Chapter Three

“Going Somewhere”: Maternal Infanticide and the Ethics of Judgment

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This essay explores several interconnected issues: the representation of crisis, and, in the case of infanticide, representation in crisis; and the ethics and aesthetics of judgment. I do not intend to discuss the substantive legal nature of maternal infanticide, except as it concerns my interest in the symbolic systems by which we represent this event and thereby accommodate it within our culture. My interest in infanticide as a problem of ethical and aesthetic representation should not be interpreted as indifference to the act of child murder. I believe it is necessary, however, to recognize that the politically charged nature of representations of violent women, whether those representations are sympathetic or hostile, makes the question of how we come to judgment, upon what narrative of guilt and innocence we choose to rely, especially important.

For feminists, infanticide, like abortion and fetal abuse, raises a set of questions about women’s social and reproductive responsibilities that are especially difficult to adjudicate. As Marie Ashe and Naomi Cahn succinctly argue: “A war of interpretation...surrounds the bad mother figure and centers on the issue of agency. This struggle involves competing understandings of such women, one which defines them as fully responsible moral agents and another which defines them as victims of individual men and of patriarchal society.” These “hard cases,” where women act violently against the vulnerable, are the ones that test the resilience and integrity of feminism in its claim to be ethical politics.

Maternal infanticide has always been represented as an unnatural crime that is beyond comprehension; like witchcraft, with which it is often connected, it is the crimen exemplum, the sure sign of Satan in the world, the

work of hidden and unknowable forces. The murder of a child by its father, however reprehensible, is nevertheless represented as within the “imaginable,” sometimes as even within the “rights” of the father, a right connected to the responsibilities of paternity and the expectations of violence associated with the patriarchy. By its very nature a quintessentially domestic crime and an attack upon the reproduction of the patriarchy, maternal infanticide is frequently employed to summon up images of a radical social malaise—and not just in the ancient Greek or Judeo-Christian tradition—witness Newt Gingrich’s claim that Susan Smith’s drowning of her two children was evidence of the moral corruption of the nation under the Democrats.

Smith was indicted just a few days before the November 1994, Congressional elections. Newt Gingrich’s comments that her behavior was emblematic of what was happening to America under the moral leadership of Clinton and the Democrats made her the “Willie Horton” of those elections—ironically so, given the way she had herself played the “race card,” stereotyping male African-Americans as likely to commit this most heinous of crimes (and thus as more “naturally” unnatural than women). Outraged by Smith’s savagery, Gingrich called for a purging of the Susan Smiths, the murdering mothers, and the Democrats, from the body politic: “I think that the mother killing the two children in South Carolina vividly reminds every American how sick the society is getting and how much we need to change things,” he said. “The only way you get change is to vote Republican.”

In a slick rhetorical move, Gingrich calls up the ancient horror of infanticide to fuel his emotional appeal and simultaneously denies the historicity of that appeal by insisting that such horrors have happened only under the rule of the Democrats. Thus, the former history professor situates Susan Smith’s murder of her two children within a violently antagonistic political discourse that casts the Democrats as players in a national tragedy much like those ancient figures from the house of Atreus, who served up infants to their fathers, or that consummate bad mother, Medea. In Gingrich’s staging of this national morality play, infanticide comes to represent all that has gone wrong with society. Smith’s crime is exemplary of all crimes against the state and its individual citizens. And only, it seems, can the catharsis of voting expunge this sickness from the state.

In his comments, Gingrich relies on an assumption entirely consistent with our culture’s sense of social responsibility and political action that the moral and the political are linked in a powerful, mutual relationship. In fact, the relationship between the moral and the political, or between individual conscience and communal action, is analogous in Western culture to the relationship between the audience of a Greek tragedy and its actors, who together figuratively embody the sickness of the state that needs purgation. The audience, both as individuals and as a community, must feel in their bodies the dis-ease that weakens the state, cathartically purify (and thus cure) themselves through pity and fear, and thereby restore the state to health. This relationship between representation and response enables both compassion and judgment. Despite his instinctive reliance on this dialectical assumption, however, Gingrich’s comments are couched in a rhetoric so antagonistic that the polis (audience) is divided against itself, forced to dis-member the communal body, and thus render judgments that are both partial and reductive.

To play out the possibilities both of his explicit and his implied model of social and moral relationships, I want to look at the narrative representation of infanticide in light of the two possibilities for judgment invoked by Gingrich’s comments—what I will call the antagonistic and the dialectical. By dialectical, I mean a mutually affective relationship between the individual and the community(ies), between the self and the other(s). In this model of engagement, narrative can transform by negotiating social, moral and jurisprudential compromises in seemingly irresolvable conflicts. In arguing for this narrative efficacy, I am placing narration, here understood as a managed account of individual actions in their cultural contexts that allows apparently irreconcilable discursive structures a space for compromise, against prosecution, here understood as an adversarial strategy by which guilty parties are punished and innocent parties exonerated.

My essay has four parts: the first is a discussion of infanticide in the context of Kenneth Burke’s theory of catharsis. Burke is a critic who has explicitly connected the political and the aesthetic in his theorizing about Aristotelian catharsis, shifting attention away from the merely psychoan-

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4. One of the ultimate ironies of Gingrich’s appeal was revealed in the trial when Susan’s step-father, a prominent Republican politician and member of the Christian Coalition, confessed to molesting her as a child and to maintaining an adulterous relationship with her as an adult.
alytical value of the cathartic experience. Burke points out that, aside from a single reference to catharsis in Aristotle’s definition of tragedy, the Poetics contains no account of the concept. In his Politics, however, Aristotle discusses musical catharsis and intimates that the subject will be treated at greater length in the Poetics. Burke argues that:

[those paragraphs in the Politics at least give reason to infer that the treatment in the Poetics was not essentially different, and that the kind of ‘purge’ produced by tragedy may have been specifically considered from the ‘civic’ point of view (as a species of political purge), in contrast with the stress on intimate, family relationships in Freud’s views on the cathartic effects of psychoanalysis.]

Burke therefore invites us to attend to the social nature of representation and the cathartic experience, suggesting that representation carries with it the weight of ethical, as well as aesthetic, constraints and promises.

The second part of the essay will re-tell the contemporary story of a Texas mother charged with the murder of her newborn infant, focusing specifically on how an adversarial system produces two competing, antagonistic versions of a univocal narrative of motherhood. The third part of the paper will offer an alternative to this confrontation by examining the concept of what I call narrative jurisprudence as a model for ethical judgment. I will also turn to another mode of judging—the literary critical model employed in the interpretation of poetry. My turn to aesthetics is not intended to lessen the crisis of infanticide, but rather to invoke a feminist ethic of representation and judgment in the context of literature. The fourth part will narrate another Texas version of infanticide—that of a mother in Houston who drowned two of her children. This story illustrates narrative jurisprudence as a model of listening and judging that accommodates the complexity of an other’s experience and draws from the audience an ethical response that is fittingly complex.

I. Burke and Catharsis

Gingrich’s rhetoric was hyperbolic, but he accurately pinpointed the tendency of the American media to represent wrongdoers through essentialized narratives of motive and action. These narratives require a public, and highly publicized, resolution in the image of the offender brought to judgment. This performative quality of legal representation (seen in extremis in the Simpson trial) is one of the many ways in which law and literature share a common culture; indeed, both legal and literary performances are representative practices of social institutions. Within those performances, “narratives are not just stories told within social contexts; rather narratives are social practices, part of the constitution of their own context.”

My choice of Aristotle’s critical term “catharsis” as read through Burke is intended to stress both this social aspect of narrative and the commonality between legal and literary narratives.

Catharsis, or purgation, is the term Aristotle uses to define the experience of those who witness the dramatic representation of a tragic event. Cleansing itself of—and through—pity and fear, the citizenry restores the state to health. In this Greek model of (limited) participatory democracy, catharsis, the key to civic health, is enabled both by compassion and by judgment, leading to reconciliation between the offender and the offender. This reconciliation is crucial; it affords society the chance to re-affirm its communal values at the same time as it integrates the offender back into its midst.

According to the philosopher Kenneth Burke, the term “catharsis” enforces a connection between the aesthetic and the political, in both their individual and communal forms. The audience who witnesses a tragedy enacted on the stage recognizes the individual and social nature of the dramatic representation, and, in witnessing, the audience realizes both its individual agency and its social responsibility. Thus catharsis refers both to the specific emotional and political response of the individual spectator, who acknowledges her own complicity in the tragedy by suffering with the transgressor in the drama, and to the larger relationship between the spectator and her community, a relationship that enables the transgressor to be reintegrated into that community. Of course, the difficulty of reintegration is enormously complicated when the community is heterogeneous, distinguished by marks of race, gender, ethnicity, religion, class, and culture. The Simpson case, once again, illustrates the difficulty of coming to a consensual judgment when the community is radically divided within itself.

I want to theorize an ethics of feminist judgment by applying this concept of dramatic catharsis to the performance of legal drama in order to analyze the relationship between the offender and those who judge her. I


am offering this model of catharsis as an alternative to the adversarial model of legal discourse, employing the term “catharsis” in its Burkean sense to mediate between the demands of the adversarial system, on the one hand, and claims of compassion, on the other. Catharsis is clarification, another term for truth-telling. If we apply this cathartic model to legal drama, we see that the jury (and by extension the public) are invited to witness the political and social consequences of justice enacted, as well as to reflect upon the personal consequences of crime and punishment. These witnesses to the trial respond both as individuals and as members of a shared community to the ritualized representation of the law’s drama, a ritual enacted in the form of the narratives of prosecution and defense. The individual offender is represented in those narratives both as an autonomous agent, with full responsibility for her actions, and as a member of a society that has directly and indirectly coerced her to behave in certain ways. The recognition of the tension between autonomy and coercion constitutes one of the hallmarks of justice.

The witnesses to the trial attend to the particular conditions represented to them as not merely a contemporaneous, unique enactment of a crime, but also the inevitable recalling and historicizing of all such moments of disruption, an act of history that can reach back symbolically to previously performed narratives. Thus, just as catharsis in its theatrical embodiment is not simply an individual’s singular, emotional release provoked by the dramatic rendition of tragic events, so too, in a legal drama, catharsis is more than simply the satisfaction of an emotional need for revenge. It is the ethical and social response of a member of a community who has been provoked by the public re-enactment of an offense committed by a member of that same community, the response works to recall the common tories shared by the community and thereby to re-integrate the offender into that community.8

To summarize, in my reading, catharsis is a multiple response generated by a realization of: 1) how the present is related to the past—this event is not one isolated aberration from the normal continuum of events, but a

8. For an extended meditation on the way in which the narrative of crime and punishment can re-integrate the offender into the community, see Sacvan Bercovitch, The Office / The Scarlet Letter (Baltimore: Johns Hopkins Press, 1991), especially where he speaks of Hester’s return to the community that has exiled her. He argues that the “bond [Hes- ter] forges anew with the community reconstitutes Hester herself, as a marginal dissenter, as an exemplum of historical continuity.” Id. at 3. This reference to Hester Prynne and her homogenous community only reinforces, however, the problems faced when the offender is perceived as outside, rather than merely marginal to, the community that is ordering judgment. I am grateful to Nan Goodman for bringing Bercovitch’s argument to my attention.

9. See supra note 6, at 217.
10. Id. at 218.
12. See Burke, supra note 4, at 366.
"Going somewhere" metaphorically describes the active aesthetic and emotional perception of narrative and the product of that perception, which is ethical reasoning. Identification through narrative with the offender and the victim is at the heart of the cathartic experience, and it produces both vicarious malevolence and vicarious suffering, neither of which should be discounted in coming to judgment. Ethical judgment is sharply distinguished from the moral indignation of those who do not wish to be moved and who thus only scapegoat the offender. The figure of the "scapegoat is a concentration of power," the locus of a culture's anxiety or confidence truths. "Criminals either actual or imaginary may...serve as scapegoats in a society that 'purifies itself' by 'moral indignation' in condemning them, though the ritualistic elements operating here are not usually recognized by the indignant." Scapegoating sidesteps history: it transforms the individual and local into the universal and the abstract by ignoring history. The universal narrative then covers up the particularity of the crisis, flattening its complexity into monothematic representation. In legal drama, the frequent avoidance of "history"—apart from the specific "legal" history of the particular case—stems from the law's pretense to objectivity. Relying on an essentialist narrative as a way of managing crisis can cover up the individual's responsibility to address the particular cultural crisis. I employ the term "cover" here in its legal sense, as in "femme coverta" (the husband "covers" the legal acts and responsibilities of his wife, who assumes thereby a covert identity). I am suggesting that when one relies on essentialist narratives as a way of explaining crises and rendering judgment, one acts "under cover of" an ahistorical and generic identity, denying one's own complicity and inferring a similar ahistoricism and generality for the offender. I am arguing for a different gesture: we should assume, and assume responsibility for, a specific social and individual identity, both for ourselves and for the offender.

This responsibility is acutely demanded when we are confronted with crimes like infanticide. In those cases, infanticide is frequently represented as the prototype of uncivilized behavior, consistent with an ancient narrative about women, their irrationality, and violence. The mother is demonized not only for the horror provoked by her individual actions, but as the representative of the principle of evil, the personification of all that must be cut out from the body politic. In this reductive narrative, the one summoned up by Gingrich, the murdering mother embodies all that threatens civilization and apparently nothing short of a rebirth into a new polity, with new parentage, can relieve that threat. But this moral and political call to action only offers the appearance of resolution. Catharsis does not operate through a metonymic calculus: one does not simply work through the individual and social tragedy by substituting another troupe (trope) of actors/agents to replace those who are not "doing it right." In judging the mother who has acted against her child, we must do more than put in opposition two essentialist narratives of motherhood, the good mother against the bad. Such adversarial discourse excludes alternative stories of a less than perfect world in which one's class, race, religious beliefs, or health (to name but a few contingencies) can make mothering unbearable.

What if there were some way to narrate a story or stories in a legal context that had the power to bring us face-to-face with what Martha Nussbaum calls "complex particularity." Perceiving an event as a story can reveal moral contaminations that a merely accusatory statement hides. One necessarily engages in an ethical reading of the other's narrative when one confronts the contaminations of the other's life. Indeed, following Levinas,

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15. Id. at 101-02.
16. Compare Burke's use of the term "covered": ...insofar as the idea of catharsis is objectified in terms of offscourings (katharmata), there is a sense in which the cleaning has led to the un-clean. Or, otherwise put: the unclean is either displaced, or 'covered.' And this principle of removal introduces in effect the principle of substitution, or vicarage, since the cleansing of
17. Kenneth Burke points out that the act of scapegoating—that is, "the alienating of inquirers from the self to the scapegoat—amounts to a rebirth of the self." See Grammar, supra note 7 at 407.
19. This act of confrontation, the standing face to face with another, explains how a jury in the court with Susan Smith, a witness to her responses and to her story, can so
Adam Newton argues that even before the act of narrating those complications, in merely recognizing that such complexity exists, one acknowledges the ethical imperative. Ethics "refers to the radicality and uniqueness of the moral situation itself, a binding claim exercised upon the self by a concrete and singular other whose moral appeal precedes both decision and understanding." 20

Attending to or narrating someone else's story functions as a kind of mediation between the other and the self, situating the listener or narrator within her own historical and political realities. This historical situating is distinguished from ahistorical assumptions about the other that come from the oft-repeated narrative, or stereotyping, whose legitimacy resides in repeatability, not in relationship to specific historical circumstances. Ethical narration emphasizes contingency and particularity, calling up the past as a way of reinvesting the present with meaning, rather than invoking the past to "cover" the crises of the present. 21 In such a narrative model, the woman who commits infanticide is not pre-judged to have committed a crime so awful as to be unrepresentable except by essentialist narratives of maternity. Rather, the complex particularities of the offender's life are judged to be of importance. The narrative of her crime actively places these historical contingencies before the audience: "Stories that are capable of countering the hegemonic are those which bridge, without denying, the particularities of experience and subjectivities and those which bear witness to what is unimagined and unexpressed... Subversive stories are narratives that employ the connection between the particular and the gener-

al by locating the individual within social organization." 22 In other words, the offender has not severed her relationship to her community by her offense; she has re-defined it, and the ethical response facilitated by narrative is to conceptualize the nature of that re-definition. 23

II. The Case of Susan Bienek, Smithville, Texas

In the case of Susan Bienek, convicted of murder in the death of her newborn son, both the prosecution and the defense crafted their strategies around maternal narratives, arguing respectively that she was a "bad" mother, in fact the worst kind of mother, or that she was a "good" mother, such a good mother that she erred only in protecting her family from the burden of the newborn's death. The structure of the trial was adversarial; the rhetoric of the trial was oppositional; and the symbolic narrative of the trial was maternal. Given that the jury could only chose between two essentialist narratives and that no alternative was offered that made sense of what she did, it is hardly surprising that it convicted her.

Susan Bienek was 34 years old when charged on January 6, 1993, with the murder of her infant son, Daniel, around midnight on December 30, 1992. She was accused of abandoning him in a garbage bag early in the morning of December 31. The body was found in a county dump six days later and traced to Susan Bienek through the mail and assorted household items in the garbage bag. Susan came to trial with a court-appointed lawyer on October 4, 1993, in the 21st Judicial District Court of Bastrop County, Judge Harold R. Towslee presiding. On October 9, after 6 hours deliberation, the jury of seven men and five woman returned a verdict of guilty of murder, rejecting lesser verdicts of involuntary manslaughter or crimi-


21. To argue that contingency and particularity are part of an ethical narrative is not to deny that some appeal to collective beliefs and values might also be made. The fact that those values are collective (and may even appear to be "universal") does not, however, make them ahistorical. "Whatever truth we may have is to be gotten not in spite of but through our historical inherence." Maurice Merleau-Ponty, Signs 109 (Richard C. McCleary trans., 1964). For a general discussion of the tension between contingency and abstract values, see the essays by Martha Nussbaum, Pierre Schlag, and Steven L. Winter in Yale Journal of Law & the Humanities (vol. 6) (1994).

22. Ewick & Silbey, supra note 6, at 220.

23. Part of that re-conceptualization of the relationship between the offender and her community is undertaken by those who critique the traditional representation of the liberal subject—the autonomous, rights-bearing, self-identified subject. In place of the liberal subject, we are asked to imagine a multiple subjectivity, generated and constrained by ethnicity, race, class, and gender. This multi-faceted subject can tell stories of power and subordination, of success and failure, of action and victimage because the real world in which this subject is constituted is fluid and equivocal. See Linda Alcoff, "Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory," 13 Signs 403, 433 (1988) (arguing for identity relative to "a constantly shifting context, to a situation that includes a new set of elements involving others, the objective economic conditions, cultural and political institutions and ideologies and so on"). Compare Martha Minow, "Identities," 3 Yale Journal of Law & the Humanities 97, 98 (1991) ("...the cultural, gender, racial, and ethnic identities of a person are not simply intrinsic to that person, but depend upon that person's self-understanding in conjunction with communal understandings").
nally negligent homicide. On October 12, after 8 1/2 more hours of deliberation, they recommended nine years imprisonment, rejecting a plea from her family for a probated sentence. Judge Towslee commented that her sentence was "not as bad as it sounds. She was quite fortunate under the circumstances."

Susan Bienek had been married for seventeen years and was the mother of four children, ranging in age from fourteen to five. She had left school after 12th grade and had worked since 1987 for the IRS in Austin, a distance of 45 miles from Smithville, where she lived in a four-room, 500-square-foot house. Susan frequently worked a 60-hour week and was the sole support of the family. She took home approximately $1600 a month after taxes. Her husband, Kelly, had not worked for some years due to back problems. She got up at four each morning, left home just before five and arrived at work at six. After the long drive home from work, she was still primarily responsible for the care of her family. She is an ideological conservative and has always attended the local Lutheran church in Smithville. She had never been involved with the police in any way before Daniel's death.

Susan Bienek described what happened on December 30 in a deposition she gave a week later:

I started feeling cramps on the 30th of December about 11:30 to 12:30. I was in bed. My husband was in the living room. I think he was lying on the couch. I went into the bathroom. I was bleeding pretty heavy. I was standing in the bathroom and the baby came out. Once the baby came out, I broke the cord. I pulled it apart with my hands. The reason I did that was to make it breathe. I didn't use scissors or a knife. The baby wasn't breathing, it just laid there. I held the baby for awhile, then I went in the kitchen and got a sheet that was on a chair. I didn't call 911 because I didn't think of it. I wrapped the baby in the sheet... Once I wrapped the baby in the sheet, I went outside through the back door. I sat on the back steps, I still had the baby in my arms. After awhile I got up and put the baby in the bassinet... I went back in the house to the bathroom. I was bleeding all this time... I started to feel dizzy so I went to bed and laid down. I had thrown the sanitary napkins in the trash can that's in the bathroom. I started feeling dizzy because I lost so much blood. I woke up a little later, it was still dark outside. I was still cramping... I laid in bed for awhile... It was getting on towards morning. I got up and dressed. I went outside through the back door. I brought the plastic trash bag and the bag containing the sanitary napkins out to the shed. I held the baby for a little bit. I put the baby in the trash bag... I carried the bag outside and put it in the passenger side seat of the truck. I went back inside the house. Rachel [my daughter] was up. I got my purse and keys and told her I'd be back in a little bit. I drove off and rode around. I thought about my family and the baby all this time... I stopped at a roadside park on Highway 21. I

put the bag with the baby and the sanitary napkins in a cardboard box that was by the trash can. This was Thursday morning... I went back home... everybody was up. I laid on the couch for awhile and fell asleep. I did what I did because the baby was dead and I can't afford funeral expenses. I didn't take it to a doctor because it was dead and they'd say I did it. The baby was dead. He wouldn't move, he wouldn't breathe. He just laid there. [Very blue, he was very blue. I picked his arm up. It fell down. I tried to make him cry. He looked like a rag doll. I hit his bottom to try and make him cry, but he did not cry. He didn't breathe. I thought he was dead.]

The prosecution characterized Susan Bienek's behavior as covert because she had told no one she was pregnant and had, in fact, specifically denied it when asked by one of her co-workers. In fact, she had not told her husband because she was not sure until she was six months gone and soon thereafter the baby had stopped moving, leading her to believe that she was mistaken. She explained on cross-examination that she had not known for sure she was pregnant with any of her children because she gained so little weight and continued to have her periods throughout the pregnancy. In response, the prosecution emphasized repeatedly her secret and duplicitous behavior, her capacity to hide her body and its procreative power from public view.

In addition to her secrecy, the prosecution also highlighted her self-control before the baby's birth and after his death, emphasizing the rationality of her behavior and thereby undermining any attempt by the defense to argue that she was mentally disturbed rather than evil. Susan's only defense, as argued by her lawyer, was that she had believed the child to be stillborn; her crime was disposing the body in a garbage bag. She was a good mother who had made a terrible but not felonious mistake. In contrast, the prosecution's narrative asserted that Susan was, despite the evidence of fourteen years of good mothering, a bad mother, a force of evil in the community.

The conflict between these two versions of the maternal story occurred most prominently in the presentation of the forensic evidence and in the lawyers' closing statements. The forensic evidence produced by the prosecution suggested that the child had indeed been alive and, even if distressed at birth, could have been saved by medical intervention. The Assistant District Attorney asked Susan why she hadn't performed CPR, called for help from her husband, dialed 911, or phoned her father who was a volunteer fireman. To all of these questions, she replied: "I don't know. I was weak. I was bleeding" or "He wasn't breathing. He was blue." Arguing that no normal mother would abandon her newborn infant without seeking some assistance, the prosecutor insisted that Susan's failure to call for help confirmed her secretive behavior and evidenced cold-hearted cruelty toward
her son. On the other hand, a county pathologist argued for the defense that sufficient evidence suggested that air found in the child's lungs and stomach could have been caused by decomposition and not by respiration. Under this narrative, Susan had acted in a state of shock and distress when she took the body of her child and placed him in a sheet and then in a garbage bag. The epitome of the good mother, Susan was momentarily deranged by the death of her son.

What both advocates lacked, however, was a convincing explanation for her secrecy. Despite the Chief Investigating Officer's attempt to supply Susan with one by suggesting various reasons why she abandoned the baby in the garbage bag, for example, that she did not want to bother with a funeral—the absence of a compelling and coherent motive that would conform to the "mother narrative" of either lawyer was disconcerting. Both lawyers agreed that Susan's behavior that night was unnatural, what they disagreed upon was the significance of that unnaturalness. In one version, Susan is the scapegoat for all that is evil and disruptive in society; in the other, she is the scapegoat for all the potential frailty and instability of women, especially reproducing women. These are both mythic narratives, generalized representations of family disorder which cloak Susan's specific identity and story.

The role of the scapegoat is evoked in both the prosecuting and defense lawyers' closing remarks. The case of Susan Bineke is, the prosecutor argues, not simply the case of an individual mother who has harmed her child. Her conduct is a threat to the community, a harbinger of moral decline: "This is not about Susan Bineke; this case is about a whole community, an outraged community. And I'll tell you another thing...this verdict...goes out and it sets standards for a lot of people for a long time to come...We've got a kid that will never see a ball game, that will never see scouting, and this community will never know that the kid would have had an affect [sic] on all of them...Believe it or not, the whole concept of justice and the importance of human life falls in your hands. You've got to stand tall." The prosecutor moves the jury's attention from the specifics of this case to the pervasive presence of crime and anti-communal behavior. He marks this case of infanticide as representative of all evil that threatens the community but offers that community, through the jury, the chance to cleanse itself of the transgressor: "[S]omeone," he said, "some force, brought this woman to justice." The prosecutor asks the jury to compare the death of the newborn to the savagery of a mother who gouges out the eyes of her child. Summoning up vaguely Oedipal images of abandonment and blindness, the prosecutor invokes mythic fears of unnatu-
is now serving time in a prison in Gatesville, Texas. Her earliest release date is 2005.

III. Dialectical Narrative and Ethical Judgment

The Bienek case illustrates the need to conceptualize a dialectical and mediatory alternative to antagonistic narratives that derive their authority and plausibility from univocal representations of human agency and morality. The case demands a form and style of narrative that represents crisis so that catharsis, and therefore ethical judgment, is possible.

The community, in the form of the specific legal or popular audience, should not judge the offender against a model of causal and historical relationships that flattens her particular experience. Rather, they should come to an ethical judgment by examining “a multiplicity of possible connections” that keep “all contextual and ethical elements in play.”30 This mediatory narrative should remind the jury that they, too, are subject to the passing of time and the contingency of events: their “historical sense...[should be] an ethical force, acting to break down static conceptions of right and wrong.”31

Let me repeat what I have already said: The offender has not severed her relationship to her community by her offense; she has re-defined it, and the ethical response facilitated by dialectical narrative is to conceptualize the nature of that re-definition. Stereotypical narratives of motherhood rehearsing the apparently ageless quality of a mother’s relationship to her community threaten to cover up particularities like class, gender and race. The mother’s crime can become the essence of what she is, regardless of the specificities of her individual life. The complex narrative that might mediate between the demands of the community for retribution and the right of the defender to justice should not be reduced to a fixed, single action, emptied of local meaning and isolated from the complexities that produced it.

As a way of imagining narrative mediation, one might contemplate how we more easily accept and judge compassionately that which is represented as “not real” as opposed to that which is represented as “real.” When reading fiction, we can suspend our judgment until we have understood the complexities of the protagonist’s life: witness our sympathetic response to Sethe’s murder of her infant daughter in Toni Morrison’s Beloved. Recognizing the possibilities present in our ethical response to fiction is rele-

vant because the literary text is not a discrete, aesthetic object, separate from the social, but rather “its value [is] as activity and its meaning [is] as a gesture and a response to a determinate situation. Thus conceived, literary and cultural criticism takes its place among the social sciences [and offers] a unique means of access to the understanding of social relations.”32 I’m suggesting here that the combination of literature, literary critical thinking and legal hermeneutics provides yet another richer nuanced way of “understanding...social relations.”

Considering a specific critical response to a literary text illustrates this ethical act of interpretation and imagination. I am not suggesting that the consequences of literary interpretation are analogous to those of legal interpretation. (And this essay is not the place to enter into the debate about the social construction of taxonomical distinctions that allow me to designate the poem as “literary” and trial testimony as “legal.”) Something, however, in the act of interpretation, ethically undertaken, compels the interpreter to arrive at a just reading of the text, and thus in criminal cases, to arrive at an appropriate judgment. What follows is a poem by Seamus Heaney about infanticide.

Limbo
Fishermen at Ballisheannon
Netted an infant last night
Along with the salmon.
An illegitimate spawning,
A small one thrown back
To the waters. But I’m sure
As she stood in the shallows
Ducking him tenderly
Till the frozen knobs of her wrists
Were as dead as the gravel,
He was a minnow with hooks
Tearing her open.

She waded in under
The sign of her cross.
He was hauled in with the fish.
Now limbo will be

30. Virginia Anderson, “Antithetical Ethics” 19 (unpublished paper on file with author). We are reminded again of how the jury in the Susan Smith trial responded to the particular details of her life and circumstances and not simply to the incontestable narrative of horror generated by her actions.
31. Id.
er, the passive victim of her culture—she affirmatively "ducks" her child. She "wade[s] in under/The sign of her cross," becoming in that moment both the sacrifier and the sacrificed, identified with Christ. 38

What happens to us when we enter into the experience of this poem? We are moved by its narrative beyond the first horror at the thought of a mother drowning her child to see that mother as neither evil nor innocent. The murdering mother is not isolated from her community, scapegoated to carry the burden of violence and sin; rather, she is re-inserted into her community, immersed, as it were, in the waters of a shared cultural narrative. Her terrible deed recapitulates the actions of others who have been driven to kill their children and thus situates her in human history. Throwing back the "small one," she is associated with the community of fishermen who have netted her baby, and as the "spawning" salmon, she is netted herself by the men who fish and by that most charitable fisher of men, Jesus Christ. Set against this potentially redemptive reading, however, is the image of the "cold glitter" of limbo, where according to Roman Catholic dogma the baby's unbaptized soul must linger forever. Even Christ "cannot fish there." And so the mother, who may be redeemed by the promise of Christ's forgiveness, is nevertheless sentenced to remember her crime forever. She, too, must dwell in limbo. According to Cullingford, "the 'child murderess' endures a female Calvary that is compounded by her religious beliefs: the cross weighs heavily upon her because infanticide outrages both her feelings as a mother and her conscience, her sense of sin." 39

The judgment suggested by the poem on the mother is ambivalent and fraught with irresolution and is for these very reasons more ethical than simple condemnation or exoneration would be. The legal system, of course, sometimes requires a verdict of innocence or guilt, or at least a formal plea by the accused. Most cases, however, are handled outside the formal constraints of the courtroom. Considerable leeway resides in prosecutorial discretion and the omnipresent plea bargaining process. Even if the case gets to court, one frequently sees the presence of the kind of ambivalence I am addressing here—probated sentences or probation instead of jail, reduced charges or pleas.

38. Compare Burke, A Grammar of Motives 406 (Berkeley: Univ. of California Press, 1969) ("...the scapegoat is 'charismatic,' a vicar. As such, it is profoundly consubstantial with those who, looking upon it as a chosen vessel, would ritualistically cleanse themselves by loading the burden of their own iniquities upon it...In representing their iniquities, it performs the role of vicarious atonement...").

39. Cullingford, supra note 34, at 53. She also states, "[The Church] has created a Limbo for women in the same way it so conveniently created one for unbaptized babies. No one can go in there, no one can talk about this experience, it is the loneliest place; it must be endured. It is a prison sentence without appeal." Id.
Placed within the complex political, ethical, and aesthetic context of the mother's own life, infanticide is authentically unrepresentable except in the terms of the culture out of which the mother has acted. Fiction like Heaney's demands that we respond as temporary members of that same culture, that we put aside our habitual responses and enter "so intensely inside [the] symbol system [of the poem's world] that a new quality or order of motives emerges from within it."40 This "new . . . order of motives" does not recast the mother as innocent victim, simply reversing an oppositional ideology that would demonize the mother. The point is not to avoid judgment (or punishment), but to render a judgment consonant in its complexity with the crime.

As a concluding example of the capacity for narrative to facilitate ethical judgment, let's consider the case of Juana Léija, charged with two counts of capital murder for the drowning deaths of her children.

IV. The Case of Juana Léija, Houston, Texas

Eleven-year-old Eloisa Léija, the daughter of Juana Léija, was deposed on April 18, 1986, the day her mother tried to kill her seven children:

This morning before school my mother told me that today we were going to go to the water and make us [sic] jump in and she told me not to be scared like the other time she did this. She told me not to say anything about it because my sisters and brothers would get scared. In March of this year, it was on a Saturday when my mother got all of my brothers and sisters together and took us down to the little river near Crockett Street. She said she was going to put us all in the river and then she was going to go in too. She was mad at my father because he drinks too much and says that he is going to kill her. He hits her a lot and all of us kids too. Mother has called the police on him but they don't do nothing to him.

We went to the river and then she couldn't do it so we all went back home. My Grandmother found out that my mother was going to do this to us and she got mad at my father and said she was going to call the police on her own son because he shouldn't do that and my mother had good reason the way he does her. One time he pointed a rifle at her and told her he was going to kill her. He always drinks and gets mean when he drinks...

My mother and father have been fighting ever since I was a little baby. He has a lot of friends he goes with to drink and gets drunk a lot....

My mother is good to us all and takes care of us but she cries a lot and doesn't want my father to be mean to us.41

40. Burke, "Catharsis—Second View," supra note 7, at 127.
41. Statement of Eloisa Léija, April 18, 1986, Harris County District Attorney.

Juana Flores was 16-years old when she first met 20-year-old Jose Luis Léija in Matamoros, Mexico. She wanted to "work, to study, and more than anything, [she] wanted to be a teacher."42 In an interview shortly after her arrest, Juana Léija said that she "never even wanted to be his girlfriend... But from the beginning, Jose Luis kept insisting that he wanted to get married, and I kept telling him I wanted to work and study. Someday, marriage. Someday, children. But I just wasn't ready yet, I told him."43 One day, Jose Luis picked her up from school, offering to take her home. But when she got into the car, "he immediately started going in a different direction from home, and I couldn't stop him. I kept telling him to take me home, but he kept driving no matter what I said until we got to this place where it was very dark and secluded and ugly. And then he raped me."44 Despite her insistence that he leave her alone, Jose Luis persisted in calling on her at home and demanding again and again that she marry him. She refused until he threatened to "go from block to block throughout her neighborhood shouting to the world that he had taken his pleasure with her and that any man who wanted could do the same."45 "I couldn't bear to hurt my parents," she said, "especially my father who always said he didn't care very much if I made good grades... but only asked that, when I finally left his home, I'd leave it dressed in white."46 Seventeen-year-old Juana dropped out of school and married Jose Luis in 1973. Soon after they entered the U.S. illegally, heading for Houston.

Juana had seven children between 1975 and 1987. In 1983, Jose Luis lost his job and all but stopped looking for another. "Every day, it was the same," said Juana. "He would leave the house, he would stay gone all day, and he would come home in the evening very drunk and very angry. And every night, there were beatings."47 Eleven-year-old Eloisa said that her father was "always mean to Esther," the oldest child who was retarded, "and [hit] her with his fist all the time because she doesn't understand him. He hits on [5-year-old] Juana a lot too. He puts bruises on all of us."48 Toward the end, Jose Luis no longer cared if the neighbors and police knew that he was beating his family. Neither did Juana. "[T]he more he did it," she said, "the less and less I cared."49 In August 1985, eight months before she tried to remove herself and her children from this nightmare,

42. Houston Chronicle, June 19, 1987, Section 1, 1.
43. Id. at 1, 21.
44. Id.
45. Id.
46. Id.
47. Id.
Juana was found in a delusional state at a hospital with her hands cupped. The doctors said that she “seemed to believe that her children were tiny and contained within her hands.”

After years of brutal abuse Juana Léjia took her children to the edge of Buffalo Bayou, in Houston, and threw them in the water, intending afterward to drown herself. In her testimony she said, “I saw no way out for us. I saw that the best thing was to end my life and their lives and that would end all our suffering.” I “wanted to end my life and the lives of my children because I knew that sooner or later my husband was going to kill me and I didn’t want my children to stay with him or someone else that was going to mistreat them. I knew that my children would suffer if they stayed behind.”

All but two of the children were rescued: five-year-old Juana and six-year-old Judas died. Juana Léjia was charged with two counts of capital murder. Her lawyer faced the extraordinarily difficult task of defending a mother, an illegal Mexican immigrant, against charges of infanticide—every class, race, and gender prejudice would be overwhelmingly against her.

The psychiatrist engaged by Juana Léjia’s lawyer, who believed that the evidence would support an insanity defense, pointed out that the most difficult issue would be “to convince the jury that it is not wrong for a mother to want to take the lives of her children and herself if she believes (knows) that is the only safe way for them. That is a psychotic and unreasonable thought process but is, I believe, the way that Mrs. Léjia was functioning at the time.” However, the case never went to a jury. Juana’s priest was able to secure the assistance of local Hispanic leaders and they, in turn, managed to convince Dick De Guerin, one of the best criminal lawyers in Texas, to take her case. Eventually, Juana Léjia was permitted to plead no contest to murder and attempted capital murder charges. She received a ten-year probated sentence, described by the Houston Chronicle as a “gentle form of probation,” and used when there is no judgment of guilt or innocence. Léjia was required to remain under the care of Harris County mental health officials.

In convincing the authorities to render a probated sentence, Juana Léjia’s lawyer situated her horrifying actions within a narrative that addressed the pain of her life, the desperation she was driven to, and the active agency of her solution. Moreover, De Guerin, a white male, had to speak for a client who was marginalized in terms of her gender, her ethnicity and her class. Narrative mediation was accomplished in the case by De Guerin with the help of a psychiatrist and Mexican folklorist José Limón who situated Léjia’s particular tragedy within a larger cultural narrative through the figure of La Llorona. The central components of the legend of La Llorona are that she appears “weeping and ... as a ghost in the form of a woman. Closely associated elements include white clothing, walking at night, appearance near water ... continuous searching, betrayal [and] the loss or murder of the child who is the object of the search.” The loss of the child, argues José Limón, does not necessarily signify the oppressive conditions of motherhood or a threat to rebellious mothers, but rather suggests “the humanly understandable, if extreme and morally incorrect, reaction of a woman to sexual and familial betrayal by a man in a Mexican cultural context where such betrayal was a common and recurrent experience for women.”

De Guerin’s narrative accommodated both the specific details of Juana Léjia’s life as an immigrant woman married to an abusive husband and the way in which her individual history recapitulated the relationship of a marginalized Latino culture to a dominant Anglo order. Juana’s experience was not articulated merely as an example of a mythic or prototypical narrative of motherhood. It was articulated in the details of her lived experience within its cultural context. Both the individual and collective representation of disempowerment and its consequences can be simultaneously witnessed, and even the murdering mother, La Llorona, has a story to tell that demands an audience.

By providing Juana Léjia with a voice that represents not only her victimization but also her active agency, her lawyer invoked both the individual and cultural story to which she was subject, empowering her to

50. Id. at 2.
51. Id. at 21.
52. Statement of Juana Léjia, April 19, 1986, Harris County District Attorney.
53. Cynics might say that these things might work for her—after all, who cares if a crazy illegal immigrant drowns her children. It’s just two fewer kids for the system to take care of. On the other hand, there is the need to insist that “real” Americans don’t behave as Léjia—that the madness and horror of her action is to be attributed to her others, her illegality. For a study of the way in which evidence itself can be “partisan,” functioning to transform the social attributes of the defendant into a successful or unsuccessful legal claim, see Mark Cooney, “Evidence as Partisanship,” Law and Society Review 833 (1994).
55. As Cooney, supra note 53, at 852, points out, “the poor and socially isolated are not always disadvantaged. Sometimes they act (to borrow a term from chaos theory) [citation omitted] as ‘strange attractors’ obtaining support from high-status individual[s] or organizations.”
resist the prolongation of that subjection. This is not a voice that is imposed upon her from the outside, “Yo soy La Llorona,” she said in one of her interviews with José Limón. Under pressure from symbolic narratives, the legal narrative in her case accepted the complexity of an individual woman’s life and generated, I believe, the appropriate ethical and legal judgment. Juana Léija’s narrative did not remain unavailable to us “en el otro” (on the other side) covered by our myths of maternity. 58

The other side for me, a white, middle-class, academic feminist and mother of two children, is the place where the unthinkable happens—the place where La Llorona walks; the place where a mother murders her children. The bridge that allows me to cross over to that other side—the only pathway to alterity—is narrative. “The gift-giving, consuming potential (as Bakhtin puts it) that one bears another is most meaningfully bestowed narratively—across time, and through a call offor stories.”59 This “crossing over,” or “going beyond,” as Burke characterizes it, is neglected as a strategy in the representation of difference, especially in law courts where the pretense of objectivity and autonomy may frustrate our longing for justice. The experiences of those whom the legal process has often cloaked cannot expect to be recognized unless their stories are told in voices that represent them as more than simply powerless. It is not sufficient to assert that one is telling one’s own version of what happened, a version of the “truth,” unless that truth can be recognized as such by those who listen. This means that we have to go beyond simply recognizing that “the same empirical events can give rise to very different amounts and types of evidence.”60 We must also recognize that some stories will not even appear to have a prima facie claim to be heard, their weak “evidentiary strength”61 rendering them implausible.

The richly contextualized story of Juana Léija’s life challenges the categories of what is legally relevant, putting pressure on the boundaries of legal narrative to yield to other narrative conventions. A powerful and central cultural symbol was invoked to make respectable what was otherwise unrepresentable, in both the aesthetic and the legal sense. The narrative of La Llorona mediates between the individual, historical facts of Juana Léija’s life and the collective symbolic narrative out of which her individual manifestation has emerged. The consequence of this mediation—of this “crossing over”—is a new relationship between the particular story of a woman’s life, the culture from which she draws her symbolic life, the culture from which she feels alienated, and the legal context that draws all these disparate elements together. The voice of La Llorona does not simply echo ballads and folk stories. What happens when the judge hands down a probated sentence is that La Llorona, the betrayed and ghostly matricide, is heard in the court, demanding an ethical inquiry heretofore unavailable.

The discourse of ethical feminism has direct application to the hardest of legal cases, even when theorized in terms of a traditional, Aristotelian aesthetic. Such a political reconceptualization not only “reinvents” classical literary theory for feminism, but provides us with an alternative to adversarial jurisprudence. The central concern of catharsis is the reconciliation between the offender and the community that has defined the terms of the offense. One might be willing to go even further and argue that certain “crimes,” like abortion, are produced by the community and that the community shares responsibility with the individual offender for the social crises that follow. As a political, ethical, emotional and aesthetic response, catharsis also affirms the power of difference qua difference, insisting that a conscious recognition of that difference accompany the reintegration of the offender into the community. The adversarial system, on the other hand, can only figure difference as opposition and requires its erasure in order to ensure the appearance of consistency and objective treatment under the law.

Infanticide raises questions about culture’s deepest anxieties, and its presence opens up otherwise hidden seams of ethical and social crises. Feminism’s responsibility, as a political and ethical discourse, is to respond to the presence of female violence in our culture and to reconfigure the relationship between the community and the offender who, despite her crime, remains part of our world.

59. See Newton at 48.
60. Cooney, supra note 53, at 834.
61. Id.