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A Few Words About Women in the Discourse of Criminal Law Upon Reading Martha Grace Duncan's Essay, Beauty in the Dark of Night

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A FEW WORDS ABOUT WOMEN IN THE DISCOURSE OF CRIMINAL LAW UPON READING MARTHA GRACE DUNCAN'S ESSAY, *BEAUTY IN THE DARK OF NIGHT*

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INTRODUCTION

One key idea in Martha Grace Duncan's essay, *Beauty in the Dark of Night: The Pleasures of Form in Criminal Law*, is that in our justice system, "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."[1] This intersecting place or moment "inextricabl[y] link[s] . . . authority and violence."[2] Professor Duncan follows this observation with another: the potent connectivity of authority and violence in the criminal law context offers a striking, almost eerie, contrast to the language that is often used by courts in analyzing, from a legal perspective, the thorny conflicts arising from state–citizen interactions related to crime and punishment. The harsh realities of crime, victimization, trial, and imprisonment—all laden with pain and violence—are discussed in opinions laced with antiquated poetic language, beautiful imagery, and soft sounds.[3] Professor Duncan herself constructs similarly unlikely literary pairings in her writing *about* criminal law texts, interweaving the languages of *story* and *witness* into the academic discourse of a law journal essay.[4]

Part I of my response to Professor Duncan's essay will underscore a few points Professor Duncan makes about how the beauty of the language of criminal law is manifested in case law. To illustrate this concept, I rely on Professor Duncan's examples of cases involving *depraved heart*, *heat of passion*, *attempt*, and the *castle doctrine* are used to illustrate. I also explore one implicit question in Professor Duncan's essay: *Why* has this antiquated language been preserved? I offer three answers, drawing from examples

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[1] Martha Grace Duncan, *Beauty in the Dark of Night: The Pleasures of Form in Criminal Law*, 59 EMORY L.J. 1203, 1244 (2010).

[2] *Id.*

[3] *Id.*

[4] *See, e.g.*, *id.* at 1226–27.

provided by Professor Duncan's essay. In brief, Part I identifies the primary reasons suggested by Professor Duncan: an intentional evasion of precise definition, exploitation of the evocative power of language to promote a particular understanding, and renewal of precedent by making indirect associational links to familiar history.

Part II raises a different question: Why should it matter now, to practicing lawyers, that criminal law is steeped in outdated, quixotic language? To answer this question, I have chosen to look at a particular context generally alluded to, but not directly addressed in, Professor Duncan's essay. Specifically, my goal is to discover what implications the peculiar language of criminal law has for women who find themselves enmeshed in the criminal justice system, whether as defendants, convicted inmates, or crime victims. Here, I focus on the "inextricable link to authority and violence"[5] present in the criminal justice system and on the contrast between the hardness of gory, grizzly details and the softness of imagery used to describe the crimes. Referencing the three previously noted methodologies (evasion of precise definition, exploitation of evocative power, and use of associational links to history), I discuss how the language of criminal law has special application to situations involving women in the system. Again, the concepts highlighted here are depraved heart murder, the heat of passion defense, attempt, and self-defense.

Finally, Part III attempts to demonstrate, through poetic form, just how pervasive and compelling the literary language of the criminal law is. Using excerpts from various texts, such as court opinions, news reports, academic texts (including Professor Duncan's essay), true-crime stories, personal narratives, confessions, and testimony, I present a documentary collage intended to break down artificial constructs of knowledge and provide evidence of the extent to which our assumptions about crime and women in the criminal justice system are subject to the power of language detailed in Professor Duncan's essay.

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[5] *Id.* at 1244.

I. AN OVERVIEW OF THE HOW AND WHY

A. How the Antiquated Language of Criminal Law Is Preserved

In her essay, Professor Duncan examines the tendency of courts to preserve antiquated—and often romantically resonant—language in the criminal law context. This responsive essay focuses on particular manifestations of this tendency identified by Professor Duncan: language relating to murder, specifically references to *depraved heart* and *heat of passion*; terms used in discussions of attempt crimes, particularly those relating to time and place; and the lexicon of self-defense, with its connection to history and culture.

1. Depraved Heart

Professor Duncan takes us through several epistemological levels in her discussion of murder. She begins by demonstrating how criminal law uses the metaphors of body and heart to elucidate concepts of *mens rea*.[6] Courts have repeatedly described a perpetrator's state of mind as a state of *heart*: The guilty murderer suffers from "hardness of heart,"[7] a "depraved heart," an "abandoned and malignant heart,"[8] and a heart "fatally bent on mischief."[9] The evil heart is the source of the criminal's "wickedness."[10]

2. Heat of Passion

The heart is understood to be a source of heat, as well as of emotion, and from the heart metaphor comes the language of fire. As Professor Duncan notes, the case law is replete with such language, beginning with the primary idiom *heat of passion*, which serves as shorthand for a particular kind of loss of control and justifies the reduction of murder to manslaughter.[11] The fire metaphor embedded in the expression *heat of passion* has been extended to cover other aspects of murder defenses discussed in case law. Courts speak of the parties' emotions "cooling off" or "rekindling."[12] As Professor Duncan

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[6] *See id.* at 1205.

[7] People v. Roe, 542 N.E.2d 610, 618 (N.Y. 1989) (Bellacosta, J., dissenting); Commonwealth v. McLaughlin, 142 A. 213, 215 (Pa. 1928). For Professor Duncan's discussion of depraved heart murder and these cases in particular, see Duncan, *supra* note 1, at 1206.

[8] JOHN KAPLAN ET AL., CRIMINAL LAW 384 (2004).

[9] *Id.* (quoting Mays v. People, 806 Ill. 306 (1883)) (internal quotation marks omitted).

[10] *McLaughlin*, 142 A. at 215.

[11] *See* Duncan, *supra* note 1, at 1206.

[12] *Id.*

also points out, the event that is generally relied on to justify a heat of passion defense is one spouse's discovery of the other *in flagrante delicto*—literally, "in the blaze of transgression."[13]

As the heat of passion defense evolved, courts and legislatures sometimes broadened its reach beyond the adulterous spouse situation. In some jurisdictions, therefore, the operative term is "extreme emotional disturbance."[14] While this term lacks a direct connection to the fire metaphor, the defense retains the correlative language through a large body of jurisprudence. Cases that discuss extreme emotional disturbance[15] abound with terms like "simmering,"[16] "inflamed,"[17] "hot blood[ed],"[18] "smouldering,"[19] and "ignited."[20]

3. Locus Poenitentiae

When looking at the law of attempt, Professor Duncan highlights court opinions that emphasize notions of mercy and the potential for redemption.[21] As she observes, courts have long voiced the belief that crime is constituted by both *mens rea* and *actus reus*; until the moment of action, the mind can be dissuaded from criminality.[22] In Latin—the Christian language of guilt and salvation—between temptation and sin lies *locus poenitentiae*, the place of repentance.[23] In recognition of this principle, Professor Duncan notes a Missouri case stating that "the law in its beneficence extends the hand of forgiveness."[24]

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[13] *Id.* at text accompanying note 74 (quoting JOSEPH T. SHIPLEY, THE ORIGINS OF ENGLISH WORDS 32 (1984)) (internal quotation marks omitted).

[14] Duncan, *supra* note 1, at 1206.

[15] State v. Kaddah, 736 A.2d 902, 911 (Conn. 1999); Boyd v. State, 389 A.2d 1282, 1288 (Del. 1978); People v. Patterson, 347 N.E.2d 898, 908 (N.Y. 1976). For Professor Duncan's discussion of these and other cases that discuss extreme emotional disturbance, see Duncan, *supra* note 1, at 1206 n.15.

[16] *Kaddah*, 736 A.2d at 911.

[17] McClellan v. Commonwealth, 715 S.W.2d 464, 469 (Ky. 2006).

[18] *Patterson*, 347 N.E.2d at 908.

[19] People v. Walker, 473 N.Y.S.2d 460, 466 (App. Div. 1984).

[20] *Id.*

[21] *See* Duncan, *supra* note 1, at 1221–22.

[22] *Id.*

[23] King v. Barker, 43 N.Z.L.R. 865, 873 (1924).

[24] Duncan, *supra* note 1, at 1222 (quoting State v. Hayes, 78 Mo. 307, 317 (1883)) (internal quotation marks omitted).

4. The Castle Doctrine

One final subject covered by Professor Duncan merits attention: the domain of self-defense. In her examination of the language of criminal law, Professor Duncan demonstrates the connectivity of the case law language to Anglo-American history and, in particular, to our feudal past.[25] Building from the precept that necessity is the "soul of . . . self defense,"[26] courts have devised the castle doctrine, implicitly concluding that one's home is inextricably linked to one's self. Defense of home is defense of self; retreat from one's home is no more expected than retreat from one's very self. "[W]hither shall he flee?" asked one court in 1884.[27] Although "retreat to the wall"[28] may be demanded in a public space, a "true man" is entitled to stand and fight when he (or his home) is threatened.[29] "Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home."[30] Home, moreover, is a private domain, the equivalent of a castle, where the owner is subject to no other.

B. Why the Antiquated Language of Criminal Law Is Preserved

Having clearly demonstrated that criminal law has preserved a language steeped in history, Professor Duncan explains some of the reasons why. She elaborates on three rationales that bear on matters discussed in Part II of this response. They are intentional evasion of precise definition, exploitation of the evocative power of language to promote a particular understanding, and renewal of precedent through indirect associational links to familiar history.

1. Intentional Evasion of Definition

Professor Duncan points out that a number of key elements in criminal law are not clearly defined. The words *malice aforethought*, for example, do not mean what they appear to mean.[31] Legal experts and courts acknowledge the ambiguity.[32] In fact, the concept has been described as "inscrutable on its

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[25] *Id.* at 1232–33 nn.182–86 and accompanying text.

[26] United States v. Peterson, 483 F.2d 1222, 1235 (D.C. Cir. 1973).

[27] Jones v. State, 76 Ala. 8, 16 (1884).

[28] MARTIN R. GARDNER & RICHARD G. SINGER, CRIMES AND PUNISHMENT 1070 (4th ed. 2004). For Professor Duncan's discussion of self-defense, the duty to retreat, and the castle doctrine, see Duncan, *supra* note 1, 1230.

[29] Erwin v. Ohio, 29 Ohio St. 186, 199–200 (1876).

[30] New York v. Tomlins, 107 N.E. 496, 497 (N.Y. 1914). For Professor Duncan's discussion of this quote, see Duncan, *supra* note 1, at 1234.

[31] *See* Duncan, *supra* note 1, at 1207 n.20.

[32] *Id.*

face"[33] and "a term of art, if not a term of deception."[34] Similarly, the premeditation–deliberation formula, which distinguishes first- and second-degree intentional murder, has been criticized as a "mystifying cloud[] of words,"[35] "notoriously unhelpful,"[36] and a "'collection of colorful verbiage,' that 'tend[s] to carry more flavor than meaning.'"[37] The ambiguity is arguably deliberate and strategic.[38] It is also, arguably, reflective of the complexity of the subject matter.

Many in the field disdain criminal law's figurative language, with its inevitable ambiguity.[39] The American Law Institute (ALI), for example, clamors for more precision in a climate demanding public exactitude.[40] But Professor Duncan defends the aging language, applauding its breadth and expressiveness.[41] The language, she says, is self-transcendent, "vibrant with contradiction."[42] In contrast to what she denotes as the ALI's call for "steno-language,"[43] Professor Duncan advocates caution and reminds us of the benefits of flexibility in this difficult area of law.[44]

2. Evocative Power

A second reason the language has been preserved is its evocative power, of which, almost certainly, judges are well aware. As Professor Duncan notes, in the "area of yearning," beauty is objective and subjective.[45] Beautiful language uses this evocative power to transport readers to another place or

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

[34] GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 208 (1978).

[35] BENJAMIN CARDOZO, WHAT MEDICINE CAN DO FOR LAW 27 (1930). For Professor Duncan's discussion of the premeditation–deliberation formula, see Duncan, *supra* note 1, at 1236.

[36] Suzanne Mounts, *Malice Aforethought in California: A History of Legislative Abdication and Judicial Vacillation*, 33 U.S.F. L. REV. 313, 313 (1999).

[37] Duncan, *supra* note 1, at 1237 (quoting CRIMINAL LAW: A CONTEMPORARY APPROACH 362 (Kate E. Bloch & Kevin C. McMunigal eds., 2005) and CRIMINAL LAW AND ITS PROCESSES 441 (Sanford H. Kadish & Stephen J. Schulhofer eds., 7th ed. 2001)).

[38] Duncan, *supra* note 1, at 1237.

[39] *Id.* at 1237.

[40] *See id.* at 1237.

[41] *See id.* at 1237–38.

[42] *Id.* at 1238.

[43] *Id.* 1238 n.231 ("*Steno-language* refers to utterances that have a 'fixed set of associations,' the same in every context." (quoting PHILIP WHEELWRIGHT, THE BURNING FOUNTAIN: A STUDY IN THE LANGUAGE OF SYMBOLISM 50 (rev. ed. 1968) (emphasis added))).

[44] *See id.* at 1238.

[45] *Id.* at 1226 (quoting GEORGE HAGMAN, AESTHETIC EXPERIENCE 97 (2005)) (internal quotation marks omitted).

time. In the imagery of the language of the criminal law, Professor Duncan sees "fullness of expression,"[46] an organic and interactive system of communication. According to Professor Duncan, the particular evocative power of criminal law's language reflects the ethos of the Romantic movement, as opposed to that of the Enlightenment when language tended toward the concrete and literal as an affectation of scientific thinking.[47]

By opting for the evocative power of language over the persuasive logic of scientific analysis, some criminal law courts have been able to retain their discretionary power. Professor Duncan provides several examples of judges whose opinions illustrate this point: Justices Jackson and Fortas and Judge Cardozo all exploited the evocative power of language. Using the example of *Morisette v. United States*, Professor Duncan shows how Justice Jackson manipulates language through contrast,[48] alliteration,[49] and romantic motifs.[50] Professor Duncan also highlights how Justice Fortas's opinion in *In re Gault*[51] employs images of England's feudal past—the medieval serf and lord—as a metaphor for the twentieth century relationship between citizen and state[52] and uses the romantic imagery of nature to discuss the due process rights of juveniles.[53] Judge Cardozo also relies on the power of subliminal Romantic motifs, as evidenced in *People v. Tomlins*.[54]

3. Associational Links

One final rationale Professor Duncan posits for preserving language is the ability of courts to incorporate large swaths of history through association or allusion. A reference that brings to mind, whether consciously or not, deep-seated lessons learned or beliefs imparted makes the task of renewing precedent relatively easy. An example of this provided by Professor Duncan is the term *malice aforethought*, which is described as "fraught with

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[46] *Id.* at 1238.
[47] *Id.* at 1238.
[48] *See id.* at 1212.
[49] *See id.* at 1212–13.
[50] *See id.* at 1213.
[51] 387 U.S. 1 (1967).
[52] Duncan, *supra* note 1, at 1220.
[53] *Id.* at nn.86–87 and accompanying text.
[54] 107 N.E. 496, 497 (N.Y. 1914). For Professor Duncan's discussion of *Tomlins*, see Duncan, *supra* note 1, at 1233.

background"[55] or "laden with accreted meaning."[56] This phrase, she says, is a "language event,"[57] meaning the very term carries history with it.[58] While Professor Duncan examines specific feudal associations of castles and the monarchy,[59] she also develops the idea of imagery associated with historical periods, light and darkness, time and mortality.[60] This imagery has considerable impact on criminal law as it relates to women today.

II. IMPLICATIONS FOR WOMEN IN THE CRIMINAL JUSTICE SYSTEM

This Part address the implications of Professor Duncan's exploration of the peculiar language of criminal law for women who find themselves enmeshed in the criminal justice system. This is a theme generally alluded to, but not directly addressed in, Professor Duncan's essay. I posit that whether they are involved in the system as defendants, convicted inmates, or crime victims, women are decisively affected by the language patterns described by Professor Duncan.

In looking at how the old and beautiful language of the criminal law applies specifically to women, it is useful to return to Professor Duncan's premise that criminal law is the "juncture where the state and the individual interact in the most dramatic way";[61] where, in fact, the state's authority over its citizens is most keenly felt. At this juncture, authority and violence are conjoined.[62] Ironically, it is here that courts are prone to invoke Romantic imagery or misty language, defining essential elements of crime and the state's role in administering justice in terms that are both evocative and ambiguous. The characteristics of language that Professor Duncan observes in criminal law cases are pervasive throughout criminal justice discourse as it relates to women, and that discourse takes place in court opinions, academic texts, news reports, testimony, and everyday storytelling. In this exploration of the language of criminal law as applied to women throughout history, I have

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55 ERICH AUERBACH, MIMESIS: THE REPRESENTATION OF REALITY IN WESTERN LITERATURE 12 (Willard R. Trask trans., Princeton Univ. Press 1953) (1946). For Professor Duncan's discussion of malice aforethought, see Duncan, *supra* note 1, at 1208.

56 *Id.*

57 NORTHROP FRYE, THE GREAT CODE: THE BIBLE AND LITERATURE 60 (1982).

58 For Professor Duncan's discussion of malice aforethought as a language event, see Duncan, *supra* note 1, at 1208.

59 *See id.* at 1229–34.

60 *Id.* at 1238–43.

61 *Id.* at 1243.

62 *Id.*

chosen to rely on a small but varied selection of texts. My choice of texts is not random, nor is it the result of a lengthy and involved search. From a vast array of documentary materials, I have selected what I believe to be a representative group: news reports of lawsuits against the Michigan Department of Corrections (MDOC), oral histories of women living and working inside the prison system, academic texts about women and crime, true-crime stories, and court opinions, including many cases cited in Professor Duncan's essay. Specific applications are particularly noted in reference to depraved heart murder, heat of passion, attempt, and the castle doctrine.

A. Historical Perspectives and Literary Manifestations

1. Depraved Heart: Body

A brief look at how the language of "abandoned and malignant heart"[63]—and more generally the metaphors of mind, body, and heart—has historically been integrated into the criminal justice system sheds light on that system's treatment of women. The era known as the Enlightenment was characterized culturally by society's belief in the power and importance of reason. "The eighteenth century," it has been noted, "witnessed in general a certain 'euphoria about the possibility of systemisation and rationalisation.'"[64] During this time, therefore, vice came to be regarded as conduct outside this dominant, presumptively male norm; if man is basically a rational being, the only explanation for irrational conduct, such as murder, must be that it occurs outside the realm of the rational. Accordingly, it was said, "[n]othing is more certainly true than that all Vice is unnatural and contrary to the nature of Man."[65] It has also been noted that "[w]ithin the Enlightenment world view, [serious crime] was caused by some combination of environmental influence, motive, and uncontrolled passion."[66] Language of this period, in opposition to

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[63] KAPLAN ET AL., *supra* note 8, at 384.

[64] SUSAN CHAPLIN, LAW, SENSIBILITY AND THE SUBLIME IN EIGHTEENTH-CENTURY WOMEN'S FICTION: SPEAKING OF DREAD 31 (2004) (quoting SUSAN STAVES, MARRIED WOMEN'S SEPARATE PROPERTY IN ENGLAND 1660–1883, at 15 (1990)).

[65] KAREN HALTTUNEN, MURDER MOST FOUL: THE KILLER AND THE AMERICAN GOTHIC IMAGINATION 47 (1998) (quoting Benjamin Whichcote, *The Glorious Evidence and Power of Divine Truth*, *in* THE CAMBRIDGE PLATONISTS: BEING SELECTIONS FROM THE WRITINGS OF BENJAMIN WHICHCOTE, JOHN SMITH, AND NATHANAEL CULVERWEL 1, 25 (Ernest Trafford Campagnac ed., 1901)). In this era, the word "Man" referred explicitly to males.

[66] *Id.* at 45–46.

the much-lauded ideal of scientific detachment, reflects the notion that felons must be "cold-blooded" and "insensib[le]."[67]

Physiological metaphors were commonly used to aid comprehension. "A depraved and vicious Mind is as really the Sickness and *Deformity* thereof, as any foul and loathsome Disease is to the Body," proclaimed seventeenth-century Cambridge Provost and Platonist founder Benjamin Whichcote.[68] By the mid-eighteenth century, the term "cold-blooded killer" had become a mainstay of American murder reports.[69] Similar phrases proliferated; for example, three "hard-hearted" men were said to have been hired by a woman to kill her husband in "cool blood."[70] Accounts of the cases of other accused murderers reported that the crimes were committed "out of 'a cool deliberate wickedness of thought,'[71] or with a 'heart obdurate to all the feelings of nature.'"[72] The accused "remained an 'unfeeling fiend,'[73] 'insensible' of wrong-doing after the deed was done."[74]

By the early twentieth century, the metaphorical body language of criminal law found its way into popular literature. A notable cultural phenomenon of the period was the rise in popularity of detective stories, crime novels, and murder mysteries, many authored by women. Agatha Christie, Dorothy Sayers, and others broke into the fiction market with tales depicting the "middle classes . . . thoroughly riddled with dirty secrets."[75]

Karen Halttunen notes that the popular literature of murder in the nineteenth century cultivated ties between sex and violence. Through both fictional and nonfictional genres emanated

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67 *Id.* at 46.

68 Whichcote, *supra* note 65 (emphasis added).

69 HALTTUNEN, *supra* note 65, at 45 (internal quotation marks omitted).

70 *Id.* (quoting NATHAN FISKE, A SERMON PREACHED AT BROOKFIELD, MARCH 6, 1778, ON THE DAY OF INTERNMENT OF MR. JOSHUA SPOONER 6 (Thomas & John Fleet 1778)) (internal quotation marks omitted).

71 *Id.* (quoting GEORGE KEATING, TRIAL OF JOHN GRAHAM AT BALTIMORE COUNTY CRIMINAL COURT ON TUESDAY AUGUST 7, 1804, at 17 (Frayer & Clark 1804)).

72 *Id.* (quoting TRIAL OF EDWARD TINKER, MARINER, FOR THE WILLFUL MURDER OF A YOUTH CALLED EDWARD AT CARTERET SUPERIOR COURT, SEPTEMBER TERM 1811, at 42–43 (Hall & Bryan and T. Watson 1811)).

73 *Id.* (quoting CONFESSION OF JOHN JOYCE, ALIAS, DAVID, WHO WAS EXECUTED ON MONDAY, THE 14TH OF MARCH, 1801, FOR THE MURDER OF MRS. SARAH CROSS 111 (Philadelphia 1808)).

74 *Id.* (quoting A CORRECT AND CONCISE ACCOUNT OF THE INTERESTING TRIAL OF JASON FAIRBANKS, FOR THE BARBAROUS AND CRUEL MURDER OF ELIZABETH FALES AT THE SUPREME JUDICIAL COURT, HOLDEN AT DEDHAM, IN THE COUNTY OF NORFOLK, STATE OF MASSACHUSETTS, ON TUESDAY AUGUST 4, 1801 (Boston c. 1801)).

75 FRANCES GRAY, WOMEN, CRIME AND LANGUAGE 28 (2003).

> a major expression of the new pornography of pain and violence, providing both an abundance of body-horror to cater to the new excitement and a steady stream of disclaimers and apologies for its own sensationalism, which merely reinforced the illicit thrill of reading such literature. Murder literature was closely related to sexual pornography, through its tendency to fuse sex with violence on the grounds of their common obscenity, and its special interest in crimes of passion, rape-murders, prostitute-killings, and abortion-homicides.[76]

Before the century was out, murder stories featuring women as sexual objects and sexual actors were firmly grounded in popular literature.[77] The late nineteenth century especially saw growth in the publication of gendered murder tales:

> Readers were ushered into a world where pregnant single women died at the hands of inept abortionists; rape victims were murdered by their sexual assailants; rejected lovers killed their scornful sweethearts, and successful seducers killed their pregnant cast-offs; prostitutes were killed by their most favored clients; jealous husbands murdered faithless wives, and adulterous husbands killed faithful wives to mate with other women; husbands and brothers avenged the honor of their women by killing their seducers; and experimenters in sexual unorthodoxy saw their innovative arrangements erupt in deadly violence.[78]

By following some of the most sensational trials of the nineteenth century, it is possible to see how linguistic shifts and developments played out in the law itself. Over time, the language of mind and heart, reason and passion, virtue and vice, self-control and violence was superimposed on the gendered language of sex and male–female relationships.

In a nineteenth-century case, for example, we learn that James Eldredge killed Sarah Jane Gould.[79] As the prosecutor told the story, the accused enticed his victim into a sexually compromising situation. From this evidence, the jury could infer that Eldredge, acting outside the realm of reason, was depraved. Eldredge, the prosecutor argued, had "beguiled the woman" and "defiled her with his filthy embrace" before "cast[ing] his baleful eyes upon

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[76] HALTTUNEN, *supra* note 65, at 83.
[77] *Id.* at 173.
[78] *Id.*
[79] *Id.* at 179.

another object of desire" (Gould's sister).[80] He then "struck his envenomed, poisoned fangs, into her bosom."[81] In this case, the male defendant is the deviant, and it is his contemptible body and his conduct that are described with such colorful language.

Before long, however, criminal law discourse began to reflect the sexualization of violence—a situation in which sex, deemed to be a presumptively female province, is pitted against male violence. In this shadowbox, only one of two factors—sex *or* violence—is deemed the primary causal element. An 1836 case involving the murder of Helen Jewett, a twenty-three-year-old prostitute, is an example of how conflicting stories emerged in the legal world.[82] Evidence in the case strongly supported a finding that Richard Robinson had committed the crime, killing Jewett with a hatchet blow to her head and then burning her body in her bed.[83] The defense framed the question as one of competing credibility: of "reputable men" against "disreputable women."[84] This categorization placed the defendant Robinson squarely within the convention of the rational man—not cold, hard, or insensible. Accordingly, some other explanation for his apparently irrational (i.e., cold-hearted) behavior was needed. The explanation given in the press was that he had been fooled and entrapped by the women's *appearance* of innocence.[85] Sexuality, situated in the woman, was at fault.[86]

Robinson was acquitted after fifteen minutes of deliberations.[87] The trial judge had helped the defense by instructing the jury to disregard testimony by "persons who lead most dissolute lives—who were inmates of a house of a bad description . . . a house engaged in destroying both sexes."[88] Although Robinson killed Jewett, he was "reputable"—a man whose heart was

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[80] *Id.* at 179 (emphasis omitted) (quoting THE TRIAL FOR MURDER OF JAMES E. ELDREDGE, CONVICTED OF POISONING SARAH JANE GOULD 118 (Hitchcock, Tillotson & Stilwell's Steam Presses 1857)) (internal quotation marks omitted).

[81] *Id.* at 179 (emphasis omitted) (quoting THE TRIAL FOR MURDER OF JAMES E. ELDREDGE, *supra* note 80, at 118) (internal quotation marks omitted).

[82] *See id.* at 199.

[83] *Id.* at 199–200.

[84] *Id.* at 202–03 (internal quotation marks omitted). The defense argued that Robinson had not killed Jewett and suggested, without producing any affirmative evidence, that another prostitute may have murdered her. *Id.*

[85] *Id.*

[86] *See id.* at 203 ("The Jewett murder offers the supreme example of how the violent death of a fallen woman could be shaped by a Gothic narrative of sexual danger and ultimate guilt borne by the female of the species.").

[87] *Id.*

[88] *Id.*

apparently not depraved, and therefore not blameworthy. The women in the brothel, and the deceased in particular, were never explicitly identified as culpable parties, but the brothel was said to be hiding an unnamed evil, one that was responsible for "destroying both sexes." Within a few decades, that evil came to be identified explicitly as female passion or, sometimes, simply female sexuality.

One of the best known criminal cases of the nineteenth century involved the murders of five women within close proximity to each other in the Whitechapel district of London, committed by an unknown perpetrator who came to be called "Jack the Ripper."[89] It has been argued that the unsolved crimes, which were committed in 1888, marked the beginning of "The Age of Sex Crime."[90] Each of the victims had some involvement in prostitution, a factor that received intense attention in the press and in the multiplicity of fictional and nonfictional stories that were written about the case.[91] Intrigue was generated not only by reference to the depraved heart of a presumably irrational man, but also by the implicit depravity of the victims. The conventional story line established these elements as an oppositional dichotomy, one that would prove difficult to maintain.

Such dueling narratives of sex and violence may have been heralded by Lord Blackstone. They perhaps first arose not in reference to guilt, but in the context of legal responsibility. Having decreed that a woman loses her status as an individual when she marries, Blackstone was forced to contemplate who should be responsible for a wife's commission of a crime.[92] It was decided that a married man would be held responsible for crimes committed by his wife with three exceptions: treason, murder, and keeping a brothel.[93] The last exception is consistent with the idea that however much a woman's identity was subsumed in her husband's, the circumstances in which a man would have been held responsible for *sexual* transgressions were very limited.

By the twentieth century, the imagery of sex, violence, and authority had become hopelessly entangled. Almost a century after the Whitechapel murders, a man named Peter Sutcliffe was tried and convicted of thirteen

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89 PHILIP SUGDEN, THE COMPLETE HISTORY OF JACK THE RIPPER xxv, 259–60 (1994).

90 GRAY, *supra* note 75, at 42 (crediting the writer and philosopher Colin Wilson with the phrase and noting that Jane Caputi borrowed it for the title of her feminist text, *The Age of Sex Crime*).

91 *See, e.g.*, *id.* at 45 ("The victims . . . were constructed even by the radical press as deserving their fate . . . .").

92 CHAPLIN, *supra* note 64, at 35.

93 *Id.*

murders and seven assaults; all of his victims were women.[94] The opposing narratives—"depraved-heart criminal murders innocent lamb" and, alternatively, "reputable and reasonable man kills seductive, fallen female"—were already in place, along with the linguistic accoutrements. But the evidence in the Sutcliffe case did not easily conform to either plotline. The language used by investigators, as well as the popular press, shows how the "depraved heart" of guilty killers became confused and intermingled with the purportedly innocent, reasonable states of mind possessed by "reputable" men caught up in taboo sexual activity when the two types of conduct overlapped.[95] The confusion appears to be due at least in part to society's inclination to condemn women for any sexual conduct, even while finding abhorrent the murderous actions of men.[96]

Despite efforts to untangle the mixed messages and to substitute the leaner, minimalist language of science and modern news reports, the ambiguity signaled in Sutcliffe is still present in women's interactions with the criminal justice system. The urge to pardon a man's loss of control when sexual relations are involved was long ago institutionalized in the "heat of passion" defense, which could reduce murder to manslaughter. When allegations involve murder of one's adulterous spouse or her paramour, a claim of uncontrollable rage in the face of such infidelity was deemed an exceptional circumstance justifying less punishment.[97] *State v. Thornton*,[98] cited by Professor Duncan, is typical. As the appellate court, modifying and remanding the first-degree murder conviction, said in that case:

> [T]he encountering by a spouse of the situation which occurred here has been held, as a matter of law, to constitute sufficient provocation to reduce a charge of homicide from one of the degrees of murder to manslaughter absent actual malice, such as a previous grudge, revenge, or the like.[99]

Actual malice—with its emblematic image of a depraved heart—is thus distinguishable from a reasonable response to provocation of the type that incites passion.

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94 GRAY, *supra* note 75, at 63.

95 *Id.* at 64 (attributing investigative errors in the Sutcliffe case to investigators' inability to see the murderer as "a product of patriarchal culture rather than as a freak of nature").

96 *See id.* at 62–63, 73.

97 CLIFTON D. BRYANT, HANDBOOK OF DEATH & DYING 970 (2003).

98 730 S.W.2d 309 (Tenn. 1987) (cited by Duncan, *supra* note 1, at 1217).

99 *Id.* at 309.

While the language in the cases seems to camouflage gender-based viewpoints, less expressive language does not necessarily advance a women's perspective any more definitively. A recent case involving the abuse of women inmates is illustrative. It can be argued that nowhere is the intersection of authority and violence more potent than in the correctional system. Indeed, in this setting, authority may be a mask for violence. The added element of female sexuality creates perfect storm conditions. The following excerpt from *Neal v. Michigan Department of Corrections*,[100] expressed in what Professor Duncan calls "steno-language,"[101] is one court's attempt to describe the situation:

> The case arises out of allegations that male corrections personnel have systematically engaged in a pattern of sexual harassment of female inmates incarcerated by the MDOC. Specifically, plaintiffs' complaint alleged that the MDOC assigns male officers to the housing units at all women's facilities without providing any training related to cross-gender supervision; that women are forced to dress, undress, and perform basic hygiene and body functions in the open with male officers observing; that defendants allow male officers to observe during gynecological and other intimate medical care; that defendants require male officers to perform body searches of women prisoners that include pat-downs of their breasts and genital areas; that women prisoners are routinely subjected to offensive sex-based sexual harassment, offensive touching, and requests for sexual acts by male officers; and that there is a pattern of male officers requesting sexual acts from women prisoners as a condition of retaining good-time credits, work details, and educational and rehabilitative program opportunities.[102]

The court's description is almost devoid of imagery, possibly because there is no familiar story that the court could allude to. Yet this clinical recitation is itself a "mystifying cloud," almost completely hiding this single empirical, quantitative fact: "This action involves over five hundred plaintiffs . . . ."[103] While the court imposes liability, the language fails to convey any real shift in perspective. The removal of the colorful verbiage does not change the underlying or continuing confusion about causation and fault.

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[100] Neal v. Dep't of Corr., 592 N.W.2d. 370 (Mich. Ct. App. 1998).

[101] Duncan, *supra* note 1, at 1238 n.229 ("*Steno-language* refers to utterances that have a 'fixed set of associations,' the same in every context." (quoting WHEELWRIGHT, *supra* note 43, at 50)).

[102] *Neal*, 592 N.W.2d at 372.

[103] Neal v. Dep't of Corr., 2009 WL 187813, at *1 (Mich. Ct. App. Jan. 27, 2009) (per curiam).

2. Heat of Passion: Fire

The heat of passion defense, with its associated language of "cooling off," "rekindling," and, eventually "extreme emotional disturbance,"[104] derives from the earlier language of depraved hearts and lost reason. Historically, the concept flows from the ideal of the passionless woman, an ideal that arose from the need to protect the rational man from a Circean allure.[105] The logic goes something like this: If it is assumed that man is rational and violent crime is irrational, then the normal, rational man will not commit such crimes; only the exceptional, irrational man will do so. But the rational man cannot be expected to be immune to all sexual overtures or to remain calm in the face of assaults on his masculine identity. What happens, then, if a man acts rationally in responding to sexual inducement and then turns to violence? To hold men blameless, or at least find them to be sympathetic when sexual conduct was involved, the public had to look elsewhere to assign fault.

An underlying difficulty here is that women have been historically problematic legal subjects. A married woman's legal identity merged into that of her husband, but commercial interests required that unmarried women be recognized as individuals in the market place.[106] A single woman, with her future status in constant doubt since she could marry and lose her individual identity, could not be reliably viewed as an independent agent.[107] The social culture pushed to remove the uncertain status, treating a woman's unfettered sexuality as teeming with risk. Thus, one solution to the dilemma was to conclude that because a "fallen" woman naturally incites even a rational man's passion, only passionless women deserve sympathy.[108] It also follows that any woman of "passion" can be presumed to be "fallen." According to Karen Halttunen, the ultimate "sexualization of the female murder victim" in print and in the public imagination thus "rested, ironically, on the *passionless* female ideal."[109] The image of the fallen woman had no early American counterpart,

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104 *See supra* notes 11–14 and accompanying text.

105 HALTTUNEN, *supra* note 65, at 183 ("The sexualization of the female murder victim rested, ironically, on the passionless female ideal.").

106 CHAPLIN, *supra* note 64, at 35.

107 *Id.* at 146.

108 *See, e.g.*, HALTTUNEN, *supra* note 65, at 210 (noting in discussion of prostitute Helen Jewett's murder that despite expressions of sympathy in the press, accounts "clearly suggested that Jewett's death was ultimately deserved").

109 *Id.* at 183 (emphasis added).

yet it became fixed as the opposite of a sexless woman who would not provoke a man's passions with her own.[110]

Again, linguistic shifts and developments reflecting these ideas played out in the law itself. In the nineteenth century, the young Henry Leander Foote wrote an account of his life, including his murder of his cousin Emily Cooper.[111] Foote killed his cousin following a trip to New York City during which he consorted with prostitutes.[112] He claimed that obsessive thoughts about his sexual experiences in the city motivated the homicide: "But with shame! shame! do I write it, I now proceeded to examine her [Cooper's] person, which inflamed my baser passion to an unmanageable degree; and after my eyes were satisfied, I violated and robbed her of her virgin purity." Then, "held 'entirely in the power of Satan,' he slit her throat."[113] Early connections between notions of a culpable "depraved heart" and the rational man's understandable departure from reason due to the instigations of "fallen women" can be seen in Foote's account of his crime. The contrast of hard factual detail and soft imagery is also apparent.

In the twentieth century, examples abound of murderous conduct defended by reference to passionate, fallen, unworthy women. A 1930 Tennessee case relied on by the *Thornton* court, which involved the murder of the defendant's wife's paramour, is illustrative. The appellate court noted:

> [I]f as a matter of fact, the deceased had debauched the wife of plaintiff in error, and the plaintiff in error had been apprised of that fact and had become convinced of its truth . . . and, with reasonable expedition, while under the influence of passion and agitation produced by such information, had killed [the paramour], he would only have been guilty of voluntary manslaughter.[114]

By the time this case was decided, the story of the cuckolded husband was familiar and required only a slight reference to the "influence of passion."

The language of passion run amok was often intertwined with racial implications. One example is the case in which Session Boyd, a black man,

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110 *Id.*

111 *Id.* at 203.

112 *Id.* at 205.

113 *Id.* (quoting from HENRY LEANDER FOOTE, A SKETCH OF THE LIFE AND ADVENTURES OF HENRY LEANDER FOOTE (1850)).

114 Davis v. State, 28 S.W.2d 993, 996 (Tenn. 1930).

was tried for the murder of a white woman with whom he had an affair.[115] Boyd's wife (also a white woman) was reputed to be "a hooker," and Boyd, according to expert psychiatric testimony, was "predisposed" to act irrationally.[116] The victim was alleged to have acted provocatively, instigating "gossip and rumors" about the Boyd's wife, including accusations that she was a "truck stop girl" and planned to leave Boyd and move in with another black man.[117] The commingling of two familiar stories—the white trash hooker and the primitive black man—perpetuated stereotypes that need no further explanation.

A few years after *Boyd*, a federal court in New York struggled to adapt the language of passion to changing sensibilities in the case of *Grant v. Dalsheim*.[118] The defendant had been convicted of manslaughter for killing his wife's lover.[119] Not inclined to excuse the defendant's behavior as readily as some earlier courts might have done, the court was nevertheless mindful of the still prevailing image of the prudent husband incensed and driven to irrational behavior. Denying the defendant's request that his conviction be overturned because of prejudicial remarks by the prosecution, the court noted:

> The prosecutor's remarks must be considered in context . . . . A review of the prosecutor's summation indicates that it was in response to a highly emotional plea on behalf of petitioner based upon finding his wife in *flagrante delicto*. The prosecutor was justified in using robust argument in response to avoid the substitution of sympathy for reasoned consideration of the evidence offered to sustain the indictment charge. The prosecution had the right to ward off the emotional appeal and to remind the jurors that no matter how enraged the petitioner may have been because he found his wife in bed with another man, he had no right to kill him—that they were to decide the case upon the evidence and the applicable law.[120]

Even as the court sought to downplay the element of passion in defining the jury's role, it employed the kind of loaded language that might encourage a "substitution of sympathy for reasoned consideration of the evidence." Words and phrases like "highly emotional," "robust argument," "ward off

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115 Boyd v. State, 389 A.2d 1282 (Del. 1978).
116 *Id.* at 1284–86.
117 *Id.* at 1284.
118 Grant v. Dalsheim, 535 F. Supp. 1382 (S.D.N.Y. 1982).
119 *Id.* at 1384.
120 *Id.* at 1385.

[emotions]," and "enraged" suggest that more is at issue than a detached, logical assessment of evidence.

The language of fire and passion persists despite legislative attempts to modify it by—most notably, as Professor Duncan points out—turning the "heat of passion" defense into the more generic "extreme emotional disturbance" defense.[121] Certainly in cases complicated by the unresolved conflict of a presumptively rational man faced with a woman who audaciously incites his sexual passions, courts cling to the passionless woman ideal and the accompanying language of fire. Thus, for example, in a 1999 case in which the defense of extreme emotional disturbance was invoked by a man who had killed one prostitute and had attempted to kill another,[122] the court's instructions to the jury included the following language: "While the emotional disturbance need not necessarily have been a spontaneous or sudden occurrence or caused by any particular provoking event, indeed [it] may have *simmered* in the defendant's mind for [a] long period of time, the disturbance must actually have influenced his conduct at the time of the killing."[123] While courts and legislatures may be moving away from the old metaphors of fire and flame, heat and cold, the ideas surrounding men and women that in many ways helped formulate this language linger, keeping the language alive.

3. Attempt: Journey

Not surprisingly, the fire metaphor at times overlaps with images of hell, damnation, and salvation. Closely connected to these images are themes of place and time and references to the transition from dark to light (or light to dark). In criminal law, these themes and images are perhaps most developed in relation to the crime of attempt and the justification of self-defense.

A key phrase in the law of attempt that Professor Duncan highlights is *locus poenitentiae*, the place where salvation happens.[124] Because criminal acts follow a trajectory from conception to completion, it is possible to think of a criminal act as a kind of journey and of the actor as one en route to a bad end. The road to salvation can be interrupted by seduction, but, conversely, a person on the road to damnation can make a turn toward grace. Thus, as Professor

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121 Duncan, *supra* note 1, at 1206.

122 State v. Kaddah, 736 A.2d 902 (Conn. 1999).

123 *Id.* at 911 (emphasis added) (quoting the trial court's instructions to the jury on extreme emotional disturbance).

124 Duncan, *supra* note 1, at 1222.

Duncan suggests, the convict, like the sinner—or *as* a sinner—always has the potential to be saved.[125]

The idea of salvation is embedded in the American system of punishment, demonstrated by the historical emphasis on saving the soul right up to the point of execution.[126] The pursuit of salvation was a motivating factor in the establishment of U.S. prisons, and punishment has always been accompanied by spiritual advice.[127] According to the doctrine of the atonement, an idea subscribed to by early English settlers, "a repentant murderer enjoyed the same access to free grace as any other sinner."[128]

Halttunen relates the story of Esther Rodgers, an American tale of the spiritual journey to salvation. Rodgers was born in Maine in 1680.[129] She was apprenticed at the age of thirteen and, at seventeen, "committed her first murder, stopping the breath of her newborn child, the fruit of an illicit liaison with a Negro serving in the same household."[130] The crime, however, went undetected until a few years later, when Rodgers again gave birth and then buried the (possibly stillborn) infant.[131] Upon discovery of the infant's body, Rodgers was prosecuted, and she then confessed to the earlier homicide.[132]

In 1701, John Rogers, a preacher, published Esther Rodgers's confession, along with three "execution sermon[s]" he made on Esther Rodgers's behalf before her execution, in a booklet entitled *Death the Certain Wages of Sin of the Impenitent.*[133] In it, Reverend Rogers focuses on "the spiritual pilgrimage of Esther Rodgers as she moved from a state of religious indifference to overwhelming conviction of sin to a strong hope, as her execution drew near, in her salvation."[134] Halttunen highlights that, according to John Rogers, Esther Rodgers was "[o]nce an irreligious, unchaste woman willing to destroy her own child to conceal her vicious conduct, [but] had been spiritually transformed during her eight months of bondage, and had emerged from prison

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125 *See id.*

126 *See* HALTTUNEN, *supra* note 65, at 20 (noting that the practice of reading a criminal's confessions aloud was "a central part of execution ritual").

127 Nancy L. Cook, *The Sky in a Box: Reflections on Prisons, Preachers, Storytelling and Salvation*, 3 FLA. COASTAL L. REV. 135, 140 (2002) (discussing the religious foundations of American prisons).

128 HALTTUNEN, *supra* note 65, at 20.

129 *Id.* at 7.

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.* at 7–8.

134 *Id.* at 8.

'Sprinkled, Cleansed, Comforted, a Candidate of Heaven.'"[135] The idea of opportunity for grace is carried over in Rogers's exhortation to the public who witnessed Esther Rodgers's execution. "This Serves only to draw the Curtain," he said, "that thou mayst behold a Tragick Scene, strangely *changed into a Theater of Mercy.*"[136]

While the possibility of finding a path to salvation was believed to exist up until the moment of death, there was the countervailing possibility of falling from a righteous path at any moment. And historically, crime narratives have reflected this belief with regard to the potential for temptation, seduction, or falling from the path to heaven. With respect to women, one such narrative aligns feminine beauty with weakness; weakness leads to sin and therefore justifies men's authority over women. This same beauty can be deceptive, disorienting the male observer with "'confused, uncertain images' which are the hallmark of the 'grander passions.'"[137] The idea of the female body as a "deceitful maze"[138] places women in the role of entrapper or seducer—the Medusa with her "tempestuous loveliness of terror."[139] Following this logic, in the nineteenth century, medical experts tried to show connections among prostitution, crime, and insanity. For example, after visiting Parisian prostitution circles, prisons, asylums, and hospitals, Dr. Augustus Kinsley Gardner, an averred specialist in both obstetrics and insanity, reported his findings on the relationship between female sexuality and insanity and the impact of these variables on criminal deviance.[140]

These attitudes have also been expressed in crime narratives. In the 1936 case of Helen Jewett's murder, reports of the young woman's demise "by the hatchet of the midnight assassin[] and the flame of the incendiary"[141] present

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[135] *Id.* (quoting John Rogers, Jr., *The Declaration and Confession of Esther Rodgers, 1701*, *in* THE ENGLISH LITERATURES OF AMERICA, 1500–1800, at 404, 404 (Myra Jehlen & Michael Warner eds., 1997)). *The Declaration and Confession of Esther Rodgers* originally was published as part of *Death and Certain Wages of Sin of the Impenitent*. THE ENGLISH LITERATURES OF AMERICA, 1500–1800, *supra* at 404.

[136] John Rogers, Jr., *supra* note 135, at 404 (emphasis added).

[137] CHAPLIN, *supra* note 64, at 20 (quoting EDMUND BURKE, A PHILOSOPHICAL ENQUIRY INTO THE ORIGIN OF OUR IDEAS OF THE SUBLIME AND THE BEAUTIFUL 79 (Harper & Brother Publishers 1860) (1757)).

[138] *Id.* (quoting BURKE, *supra* note 137, at 145).

[139] Percy Bysshe Shelley, *On the Medusa of Leonardo da Vinci in the Florentine Gallery*, *in* 1 POEMS FOR THE MILLENNIUM l, 32 (Jerome Rothenberg & Jeffrey C. Robinson eds., 2009).

[140] G.J. BARKER-BENFIELD, THE HORRORS OF THE HALF-KNOWN LIFE: MALE ATTITUDES TOWARD WOMEN AND SEXUALITY IN NINETEENTH-CENTURY AMERICA 83 (1976).

[141] HALTTUNEN, *supra* note 65, at 201 (quoting THE LIFE OF ELLEN JEWETT; ILLUSTRATIVE OF HER ADVENTURES WITH VERY IMPORTANT INCIDENTS, FROM HER SEDUCTION TO THE PERIOD OF HER MURDER, TOGETHER WITH VARIOUS EXTRACTS FROM HER JOURNAL, CORRESPONDENCE, AND POETICAL EFFUSIONS 45 (New York 1836)). *The Life of Ellen Jewett* is one of several pamphlets that was published around the time of

the chronology as a logical progression from a move into a brothel to a tragic end. It was not the perpetrator's situation that caught the public's attention but the victim's journey from innocence to sin to a fiery end—described in the intertwined language of sex and violence. Karen Halttunen explains:

> That envious working girl had failed to see "the future picture of the burnt and blackened body, and the ghastly gashes in the brain, which were to be the epilogue of the fine show and false delight." When popular accounts described Jewett "with her transparent forehead half divided with a butcher's stroke, and her silver skin burnt to a cinder where it was not laced with blood . . ." they suggested that [her] death was the inevitable result of her sexual fall.[142]

Henry Leander Foote's similar accounts of his own crimes portrayed prostitutes as the activating agents.[143] As discussed, Foote not only raped and killed his cousin following an episodic consortium with prostitutes; he also killed his mother when she took away the liquor he had begun to imbibe freely.[144] In his account, Foote blamed liquor, prostitutes, and "licentious novels" for his conduct.[145] Specifically with regard to the prostitutes, he reproved "those fine looking women" who "array themselves in the most gay costume, adorn their persons with pearls, rings, paint, and jewels, and perfume themselves till they smell as sweet as an oriental garden to enchant and bewitch young men."[146] Having been "enticed" by the "snares, arts, and devices of the harlot," he was not in control.[147]

By the mid-twentieth century, the distinctions between the rational man unwittingly seduced and the cold-hearted man with a depraved heart and between the virginal, passionless woman and the fiery seductress were routinely woven into the analysis of crimes that crossed gender lines. These distinctions are drawn in the Sutcliffe murder case, which involved multiple victims.[148] Investigators sorted out relatively "deserving" victims from the

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Helen Jewett's murder and refers to Helen Jewett as Ellen Jewett. *See* Patricia Cline Cohen, *The Helen Jewett Murder: Violence, Gender, and Sexual Licentiousness in Antebellum America*, 2 NWSA J. 374, 380–82 (1990). (Due to the limited availability of the pamphlet, the page numbers are taken from secondary sources.).

142 *Id.* (quoting GEORGE WILKES & H.R. HOWARD, THE LIVES OF HELEN JEWETT AND RICHARD P. ROBINSON 40, 119 (T.B. Peterson 1849) [hereinafter THE LIVES OF JEWETT AND ROBINSON]).

143 *Id.* at 203–05.

144 *Id.* at 205.

145 *Id.* at 204 (quoting FOOTE, *supra* note 113, at 35) (internal quotation marks omitted).

146 *Id.* at 204 (quoting FOOTE, *supra* note 113, at 35–37) (internal quotation marks omitted).

147 *Id.* at 206 (quoting FOOTE, *supra* note 113, at 39–43) (internal quotation marks omitted).

148 GRAY, *supra* note 75, at 63.

"innocent" based on the linguistic doublethink of whore/victim.[149] The chief investigator in the case picked up on Sutcliffe's judgments about his victims: that by walking alone at night, walking slowly, or making gestures that could be interpreted as being provocative, Sutcliffe's victims triggered a kind of "insane" response from him.[150] The police were put on the defensive by Sutcliffe's twisted assertions of victim fault, prompting assurances at a press conference that they intended to "continue to arrest prostitutes" and were concerned about the possibility that "innocent girls" were being targeted.[151]

Throughout history, a thread of mitigation has run through criminal law discourse that suggests a reduced culpability on the part of the perpetrator when crime was triggered by sexual temptation. Sir Robert Anderson, lead investigator in the "Jack the Ripper" case, writes in his memoir, *The Lighter Side of My Official Life*, that warning prostitutes off the streets brought an end to the deadly crime spree of the never-found murderer, thus implying that the women's conduct had been the main source of the problem.[152] At the same time, there are suggestions in criminal law literature that the *women*, rather than the perpetrators, can find redemption. Even Harriet Vane, the talented, independent protagonist of Dorothy Sayers's detective novels, can be viewed as a woman who has found her way when at last she marries. In the eyes of many readers, says Frances Gray, "[Vane's] marriage to Peter Wimsey *redeems* her past."[153]

4. The Castle Doctrine: Feudal Past

Some of criminal law's historical connections go back much further than the Enlightenment or Victorian times: The law of self-defense, like the law of attempt, hearkens back to the feudal era in England. By its very appellation, the castle doctrine of self-defense evokes the history and social culture of medieval times. The castle doctrine is framed in much the same way as the heat-of-passion exemption: a justifiable response to an unendurable affront. The language associated with claims of right (in the case of self-defense) and claims of mitigation (in cases of attempt and heat of passion) suggests

149 *Id.* at 72–73.
150 *Id.* at 73.
151 *Id.* at 73 (quoting an October 1979 newspaper article from the *Evening News*).
152 *Id.* at 45 (citing SIR ROBERT ANDERSON, THE LIGHTER SIDE OF MY OFFICIAL LIFE 197 (1994)).
153 *Id.* at 29.

necessity, inevitability, and timelessness.[154] And in cases where women are implicated as criminal actors, victims, or essential third parties, this language reflects the refinements of social judgments about the men and women involved.

The eloquent phrases defining self-defense and attempt fittingly reflect the paradoxes in law and society. The castle conjures up images of knights in armor, battlements, the defense of property, and assertions of right and might. Within this world, women were property, part of the owned estate.[155] There were exceptions to this principle; unmarried women (and even married women in some circumstances) could own property in their own right.[156] For the general principle that women were property to hold true, two accommodations were made: married women who owned property were treated in law, though not in reality, as *femmes sole*; and unmarried women were treated as *not-yet-married* women.[157] This conception preserved the identity of men as kings of the castle. It also marginalized independent women, putting social interactions with them or their oft-presumed equivalents, "fallen women," on a different footing.

One manifestation of the friction between woman-as-property and woman-as-property-owner can be seen in the evolution of the discourse surrounding the crime of rape. Rape was for many centuries considered a crime against property—a man's property.[158] Consensual sex between a woman and a man who was not her husband meant the ruination of the woman's future, and consent was presumed in the absence of clearly expressed resistance.[159] A woman could exercise free will by consenting to or refusing sexual relations, but these actions were not on her own behalf.[160] And once she, as "property,"

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[154] The appellation comes from the adage, "A man's home is his castle." As Joel Prentiss Bishop explained in "Defence of the Castle" in his 1877 criminal treatise, "it may now be deemed to be reasonably clear, that, to prevent an unlawful entrance into the dwelling-house, the occupant may make defense to the taking of life, without being liable for even manslaughter." 2 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 707, at 393 (6th ed. 1877); *see also* Nancy L. Cook, *In Celia's Defense: Transforming the Story of Property Acquisition in Sexual Harassment Cases into a Feminist Castle Doctrine*, 6 VA. J. SOC. POL. & L. 197, 287 (1999).

[155] Cook, *supra* note 154, at 247–48 (discussing the history of the legal concept of women as property).

[156] *See* CHAPLIN, *supra* note 64, at 145–46 (discussing the legal treatment of women property owners).

[157] *Id.*

[158] GRAY, *supra* note 75, at 85.

[159] *See id.* ("Under the Deuteronomic code, a betrothed woman discovered having sex with another man in the town could be executed on the grounds that her transgression was voluntary 'because she did not cry for help.'").

[160] *Id.*

was "damaged" and rendered worthless, there was nothing to be done but destroy or discard her, a fate imposed even on those identified as "innocents" and "true" victims.[161] Even literature seemed unable to find any other way to rectify the contradictions while preserving men's dominant status.

Within these narratives are the images of darkness and light. The castle is not only associated with royalty, Arthurian romance, and power but also with the cold and dark of stone walls, dungeons, secret passages, intrigue, and horror.[162] Reason, that central characteristic of the "Enlightenment" man, represents a quest for light.[163] Blackstone, who compares law to a Gothic castle, sees more in the symbolism than awe-inspiring authority; he also sees mystery, the timeless void of human origins—a wild, shadowy nature to be tamed.[164] The mission of the rational man is to exercise control over nature. But the dark side of nature is always threatening, and one potential source of the darkness is the female of the species.

The rational man's defense to murder reveals this mindset. One explanation for Peter Sutcliffe's murderous spree was his claim that the first murder was provoked by a prostitute's taunt regarding his sexual inadequacy.[165] Sutcliffe's inability to assume a proper role in relation to a woman of dark passions created a "cocktail of frustration, guilt and humiliation" that understandably, according to press reports, "could lead to fury."[166] Reports of Richard Robinson's murder of Helen Jewett in a New York City brothel also suggest a rational response to the deep, dark threats within and outside the castle walls. Further, they suggest that Jewett's death was ultimately deserved. Discussing that case, one commentator described prostitutes as "a troop of gaudy poisoners, teeming with disease," allowed to "stream through the street, carrying death beneath their skirts."[167] Thus, a

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161 *See, e.g.*, Judy M. Cornett, *The Treachery of Perception: Evidence and Experience in Clarissa*, 63 U. CIN. L. REV. 165, 177 n.79 (1994) (describing the plot of Samuel Richardson's novel *Clarissa*, in which the protagonist "eventually withers away and dies" after being raped); WILLIAM SHAKESPEARE, THE RAPE OF LUCRECE ll. 1700–16 (where Lucrece, the victim of a rape, commits suicide); WILLIAM SHAKESPEARE, TITUS ANDRONICUS act 5, sc. 3 (where Titus kills his own daughter, Lavinia, to protect her from the shame of living as a rape victim).

162 CHAPLIN, *supra* note 64, at 127–28.

163 *See id.* at 24 (discussing the idea that, according to Hobbes, man's "being in the dark" creates anxiety that motivates a desire for knowledge, i.e., "enlightenment").

164 *Id.* at 27 (citing WILLIAM BLACKSTONE, COMMENTARIES *33).

165 GRAY, *supra* note 75, at 67–68.

166 *Id.* at 68 (quoting a *London Observer* article published May 7, 1981).

167 HALTTUNEN, *supra* note 65, at 201 (quoting THE LIVES OF JEWETT AND ROBINSON, *supra* note 142, at 79) (internal quotation marks omitted).

woman like Helen Jewett, who would "entice the wayfarer with her blandishments, and willfully and basely light a fire in his bones . . . *should be treated as a murderess*."[168] The rational man's death blow to such a woman could be construed, "like the slaying of Medusa, as an act of just retribution and collective male self-defense."[169] A *New York Herald* story similarly employed blame-shifting language: "How could a young man perpetrate so brutal an act? Is it not more like the work of a woman? Are not the whole train of circumstances within the ingenuity of a female, abandoned and desperate?"[170] Incorporating the imagery of fire and pestilence, ancient Greek wisdom, and the innocent wayfarer, these stories imply an undeniable and inevitable conclusion that the male perpetrator's conduct was justified.

As white western women sought more independence, and the law granted them more legal rights and privileges, the story language that had been developing in criminal justice continued to have significant impact on their fates. A highly publicized case in England in the early 1920s involved Edith Thompson, who was hanged as an accomplice (along with her paramour, the actual killer) for the murder of her husband.[171] Thompson's case illustrates the continuing uncertainty of the place of women in western culture, even as the law was evolving. Thompson was steeped in romantic tradition, a fact reflected in letters she wrote to her lover, which were filled with references to romantic novels and the trappings of a freethinking society.[172] While she describes herself as behaving in the detached and passionless manner expected of women—at the Waldorf, waiting to have tea, wearing a black frock—she nevertheless situates herself as a modern, independent woman, free to flirt and enjoy life's adventures.[173] She thereby puts herself outside the castle's protection. The circumstantial evidence of her complicity in her husband's murder relied on the narrative model of a romantic Victorian-turned-independent woman unredeemed. Ultimately, in the public eye, she seemed to

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168 *Id.* at 201 (quoting THE LIVES OF JEWETT AND ROBINSON, *supra* note 142, at 79) (internal quotation marks omitted).

169 *Id.*

170 *Id.* at 202 (citing DANIEL A. COHEN, PILLARS OF SALT, MONUMENTS OF GRACE: NEW ENGLAND CRIME LITERATURE AND THE ORIGINS OF AMERICAN POPULAR CULTURE 1674–1860, at 21 (1993) (quoting a *New York Herald* article published April 14, 1836)).

171 GRAY, supra note 75, at 20.

172 *Id.*

173 *Id.*

become the castle's ghost, neither evil woman of passion nor cool hostess of virtue.[174]

Recent events highlight how these historical patterns have had dire consequences for women in modern times. For example, in 1994, female inmates of Michigan's prisons brought suit in federal court alleging civil rights violations through multiple acts of physical abuse and sexual harassment. Newspaper reports of the trial noted that "[t]he women's stories were different, and yet the same."[175] Most of the women said they had not reported the abuse.[176] "There was no point, they testified," because nothing would be done.[177] Moreover, there was great risk, according to the women's testimony, because "officers could and did retaliate with tickets for misconduct that could put them in isolation, and cost them access to their education, visitation, and even their release."[178] In this narrative are echoes of the impregnable castle, fortified and controlled by the men who own it. Press coverage of the case repeatedly described the prison environment as one in which a "culture of impunity" reigned.[179] "Culture of impunity," a term often associated with torture and genocide, is perhaps part of the new millennium's beautiful language, a late-century model of darkness, dungeons, and unrestrained natures. It suggests, in this context, that the guards and prison officials who engaged in rape, sexual assault, intimidation, and other forms of abuse against female inmates acted with a "depraved heart," but without fear of punishment. Thus, the evocative poetic language of the criminal law is transformed and comes full circle.

C. Professor Duncan's Linguistic Theory in Context

Professor Duncan's analysis of why courts might choose to lean on the poetic language of criminal law readily applies in the context of women in the criminal justice system. Participants in the system use the language she quotes in this context as much as, if not more often than, in other contexts as a way of evading precise definition. The evocative power of language is particularly

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174 *Id.* at 24 (describing Edith Thompson as a "silenced object to be looked at"—both a "spectacle to incite compassion" and an "unclean" woman threatening social stability).

175 Susan L. Oppat, *Prison Guard Abuse Lawsuit Goes to Jury*, ANN ARBOR NEWS, Jan. 31, 2008, *available at* http://blog.mlive.com/annarbornews/2008/01/prison_guard_abuse_lawsuit_goe.html.

176 *Id.*

177 *Id.*

178 *Id.*

179 Eric D. Campbell, *Women Prisoners' Lawsuit Addresses MDOC Abuse*, MICH. CITIZEN, Sept. 25, 2009 (quoting U.S. Human Rights Watch director David Fahti).

evident when matters of gender are implicitly at issue. Historical associations also can be easily seen; indeed, where women are concerned, allusions to cultural markers might be viewed as a well-oiled slope to preserve historical, gender-based rights and privileges.

1. Evasion of Precise Definition

One reason frequently given as to why the language of criminal law stories, in case law and elsewhere, tends to be vague, impressionistic, or imprecise is that the subject matter of mystery and horror does not lend itself to easy description. Writing about the difficulty in conveying a story of death, because its discovery that comes only in sensory perceptions, Virginia Woolf asserts, "[W]e cannot possibly break out of the frame of the picture by speaking natural words."[180] This reasoning has been used over time to account for writers' and tellers' inability to articulate with any exactitude the events, causes, and consequences of serious violence. "Language is incapable of giving utterance to the feelings that shock the soul as its horrors and enormities are brought before us," states one nineteenth-century author.[181] In part, says Karen Halttunen, this belief has been "[s]haped by the . . . dominance of legal narrative, [wherein] murder remains a 'mystery,' fragmentary and open-ended, resistant to full moral closure."[182] Halttunen herself accepts this perspective, observing:

> True-crime literature is engaged in an endless exploration of a question to which we have no satisfying answer. All it can do is to repeat over and over again, with each horrifying revelation of some new case, that murder is fundamentally a mystery—resistant to full knowledge and moral comprehension—and a horror—unspeakable, unimaginable, inexplicable.[183]

In order to convey what is understood to be true, the reporter requires "a language beyond the literal."[184]

This may be one explanation for the imprecision of language in criminal law, but it is likely that there are other reasons as well. For instance, in many criminal matters, the ambiguous language may be used to hide our shame.

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180 VIRGINIA WOOLF, *Three Pictures*, *in* DEATH OF THE MOTH AND OTHER ESSAYS 14 (1942).

181 HALTTUNEN, *supra* note 65, at 73 (quoting an unspecified mid-nineteenth-century popular murder anthology) (internal citation marks omitted).

182 *Id.* at 242.

183 *Id.* at 244.

184 GRAY, *supra* note 75, at 93.

Four different examples involving intimate relationships with women can be used to demonstrate how shame plays a role in transference, denial, avoidance, and self-deception, possibly accounting for some uncertain or unclear language: seventeenth-century law on infanticide; eighteenth-century defenses to charges of infanticide; conditions in women's prisons in modern times; and investigative findings into conditions in modern women's prisons.

The idea of shame was explicit in the lexicon of English and early Anglo-American law. The preamble to a 1624 infanticide statute, which called for the execution of any mother of a dead infant in the absence of proof that the child had been born dead, is illustrative: "WHEREAS many lewd women that have been delivered of bastard children, to avoid their shame, and to escape punishment, do secretly bury or conceal the death of their children, and after, if the child be found dead, the said woman do allege, that the said child was born dead," guilt was presumed and the ultimate punishment was required.[185] Applicable only to unmarried women, whose "lewd[ness]" was the family's and the community's shame, the situations to which the statute referred were often described in general terms.[186] One account of a 1679 case, for example, reported that the accused, "consenting that she was never married," had been convicted of "a crime in itself so horrible and unnatural, as one would think no person, especially of that sex, which is considered the most tender hearted and merciful, could be guilty of such an inhumane Impiety."[187] The crime referred to is infanticide—murder—even though the proof consisted only of evidence that the defendant delivered the child and did so without a witness present to attest to the child either not having been alive at birth or having died of natural causes.[188] Here, shame is used as justification for criminalization and to silence those to whom the shame attaches. Vague language ensures that a full delineation of events is not revealed.

Within the next half century, women would use shame as a defense strategy. If a woman could provide evidence of her own virtue and proof of seduction by an irrational man, she might convince a court that she "did it to hide Shame."[189] By cloaking herself in shame, and giving up a claim to fully

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185 CHAPLIN, *supra* note 64, at 87–88 (citing the preamble to Statute of James I, 1634, c. 27, § 21 (Eng.)).

186 *Id.* at 88.

187 *Id.* (quoting PETER C. HOFFER & N.E.H. HULL, MURDERING MOTHERS: INFANTICIDE IN ENGLAND AND NEW ENGLAND 1558–1803, at 67 (1981)).

188 *Id.*

189 *Id.* at 89 (citing the case of Sarah Hayes, decided April 9, 1746, Proceedings of the Old Bailey); *see also* Sarah Hayes, Killing, The Proceedings of the Old Bailey—London's Central Criminal Court, 1674–1913,

autonomous agency, an unmarried woman might preserve some measure of status or, at least, her life.[190] The trade-off was that women would be regarded as "real objects of our greatest pity."[191] The "cause of this most horrid crime"—infanticide—was deemed to be "an excess of what is really a virtue, of the sense of shame, or modesty."[192] The language remains nebulous, but the veiled cause of the crime—shame—is now identified as a virtue rather than a vice.

A more recent example, drawn from the reflections of women inmates on dysfunctional intimate relationships that contributed to their involvement in the criminal justice system, suggests women have internalized shame in connection with sexual identity, if not as a virtue, at least as an understood expectation. In the late twentieth century, as in the mid-eighteenth century, this assumption of shame created conflicts for women caught up in the criminal justice system. In strikingly clear terms, one inmate in the New York prison system explains it this way:

> A lot of women in here won't be woman enough to say that they were abused by a man. I want women to know that I was abused by a man and I'm doing time for a man, and that's something I'm never going to do again once I'm released. I'm not that proud; I was used by this man, I was abused by this man, and I went through enough.[193]

It is not only the abused themselves who experience shame; even those who recognize and condemn acts of abuse employ language that hides the real experience. The female Michigan inmates who filed the suit alleged that they were required to

> *perform basic hygiene and body functions* in the open with male officers observing; that defendants allow male officers to observe during *gynecological and other intimate medical care*. . . that women prisoners [were] routinely subjected to *offensive sex-based sexual harassment, offensive touching, and requests for sexual acts by male officers*; and that there [was] a pattern of male officers requesting sexual acts from women prisoners as a condition of retaining good-

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http://www.oldbaileyonline.org/browse.jsp?id=t17460409-47-defend695&div=t17460409-47#highlight (last visited June 5, 2010).

190 *See id.*

191 *Id.* at 90 (citing THE LETTERS OF ERASMUS DARWIN 42 (Desmond King-Hele ed., 1981).

192 *Id.* (citation omitted).

193 PAULA C. JOHNSON, INNER LIVES: VOICES OF AFRICAN AMERICAN WOMEN IN PRISON 129 (2003) (discussing the story of Marilyn).

> time credits, work details, and educational and rehabilitative program opportunities.[194]

Having eliminated the coded language of passion and fire, writings that examine women and men in the criminal justice system now substitute a different coded language, one that is equally indefinite and vague.

Legislatures, courts, and others in the criminal justice system have attempted to neutralize the language of criminal law, replacing, for example, "heat of passion" with "extreme emotional disturbance" and avoiding charged terminology. But the result isn't necessarily any different and may spring from the same motivation—a disinclination to confront the experience of shame. In one case cited by Professor Duncan, the testimony an expert witness about the defendant's state of mind and the court's explanation of the applicable law are evasive to the point of being self-deceptive.[195] The psychiatrist's conclusions on the issue of extreme emotional disturbance were expressed: "Like as in any love, there is hate and with passive people there is more love on the surface than hate and this came out. He was predisposed to his personality at times to overreact with repressed hostility."[196] The court, amplifying the confusion, charged the jury:

> There must be a reasonable explanation for the existence of the extreme emotional disturbance or distress. It is not the person who must be reasonable at the time because a reasonable man would not intentionally kill another person; it is the frenzy of mind based upon a reasonable explanation which is basic to the jury's determination.[197]

Relying on the assumption that men are reasonable, and only a man far outside the norm or justly provoked would engage in such violence, the court's language here raises a question of whether, in the circumstances of this case, those involved in the trial were unable to fit the facts into the presumptive norm.[198]

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194 Neal v. Mich. Dep't of Corr., 592 N.W.2d. 370, 372 (Mich. 1998) (emphasis added).

195 *See* Boyd v. State, 389 A.2d 1282, 1286 (Del. 1978). Professor Duncan references *Boyd* in Duncan, *supra* note 1, at 1206.

196 *Boyd*, 389 A.2d at 1286.

197 *Id.* at 1288 (emphasis omitted).

198 The case came out of rural Delaware in 1978, and the defendant, a black man married to a white woman, had killed his white paramour. *Id.* at 1282.

2. Power of Language

Certainly, the criminal law's language is as memorable, evocative, and associative with respect to women as it is in other contexts. Romantic motifs and subliminal messages abound in this as in other forms of reportage. As Toni Morrison writes:

> The symbolic language that emanates from unforeseen events supplies media with the raw material from which a narrative emerges—already scripted, fully spectacularized and riveting . . . . Underneath the commodified story (of violence, sex, race, etc.) is a cultural one. . . . The spectacle is the narrative; the narrative is spectacularized and both monopolize appearance and social reality. Interested only in developing itself, the spectacle is immune to correction.[199]

In some sense, the symbiosis between narrative and spectacle has always been part of the criminal justice system. Professor Duncan elucidates historical differences in public manifestations of the relationship, specifically in the Romantic and overtly scientific Enlightenment eras. She quotes historian and philosopher Richard Tarnas: "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, in contrast, reality was concrete and literal, univocal."[200] The nineteenth century ushered in the practice of looking to cultural context for causational clues, leading to social and behavioral consequences of the sort Toni Morrison identifies. As a "humanitarian revolution" took hold, the symbiosis changed in appearance, though not in its fundamental character.[201] This nineteenth-century "humanitarian revolution in sensibility . . . introduced a whole range of new attitudes towards violence, pain, and death, [and] provided the necessary cultural context for sensationalist murder literature."[202] Evidence abounds that such notions apply to cases involving women in the criminal justice system. A brief chronology that highlights the language used by prosecutors, defense attorneys, medical experts, the accused, the police, prison guards, and

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[199] Toni Morrison, *Introduction* to BIRTH OF A NATION'HOOD: GAZE, SCRIPT, AND SPECTACLE IN THE O.J. SIMPSON CASE xvi–xvii (Toni Morrison & Claudia Brodsky Lacour eds., 1997).

[200] Duncan, *supra* note 1, at 1239 (quoting RICHARD TARNAS, THE PASSION OF THE WESTERN MIND 368 (1991)).

[201] *See infra* notes 202–205 and accompanying text.

[202] HALTTUNEN, *supra* note 65, at 78.

oversight agents demonstrates how common and pervasive the use of evocative, allusive language is in this context.

In the early part of the nineteenth century, the prosecutor in the case against James Eldredge, a man alleged to have poisoned pregnant Sarah Jane Gould because he had fallen in love with Gould's sister,[203] used a Biblical reference to persuade the jury of Eldredge's guilt.[204] He introduced the image of the serpent in the Biblical tale of the Garden of Eden, arguing that the defendant tempted the woman, and, like that "serpent of old," brought her to shame and ruin.[205] In another nineteenth-century case, the defense used the same analog, but this time it was to excuse the conduct of an accused murderer. In the Richard Robinson case, in which the defendant was alleged to have murdered a prostitute, it was a woman, not the defendant, who was compared to the serpent.[206] Robinson's attorney similarly referenced the story of Adam and Eve in the Garden of Eden.[207] He portrayed the prosecution's chief witness, the owner of the brothel where the homicide occurred, as "corrupt and rotten," "polluted," and a "tender flower concealing the serpent that is beneath."[208] In these examples, the lawyers wove allusions and metaphors into their arguments to create spectacle in the court and promote the adoption of the related narrative in the public's consciousness.

During this same period, medical experts adopted the language of nature in their analyses of aberrant or deviant behavior. The improper use of words, alleged to be an "abuse of words," was itself deemed to be madness.[209] Nearly all of woman's biological ailments were said to originate in her reproductive organs—"the seat of her diseases."[210] Some physicians believed that menstruation was itself a form of disease, and others believed that sexual desire in a woman was a pathological condition.[211] The "controlling

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[203] *See supra* notes 79–81 and accompanying text.

[204] HALTTUNEN, *supra* note 65, at 179.

[205] *Id.* at 179 (quoting THE TRIAL FOR MURDER OF JAMES E. ELDREDGE, *supra* note 80, at 118) (internal quotation marks omitted).

[206] *Id.* at 202.

[207] *Id.*

[208] *Id.* (quoting RICHARD P. ROBINSON ET AL., MURDER MOST FOUL!: A SYNOPSIS OF SPEECHES OF OGDEN HOFFMAN, THOMAS PHENIX, HUGH MAXWELL, JUDGE EDWARDS, & C. ON THE TRIAL OF ROBINSON, FOR THE MURDER OF ELLEN JEWETT (1836)).

[209] CHAPLIN, *supra* note 64, at 25 (quoting THOMAS HOBBES, LEVIATHAN 146 (C.B. Macpherson ed., 1986) (1651)) (internal quotation marks omitted).

[210] CARROLL SMITH-ROSENBERG, DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA 183–84 (1985) (quoting JOHN WILTBANK, INTRODUCTORY LECTURE FOR THE SESSION 1853–54, at 7 (1854)).

[211] *Id.* at 184.

influence" exerted upon a woman by her reproductive processes was believed to extend to her mental state.[212] Hysteria, a "morbid state" in men, was deemed the "natural state" in women.[213] Pregnancy, childbirth, lactation, and menstruation all placed women in the dangerous state of "temporary insanity" in which they were "more prone than men to commit any unusual or outrageous act."[214] Such ideas, dressed in the romantic language of nature and presented at trials in the form of expert testimony, were used as medical authority to advance the passionless ideal.[215]

This reliance on evocative imagery persisted throughout the twentieth century. Edith Thompson, whose trial for murder in Great Britain has been the subject of historical commentary and literature since its occurrence in 1922, subscribed to the narrative scripts of her time. In letters written to her lover before her husband's death, Thompson playfully relates stories in the coded language of the dominant criminal justice discourse. In one, she describes an encounter with a man looking for a woman who called herself "Romance" with whom he had corresponded through the "Personal Column."[216] The romantic images of black lace and roses are notable in Thompson's letter along with reference to the possibility that the man in search of "Romance" was "mad."[217] Similarly, the public narrative that followed Thompson's hanging "partook of the nature of spectacle"; rumors circulated about her going mad or miscarrying,[218] and social commentators exploited her death to advocate against either the death penalty or the "flaccid sentimentality" of the anti-capital punishment lobby.[219]

The discourse of spectacle and evocation has become a part of everyday speech in the criminal justice system—so embedded that it persists even when the speaker intends to convey the opposite impression. When the court in *Grant v. Dalsheim*[220] attempted to insist on deliberations free from emotion, it

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212 *Id.* at 183 (quoting WILTBANK, *supra* note 210, at 7).

213 *Id.* at 206 (quoting THOMAS LAYCOCK, AN ESSAY ON HYSTERIA 76 (1840)).

214 RICHARD W. WERTZ & DOROTHY C. WERTZ, LYING-IN: A HISTORY OF CHILDBIRTH IN AMERICA 57 (1989) (quoting HORATIO R. STORER & FRANKLIN FISKE HEARD, CRIMINAL ABORTION: ITS NATURE, ITS EVIDENCE, AND ITS LAW 100–01, n.2 (1868)).

215 *Id.*

216 Letter from Edith Thompson to Frederick Bywaters (Aug. 15, 1922) (excerpted in GRAY, *supra* note 75, at 20).

217 *See id.*

218 GRAY, *supra* note 75, at 22.

219 *Id.* at 24 (quoting Letter from T.S. Eliot to the *Daily Mail* (Jan. 8, 1923)) (internal quotation marks omitted).

220 Grant v. Dalsheim, 535 F. Supp. 1382 (S.D.N.Y. 1982).

ironically used language that was rife with appeals to emotion: "robust," "ward off," and "enraged."[221] More recently, a prison warden related his belief that "an inmate is an inmate, whether you're female, whether you're a male,"[222] describing the sameness in language that plays to coded stereotypes:

> To me you're an individual, you just happen to be female. It doesn't mean that you are more *slick* or more *sly* than the male inmates. I see the equivalence. An inmate is an inmate. I think some people who have stereotypes could say, "Female inmates *whine* a little bit more, *they press* to get their way, *they keep pushing and pushing and pushing, or they cry.*" There are men that are that way.[223]

Similarly, a Human Rights Watch Report, detailing instances of violence against female inmates uses language that conjures up familiar images, albeit less conspicuously:

> [O]fficers often *target like a radar* women with histories of sexual or physical abuse or prisoners in *emotionally vulnerable* positions such as those who lack support from family or friends, who are *alienated or isolated* by other prisoners or staff and younger women who are incarcerated for the first time.[224]

There is something reminiscent of the depraved heart in the phrase "target like a radar," although it arises not from an environment in which the rational man is the norm and violence is an aberration but rather from an environment in which violence has come to be accepted in a "culture of impunity." Perhaps of equal significance is the fact that alienation, isolation, and vulnerability are themes of Romanticism and call to mind Romanticism's narratives of helpless women in need of protection.

3. Context

Professor Duncan provides examples of skillful judicial authors who deliberately use the associative power of language to incorporate whole segments of history through allusion.[225] In this way, courts can easily and unobtrusively renew not only legal precedent but also the assumptions on

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221 *Id.* at 1385.

222 JOHNSON, *supra* note 193, at 221.

223 *Id.* at 222 (emphasis added).

224 Neal v. Dep't of Corr., No. 285232, 2009 WL 187813, at *3 (Mich. Ct. App. 2009) (quoting HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996), *available at* http://www.hrw.org/legacy/reports/1996/Us1.htm).

225 *See supra* notes 50–54 and accompanying text.

which those legal precedents depend. In two ways, criminal law's language—as it describes gendered situations and defines related issues—readily and demonstrably slips into historical association. Two particular uses of language can be found in the discourse of "Other" and, conversely, in the discourse of privilege.

The discourse of "Other," with embedded linguistic codes, can be seen in two cases discussed in Professor Duncan's essay. In *McQuirter v. State*, a case raising the question of whether one can be convicted of attempt to commit assault with intent to rape, the court explicitly condones the jury's consideration of "social conditions."[226] This allowed the jury to consider a police officer's testimony that the defendant reportedly had come to town on the night of the alleged crime "with the intention of getting him a white woman."[227] According to the officer, McQuirter planned to approach the first white woman he saw, and when one walked by the truck in which he was sitting, he got out of the truck and "watched the lady."[228] He told the officer "that he was going to carry her in the cotton patch and if she hollered he was going to kill her."[229] The reference to the prosecutrix as the "lady" coupled with a reference to "the cotton patch" plays on deeply entrenched racial myths and prejudices. Although he denied following the woman, accosting her, or even making the statements attributed to him, and he had no criminal history, "[a]ppellant, a Negro man, was found guilty of an attempt to commit an assault with intent to rape."[230] On appeal, the evidence was found to be "ample to sustain the judgment of conviction."[231]

The previously discussed *Boyd* case,[232] involving the murder of a white woman by a black man with whom she'd had an affair, provides another example of the contextually referential discourse of "Other."[233] In *Boyd*, the jury heard testimony about gossip and rumors circulated by the victim, saying that the wife of the accused was a "truck stop girl" and a "hooker."[234] Such words are part of a broadly inclusive set of condemnations and connote widely

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226 McQuirter v. State, 63 So. 2d 388, 390 (Ala. Ct. App. 1953). For Professor Duncan's discussion of *McQuirter*, see Duncan, *supra* note 1, at 1221.

227 *McQuirter*, 63 So. 2d at 389.

228 *Id.*

229 *Id.*

230 *Id.* at 388.

231 *Id.* at 390.

232 *See supra* notes 173–76 and accompanying text.

233 Boyd v. State, 389 A.2d 1282 (Del. 1978).

234 *Id.* at 1284 (internal quotation marks omitted).

accepted judgments about women's alleged misconduct. Negative connotations are inferable from any number of similar euphemisms that may reference any number of circumstances: sexual transactions, adultery, promiscuity, loss of virginity, criminality, unwillingness to submit to authority, poor housekeeping, lack of visible means of support, flamboyance, as well as many others. Yet all have come to suggest immorality or deviance. Frances Gray gives a detailed explanation of how, in social history, the phrase "bad woman" came to mean the same thing as whore, with the terms for slovenly ("slut" and "slattern") ultimately becoming synonyms for a prostitute (i.e., a woman who accepts compensation for the use of her body in a sexual way).[235] Gray traces this shift in conceptualization to Shakespeare's *Othello* but sees the phenomenon more broadly as a conflation of roles to prevent women from having independence.[236]

The discourse of privilege includes numerous references to feudal times, where the authority of the state was represented by icons of power to own and command. This discourse goes back at least to the time of Blackstone, who saw in the castle a perfect metaphor for man's dominion over nature.[237] That metaphor has been used for centuries in Anglo-American jurisprudence. *Davis v. State*, a 1930 Tennessee case, for example, contains this statement: "It is not necessary that a defendant's reason be *dethroned* to mitigate a killing to manslaughter."[238] In a more recent narrative, an attorney representing incarcerated women in a class action suit used feudal imagery to describe the everyday experience of women guarded by men in District of Columbia prisons:

> At the annex, the women had *to run a gauntlet* of male prisoners every day. They would leave the facility and walk down the hill through a row of men to go eat their meals on the men's compound. The men would yell obscenities about the women's bodies and the staff would just look away when that happened. This happened every time they had a meal, and there were three meals a day. It was a highly sexualized environment . . . .[239]

Discussing the situation in *Neal v. Department of Corrections*, the first case applying the Michigan Civil Rights Act to prisoners, David Fahti, Director of

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235 GRAY, *supra* note 75, at 72–73.

236 *Id.*

237 *See supra* note 164 and accompanying text.

238 28 S.W.2d 993, 996 (Tenn. 1930) (emphasis added).

239 JOHNSON, *supra* note 193, at 256–57 (emphasis added) (relaying an account of attorney and law professor Brenda Smith).

the United States Human Rights Watch, likened the treatment of women inmates to torture: "This is a problem that arises whenever you have the power imbalance and culture of impunity that you see in prisons."[240] By "culture of impunity," he meant an environment in which those with authority enjoyed absolute freedom from punishment, "a culture of prison abuse that was executed by subordinates and tolerated by administrators."[241] Although it is ironic that here the castle metaphor is used in reference to violations of the law, it nevertheless remains true that "culture of impunity" implies a privileged status.

III. CONCLUSIONS: A DOCUMENTARY COLLAGE

Looking at how the language of criminal law impacts women, one might question whether its preservation is worth the price. Even a modest critique exposes drawbacks: the language covers a host of prejudices; it often affirms the familiar, perpetuating, whether intentionally or not, traditional norms that—let's face it—have not improved the lot of most women. This expressive language often creates a spectacle when respect is called for.

And yet, the feminist critique of language in law certainly has demonstrated that "steno-language," dry and imageless, is equally misleading. A strong case has been made that the language of story and witness helps avoid legal discourse's illusion of neutrality and scientific certainty.[242] The bottom line is that when it comes to language, it is never a question of *what* but rather of *how* the language is used, and to what purpose. It behooves us to think seriously about that purpose: Is it truth or justice? Is it order and peace, or the preservation of a way of life with all its associated privileges and prejudices?

This final Part uses excerpts of various texts cited in the first two sections of this Response, such as court opinions, news reports, academic texts (including Professor Duncan's essay), true-crime stories, personal narratives, and testimony to demonstrate how pervasive and compelling the literary

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240 Campbell, *supra* note 179, at 2.

241 *Id.*

242 *See, e.g.*, MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE (1995); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 8–9 (1991); George H. Taylor, *Derrick Bell's Narratives as Parables*, 31 N.Y.U. REV. L. & SOC. CHANGE 225, 227 (2007); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 80 (1994); *see also* Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 95 (1992); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2435–36 (1989).

language of the criminal law is. I follow an outline parallel to that employed in previous sections. The collage thus covers four Parts: (A) Woman as Victim of Depraved Heart; (B) Seductress Generating Heat of Passion; (C) Wives and Lovers on the Journey to Salvation; and (D) Women as Prisoners of the Castle. This documentary collage is intended to break down artificial constructs of knowledge and provide evidence of the extent to which our assumptions about crime and women in the criminal justice system are subject to the power of language, as detailed by Professor Duncan in her essay. It is also an attempt to demonstrate, through the medium of poetic form, the importance of form itself and how the mode of expression affects the mode of understanding. The structure of a court's opinion takes the mind along one kind of path; a law review article takes it on another. The structures of poetry, of fiction, and of literary essay lead the mind along different paths. Each has value.

The particular form used here, documentary poetry, is a relatively new genre, created from the "everyday debris" of writings that document and adorn our lives.[243] The words "documentary" and "poetry" are derived, respectively, from root words meaning "to teach" and "to create."[244] Creators of the form believe that one can find in everyday publications "the sound of a poetry, a measure-by-placement-&-displacement, not far from our own."[245] The recasting of existing documentation into literary form is one way to take the reader along a path that leads to a deeper understanding of the words' meaning. "For surely," says Rothenberg, "it should be clear by now that poetry is less literature than a process of thought and feeling and the arrangement of that into affective utterances."[246]

We need it all: rhythm, metaphor, allusion, realism, minimalism, lyricism, mystery, memoir, poetry, romance; the who, what, where, and when of journalism; and the how and why of academic analysis. Professor Duncan's recognition of, respect for, and artful play with the English language deliver messages worth hearing. Beauty of form is essential; it calls for our attention and demands our consideration. As physician–poet William Carlos Williams tells us:

> It is difficult
> to get the news from poems

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243 *Introduction* to 1 POEMS FOR THE MILLENNIUM, *supra* note 139.

244 THE AMERICAN HERITAGE LEGAL DICTIONARY OF THE ENGLISH LANGUAGE 546, 1397 (3d ed. 1993).

245 JEROME ROTHENBERG, PRE-FACES & OTHER WRITINGS 151 (1981).

246 *Id.*

yet men die miserably every day
for lack
of what is found there.[247]

Seductive Beauty
A Documentary Collage
About Law, Language, and Crime

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."[248]
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 doorstop; 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.[249]

I. Victim of a Depraved Heart

Criminal law is sensual.[250]
It stirs all the senses,[251] it
can make you quiver
with its beautiful language
and concepts.[252] Like Attempt.

At first blush, the crime of attempt

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247 WILLIAM CARLOS WILLIAMS, ASPHODEL, THAT GREENY FLOWER & OTHER LOVE POEMS 19 (1994).
248 Duncan, *supra* note 1, at 1203.
249 *Id.*
250 *Id.* 1217.
251 *Id.*
252 *Id.* at 1219. I replaced "criminal law" in the original source with "it."

may appear a little dull. . . .
the *facts* . . . often listless . . .
defendants may be found guilty if
they are in dangerous proximity
to the target crime,
if they have taken the last step
or one substantial step, . . .if
they no longer retain
. . . a place of repentance.[253]

I have learned to *savor*
attempt.[254] I myself was once the victim
of an attempted crime.[255]
At a taxi stand,
one of the drivers . . . offered me
a free ride . . .
I should have known better . . . .
He urged that I sit in front
with him,
instead of in back, and I
foolishly
acquiesced.[256]
[W]e were traveling fast on the highway
and he was talking in a leering tone about my lips . . . .[257]
he exited the highway and turned on a dirt road. . . .
he stopped the car.
He pulled me toward him
with a rough gesture and started
to kiss me.[258]

I want women to know that
I was abused by a man . . .
I was used by this man,
I was abused by this man.[259]

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253 *Id.* at 1221 (internal quotation marks and footnotes omitted).
254 *Id.* at 1222.
255 *Id.* at 1224.
256 *Id.*
257 *Id.*
258 *Id.*

And we start to talk,
before she took her clothes off, and then
I don't know. I was driving. I stopped.
I parked my car; I don't know where. And we moved
to the backseat . . . . She took off her clothes.
I don't know. I tried to kiss her
or something. Also, she asked me
about money and I told her . . . . I don't, I don't pay
money for sex. . . . I tried to make sex with her.
She doesn't want. Then I don't know how
she hit me in my eyes and this moment
I feel pain in my eyes. I don't remember. I,
I hit her and she bite me. . . . I start to hit her,
punch her. I don't know. . . . I feel scared.
She doesn't move, she doesn't talk.
So what I can do.[260]

The enticements
of the prostitute made him
want to see another
nude female, which led him
to drug, strip, and examine
his young cousin, which
so excited him that he
raped her, which necessitated
killing her, which required
that he kill his mother.[261]

Whither shall he flee,
and how far,
and when may he be
permitted
to return?[262]

II. Seductress and the Heat of Passion

There must be a *reasonable explanation*

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259 JOHNSON, *supra* note 193, at 129 (story of Marilyn).
260 State v. Kaddah, 736 A.2d 902, 911 (Conn. 1999) (transcript of a police interview with the defendant).
261 HALTTUNEN, *supra* note 65, at 206.
262 Jones v. State, 76 Ala. 8, 16 (1884) (emphasis added).

for the existence
of the extreme emotional disturbance

or distress. It is not the person
who must be reasonable at the time
because a reasonable man would not intentionally

kill another person; it is the frenzy of mind
based upon a reasonable explanation
which is basic to the jury's determination.[263]

strange thoughts, extraordinary feelings, unseasonable appetites,
criminal impulses, may haunt a mind at other times
more innocent and pure.[264]

[T]he name *heat of passion*
is central to the meaning . . . .
Essence, not accident;

a leitmotif . . . .[265] beauty is both
objective and subjective—
a quality of the object,
yes, but also
of the person observing . . . .[266]

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.[267]

those fine looking women[268] *frail sisterhood . . .*
a troop of gaudy poisoners, teeming with disease[269]

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263 Boyd v. State, 389 A.2d 1282, 1286 (Del. 1978).

264 Edward C. Mann, *Morbid Sexual Perversions as Related to Insanity*, 14 MED. BULL. 90, 94 (1892).

265 Duncan, *supra* note 1, at 1206.

266 *Id.* at 1226.

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

268 HALTTUNEN, *supra* note 65, at 204 (quoting FOOTE, *supra* note 113) (internal quotation marks omitted).

array themselves in the most gay costume, adorn their persons
with pearls, rings, paint, and jewels,
and perfume themselves till they smell as sweet as
an oriental garden[270]
stream through the streets . . . death beneath their skirts.[271]
bawd, call girl, camp follower, chippie, demi-mondaine, drab,
fallen woman, fancy woman, floozy, grisette,
harlot, hooker, housegirl, kept woman,
lady of pleasure, lady of the evening, lady of the night,
loose woman, madam, slattern, slut, streetwalker, strumpet,
tart, tramp, trollop, trull[272]
enchant . . . bewitch
young men[273]

The woman who would
entice the wayfarer
with her blandishments, and willfully,

and basely light a fire in his bones . . .
should be treated
as a murderess.

To kill such a woman could be construed,
like the slaying of Medusa,
as an act of just

retribution and collective
male
self-
defense.[274]

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[269] *Id.* at 201 (quoting THE LIVES OF JEWETT AND ROBINSON, *supra* note 142, at 79) (internal quotation marks omitted).

[270] *Id.* at 204 (quoting FOOTE, *supra* note 113) (internal quotation marks omitted).

[271] *Id.* at 201 (quoting THE LIVES OF JEWETT AND ROBINSON, *supra* note 142, at 79) (internal quotation marks omitted).

[272] GRAY, *supra* note 75, at 72 (citing to ROSALIE MAGGIO, THE NON-SEXIST WORD FINDER: A DICTIONARY OF GENDER-FREE USAGE (1987)).

[273] HALTTUNEN, *supra* note 65, at 204 (quoting FOOTE, *supra* note 113) (internal quotation marks omitted).

[274] *Id.* at 201 (quoting THE LIVES OF JEWETT AND ROBINSON, *supra* note 142, at 79) (internal quotation marks omitted).

III. Wives and Lovers on a Saving Journey

"An attempt to commit an assault with intent to rape" . . . means
an attempt to rape which has not proceeded far enough
to amount to assault . . . .[275]
anywhere between the conception of the intent
and the overt act . . . there is room for repentance; and the law
in its beneficence
extends the hand of forgiveness.[276]
[T]o justify a conviction . . . the jury must be satisfied . . .
that defendant intended to have sexual intercourse
with prosecutrix against her will, by force
or by putting her in fear.[277]
(But when she expressed her fears . . . .)[278]

I pressed charges, they gave him six months, and he went back[279]
(It was horrible for him, she says, horrible.)[280]
and that's when he said he was going to kill me
for sending him back to jail. He[281]
(became furious at her lack of faith in him
and proceeded with his plan)[282]
got out in 1986. I hadn't seen him,
but he'd been looking for me. . . . This one particular night . . .
I was sitting in the car at the supermarket.
Who do I see but him?[283] (Almost everything
looks different when seen from up close
than it does from far away . . . .)[284]

[Appellant] actually discovered the victim
and his wife engaged in sexual intercourse
in appellant's own home. . . . the passions of any
reasonable person would have been inflamed.[285]

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275 Burton v. State, 62 So. 394, 396 (Ala. Ct. App. 1913).
276 State v. Hayes, 78 Mo. 307, 317 (1883).
277 McQuirter v. State, 63 So. 2d 388, 390 (Ala. Ct. App. 1953).
278 Duncan, *supra* note 1, at 1218 (parentheses added).
279 JOHNSON, *supra* note 193, at 60 (story of DonAlda).
280 Duncan, *supra* note 1, at 1218 (quotation marks omitted) (parentheses added).
281 JOHNSON, *supra* note 193, at 60 (story of DonAlda).
282 Duncan, *supra* note 1, at 1218 (parentheses added).
283 JOHNSON, *supra* note 193, at 60 (story of DonAlda).
284 Duncan, *supra* note 1, at 1244 (parentheses added).

‘all this stuff this boy had told me that morning
came back to me and him riding around with his wife
and both of them looked happy and my home
tore all to pieces, I don’t know what happened,
I lost control of myself.’[286] (It was horrible for him.)[287]
[T]he misconduct of the wife
afforded sufficient provocation . . . .[288]

When he walked up to the car, he had
a grocery bag in his arm, and he shifted the bag.
Then I saw the butt of the gun in there.[289]
(Anywhere between the conception of the intent
and the overt act . . . there is room for repentance . . . .)[290]
So, I reached under my seat, and got the gun
and shot out the window, and shot at him. . . .
I was shooting out the window, just scared. . . . I didn’t even know
that I shot him. I knew I grabbed the gun. I knew I fired that gun.
I didn’t think I hit him. I hit him several times, I found out.[291]
[T]o justify a conviction the jury must be satisfied
that defendant intended. . . (in passion adequately provoked)[292]

to have sexual intercourse . . . if there is evidence
from which it may be inferred that . . . defendant
intended to gratify his lustful desires . . .
a jury question is presented. . . .
[T]he jury may consider social conditions and customs
founded upon racial differences, such as
that the prosecutrix was a white woman
and defendant was a Negro man.[293]
(our normal solicitude for the life of the attacker
is somewhat dampened when he chooses such
historically protected premises on which to make his murderous assault.)[294]

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285 State v. Thornton, 730 S.W.2d 309, 315 (Tenn. 1987).
286 Whitsett v. State, 299 S.W.2d 2, 7 (Tenn. 1957) (statement by the defendant).
287 Duncan, *supra* note 1, at 1218 (parentheses added).
288 *Thornton*, 730 S.W.2d at 314.
289 JOHNSON, *supra* note 193, at 60 (story of DonAlda).
290 State v. Hayes, 78 Mo. 307, 317 (1883).
291 JOHNSON, *supra* note 193, at 60 (story of DonAlda).
292 Drye v. State, 184 S.W.2d 10, 13 (Tenn. 1944).
293 McQuirter v. State, 63 So. 2d 388, 390 (Ala. Ct. App. 1953).

[T]he evidence in this case . . . was ample to sustain
the judgment of conviction.[295]

IV. Prisoners of the Castle

Testify: to make a declaration
of truth or fact.[296]

Define: to state
the precise meaning of.[297]

Irony: the use of words to
express something different from
and often opposite to
their literal meaning.[298]

The term *malice aforethought* is a false friend,
a misleading cognate,
like the Spanish word *embarasada* . . .
What does *embarasada appear* to mean?
. . . Embarrassed. What *does* it mean?
. . . Pregnant![299]

Embarrass: from the French embarrasser, to encumber,
hamper, from Spanish embarazar, from Italian,
imbarazzo, obstacle, obstruction, from imbarrare,
to block, to bar. Meaning:
To cause to feel self-conscious or ill at ease . . . .
To hinder with obstacles or difficulties; impede . . . .
To interfere with (a bodily function)
or impede the function of (a body part) . . . .[300]

. . . women were shackled in labor;
They were handcuffed
by an arm or a leg or both
while they were giving birth.[301]
Once an irreligious, unchaste woman

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294 Redondo v. State, 380 So. 2d 1107, 1111 (Fla. 1980) (parentheses added).
295 *McQuirter*, 63 So. 2d at 390.
296 AMERICAN HERITAGE DICTIONARY, *supra* note 244, at 1788.
297 *Id.* at 476.
298 *Id.* at 924.
299 Duncan, *supra* note 1, at 1207 (internal quotation marks omitted).
300 AMERICAN HERITAGE DICTIONARY, *supra* note 244, at 583.
301 JOHNSON, *supra* note 193, at 257 (recollections of attorney and law professor Brenda Smith).

willing to destroy her own child
to conceal her vicious conduct . . .
had been spiritually transformed
during her eight months of bondage,
and had emerged from prison
"Sprinkled, Cleansed, Comforted,
a Candidate of Heaven."[302]

Correction: Punishment
intended to rehabilitate
or improve.[303]

All of them were assaulted, they testified,
by a corrections officer . . . who resigned
after a laundry list of rules violations . . . .
They were also assaulted,
sometimes raped, by other officers
over a period of years, they told the jury.
The women admitted
that most of them did not report
the abuse. There was no point,
they testified. The officer who assaulted
all of them had been investigated
20 times, he told them,
"and they can't touch me."[304]

Assault: from Vulgar
Latin, to jump.[305]
Rape: from Latin, to seize.[306]
Abuse: Latin, improper use.[307]

. . . a former director of the state
Department of Mental Health . . . testified
that the women were believable. He said
they told him of numerous incidents

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302 HALTTUNEN, *supra* note 65, at 8 (quoting Rogers, *supra* note 135, at 404, 404)
303 AMERICAN HERITAGE DICTIONARY, *supra* note 244, at 411.
304 Oppat, *supra* note 175.
305 AMERICAN HERITAGE DICTIONARY, *supra* note 244, at 107–08.
306 *Id.* at 1450.
307 *Id.* at 8.

that included: Corrections officers
groping some women for years—
three times a day, seven days a week—
. . . A corrections officer regularly
crooking his finger at one woman,
meaning she had to raise her shirt
to display her breasts.
. . . Orders over the public address system
for women to go to deserted areas,
where they would be
sexually assaulted.[308]

Grope: search blindly[309]
Crook: dishonest[310]
Correction: punishment[311]

"Some states don't even consider it a crime"
for corrections officers to rape or have sex
with the female inmates whose lives
they control.[312] A former
corrections officer testified that . . .
during her first midnight shift
she saw four male officers
go into four inmates' rooms
and close the doors.[313] At the annex
the women had to *run a gauntlet*
of male prisoners
every day.[314]

Running the gauntlet. . . .
a form of physical punishment
wherein a man is compelled
to run between two rows—a gauntlet—

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308 Andy Angelo, *Lawsuit Alleges Women Abused by Prison Guards*, GRAND RAPIDS PRESS, Jan. 30, 2008, *available at* http://blog.mlive.com/grpress/2008/01/lawsuit_alleges_women_abused_b.html.

309 AMERICAN HERITAGE DICTIONARY, *supra* note 244, at 774.

310 *Id.* at 433.

311 *Id.* at 411.

312 Oppat, *supra* note 175 (quoting State Assistant Attorney General Allan Soros).

313 *Id.*

314 JOHNSON, *supra* note 193, at 256 (recollections of attorney and law professor Brenda Smith).

> of soldiers who strike him
> as he passes. . . . Running the gauntlet
> was considered far less of a dishonor
> than a beating (with exposure to ridicule) . . .
> since one could "take it like a man"
> upright and among soldiers.[315]

The women
were housed in co-ed facilities . . . .
They would leave the facility
and walk down the hill
through a row of men
to go eat their meals
on the men's compound. The men
would yell obscenities
about the women's bodies and
the staff would just look away
when that happened. This happened
every time they had a meal,
and there were three meals
a day. It was a highly sexualized
environment . . . .[316]

> In some traditions, if the condemned
> was able to finish the run
> and exit the gauntlet, at the far end,
> his faults would be deemed paid
> and he would rejoin his comrades
> with a clean slate. Elsewhere,
> he was sent back through the gauntlet
> until death.[317]

They had the power to stop it . . .
Everyone was begging them
. . . to stop the torture.
They took the reports,

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[315] Running the Gauntlet, Wikipedia, http://en.wikipedia.org/wiki/Running_the_gauntlet (last visited June 3, 2010).

[316] JOHNSON, *supra* note 193, at 256–57 (recollections of attorney and law professor Brenda Smith).

[317] Running the Gauntlet, *supra* note 315.

and did nothing.[318]

We remain your daughters,
sisters, mothers, aunts, and nieces.
We have been separated,
but we are not gone.
We may be distant,
But we are part of you.
We may be absent,
but we are very much
present.[319]

apology: An acknowledgement expressing regret or
asking pardon for fault or offense . . . .[320]
pardon: to release (a person) from
punishment; exempt from penalty . . . .[321]
regret: . . . from Old French, regreter:
to weep.[322]

In a gesture
considered extremely rare . . .
the jurors stated:
"We, the members of the jury . . .
would like to express
our extreme regret
and apologies for what
you have been through."[323]

Epilogue

We met
in the same Italian restaurant as before,
though it seemed a different place because of
the attractive renovations. The walls, which had
previously shone bright yellow, were now
a stylish pumpkin; the blinding

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318 Oppat, *supra* note 175 (quoting plaintiff's attorney Richard A. Soble) (quotation marks omitted).
319 Joyce Logan, *Foreword* to JOHNSON, *supra* note 193, at vii.
320 AMERICAN HERITAGE DICTIONARY, *supra* note 244, at 8.
321 *Id.* at 1277.
322 *Id.* at 1470.
323 Campbell, *supra* note 179, at 1.

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. In addition
to the altered décor, the restaurant boasted
a new menu, so my friend and I—departing
from our traditional eggplant parmigiana—
ordered the apple and goat-cheese ravioli
and lasagna.[324]

[324] Duncan, *supra* note 1, at 1243–44.