs he has sent, and the newspaper articles and court documents I have read. Smart, disciplined, and intellectually curious, Ed is also a little arrogant and insecure. I attribute the arrogance to the insecurity. He’s embarrassed—*mortified*, he would say—about being a prisoner. Incarcerated at age sixteen for shooting two men, one of whom remains paralyzed below the waist, Ed has spent just over half his life in prison.¹³⁵ He tells me that he understands all too well what the average person thinks of inmates.

For example, there was the time I stopped writing to Ed after he begged me to get him out. Because I was not admitted to the Bar in his state, and doubted my ability to improve his life in any practical way, I had clarified the limits of our relationship at the outset. When he wrote again after my months of silence, Ed acknowledged his mistake with self-effacing class: “I’m feeling inappropriate We agreed when we first started our correspondence . . . that you weren’t able to help me I hope that the letter did not suddenly alter the neat correspondence we’ve been sharing.”¹³⁶ Another time, I sent him a Christmas card with my home address on the envelope. In his next letter, Ed wrote that, not knowing the extent of our friendship, he assumed I had made a mistake. Thus, he reported, he had destroyed the envelope immediately and made a point of responding to my *office* address. “I always worry,” he explained, “that I’m going to inadvertently overstep a boundry [sic] and you’ll think ‘inmate alert.’”¹³⁷

¹³³ See *id.* at 174.

¹³⁴ HAGMAN, *supra* note 129, at 97.

¹³⁵ For a detailed discussion of Ed’s crime and behavior after his arrest, see Duncan, *supra* note 36, at 1507–12.

¹³⁶ Letter from Edward A. Tilley to author 5 (Jan. 14, 2002) (on file with author).

¹³⁷ Letter from Edward A. Tilley to author 2–3 (Jan. 29, 2008) (on file with author).

Ed is a serious student. He has read everything that I have published during the ten years of our correspondence, including a long scholarly article and several personal memoirs, as well as a book I had written before we met. Sometimes, he recommends books to me or critiques my work, asking pertinent questions and making thoughtful suggestions about commas and question marks.¹³⁸ For example, when he read my law review article “*So Young and So Untender*”: *Remorseless Children and the Expectations of the Law*, an article in which Ed himself is one of the featured defendants, he asked why I hadn’t used a question mark after the word *Untender*, as Shakespeare does in the original phrase from *King Lear*.¹³⁹ Given the argument I was making, he was right; the question mark would have made more sense.

Several years ago, Ed began studying Shakespeare because he liked the quotations from the plays that he noticed in my book. In one letter, he wrote:

Well . . . you’ve set me off on an amazing course with the Shakespeare I am deep into it, and I’ve devised a system of study which allows me to break a play completely apart and analyze it, in my search for what I’m looking for, which is ultimately Myself. I’ve bought into the theory that within Shakespeare’s complete works lies the complete range of the human condition, and that we are all just shades of various characters I believe a mastery of them all will equal a mastery of yourself.¹⁴⁰

Reading this letter for the first time, I was amazed by Ed’s resilience in the face of his lengthy incarceration. Notwithstanding years spent in solitary confinement, he retains the ability to respond with awe, idealization, and hope.

Ed’s gift for transcendence shines through again in his letters from a “supermax” prison where he and the other inmates were never allowed out of doors. “I fantasize,” he wrote, “about . . . smelling grass or rain clouds, or hear[ing] and feel[ing] wind all around me, or smell[ing] leaves, or dirt or tree bark.”¹⁴¹ [D]o yourself a favor,” he added. “[F]eel[] wind all around you.”¹⁴²

¹³⁸ See, e.g., Letter from Edward A. Tilley to author 1 (Jan. 10, 2005) (on file with author); Letter from Edward A. Tilley to author 1–3 (Aug. 24, 2008) (on file with author).

¹³⁹ See Duncan, *supra* note 36; WILLIAM SHAKESPEARE, KING LEAR act 1, sc. 1.

¹⁴⁰ Letter from Edward A. Tilley to author 1 (Jan. 21, 2004) (on file with author).

¹⁴¹ Letter from Edward A. Tilley to author 5 (Mar. 12, 2001) (on file with author).

¹⁴² *Id.*

Some time after this letter was written, the American Civil Liberties Union brought a class action lawsuit to challenge conditions in the “supermax,”¹⁴³ and Ed, along with some of his fellow prisoners, testified in court. “We all were fascinated by the courtroom,” Ed wrote. “[Y]ou have to realize that that was the first time I had walked on carpet for ten years[,] and that was the first chair I had ‘experienced’ in as long (man, that chair was plush; it swiveled, rocked, etc. and I had to restrain myself from spinning in it); plus, that was the first time I had seen such beautiful colors in as long (rich blues, woods, etc.)”¹⁴⁴ Ed’s rhapsodic description of his aesthetic experience resonates with the theory put forth by James Joyce in *A Portrait of the Artist as a Young Man*. Speaking through his character Stephen Dedalus, Joyce writes that the “esthetic emotion . . . is . . . static. The mind is arrested and raised above desire and loathing.”¹⁴⁵

When the plaintiffs won their suit, prison policy underwent numerous changes, among them, the implementation of a right to exercise outside.¹⁴⁶ After his first workout under the new regime, Ed wrote to me with joy: “I got to smell fresh asphalt being laid from a construction project within eyesight (*man*, I’d forgotten how awesome that smell is), and I’ve also smelled fresh-cut grass, and tractor exhaust; I’ve also felt rain and stared at clouds.”¹⁴⁷

Related to his capacity for reverence toward the outdoors is Ed’s ability to feel and movingly express appreciation for people. For instance, he sent me a photograph in which his hands are cuffed, but he is smiling. On the back of the photograph, he wrote, “This smile originated all the way back from when we met. You’ve changed my life.”¹⁴⁸

I realize that it takes very little to raise a prisoner’s hopes, so forgotten do convicts feel behind the walls. Still I worry that Ed gives me too much credit—that some day he may be disappointed in me, or even feel betrayed. Dreading such an occurrence, I try to expose my feet of clay, but he insists his point of view is accurate. Perhaps it is only through idealization that he is able to transcend his circumstances, to sustain hope. For the same reason, I suspect, he needs to view nature as astonishingly beautiful, industrial odors as

¹⁴³ *Austin v. Wilkinson*, 372 F.3d 346 (6th Cir. 2004).

¹⁴⁴ Letter from Edward A. Tilley to author 4 (Jan. 14, 2002) (on file with author).

¹⁴⁵ See JAMES JOYCE, *A PORTRAIT OF THE ARTIST AS A YOUNG MAN* 240 (1916).

¹⁴⁶ See *Austin*, 372 F.3d at 349 (“[T]he Eighth Amendment claims, related primarily to medical care and the provision of outdoor recreation, were settled.”).

¹⁴⁷ Letter from Edward A. Tilley to author 2 (Aug. 2, 2006) (on file with author).

¹⁴⁸ Photograph on file with author.

awesome, and Shakespeare's plays as great enough to encompass all personalities on earth.¹⁴⁹ Idealization is, to be sure, a universal human tendency, but in Ed it may also function as an effective defense, warding off loneliness and despair.¹⁵⁰

IX. "FLIGHT IS FOR SANCTUARY"¹⁵¹: THE MOTIF OF THE CASTLE IN CRIMINAL LAW

*Hang out our banners on the outward walls;
The cry is still "They come;" our castle's strength
Will laugh a siege to scorn . . .*

Shakespeare, *The Tragedy of Macbeth*¹⁵²

In *Backstage*,¹⁵³ one of his four essays on the writer's craft, the Soviet novelist and critic Yevgeny Zamyatin offers a unique and riveting perspective on imagery, one that has guided and sustained my own writing for many years. "I rarely use individual, chance images," he writes. "[T]hese are only sparks, which live for a brief moment, and then are extinguished, forgotten."¹⁵⁴ The writer who uses chance images, he contends, has failed "to concentrate, to truly see, to believe."¹⁵⁵ In contrast to these ephemeral "sparks," Zamyatin describes "integral" images,¹⁵⁶ or "leitmotifs,"¹⁵⁷ which emerge from the writer's deep conviction. Thus, he reports: "If I firmly believe in the image, it will inevitably give rise to an entire system of related images, it will spread its roots through paragraphs and pages."¹⁵⁸

¹⁴⁹ For a discussion of the relationship between idealization and beauty, see HAGMAN, *supra* note 129, at 95–96. Hagman writes that beauty "results from . . . [a] dialectic between an inner readiness for idealization and the encounter with an object that is 'worthy' of the projection." *Id.* at 96.

¹⁵⁰ For a discussion of "idealization" as a normal and universal tendency, see NANCY McWILLIAMS, *PSYCHOANALYTIC DIAGNOSIS* 105 (1994). For an interpretation of "idealization" as a defense mechanism, see *id.* at 105–06, 173–74; see also Carlo Strenger, *The Classic and the Romantic Vision in Psychoanalysis*, 70 *INT'L J. PSYCHO-ANALYSIS* 593, 596–600 (1989) (presenting two distinct views of idealization in psychoanalysis).

¹⁵¹ *People v. Tomlins*, 107 N.E. 496, 497 (N.Y. 1914).

¹⁵² WILLIAM SHAKESPEARE, *THE TRAGEDY OF MACBETH* act 5, sc. 5.

¹⁵³ YEVGENY ZAMYATIN, *Backstage, in A SOVIET HERETIC: ESSAYS BY YEVEGNY ZAMYATIN* 190 (Mirra Ginsburg ed. & trans., 1970).

¹⁵⁴ *Id.* at 198.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

Applying Zamyatin's dichotomy to criminal law, one finds examples of both "chance images" and leitmotifs. Among the former, I recall with fondness Justice Jackson's term "chameleon-like" to describe the crime of conspiracy;¹⁵⁹ Judge Posner's use of the ostrich metaphor to interpret "willful blindness";¹⁶⁰ and Judge Tobriner's reference to a particularly broad argument by the state as "an uncharted sea of felony murder"¹⁶¹ on which the court "remain[s] unwilling to embark." More surprising and significant are the images in which judges seem to "firmly believe"—images that have "spread their roots"¹⁶² not only through paragraphs and pages, but also across oceans and continents and through the centuries. As we have already seen, *heat of passion* would qualify as one such leitmotif,¹⁶³ and another is surely the *castle*. A storied image, which figures in numerous fairy tales and historical romances,¹⁶⁴ the *castle* comes into criminal law by way of the "castle doctrine," an age-old exception to the "rule of retreat" in self-defense law.

"Self-defense," courts tell us, with a beautiful maritime metaphor, "*sounds* in necessity";¹⁶⁵ or again, with a spiritual trope: "[N]ecessity [is] the *soul* of . . . self-defense"¹⁶⁶ Derived from Latin roots meaning "not" and "to yield,"¹⁶⁷ the requirement of necessity flows from the assumption that life is "a thing precious and favoured in law";¹⁶⁸ thus, no one may employ deadly force, even in self-defense, unless it is exigent, or *necessary*. In practice, the requirement of *necessity* means that the defender must believe she faces a

¹⁵⁹ *Krulewitch v. United States*, 336 U.S. 440, 447 (1949) (Jackson, J., concurring) (describing the crime of conspiracy as "chameleon-like" in that it "takes on a special coloration from each of the independent offenses on which it may be overlaid").

¹⁶⁰ *United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990) (suggesting that we interpret willful blindness by thinking about what "real ostriches do (or at least are popularly supposed to do)"). For a discussion of "willful blindness," see *KADISH ET AL.*, *supra* note 5, at 232.

¹⁶¹ *People v. Phillips*, 414 P.2d 353, 361 (Cal. 1966).

¹⁶² *ZAMYATIN*, *supra* note 153, at 198.

¹⁶³ See *supra* text accompanying notes 10–16.

¹⁶⁴ See, e.g., SIR WALTER SCOTT, *IVANHOE* (Barnes & Noble Classics, 2005) (1819); Jacob Grimm & Wilhelm Grimm, *Snow White*, in *THE ANNOTATED CLASSIC FAIRY TALES* 79–94 (Maria Tatar ed. & trans., 2002) [hereinafter *CLASSIC FAIRY TALES*]; Jacob Grimm & Wilhelm Grimm, *Sleeping Beauty*, in *CLASSIC FAIRY TALES*, *supra* at 95–104. Jeanne-Marie Leprince de Beaumont, *Beauty and the Beast*, in *CLASSIC FAIRY TALES*, *supra* at 58–78.

¹⁶⁵ See MARTIN R. GARDNER & RICHARD G. SINGER, *CRIMES AND PUNISHMENT* 1067 (4th ed. 2004) (emphasis added) (internal quotation marks omitted) (describing the "slogan that self-defense 'sounds' in necessity").

¹⁶⁶ *United States v. Peterson*, 483 F.2d 1222, 1235 (D.C. Cir. 1973) (emphasis added).

¹⁶⁷ See JOSEPH T. SHIPLEY, *THE ORIGINS OF ENGLISH WORDS* 261–63 (1984) (discussing words derived from the root *ne*); *id.* at 344 (discussing words derived from the root *sed*).

¹⁶⁸ *Semayne's Case*, (1604) 77 Eng. Rep. 194, 195 (King's Bench).

threat of death or serious bodily injury; she must also perceive the threat to be unlawful and imminent; and, finally, all her beliefs must be reasonable.¹⁶⁹ Absent these conditions, self-defense cannot, in the elegant language of the law, *avail*.¹⁷⁰

Nonetheless, even when all these criteria are met, the defender who knows she can retreat from the assailant and do so in complete safety, is in some jurisdictions required to retreat.¹⁷¹ Actually, the whole phrase (which derives from a time before the existence of firearms) is “retreat to the wall.”¹⁷² Emanating from a strict interpretation of *necessity*, the rule of retreat was a part of self-defense doctrine at common law. But, when the common law was introduced into this country, many jurisdictions, particularly in the South and West, rejected the rule of retreat as cowardly,¹⁷³ supplanting it with the amusingly named “*true man*” doctrine. As the Supreme Court of Ohio explained in 1876:

The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life, where the assault is provoked; but a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm.¹⁷⁴

As a result of concerns about manliness and honor, the duty to retreat is now a minority view in the United States, whereas in England it continues to be the law of the land.¹⁷⁵ Even in England, however, there is an exception; namely, the privilege of non-retreat from the home, known as the castle doctrine. As enunciated in 1847 by Sir Matthew Hale, Lord Chief Justice of the Court of King’s Bench, the doctrine is as follows:

[The defender], being in his own house, need not fly as far as he can, as in other cases of *se defendendo*, for he hath the protection of his

¹⁶⁹ See *Peterson*, 483 F.2d at 1230.

¹⁷⁰ See, e.g., *Laney v. United States*, 294 F. 412, 414 (D.C. Cir. 1923).

¹⁷¹ See *State v. Abbott*, 174 A.2d 881, 884 (N.J. 1961) (calling the principle of retreat “salutary if reasonably limited”).

¹⁷² See GARDNER & SINGER, *supra* note 165, at 1070.

¹⁷³ See Rachel V. Lee, *A Further Erosion of the Retreat Rule in North Carolina*, 12 WAKE FOREST L. REV. 1093, 1095 (1976).

¹⁷⁴ *Erwin v. Ohio*, 29 Ohio St. 186, 199–200 (1876).

¹⁷⁵ See Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 243 (2008). For an excellent discussion of the rule of retreat in historical context, see GARDNER & SINGER, *supra* note 165, at 1069–72.

house to excuse him from flying, for *that* would be to give up the possession of his house to his adversary by his flight.¹⁷⁶

More than a century later, an American court reiterated the castle doctrine, albeit with tongue-in-cheek: “[O]ur normal solicitude for the life of the attacker,” it said, “is somewhat dampened when he chooses such historically protected premises on which to make his murderous assault.”¹⁷⁷

Whether the castle doctrine is fully consistent with the requirement of *necessity* is debatable. On the one hand, the privilege of non-retreat from the home seems an exception because the defender could just as easily flee from a dwelling as from anywhere else. On the other hand, some theorists, taking literally the old expression “retreat *to the wall*” argue that the defender who is in her dwelling has reached the wall, and thus fulfilled the requirement of necessity.¹⁷⁸ As we noted earlier in the context of depraved heart,¹⁷⁹ here again we see how a metaphor that has grown tired and stale can come alive again when studied with fresh eyes.

But suppose the assailant and the defender *both* live in the dwelling where the assault occurs. In these cases, some courts hold that the castle exception does not apply, and the defender must flee. Making a charming argument for this view, the Connecticut Supreme Court wrote in 1981: “We cannot conclude that the Connecticut legislature intended to sanction the reenactment of the climactic scene from *High Noon* in the familial kitchens of this state.”¹⁸⁰ Ironically, here the court draws on the very cowboy ethos that underlies the “true man” doctrine and uses it as a reason for requiring retreat. The reference to *High Noon* is especially apt because the movie’s central question is whether ex-marshal Will Kane should leave town before the arrival of his nemesis or risk a shootout on the streets of Hadleyville.¹⁸¹

Less hyperbolic, but more poetic, are cases *favoring* the castle doctrine even in circumstances of co-habitation or co-ownership of property. For example, in *Jones v. State*¹⁸² we see the deep roots of the castle doctrine and

¹⁷⁶ 1 SIR MATTHEW HALE, *HISTORIA PLACITORUM CORNAE: THE HISTORY OF THE PLEAS OF THE CROWN* 486 (W.A. Stokes & E. Ingersoll eds., 1st Am. ed. 1847).

¹⁷⁷ *Redondo v. State*, 380 So. 2d 1107, 1111 (Fla. Dist. Ct. App. 1980).

¹⁷⁸ See Christine Catalfamo, *Stand Your Ground: Florida’s Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL. 504, 530 (2007) (emphasis added).

¹⁷⁹ See *supra* text accompanying notes 5–9.

¹⁸⁰ *State v. Shaw*, 441 A.2d 561, 566 (Conn. 1981).

¹⁸¹ See *HIGH NOON* (Stanley Kramer Productions 1952).

¹⁸² *Jones v. State*, 76 Ala. 8 (1884).

the feudal ambience it evokes. In this case concerning joint owners of a bar, a man killed his brother-in-law in self-defense.¹⁸³ The trial court instructed the jury that because the attacker shared ownership of the very place where the assault occurred, the defender had an obligation to retreat.¹⁸⁴ However, on appeal from the murder conviction, the Supreme Court of Alabama found that the retreat rule did not apply when the defender was in his own dwelling or place of business: “Why,” the court asked, “should one retreat from his own house . . . ? Whither shall he flee, and how far, and when may he be permitted to return?”¹⁸⁵

By rhetorically asking, “Whither shall he flee?,” the court seems to imply that there is no obvious place where the retreating victim could find sanctuary. This, of course, is a relatively accurate portrayal of the feudal era from which the castle metaphor derives. In a period distinguished by a weak central government incapable of protecting persons or property, the people relied instead on local lords who lived in fortified buildings equipped with dungeons and drawbridges, turrets and towers, moats and keeps—in short, castles.¹⁸⁶

Beautiful language evoking the medieval period appears again in *People v. Tomlins*, a 1914 case in which a man, acting in self-defense, killed his twenty-two-year-old son in the cottage where they both lived.¹⁸⁷ At trial, the court instructed that under these circumstances the father had a duty to retreat if he could safely do so, but the New York Court of Appeals reversed.¹⁸⁸ In an opinion by Judge Cardozo, the court quoted Lord Chief Justice Hale to the effect that a man attacked in his own home was not then, and never had been, required to retreat.¹⁸⁹ Continuing in his own words, Cardozo wrote, “He is under no duty to take to the fields and the highways, a fugitive from his own home.”¹⁹⁰ Here, Cardozo uses two alliterative pairs: *fields* and *fugitive*, *highways* and *home*, to create a passage of Churchillian beauty. Then, he employs a rhetorical device called a *chiasmus*, or “crossing”—derived from the

¹⁸³ *Id.* at 9.

¹⁸⁴ *Id.* at 16.

¹⁸⁵ *Id.*

¹⁸⁶ For a description of the disorder “approaching anarchy” that characterized medieval Europe, see SABINE, *supra* note 95, at 214.

¹⁸⁷ 107 N.E. 496, 497 (N.Y. 1914).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

Greek for *chi* or *X*¹⁹¹—to compose this lovely sentence: “Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home.”¹⁹²

In keeping with Zamyatin’s description of the image in which one “truly believes,” the leitmotif of the castle has “spread its roots” beyond the image of the home as a sanctuary to the implied converse as well: the picture of any place *outside* the home as wild, dangerous, and lacking in succor. In studying self-defense, then, we have the pleasure of contemplating not only our own era, but also the era roughly one thousand years ago when our ancestors lived under feudalism—that system of vassalage and decentralized power that prepared the way for limited monarchy and democracy.¹⁹³

X. MISERERE MEI DEUS: THE POETRY RECITAL IN CRIMINAL LAW

Working in criminal law, one gains a sense of connectedness to people and practices of long ago. In studying homicide, for instance, one learns about a monetary fine for murder called the *murdrum*, which is related to our word *murder*. According to one widely held theory, the *murdrum* originated in the years following the Norman Conquest, when the English often expressed resistance to their conquerors through secret assassinations.¹⁹⁴ To deter such hidden slayings, William I declared that if a Frenchman were the victim of an unlawful homicide and no culprit were brought to justice, one hundred Englishmen would be assessed a fine, or *murdrum*.¹⁹⁵ If, on the other hand, an Englishman were unlawfully slain, and the slayer not discovered, no such fine would be levied on the French.¹⁹⁶ This is a beguiling part of legal history

¹⁹¹ SHERIDAN BAKER, *THE COMPLETE STYLIST AND HANDBOOK* 462 (3d ed. 1984).

¹⁹² *Tomlins*, 107 N.E. at 497.

¹⁹³ In his *magnum opus*, Barrington Moore argues that “Western feudalism . . . favor[ed] democratic possibilities.” BARRINGTON MOORE, JR., *SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY: LORD AND PEASANT IN THE MAKING OF THE MODERN WORLD* 415 (1966). Specifically, he singles out the “notion of . . . immunity of certain groups and persons from the power of the ruler, along with the conception of the right of resistance to unjust authority. . . . [and] the conception of contract as . . . a crucial legacy from European medieval society to modern Western conceptions of a free society.” *Id.*; see also STANLEY ROTHMAN ET AL., *EUROPEAN SOCIETY AND POLITICS* 24 (1976) (citing the “tradition of reciprocal obligations that was feudalism” as the origin of rules limiting the power of the monarchy); R.C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 109 (2d ed. 1988) (referring to the role of feudalism in “check[ing] royal power” in England).

¹⁹⁴ *E.g.*, THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 445 (5th ed. 1956). *But see* Bruce R. O’Brien, *From Mordor to Murdrum: The Preconquest Origin and Norman Revival of the Murder Fine*, 71 *SPECULUM* 321, 325 (1966) (arguing that the murder fine originated before the Norman Conquest, with the Danish King Cnut).

¹⁹⁵ PLUCKNETT, *supra* note 194, at 445.

¹⁹⁶ *Id.*

because it highlights the intimate connection between criminal justice and government. The very fact that the rulers felt compelled to adopt such a measure as the *murdrum* bears witness to the hostility that a conquered people harbored toward their foreign invaders.¹⁹⁷

Of course, this story does not explain the contemporary meaning of murder as an unlawful killing of a human being with malice aforethought. Historians believe that, along with the meaning of *murdrum* as a fine, it also signified a secret killing¹⁹⁸ or, specifically, a killing effected by “lying in wait.”¹⁹⁹ A killing perpetrated in secret was considered more heinous than other homicides; thus, it makes sense that the word would eventually apply to the most terrible in a hierarchy of unlawful killings. But exactly how *murdrum* came to be associated with “malice aforethought” remains unknown.²⁰⁰

Besides the tensions between the Anglo-Saxons and their Norman rulers, another force that greatly affected the evolution of criminal law was the desire to limit capital punishment. For about four hundred years after the Norman Conquest, all homicides were deemed murder and punishable by death.²⁰¹ But in the late fifteenth century this began to change as manslaughter came into being to allow for a kind of homicide that was not a capital offense.²⁰² Based on its roots, the Anglo-Saxon word *manslaughter* should mean the same as its French counterpart, *homicide*, but as J.H. Baker has noted, “the French word *homicide* became the genus, while the Anglo-Saxon words *manslaughter* and *murder* represented two of its species.”²⁰³ When I explain this distinction to my students, it seems to help. For without the historical context, they sometimes revert to the layman’s tendency to think of all unlawful killings as murder.

Even before the creation of a category called *manslaughter*, another legal doctrine evolved to “mitigate the extreme rigor of the criminal laws.”²⁰⁴ This doctrine, *benefit of clergy*, did not exclude any types of homicide from the

¹⁹⁷ See O’Brien, *supra* note 194, at 322 (summarizing the view “accepted by most Anglo-Norman historians . . . that . . . Norman lordship was commonly resisted by violent, even ‘terrorist,’ force”).

¹⁹⁸ E.g., PLUCKNETT, *supra* note 194, at 445; S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 370 (1969).

¹⁹⁹ PLUCKNETT, *supra* note 194, at 444.

²⁰⁰ See J.M. Kaye, *The Early History of Murder and Manslaughter*, 83 L.Q. REV. 365, 366–68 (1967).

²⁰¹ See RICHARD J. BONNIE ET AL., CRIMINAL LAW 651 (1st ed. 1997).

²⁰² See J.H. BAKER, THE COMMON LAW TRADITION: LAWYERS, BOOKS AND THE LAW 227 (2000).

²⁰³ *Id.*

²⁰⁴ BLACK’S LAW DICTIONARY, *supra* note 75, at 158 (defining *benefit of the clergy*).

death penalty, but instead exempted an occupation, the clergy, from the jurisdiction of the civil courts and from capital punishment.²⁰⁵ By and large, only members of the clergy were literate, so felons could prove their clerical status by reading aloud from the Bible²⁰⁶—usually Psalm 51, verse 1, which begins, “*Miserere Mei, Deus*: ‘Have mercy on me, O God.’”²⁰⁷ Eminently suitable in theme, this verse became known by a colorful name: “The Neck-Verse.”²⁰⁸ Over time, a custom grew whereby shrewd felons, assisted by sympathetic jailers, would memorize this passage and, by pretending to read it, escape hanging.²⁰⁹ In the lifesaving power of this single verse, we see the early entwinement of poetry with criminal law.

XI. “A ROSE BY ANY OTHER NAME”²¹⁰: THE DISPUTE OVER METAPHOR IN CRIMINAL LAW

But *should* criminal law be entwined with poetry? Some legal scholars answer this question with a vehement “No.” According to these critics, the mellifluous names and definitions of criminal law are “amorphous,”²¹¹ “broad,”²¹² and virtually meaningless.²¹³ The defining characteristic of murder—malice aforethought—is said to be “inscrutable on its face”²¹⁴ and “a term of art, if not a term of deception.”²¹⁵ The premeditation–deliberation formula, which distinguishes first- and second-degree intentional murder, is criticized as a “mystifying cloud of words.”²¹⁶ And the various definitions of depraved heart murder are dismissed as “notoriously unhelpful”²¹⁷—“a

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ FRANCIS WATT, *THE LAW’S LUMBER ROOM* 4 (1895); see also BLACK’S LAW DICTIONARY, *supra* note 75, at 1031 (defining *neck-verse*).

²⁰⁸ See THE OXFORD ENGLISH DICTIONARY 66 (1970) (defining *neck-verse*).

²⁰⁹ CHRISTOPHER HIBBERT, *THE ROOTS OF EVIL: A SOCIAL HISTORY OF CRIME AND PUNISHMENT* 16 (1963).

²¹⁰ WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, act 2, sc. 2, ll. 43–44.

²¹¹ Paul H. Robinson et al., *The Five Worst (And Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 43 (2000).

²¹² *Id.*

²¹³ Cf. MARCUS D. DUBBER, *CRIMINAL LAW: THE MODEL PENAL CODE 2* (2002) (describing the author’s first encounter with the Model Penal Code, when he found that “[s]uddenly words mattered; words even retained their meaning from one rule to the next”).

²¹⁴ Robinson, *supra* note 211, at 43.

²¹⁵ GLANVILLE WILLIAMS, *TEXTBOOK OF CRIMINAL LAW* 208 (1978).

²¹⁶ BENJAMIN CARDOZO, *WHAT MEDICINE CAN DO FOR LAW* 27 (1930).

²¹⁷ Mounts, *supra* note 18, at 362.

collection of colorful verbiage”²¹⁸ that “tend[s] to carry more flavor than meaning.”²¹⁹

Disdaining criminal law’s figurative language, with its inevitable ambiguity, legal scholars have urged replacing the traditional terms with words that have precise and consistent meanings.²²⁰ Like Juliet Capulet, who urged Romeo to “be some other name”²²¹ because Montague is “nor hand nor foot/Nor arm, nor face, nor any other part/Belonging to a man,”²²² these scholars assume that names are mere “arbitrary symbol[s]”²²³ and can thus be altered with impunity. In a concrete manifestation of this assumption, the American Law Institute sponsored the creation of the Model Penal Code (MPC), which has been adopted in substantial part by more than half the states.²²⁴ The explicit purpose of the MPC is to “dispel the obscurity” of the common law.²²⁵

In contrast to its critics, I believe that the common law language of criminal law is valuable for its beauty, its rich historical resonance, and its expressive meaning. Rather than being a failed attempt at *precise* language, the common law terminology is, I propose, a different *kind* of language altogether. It is what philosopher Philip Wheelwright calls “*expressive*” or “*depth language*,”²²⁶ where ambiguity stems not from sloppiness but from an effort to unite diverse associations and thereby invent new meanings.²²⁷

²¹⁸ KATE E. BLOCH & KEVIN C. MCMUNIGAL, *CRIMINAL LAW: A CONTEMPORARY APPROACH* 362 (2005).

²¹⁹ SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 441 (7th ed. 2001).

²²⁰ See, e.g., Bernard E. Gegan, *A Case of Depraved Mind Murder*, 49 ST. JOHN’S L. REV. 417, 459 (1974) (describing the ambiguity of depraved heart murder and suggesting that “we would be better off without it”); Robinson, *supra* note 211, at 10 (arguing that a criminal code should be drafted in “common and plain words where possible and provide straightforward definitions” using “short and clear” sentences).

²²¹ WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 1.

²²² *Id.*

²²³ 2 MODEL PENAL CODE AND COMMENTARIES § 210.2 cmt. at 14 (Official Draft and Revised Comments 1980) (quoting the 1953 Royal Commission on Capital Punishment) (internal quotation marks omitted).

²²⁴ KADISH ET AL., *supra* note 5, at 133.

²²⁵ 1 MODEL PENAL CODE AND COMMENTARIES § 2.02 cmt. (Official Draft and Revised Comments 1985).

²²⁶ PHILIP WHEELWRIGHT, *THE BURNING FOUNTAIN: A STUDY IN THE LANGUAGE OF SYMBOLISM* 15 (rev. ed. 1968) (emphasis added).

²²⁷ *Id.* at 81 (describing “[p]oetically charged language” as always “produc[ing] an integral meaning that radically transcends the sum of the ingredient meanings”); see also OWEN BARFIELD, *Poetic Diction and Legal Fiction*, in *THE REDISCOVERY OF MEANING, AND OTHER ESSAYS* 44, 60 (1977) (emphasizing the importance of metaphor in making meaning and explaining why “the logical use of language can never add any meaning to it”).

In his seminal books *Metaphor and Reality*²²⁸ and *The Burning Fountain*,²²⁹ Wheelwright distinguishes between “expressive” language, on the one hand, and what he calls “steno” language, on the other.²³⁰ Steno-language refers to utterances that have a “fixed set of associations,” the same in every context.²³¹ This rigidity of meaning may come about in two ways: from prescription, as in science (and the MPC), or from inertia, as in metaphors that have lost their freshness from overuse (for instance, “a tragic death”).²³² In its prescribed form, steno-language eschews vagueness and ambiguity and “can be shared in exactly the same way by a very large number of persons.”²³³ This “public exactitude,”²³⁴ rather than evocativeness or nuance, is the virtue of steno-language.

In expressive language, on the other hand, the meanings of words are not fixed but may vary with the context. Expressive language is “self-transcendent,”²³⁵ evoking associations that generate tension, even paradox, by their juxtaposition. For instance, in the phrase *depraved heart*, a word associated with evil is juxtaposed to one associated with goodness, resulting in a term that is vibrant with contradiction. In expressive utterances, as in poetry, the choice of language is never accidental; rather, there is an organic and interactive relationship between the words and the thought.²³⁶ While lacking the clarity and precision of steno-language, expressive language has its own virtue: fullness of expression.²³⁷

Framing the issue still more broadly, I believe that the figurative language of criminal law reflects the ethos of the Romantic Movement,²³⁸ whereas the

²²⁸ PHILIP WHEELWRIGHT, *METAPHOR AND REALITY* (1962).

²²⁹ WHEELWRIGHT, *supra* note 226.

²³⁰ *Id.* at 17.

²³¹ *Id.* at 50.

²³² *See* WHEELWRIGHT, *supra* note 228, at 37, 94.

²³³ *Id.* at 33.

²³⁴ *Id.* at 94.

²³⁵ WHEELWRIGHT, *supra* note 226, at 7.

²³⁶ *Id.* at 76. Illustrating this point, Wheelwright says that “if Shakespeare had decided to let the Weird Sisters inhabit water . . . instead of ‘fog and filthie air,’ the whole play of *Macbeth* would have been profoundly different.” *Id.* (quoting WHEELWRIGHT, *supra* note 228, at 95).

²³⁷ *Id.* at 15. *Cf.* C.S. Lewis, *Bluspels and Flalanspheres*, in *THE NORTON READER* 136, 148 (Arthur M. Eastman ed., rev. ed. 1969) (arguing that “meaning . . . is the antecedent condition both of truth and falsehood” and that imaginative language is richer in meaning than literal language).

²³⁸ The resonance between criminal law and Romanticism has been largely overlooked by previous scholars. For example, the 760-page book *Romanticism: An Oxford Guide* contains numerous chapters demonstrating the themes of Romanticism in fields such as ecology, feminism, post-colonialism, science, politics, and psychoanalysis, but makes no mention of criminal law. *See* ROMANTICISM: AN OXFORD GUIDE

opposition to this language reflects the ethos of the Enlightenment. In *The Passion of the Western Mind*, historian and philosopher Richard Tarnas describes the Romantic vision of reality that arose in Europe in the late eighteenth century and how it departed from that of the Classical school: “For the Romantic, reality was symbolically resonant through and through, and was therefore fundamentally multivalent, a constantly changing complex of many-leveled meanings, even of opposites. For the Enlightenment-scientific mind, by contrast, reality was concrete and literal, univocal.”²³⁹ When we understand the disagreement over the language of criminal law as a particular instance of a vast historical and philosophical debate, we realize that both kinds of language are necessary; they are dialectically related Weltanschauungs and form parts of a single whole.

XII. “HALF-VEILED AND HALF-REVEALED”: THE DUSKY IMAGES AND SHROUDED TRUTHS OF CRIMINAL LAW

The artist leaves his “deep and hidden truth” half-veiled and half-revealed.

Robert Donington²⁴⁰

Amidst the rich, figurative language of criminal law, this Essay has considered imagery that clusters around several subjects: *the body* (depraved heart, hot blood, the hand of forgiveness); *fire* (heat of passion, simmering, cooling-off, rekindling); *the journey* (dangerous proximity, last step, place of repentance); and *the feudal past* (attornment, castle, retreat to the wall). But we have yet to discuss another important leitmotif, that of the earth’s turning or, more exactly, the shadows and darkness that descend upon the earth when it faces away from the sun or is blocked from the sun’s rays. To be sure, some of these images fall into the class that Zamyatin calls “individual, chance images . . . which live for a brief moment, and then are extinguished, forgotten.”²⁴¹

(Nicholas Roe ed., 2005). And yet, to echo what Andrew Michael Roberts writes about psychoanalysis, criminal law and Romanticism “seem made for each other.” Andrew Michael Roberts, *Psychoanalysis*, in *ROMANTICISM: AN OXFORD GUIDE*, *supra* at 219, 219. In addition to the central role of figurative language, another characteristic that criminal law shares with Romanticism is the “foregrounding of individual consciousness.” See Paul D. Sheats, *Lyric*, in *ROMANTICISM: AN OXFORD GUIDE*, *supra* at 310, 319. In criminal law, the central importance of individual subjectivity is reflected in the concept of *mens rea*. See, e.g., *supra* text accompanying notes 42–55.

²³⁹ RICHARD TARNAS, *THE PASSION OF THE WESTERN MIND* 368 (1991).

²⁴⁰ ROBERT DONINGTON, *WAGNER’S ‘RING’ AND ITS SYMBOLS* 13, 15 (3d ed. 1984).

²⁴¹ ZAMYATIN, *supra* note 153, at 198.

Such is the image of “shadows” in the phrase “mere names and shadows,” which a court used to belittle the refined subtleties of embezzlement law in one nineteenth-century case.²⁴² In that case, the defendant argued that a quantity of wheat stored in a warehouse was not “under his care”;²⁴³ thus, the crime of embezzlement (which requires that the “appropriated” property be in the lawful possession of the embezzler) was not established.²⁴⁴ Upholding the conviction, the Supreme Court of Ohio reasoned that courts should not be “misled by mere names and shadows.”²⁴⁵

As in the embezzlement case, the court in *United States v. Lyons*²⁴⁶ employs images of visible darkness—*twilight* and *dusk*—to convey the concept of insignificance. Specifically, the *Lyons* court alludes to the hazy distinction between these two stages of nightfall to disparage the “irresistible impulse” prong of the insanity defense. Poetically, it writes, “The line between an irresistible impulse and an impulse not resisted is probably no sharper than between twilight and dusk.”²⁴⁷

Yet another chance expression of the darkness archetype appears in the court’s explanation of character evidence in *Michelson v. United States*.²⁴⁸ Here, the court states that witnesses may not testify about their *personal experience* with the defendant—only as to the defendant’s *reputation*, that is, “as to the *shadow* his daily life has cast in his neighborhood.”²⁴⁹ Reminiscent of Plato’s allegory of the cave where the prisoners see only *shadows* projected onto the wall by the fire behind them,²⁵⁰ this use of the metaphor emphasizes the difference between mediated perceptions and “direct” experience.

Among chance images that relate to the earth’s circadian rhythm, a particularly striking illustration appears in Justice Burger’s opinion in the 1975 case of *Breed v. Jones*.²⁵¹ The case concerns the privilege against double jeopardy—more specifically, whether it should apply to minors who are

²⁴² *Calkins v. State*, 18 Ohio St. 366 (1868).

²⁴³ *Id.* at 372 (internal quotation marks omitted).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ 731 F.2d 243 (5th Cir. 1984).

²⁴⁷ *Id.* at 248 (quoting *American Psychiatric Association Statement on the Insanity Defense*, 140 J. AM. PSYCHIATRY 681 (1983) (internal quotation marks omitted)).

²⁴⁸ *Michelson v. United States*, 335 U.S. 469, 478–86 (1948).

²⁴⁹ *Id.* at 477 (emphasis added).

²⁵⁰ See PLATO, *THE REPUBLIC OF PLATO* 193–94 (Allan Bloom trans. & ed., Basic Books 2d ed. 1968) (c. 360 B.C.E).

²⁵¹ *Breed v. Jones*, 421 U.S. 519 (1975).

adjudicated first in juvenile court and then, after transfer, in criminal court.²⁵² Three paragraphs into the analytic part of the opinion, Justice Burger sums up the Court's reasoning in these words: "We believe it is simply *too late in the day* to conclude . . . that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has . . . violate[d] a criminal law and whose potential consequences include . . . stigma . . . and the deprivation of liberty for many years."²⁵³

I have always admired this sentence, but never fully understood why. Now I see that in the five short words comprising the phrase "too late in the day," Justice Burger has accomplished something remarkable. He has not only alluded to the great juvenile justice cases of the 1960s and early 70s;²⁵⁴ not only suggested that the holding in *Breed* could not, logically, be other than it is; but also, with that brief image, he managed to recall the seventy-five year history of a grand social experiment: the ardent enthusiasm of those who espoused the virtues of the juvenile court at the end of the last century, who clung to hope in the face of growing disappointment, and who, by 1975, experienced regret and a sense of defeat.²⁵⁵

In addition to its role as a "chance" image in numerous criminal cases, *darkness* has been a dominant image in the crime of burglary. As early as the 1450s, perhaps earlier, it was settled that burglary included a nocturnal element²⁵⁶—a requirement that naturally raised the question of how *night* should be defined. The answer, in the beginning, was that night meant any time between sunset and sunrise.²⁵⁷ From the criminal perspective, this interpretation was harsh for it allowed a conviction for burglary even when the offense occurred under conditions of partial visibility, when a glow emanated

²⁵² *Id.* at 519.

²⁵³ *Id.* at 529 (emphasis added) (citation omitted).

²⁵⁴ See generally *In re Winship*, 397 U.S. 358 (1970) (holding that when a juvenile is charged with a criminal offense, every element of the offense must be proven beyond a reasonable doubt); *In re Gault*, 387 U.S. 1 (1967) (holding that juveniles accused of crimes in juvenile proceedings must be accorded the same due process rights as adults); *Kent v. United States*, 383 U.S. 541 (1966) (holding that the juvenile court's latitude in determining whether to waive jurisdiction and allow a case to be heard in criminal court is not total).

²⁵⁵ For a brief summary of the history of the juvenile justice system, see *Breed*, 421 U.S. at 528–29 (acknowledging the "gap between the originally benign conception of the system and its realities"). For more detailed discussions, see *Introduction to Part II: The Origin of the Juvenile Court*, in *JUVENILE JUSTICE PHILOSOPHY* 27, 27–36 (Frederic L. Faust & Paul J. Brantingham eds., 2d ed. 1979); Anthony Platt, *The Rise of the Child-Saving Movement: A Study in Social Policy and Correctional Reform*, in *JUVENILE JUSTICE PHILOSOPHY*, *supra* at 115, 115–138.

²⁵⁶ J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 532 (4th ed. 2002).

²⁵⁷ *Id.*

from below the horizon, at dawning or at twilight. More benevolent in its impact on criminals was an interpretation adopted later—that of night as the time “when a man’s face could not be discerned.”²⁵⁸ This approach would have benefitted the offender who, when unlawfully “breaking and entering a dwelling of another at night with intent to commit some felony inside,”²⁵⁹ made sure to do so between daybreak and sunrise, or between sunset and total darkness.

In contemporary times, some American jurisdictions have obliterated the “at night” element of burglary, but regardless of the statutory definition, darkness still carries rhetorical power. In fact, Judge Leventhal’s dissent in *United States v. Barker*, one of the cases emerging out of the Watergate scandal of the 1970s—one of the most beautiful dissents in all of criminal law—uses *nighttime* both literally and symbolically to great effect.²⁶⁰ *Barker* concerns two men who broke into the office of Daniel Ellsberg’s psychiatrist in hopes of discrediting the man (Ellsberg) who had released the Pentagon Papers to the press.²⁶¹ The two men assumed that their supervisor, who wrote to Barker on White House stationary, could legally authorize the forcible break-in as a patriotic act in the interest of national security.²⁶² In this assumption they were, of course, mistaken. The question the court faces on appeal is whether their mistake should exonerate them.²⁶³

Although time of day is not an issue in this case, Judge Leventhal emphasizes when the crime was committed, using expressions such as “compounded by subterfuge [and] dark of night.”²⁶⁴ Toward the end of the opinion, Leventhal again alludes to night, this time substituting the more ominous word “dead” for “dark,” thus conjuring up thoughts of homicide.²⁶⁵ Using the intimate first-person point of view and slowing down the sentence through repetition, dashes, and monosyllabic words, Judge Leventhal offers the reader this moving statement of personal belief: “I come back—again and again in my mind—to the stark fact that we are dealing with a breaking and

²⁵⁸ *Id.* at 533.

²⁵⁹ KADISH ET AL., *supra* note 5, at 561.

²⁶⁰ 546 F.2d 940, 940 (D.C. Cir. 1976). For background on the Watergate scandal, see JOHN W. DEAN, *BLIND AMBITION: THE WHITE HOUSE YEARS* (1976); and JAMES DOYLE, *NOT ABOVE THE LAW: THE BATTLES OF WATERGATE* PROSECUTORS COX AND JAWORSKI (1977).

²⁶¹ *Barker*, 546 F.2d at 943.

²⁶² *Id.*

²⁶³ *Id.* at 944.

²⁶⁴ *Id.* at 958.

²⁶⁵ *Id.* at 973.

entering in the dead of night, both surreptitious and forcible, and a violation of civil rights statutes.”²⁶⁶ The next sentence is the last substantive sentence in the opinion, and in this prominent place the judge presents a variation on his theme: “This,” he writes, “is simply light years away from the kinds of situations where the law has gingerly carved out exceptions permitting reasonable mistake of law as a defense.”²⁶⁷ Ironically, the phrase “light years” evokes, for many of us, the seemingly infinite darkness of a journey through space, the kind of pilgrimage that light must make to reach us from a star.

As in particular cases, judges employ the images of nighttime, dusk, shadow, and twilight to clarify their reasoning or render a holding more eloquent, so also in criminal law generally, scholars use metaphors of obscurity to describe the enigmatic nature of the field.²⁶⁸ As we have seen, these metaphors are often intended as criticisms, yet the nebulousness of the doctrines may be the very quality that gives criminal law its beauty. Like the artist, criminal law “leaves [its] ‘deep and hidden truth’ half-veiled and half-revealed.”²⁶⁹ And the veil that criminal law drapes over its “truth” is composed of language—the beautiful language of poetry.

EPILOGUE

*Some say a marshaling of horsemen, others, soldiers on the march,
And others still say that a fleet of ships is the most beautiful thing
on the dark earth. I say
it is what you love.*

Sappho, *Fragment 16*²⁷⁰

One evening, not long ago, I had dinner again with the friend who had wondered how I could work in “*that field*.” We met in the same Italian restaurant as before, though it seemed like a different place because of attractive renovations. The walls, which had previously shone bright yellow, were now a stylish pumpkin; the blinding overhead lighting had been replaced by the soft glow of Tiffany pendant lamps, and the tables, which had been crowded together, were separated now, resulting in a more peaceful ambience.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ See *supra* text accompanying notes 211–219.

²⁶⁹ DONINGTON, *supra* note 240, at 15.

²⁷⁰ Sappho, *Fragment 16*, quoted in epigraph to ALEXANDER NEHAMAS, ONLY A PROMISE OF HAPPINESS: THE PLACE OF BEAUTY IN A WORLD OF ART (2007).

In addition to the altered decor, the restaurant boasted a new menu, so my friend and I departed from our traditional eggplant parmigiana and ordered the apple- and goat-cheese ravioli and lasagna.

In the months since our previous dinner, I had reflected on my friend's remark. Her implicit question had startled me then, leaving me unable to articulate a response. Now better prepared, I explained that criminal law succeeded to the passion I once bestowed on my first intellectual love—political science. According to Max Weber's classic description, the state "has been successful in seeking to monopolize the legitimate use of physical force as a means of domination within a territory."²⁷¹ Punishment, a "legitimate use of physical force," is thus a quintessential function of the state. And, because of the risk it poses to life and liberty, criminal law represents the juncture where state and individual interact in the most dramatic way; the point at which the state goes furthest in exerting its authority over the citizen.

But whereas, in the beginning, my attraction to criminal law centered on what one might call its "hard" aspect—its inextricable link to authority and violence—over time, my fascination with the field came to derive from its "soft" qualities as well—from the rich poetry of its images, the melody of its cadences, and the aesthetically pleasing contrast between its facts, which are ever new, and its doctrines, which are centuries old.

Almost everything looks different when seen from up close than it does from afar, and criminal law is no exception. It has taken years for me to move near enough to see criminal law as a language event, with centripetal as well as centrifugal meanings; to appreciate that criminal law is "fraught with background"; to notice the awesome beauty of its doctrines, yet still sympathize with those who (like my friend) repudiate the field as gory and macabre. In *Civilization and Its Discontents*, Freud suggests that intellectually engrossing work, if one is lucky enough to find it, may be the most reliable of all sources of happiness.²⁷² I am grateful to have discovered, in criminal law, work that can stand up to this challenge and, with it, the opportunity to live *for* as well as *off* my vocation.²⁷³

²⁷¹ WEBER, *supra* note 2, at 82–83.

²⁷² SIGMUND FREUD, *Civilization and Its Discontents*, in 21 THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 64, 79 (James Strachey trans. & ed., 1975) (1930).

²⁷³ See WEBER, *supra* note 2, at 84; see also *supra* text accompanying note 2.