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Katie Barclay

**Narrative, law and emotion: husband killers in early nineteenth-century Ireland**

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# **Narrative, Law and Emotion: Husband Killers in Early Nineteenth-Century Ireland**

KATIE BARCLAY

## **Abstract:**

*Scholars of emotion and the law have sought to demonstrate the significant role emotion plays in shaping the operation of courtrooms, the development of legal theory and practice, and the possibilities for justice. This paper contributes to the discussion by exploring what happens when emotion is ignored or underplayed in trial narratives, seeking to demonstrate that whose emotion is considered to be important can shed light on power dynamics, law and the cultures in which law operates. It does so through a case study of women on trial for murdering their husbands in early nineteenth-century Ireland. It argues that emotion is not simply another species of evidence that can be used in criminal processes, but itself a type of narrative – emotion is constructed and performed by actors in legal dramas and forms a competing story to others in the courtroom space.*

**Keywords:** murder, Ireland, emotion, gender, narrative, courtrooms

## I. INTRODUCTION

The key question explored in this paper was raised by a reading of the popular historian Kate Summerscale's recreation of the late Victorian scandal of Robert Coombes, a thirteen-year-

old boy acquitted of murdering his mother on grounds of insanity.<sup>1</sup> In reading and writing the 1895 trial using surviving trial documents, family and institutional papers, and accounts in the press, Summerscale described how Coombes' behaviour, actions that were unusual, deeply shocking and difficult to explain at the time, was made explicable by locating him as a 'new boy'. Like the 'new woman' of the period, the 'new boy' reflected novel ideas about adolescence in child development theory and an associated market of goods, from books to clothing, targeting this youth. In particular was a swathe of 'penny bloods', short periodicals for young men that sold them stories of daring do and adventure, often overseas and in the colonies.<sup>2</sup> Coombes' behaviour, the press explained, was driven by a desire to leave home, to adventure in the world, and to cut his ties to a mother who limited these ambitions. Others speculated his actions were underpinned by the degeneracy that concerned observers noted afflicted the lower orders of the period.

The prosecution's narrative of the unscrupulous 'new boy' was not entirely successful, however, as Coombes was found insane, a decision informed by testimony that he had long-term headaches that potentially caused a short mental break. The story that was *not* told, but which Summerscale found hinted at in some news accounts, was that of child abuse. A modern reader of the trial documents, including the boy and his brother's accounts of their home life, would find several 'red flags' suggestive of physical abuse and neglect, and very possibly sexual abuse of Robert by his mother. Yet, as Summerscale notes, this possibility was not raised in legal argument. Whether it was felt wrong to speak ill of the dead, or

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<sup>1</sup> Kate Summerscale, *The Wicked Boy: the Mystery of a Victorian Child Murderer*, London, 2016.

<sup>2</sup> Sally Powell, 'Black Markets and Cadaverous Pies: the Corpse, Urban Trade and Industrial Consumption in the Penny Blood', in Andrew Maunder and Grace Moore, eds., *Victorian Crime, Madness and Sensation*, Aldershot, 2004, 45–58.

because a murderous son was not tied in the popular or psychological imagination of the period to child abuse, this narrative went unspoken in court and largely in the media too. It is one that a modern reader, primed by our Freudian heritage, would struggle to ignore, just as Summerscale could not.

That the stories available to be told in court are shaped by the conventions, legal, social and cultural, of the period has now been well charted by social and legal historians. Historians of criminal intent, for example, have argued that during the eighteenth century a wider range of ‘mental states’ were made available to excuse criminal behaviour. Dana Rabin highlights how defences of mental distress, temporary ‘phrenzy’, necessity, drunkenness, and compulsion expanded the mitigating circumstances on offer to juries in England and Wales.<sup>3</sup> Martin Wiener charts the contraction of some of these options in the nineteenth century as courts and the public placed more emphasis on self-control, particularly for men.<sup>4</sup> Work on Scotland argues that such shifts were less marked, as a culture of manly emotional control was significant across the eighteenth century.<sup>5</sup> Moving back in time, Garthine Walker describes how explanations for parricide moved from sin to psychology over the early modern period, as ‘selfish’ children motivated by greed were replaced by portraits of the

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<sup>3</sup> Dana Y. Rabin, *Identity, Crime, and Legal Responsibility in Eighteenth-Century England*, Houndmills, 2004.

<sup>4</sup> Martin J. Wiener, *Men of Blood: Violence, Manliness and Criminal Justice in Victorian England*, Cambridge, 2004.

<sup>5</sup> Robert Houston, ‘Courts, Doctors and Insanity Defences in Eighteenth and Early Nineteenth-Century Scotland’, 26 *International Journal of Law and Psychiatry* (2003), 339–354; Chloë Kennedy, “‘Ungovernable Feelings and Passions’”: Common Sense Philosophy and Mental State Defences in Nineteenth-Century Scotland’, 20 *Edinburgh Law Review* (2016), 285–311.

individual and their personalized motives.<sup>6</sup> Nicola Lacey broadly agrees and particularly emphasizes the implications for gender, with women's crime moving from rational, if sinful, to overlaid by passionate impulse and irrational loss of self.<sup>7</sup>

What this literature suggests, as does the Coombes case, is that if there are histories of the expansion and retraction of forms of evidence and legal narratives available to criminal defendants or other actors in the legal system, then there are also stories untold, gaps in legal narratives, or narratives of self unavailable to people at particular historical points. Such gaps produce tensions within the legal system and its representations in culture. Francis Dolan, and other early modernists, have lamented the absence of personal motivation in the representation of early modern domestic crime as a result of the focus on sin and morality.<sup>8</sup> I have highlighted the ways that, for 'unimaginable' crimes such as parricide, eighteenth-century Scots often combined competing narratives in their legal depositions – from sin, to greed, to bad character, to anger – in an attempt to find resolution in the fullness of competing explanations, if not in independent variables – a technique that drew attention to the constructed nature of such explanations.<sup>9</sup> Yet, despite acknowledgement of the stories left

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<sup>6</sup> Garthine Walker, 'Imagining the Unimaginable: Parricide in Early Modern England and Wales, c.1600-1760', 41 *Journal of Family History* (2016), 271–293.

<sup>7</sup> Nicola Lacey, *Women, Crime and Character: From Moll Flanders to Tess of the D'Urbervilles*, Oxford, 2008; see also: Bridget Walsh, *Domestic Murder in Nineteenth-Century England: Literary and Cultural Representations*, Farnham, 2014.

<sup>8</sup> Frances E. Dolan, *Dangerous Familiars: Representations of Domestic Crime in England 1550-1700*, Ithaca, 1994, 48–58.

<sup>9</sup> Katie Barclay, 'From Confession to Declaration: Changing Narratives of Parricide in Eighteenth-Century Scotland', in Marianna Muravyeva and Raisa Toivo, eds., *Honor Thy*

untold, how fissures in courtroom narratives shape courtroom dynamics is relatively understudied.

This paper explores the gap in narrative formed when emotion is ignored during trials for women accused of murdering their husbands in early-nineteenth-century Ireland, with a particular focus on the 1842 Dublin trial of Mrs Ellen Byrne. A developing scholarship on legal emotions has sought to challenge older conceptions of the law as a purely rational process. Such work highlights the emotions of actors in courts or legal processes, from witnesses to the judiciary; it reflects on the emotional component of legal problems or the, sometimes unspoken, emotions shaping legal precedent and doctrine; it highlights research on the role of emotion in cognition and its implications for legal decision-making, and much more.<sup>10</sup> In a scholarship invested in putting emotion back into the law, a discussion of its absence may seem counterproductive. Yet, as I argue and as the Byrne case highlights, the absence of emotion also produces a story, one that in this instance was unsatisfactory for a jury who, I suggest, required emotion to interpret the case and to produce a conclusive narrative around the events leading to Augustine Byrne's death. In doing so, I contribute to a wider scholarship within critical legal studies that reflects on the courtroom as, not just a legal, but a social and cultural practice.<sup>11</sup> My focus is on narrative and storytelling, I engage in a wider conversation about how the law – as a human activity performed in courts – both

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*Father and Mother: Violence Against Parents in Early Modern Europe*, Basingstoke, forthcoming.

<sup>10</sup> Susan Bandes, ed., *The Passions of the Law*, New York, 1999; Terry A. Maroney, 'A Field Evolves: Introduction to the Special Section on Law and Emotion', 8 *Emotion Review* (2016), 3–7.

<sup>11</sup> Christopher W. Brookes, *Law, Politics and Society in Early Modern England*, Cambridge, 2008.

reflects the values and beliefs of the societies in which it operates and seeks to make itself comprehensible in a narrative form that is simultaneously legal, cultural and emotional.

Mrs Byrne took that appellation on her marriage to Augustine in 1833. A widow, she brought considerable property to the match with the wealthy pawnbroker. To the external world, they were upstanding members of society but, as in every good Victorian melodrama, behind closed doors the respectable façade crumbled. Not only were they unhappily married, marked by their choice to use separate bedrooms, but the couple was ‘addicted, in more than ordinary degree, to habits of drunkenness’.<sup>12</sup> In early July 1842, the couple, following a pattern established in their marriage, locked themselves into Mr Byrne’s bedroom, only emerging to call for alcohol and some limited food. A week later Mr Byrne was dead.

Middle-class female murderers fascinated the Victorians, in Ireland as in the rest of the United Kingdom. Contemporary understandings of femininity constructed middle-class women as sensitive, delicate, ideally innocent of the world, and in need of male protection – a model that relied on the intersection of the privileges of their class with the ‘innate’ characteristics of their gender.<sup>13</sup> Female violence, particularly against adult men, unsettled such archetypes, challenging the reputation of the ‘soft sex’. Domestic violence by such women against husbands or children was additionally threatening, both for its disruption of patriarchal order and to an increasingly romantic imagining of the home as a refuge from a harsh world, a haven produced through middle-class women’s labour.<sup>14</sup> Within this context,

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<sup>12</sup> Thomas R. Dunckley, *The Trial of Ellen Byrne for the Murder of Augustine Byrne, her Husband...*, Dublin, 1842, 3.

<sup>13</sup> Deborah Gorman, *The Victorian Girl and the Feminine Ideal*, London, 2012.

<sup>14</sup> Walsh, *Domestic Murder*; Marlene Tromp, “‘Throwing the Wedding-Shoe’: Foundational Violence, Unhappy Couples, and Murderous Women’, 39 *Victorian Review* (2013), 39–43;

the trial of Mrs Byrne, if not a media sensation, caused a splash in the Irish press. It resulted in the publication of a full-length trial report sold as a sixty page pamphlet, as well as numerous newspaper accounts and prints.

This article draws on printed publications, mostly newspaper reports and pamphlets (the latter very often written by practising lawyers), which explore the trials of women accused of killing their husbands. They provide a unique record of courtroom dynamics, recording not only legal argument or process, but often how people were dressed, how they spoke or interacted, their gestures and demeanour, and frequently their emotions as interpreted by a journalist or pamphlet writer.<sup>15</sup> Pamphlets typically purport to be entire accounts of trials, beginning with lists of juries and grand juries, opening remarks from the court, legal speeches, arguments between lawyers, cross-examination, charges and verdicts. Many also report on the physical space of the court, audience responses, clothing, interruptions, and similar events that shaped dynamics. Perhaps apart from recordings of the lower courts (which typically do not appear in pamphlets and are often humorous), there is little difference between pamphlets and what is reported in newspapers; indeed, some pamphlets are serialized in the press.<sup>16</sup> What is distinctive about newspaper accounts is that

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for an alternative see: Wiener, *Men of Blood*; Carolyn Conley, 'No Pedestals: Women and Violence in Late Nineteenth-Century Ireland,' 28 *Journal of Social History* (1995), 801–818.

<sup>15</sup> A helpful discussion of sources can be found in John Langbein, 'The Criminal Trial Before the Lawyers', 45 *The University of Chicago Law Review* (1978), 263–316.

<sup>16</sup> For example, James Mongan, *A Report of the Trial of the Action in Which Bartholomew McGarahan was the Plaintiff and the Rev. Thomas Maguire was the Defendant...* Dublin, 1827 appeared over several weeks in local newspapers, such as the *Connaught Journal* and *Ballina Impartial*.



they are more likely to be condensed or edited for space, and so tend to be shorter and more selective.

Reports such as these provide the main source of material for courtroom interactions and legal process and decision-making during this period across the United Kingdom. They are critical for Irish history as the destruction of the Four Courts and the country's legal records in 1922 left little for historians to work with. In the early nineteenth century, as in many cases today, there was no formal record kept of trial proceedings.<sup>17</sup> Court records instead consisted of papers of process, judgments, and occasionally the notes of the judiciary and barristers. From the early eighteenth century however, public interest in court proceedings motivated 'journalists' and others to record and publish what they witnessed.<sup>18</sup> As importantly, the growing significance of the appearance of justice to the law's legitimacy encouraged the court to co-operate with journalists, to provide space for the public in large galleries, and to articulate the law as something transparent and corresponding to 'common sense' ideas of fairness, rather than an obtuse application of legal principle.<sup>19</sup> Those who recorded court proceedings were expected to record events accurately and impartially – those who did not could face significant censure in the press.<sup>20</sup>

In an era before professional journalists, the men who performed such work varied from those who saw themselves as 'publishers' to freelancers, who used it as a mechanism

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<sup>17</sup> The UK lower courts still do not make transcripts or recordings of courtroom proceedings.

<sup>18</sup> Langbein, 'The Criminal Trial'.

<sup>19</sup> Katie Barclay, *Men on Trial: Emotion, Embodiment and Identity in Ireland, 1800-1945*, forthcoming.

<sup>20</sup> See for example: 'Dublin Police', *Southern Reporter and Cork Commercial Courier*, 29 May 1830. For discussion, Katie Barclay, 'Stereotypes as Political Resistance: the Irish Police Court Columns, c.1820-1845', 42 *Social History* (2017), 257-80.

for expanding their income.<sup>21</sup> Notably, the latter category included a significant number of lawyers who authored a large percentage of the surviving trial pamphlets and whose occupation lent authority to the veracity of the proceeding. Works produced by lawyers did not differ significantly from those outside the profession. Moreover, given that some of the professional ‘publishers’ made their reputation in making records of public events, not just trials but parliamentary proceedings, public speeches, and political campaigns, high-quality accounting of events was a key component of their business model. Some of these records, such as the state trials edited by William Cobbett (1763-1835), a political radical and writer, and Thomas Howell (1767-185), a lawyer, or the parliamentary proceedings, edited by Thomas Hansard (1776-1833), a printer, continue to stand as the authoritative version of proceedings. Thomas R. Dunckley, who produced the pamphlet of the Byrne case, performed a similar function in Dublin; his name was typically attached to public events that required close transcriptions of speech.<sup>22</sup> Like other historical legal sources, law reporting of this nature can never capture the fullness of trials. Just as depositions, pleadings, minute books and judgments are shaped by genre rules that inform their structure and content, so to the meaning of law reporting is informed by its literary form. Nonetheless they provide one of the few windows into the fluid and interactive engagement between actors in courtroom spaces, and captured evidence of what went on in the courtroom which no other source has replicated until the introduction of television cameras.

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<sup>21</sup> A. Aspinall, ‘The Social Status of Journalists at the Beginning of the Nineteenth Century’, 21,83 *Review of English Studies* (1945), 216–32.

<sup>22</sup> For example he also published: Thomas R. Dunckley, *The Speeches delivered at the fourth Annual Meeting of the Church Education Society [of Ireland], held in the Rotunda...* Dublin, 1843; Thomas R. Dunckley, *The New Irish Pulpit or Gospel Preacher*, Dublin, 1836 [collection of public sermons].

As with any description of a dynamic situation, what reporters saw and chose to emphasize was shaped by their own preconceptions and concerns, those of their audience and how many column inches they had to fill. This weakness may appear particularly crucial in a discussion of emotion. Accurately interpreting what another feels is remarkably challenging even today.<sup>23</sup> Interpreting emotion on bodies – particularly of those with well-paid lawyers – that have been primed to behave in ways that a court should find sympathetic is even more difficult. For the purposes of this article, however, what an individual felt in court was less important than how their performance of emotion was interpreted by courtroom audiences, including the judiciary and juries. This is not a perfect assumption, but it is bolstered by a commitment by journalists during the period to convey events in court accurately (and considerable public debate around situations where that did not occur); by commentary on how people in court responded to events (gasping audiences or fainting jurors for example); and by the narrative structure of court reporting.<sup>24</sup>

Much court reporting is inherently conservative, selecting witness testimony and descriptions of behaviour that lead the reader to understand the jury decision or judicial outcome. This leads the reader to the impression that justice was done, reinforcing the legitimacy of the legal system, whilst perhaps also giving insight into the key pieces of evidence or events in court that had been taken into account by judges and juries when coming to their decisions. Of course, not all jury verdicts were unanimous, nor did judges and juries always agree with each other, but that journalists were able to provide useful explanatory narratives for verdicts suggests that their perspective was not too far different from how the majority of people in court interpreted what appeared before them. This is not a

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<sup>23</sup> Susan A. Bandes, 'Remorse and Criminal Justice', 8 *Emotion Review* (2016), 14–19.

<sup>24</sup> For extended discussion of Irish court reporting see: Barclay, 'Stereotypes as Political Resistance'.

claim that everyone in court agreed with or was happy about particular verdicts; reports often recount such discontent and provide narratives to help explain it. There appears to have been a general level of satisfaction with the quality of trial reporting. They were sometimes used by the judiciary in legal reports where other notes did not exist. Moreover the key role that journalists were understood to play in shaping courtroom dynamics (ensuring the good behaviour of all present and so the application of justice) provides a level of confidence in the quality of these as sources for events in court.<sup>25</sup>

This approach to interpreting trials treats the courtroom as a holistic space, which is important given that it is unlikely that the outcome of any trial is determined by one variable alone. There is a considerable historiography exploring the impact of lawyers on trial processes and the motivations of juries – highlighting for example that juries were reluctant to find guilty verdicts in capital cases, particularly in Ireland – that feeds into an interpretation of courtroom dynamics.<sup>26</sup> It is also well recognized that ‘the law’ provides a ‘grammar and syntax’ for its operation, that shapes what is of legal significance, as well as what can be spoken or not in courtrooms.<sup>27</sup> And news reports can provide access to that in as much as they attend to the behaviour of such actors in courtroom processes. Spending considerable time on a lawyer’s speech, for example, can highlight the role that the reporter

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<sup>25</sup> Ibid.

<sup>26</sup> John Langbein, *The Origins of the Adversary Criminal Trial*, Oxford, 2003; Thomas A. Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800*, Chicago, 1985; Niamh Howlin, ‘Nineteenth-Century Criminal Justice: Uniquely Irish or Simply “Not English”?’ , 3 *Irish Journal of Legal Studies* (2013), 67–89.

<sup>27</sup> Derek Neal, ‘Suits Make the Man: Masculinity in Two English Law Courts, c.1500’, 37 *Canadian Journal of History* (2002), 1–22; Garthine Walker, *Crime, Gender and Social Order in Early Modern England*, Cambridge, 2003, 113–158.

felt it played in shaping the outcome of the trial. Reports of judges' charges that clarify the law help readers understand what was legally at stake. The emphasis they place on displays of emotion and barristers' and judges' discussions of them are highly suggestive of their cultural and legal significance. Given that most reports balance speeches with witness testimony and descriptions of the bodies and behaviours of courtroom actors however, weighting different components of the trial for their impact using this source material is challenging. Rather court-reporting aims to weave together multiple threads to build a coherent narrative for the reader with a satisfying outcome; it is an attempt to impose order on the messiness of human experience, much as juries and judges attempted to do with their verdicts, and much as historians try to do when producing tales of the past. As this suggests, my focus on the role emotion plays in these stories is not a claim that they are always the only explanatory factor shaping the outcome of the trial; rather it is to argue that attending to emotion can contribute to a fuller understanding of how justice was produced in courtrooms. Importantly, it is notable that this was something that contemporaries themselves were concerned with, often devoting considerable space to descriptions of emotion and allowing such descriptions to hold explanatory force in trial accounts. As is explored below, this public interest also reflects the significance of emotion to the 'logic' of the law.

## II. NARRATIVIZING EMOTION; EMOTION AS EVIDENCE

An effective prosecution in a criminal trial typically depends upon the ability of the prosecution to take disparate pieces of evidence and traces of everyday life and to construct them into a coherent narrative of events that demonstrates the culpability of the defendant.<sup>28</sup>

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<sup>28</sup> Robin Wharton and Derek Miller, 'New Directions in Law and Narrative,' [5 June 2016] *Law, Culture and the Humanities*, online first, <https://doi.org/10.1177/1743872116652865>; Jackson, *Law, Fact and Narrative*.

In most cases, this narrative is temporal, constructed along an orderly timeline, and sequential, with one event following another to demonstrate causality, as rules of culpability require that a defendant's actions are shown either to be criminal themselves or to have led to a consequence (such as death) that incriminates them. In an early nineteenth-century context, most evidence continued to be parole – the accounting of events by witnesses. Defendants could speak for and represent themselves, but not testify under oath; the role of defence was increasingly performed by barristers, reducing defendants to observers of court proceedings. Most evidentiary rules, and they were still quite limited, spoke to restricting *who* could testify in particular contexts (wives against husband; those who held malice, etc).<sup>29</sup> Restrictions on the content of testimony were less burdensome, with the hearsay bar being the most notable example.<sup>30</sup> One of the results of this was that a key component of legal evidence was the character of the witness, something largely determined by their appearance, social class and their performance in the courtroom. Indeed, much of the writing on evidentiary rules during this period attends to the ways that character, and so truth, can be determined through a reading of witnesses' bodies.<sup>31</sup> This was considered to be particularly important where

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<sup>29</sup> Leonard MacNally, *The Rules of Evidence on Pleas of the Crown*, Dublin, 1802; Henry Roscoe, *A Digest of the Law of Evidence in Criminal Cases*, London, 1835; Richard McMahon, 'Introduction', in Richard McMahon, ed., *Crime, Law and Popular Culture in Europe, 1500-1900*, Collumpton, 2008, 1–31; Barbara Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence*, Berkeley, 1991.

<sup>30</sup> John Hostettler, *A History of Criminal Justice in England and Wales*, Hook, 2009, 225–243.

<sup>31</sup> See MacNally, *The Rules of Evidence*; Katie Barclay, 'Performing Emotion and Reading the Male Body in the Irish Court, c.1800–1845', 50 *Journal of Social History* (2017).

evidence was ‘circumstantial’ or ‘presumptive’, rather than direct. McNally notes that witnesses describing circumstantial evidence must be of ‘impeachable veracity’ and particular attention must be given to ‘character’.<sup>32</sup> This collapsed the distinction between those testifying and the testimony itself in the determination of probative evidence for the court.

As a result, the courtroom and its actors become implicated in its production of legal narratives. This can include physical architecture, the bodies of prosecutors, defendants, witnesses, lawyers, the judiciary and other legal actors, their clothing and behaviour, the effective use of speech and rhetoric, legal procedure and rules of evidence, and a host of other factors.<sup>33</sup> Such ‘evidences’ can disrupt or affirm the prosecution’s narrative, which may also compete with alternative narratives produced by the defence, by witnesses, the media, broader cultural biases or beliefs (such as preconceptions about race) or the law itself.<sup>34</sup> Whilst the goal may be the production of a particular story, in practice whether such a story is successful or fails can rest less on its overarching narrative than on individual pieces of evidence or argument that act as lynchpins for the entire structure. Thus the court may spend considerable time examining one segment of the narrative, as much as it attends to the larger picture.

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<sup>32</sup> MacNally, *The Rules of Evidence*, 579.

<sup>33</sup> Jenny Scott, ‘Legal Architecture Re-imagined’, 5 *Law and Humanities* (2011), 415–423; Neal Feigenson, ‘Jurors’ Emotions and Judgments of Legal Responsibility and Blame: What Does the Experimental Research Tell Us?’, 8 *Emotion Review* (2016), 26–31; Bandes, ‘Remorse’.

<sup>34</sup> For example, Barrington Walker, *Race on Trial: Black Defendants in Ontario’s Criminal Courts, 1858-1958*, Toronto, 2011.

Emotion may be a component of criminal intent, such as in a hate crime.<sup>35</sup> It may form an integral part of the motive or explanation for a particular act, such as in a crime of passion.<sup>36</sup> It may feature on the faces or bodies of a variety of court actors, speaking to their culpability, honesty, belief (for example, in a client's case), hurt, remorse, or general character.<sup>37</sup> Legal rhetoric, particularly the speeches of lawyers and the judiciary, may utilize affect and emotional signalling to persuade their listeners; indeed, persuasion itself may be figured as an emotional process.<sup>38</sup>

Emotion was a key component of the legal definition of murder in the nineteenth century, where it was distinguished from manslaughter by 'malice forethought'. Malice was 'action unlawful done deliberately, and with intention of mischief, or great bodily harm' ... 'the heart [that acts] regardless of social duty'.<sup>39</sup> Legal malice was noted to be different from common usage: 'In common acceptance malice is took to be a settled anger (which requires some length of time) in one person against another, and a desire of revenge; but in the *legal* acceptance it imports a wickedness, which includes circumstances attending an act, that cuts off all excuse'. Evidence of malice was 'collected either from the manner of doing or from

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<sup>35</sup> Gail Mason, 'The Symbolic Purposes of Hate Crime Law: Ideal Victims and Emotions', 18 *Theoretical Criminology* (2014), 75–92.

<sup>36</sup> Eimear Spain, *The Role of Emotion in Criminal Law Defences: Duress, Necessity and Lesser Evils*, Cambridge, 2011.

<sup>37</sup> Bandes, 'Remorse'; Wiener, *Men of Blood*.

<sup>38</sup> Laura Krugman Ray, 'Judicial Personality: Rhetoric and Emotion in Supreme Court Decisions', 59 *Washington and Lee Law Review* (2002), 193–234; Katie Barclay, 'Emotions, the Law and the Press in Britain: Seduction and Breach of Promise Suits, 1780-1830', 39 *Journal of Eighteenth-Century Studies* (2016), 267–284.

<sup>39</sup> MacNally, *The Rules of Evidence*, 555-556.



the person slain, or the person killing’, where murder was ‘wilful’ (i.e. intends harm) or without provocation.<sup>40</sup> This required significant attention to be given to a defendant’s state of mind, motivation and intention that were often construed in emotional terms.<sup>41</sup> Similarly, it was central to one of the three definitions of that which distinguished manslaughter from excusable homicide – death caused by another ‘owing to sudden transport of passion’.<sup>42</sup> Here the law explicitly distinguished between provocation, understood in emotional terms, and a period of ‘cooling off’, which if proved would lead to a murder conviction.<sup>43</sup> Emotion played a central role in shaping legal definitions of murder and manslaughter, which influenced the types of evidence required in court.

As importantly, because emotion is and can be a segment of narrative, it too is narrated. What emotion is, what it means, its implications for feeling and action, are produced through its articulation, including in the space of the court.<sup>44</sup> Emotion then can function not only as a form of evidence but as a narrative within a narrative or a competing version of events, such as when the emotion displayed on the body of a defendant disrupts the prosecutor’s depiction of his or her villainy. An absence of emotion too can be narrated, signalling another untold story or troubling the edges of a case. It can thus alert the historian to differences in emotional practice at particular times.

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<sup>40</sup> Ibid, 551.

<sup>41</sup> Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests and Institutions*, Oxford, 2016.

<sup>42</sup> MacNally, *The Rules of Evidence*, 555-556.

<sup>43</sup> Ibid, 568.

<sup>44</sup> Jeffrey Pence, ‘Narrative Emotion: Feeling, Form and Function’, 34 *Journal of Narrative Theory* (2004), 273–276; David S. Miall, ‘Emotion and the Structuring of Narrative Responses’, 32 *Poetics Today* (2011), 323–348.

### III. EMOTIONS ABOUT WOMEN AND WOMEN'S EMOTIONS IN COURT

There is a sizeable historiography of criminal women and their reception in courtrooms and by the media, particularly for England. Much of this has concentrated on what might be described as the public's feelings about criminal women, with a focus on sensationalist reports and melodramatic representation. In broad terms, the historiography argues that during the eighteenth and into the nineteenth century the representation of criminal women shifted; women moved from disorderly threats to social order, violent and threatening, to victims of society, circumstance and often specific men.<sup>45</sup> This reflected broader changes in understandings of femininity, where women were increasingly domesticated and pacified and conversely men reimagined as having a greater propensity to violence. Other historians have complicated such narratives, either by demonstrating how in particular instances early modern violent female offenders could be made sympathetic, or, and particularly for the later nineteenth century, by showing how new models of femininity, like the flapper, disrupted convention and demanded new types of storytelling about women.<sup>46</sup> There is also a related

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<sup>45</sup> Martin Wiener, 'Alice Arden to Bill Sikes: Changing Nightmares of Intimate Violence in England, 1558-1869', 40 *Journal of British Studies* (2001), 184–212; Martin Wiener, *Reconstructing the Criminal: Criminal, Law and Policy in England, 1830-1914*, Cambridge, 1990; Kirsten T. Saxton, *Narratives of Women and Murder in England, 1680-1760: Deadly Plots*, Aldershot, 2009.

<sup>46</sup> Keith M. Botelho, 'Maternal Memory and Murder in Early Seventeenth-Century England', 48 *Studies in English Literature, 1500-1900* (2008), 111–130; Susan C. Staub, 'Early Modern Medea: Representations of Child Murder in the Street Literature of Seventeenth-Century England', in Naomi J. Miller and Naomi Yavneh, eds., *Maternal Measures: Figuring*

history of the pathologization of criminality and the way it defined the female criminal and her emotions.<sup>47</sup>

With a focus on high-profile and sensationalist crime, often compared to melodrama, this is a historiography charged with emotion, if emotions that are often unnamed, and left in the domain of ‘scandal’. What this literature demonstrates is that the public’s emotional investments in particular understandings of femininity were brought to court and provided the boundaries and shape of what could be argued about female behaviour, as well as predicting how juries might respond to such arguments.<sup>48</sup> This was the broader social and cultural narrative in which individual crimes and individual emotions were given meaning.

It is a narrative that also holds for Ireland, where, by the early nineteenth century, women who killed their husbands – even for ‘selfish’ motives, such as adultery – were often viewed sympathetically as ‘unfortunate women’, especially if they performed well in the courtroom. There was clearly a class dimension, with more ‘respectable’ women (if still from the lower orders) receiving greater space in the press and thus more space for humanizing their cases.<sup>49</sup> Yet whilst the wife who murdered her spouse provoked ‘horror’, it was

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*Caregiving in the Early Modern Period*, Aldershot, 2000, 333–347; Lucy Bland, *Modern Women on Trial: Sexual Transgression in the Age of the Flapper*, Manchester, 2013.

<sup>47</sup> Lisa Downing, ‘Murder in the Feminine: Marie Lafarge and the Sexualisation of the Nineteenth-Century Criminal Woman’, 18 *Journal of the History of Sexuality* (2009), 121–137.

<sup>48</sup> Wiener, *Men of Blood*; Barclay, ‘Emotions, the Law’.

<sup>49</sup> Respectable accounts include: *Connaught Journal*, 8 May 1823; *Freeman’s Journal*, 5 Feb. 1848; *Limerick Reporter*, 14 Jan. 1848; Lower order accounts include: *Ballina Advertiser*, 6 Aug. 1841; *Ballina Advertiser*, 11 March 1842; *Ballina Impartial*, 21 March 1825; *Ballina Impartial*, 15 June 1829; *Ballina Impartial*, 14 Sept. 1829; *Ballina Impartial*, 18 March 1833;

typically in a 'tragic' register. The husband murderer was a sad indictment on society, not a malevolent threat.<sup>50</sup> The adulteress Mary Anne McConkey was described as 'wretched' and a 'poor creature' at her execution; on the event 'the town exhibited an appearance of intense anxiety', hoping for a reprieve.<sup>51</sup> There was even a petition to raise money for Ellen Connell's orphan children after she killed her husband in order to elope with her paramour.<sup>52</sup>

As well as a focus on an 'emotional public opinion' that surrounded female crime, the role of emotions in shaping courtroom narratives has been given some limited attention by historians. That reading the demeanour of defendants and witnesses was important to jury decision-making is well-recognized, even regarded as a key reason for the slow 'lawyerization' of the trial across the eighteenth century in England and Ireland.<sup>53</sup> Courtroom behaviour was understood to provide evidence of character, which in turn spoke to an individual's capacity or likelihood of being engaged in criminality or in testifying honestly.<sup>54</sup> In the later eighteenth and nineteenth century, character incorporated a 'mental, inner state' that defendants and witnesses at times tried to articulate for the court.<sup>55</sup> As I argue elsewhere however, nineteenth-century Irish audiences viewed character, including its psychological dimension, as physically manifested on and through the body, giving them confidence in using demeanour as legal evidence and ensuring that descriptions of bodies formed central

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*Ballina Impartial*, 5 Aug. 1833; *Connaught Journal*, 10 April 1826; *Connaught Journal*, 25 Jan. 1829; *Bell's Weekly Messenger*, 28 March 1841; *Northern Standard*, 22 March 1845.

<sup>50</sup> Wiener, *Men of Blood*.

<sup>51</sup> *Weekly Freeman's Journal*, 8 May 1841. See also: *Freeman's Journal*, 19 March 1830.

<sup>52</sup> *Freeman's Journal*, 29 March 1830.

<sup>53</sup> Langbein, *Origins*; Green, *Verdict According to Conscience*.

<sup>54</sup> Lacey, *In Search of Criminal Responsibility*; Wiener, *Men of Blood*.

<sup>55</sup> Lacey, *In Search of Criminal Responsibility*, 70; Rabin, *Identity, Crime*.

components of journalistic descriptions of trials.<sup>56</sup> It was a focus on the body and emotion that perhaps enabled juries and the public to set aside their concerns about the role of the defence lawyer as a barrier between them and the increasingly silent defendant.

Given the importance of emotion and the body to trial reporting, female emotion (much more so than male) has not been ignored by historians.<sup>57</sup> To affirm his argument that female offenders were received more sympathetically than men in the nineteenth century, Wiener describes the media response to Ann Barber's 'bitter and piercing' shrieks and 'heart-rending cries' at execution; how Hannah Reid was 'pale and agitated, she could hardly stand', provoking sympathy in the judge; and that Mary Ann Higgins had 'an appearance of modesty and innocence about her which ... excited strong feelings of interest and compassion towards her'.<sup>58</sup>

Eleanor Gordon and Gwyneth Nair's account of the trial of Madeleine Smith (1857) is particularly noteworthy given its parallels to the Byrne case. Smith, a member of the Glasgow middle classes, was tried for poisoning her lover. Throughout the trial, Smith was described as 'composed', 'calm and unruffled, her gaze candid'; 'unmoved, cool, serene', 'nonchalant'. Only when the account of her premarital sexual activity was discussed did she show any variation, flushing at one moment, going pale at another, and becoming 'saddened'.<sup>59</sup> As Gordon and Nair note, her emotions were not just of interest to the public but drawn into legal discussion. The prosecutor was compelled to address it, noting her great 'courage', but asserting that such courage was not inconsistent with guilt. The defence claimed just this,

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<sup>56</sup> Barclay, 'Performing Emotion'.

<sup>57</sup> Barclay, 'Emotions, the Law'.

<sup>58</sup> Wiener, *Men of Blood*, 128–129.

<sup>59</sup> Eleanor Gordon & Gwyneth Nair, *Murder and Morality in Victorian Britain: the Story of Madeleine Smith*, Manchester, 2009, 127–139.

arguing that her emotional control was more congruent with innocence. Moreover, he pointed to another case of a ‘calm and serene’ female killer at trial, convicted but later found to be innocent when someone else confessed. Despite the prosecutor’s attempts to disregard Smith’s emotions, in this cultural context the weight of the emotional evidence of her body suggested innocence, forcing the prosecution to address it and being used to advantage by the defence. Smith was acquitted.

Unsurprisingly then, femininity and emotion overlapped; emotions were gendered. Women were expected to emote differently in court from men and in ways that conformed to broader expectations of female behaviour. In Irish courtrooms of the first half of the century, this was particularly marked by locating as mothers women who killed their husbands, a characterization that humanized them and confirmed their femininity despite their violence. It was a technique that drew attention to the emotions of the women on the stand, and was underpinned through similar sympathetic constructions of the criminal mother in the literature of the period.<sup>60</sup> When Anne Smith, the eleven-year-old daughter of Catherine Smith, was brought forward to testify to her mother’s involvement in her father’s murder, ‘the prisoner ... wept bitterly’. During testimony, the child burst into tears and could not proceed.<sup>61</sup> Catherine had killed her husband to elope with a lover; she had made several attempts to drown and choke him, before she and her lover beat him to death. She personally hit him repeatedly with stones as he died. It was a damning narrative provided by her lover for the court; the introduction of her child and both their tears softened Catherine’s image after the details of her violence and drew out the tragedy of the case for the reader.

In a similar way, while Ellen Connell ‘did not seem in the least affected during the trial’, a damning indictment of her sensibility, on being sentenced to death she ‘inquired for

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<sup>60</sup> Lacey, *Women, Character*, 141–142.

<sup>61</sup> *Dublin Evening Packet & Correspondent*, 23 March 1830.

her children'. The result was the appeal to support them mentioned above.<sup>62</sup> These cases did not result in an acquittal, but they did align woman like Catherine and Ellen more closely to contemporary models of femininity, affirming their humanity for the court and maintaining the political status quo. Through their motherhood and their care for their children, the ways in which these women disrupted patriarchal social order – their threat to society – were reduced.

At times such emotion actively disrupted the narrative logic of trials. In an 1840 Downpatrick case, an 'unfortunate' woman accused of murdering her husband 'shrieked in hysterical phrenzy' when her child was brought out to testify against her. She grasped at her daughter 'convulsively from the dock & seizing it [her] pressed it [her] closely to her heart'.<sup>63</sup> The scene was particularly moving; 'almost everyone was in tears', the judge wept and the jury 'entreated the removal of the child from the table'. The prisoner then fainted and a member of the jury had an 'apoplectic fit'. Needless to say, the child was not examined and the trial collapsed. Next day, after a retrial where the child did not testify, she was found guilty of manslaughter. Here a mother's emotions, and their contagious distribution across the court, disrupted court proceedings, not only complicating the prosecutor's narrative but stopping it. It was a disruption that brought the court together – judge, jury, 'almost everyone' – was impacted by this emotional scene. Rather than a mother's love acting as counter-narrative or as a single piece of evidence, it became the only narrative available to the court.

Conversely, a display of motherly emotion could disrupt proceedings by redirecting culpability towards a child witness. During Anne Cullen's testimony against her mother Margaret and sister Bridget for her father's murder, her mother 'rung her hands, and burst

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<sup>62</sup> *Drogheda Journal, or Meath & Louth Advertiser*, 27 March 1830.

<sup>63</sup> *Ballina Advertiser*, 7 Aug. 1840.

into tears'; when Anne was asked to identify the murderers 'a distressing scene took place between the prisoners and the witness, and much sharp and pointed recrimination'.<sup>64</sup> Coupled with an alibi for Margaret and Bridget, Margaret's tears and their distressing fight in court undermined Anne's testimony. This was not the reluctant child testifying against a remorseful, affective mother, but a divided family. In such circumstances, Margaret's tears were backed by a cultural ideal of an innate maternal instinct to put her children first; her sorrow spoke to Anne's betrayal, not her own bad behaviour. That such conflict spoke poorly of the family, however, was affirmed through the reporter's comment that they were 'very ill-looking characters'. Margaret and Bridget were acquitted.

Not all women successfully conformed to mainstream models for feminine emotion within court, limiting their capacity to evoke sympathy. As I have argued elsewhere, women who disrupted such ideals tended to be viewed more harshly and were treated with less respect by lawyers and judges. This was a particular problem for working-class women, given that the passivity and delicacy of the ideal woman was not always achievable.<sup>65</sup> By the 1920s, the problem with gendered constructions of emotion was subject to overt debate in the press, with Lady Russell's failure to win in *Russell v Russell* argued to be the result of her refusal to show traditional feminine emotions. As one *Sunday Express* columnist noted: 'Supposing she had shed a few tears every time Marshall Hall [opposing barrister] went a bit rough? Supposing she had swooned from exhaustion? ... Supposing her lips had quivered whenever the baby was mentioned. ... All women know the effect of tears and blushes and quivering lips on men'. Lady Russell's refusal to do so, it was argued, lost her case.<sup>66</sup>

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<sup>64</sup> *Newry Telegraph*, 21 Aug. 1829

<sup>65</sup> Barclay, *Men on Trial*.

<sup>66</sup> Bland, *Modern Women on Trial*, 197.



If the discussion of how the female body emoted in court is the subject of a relatively small literature, how a woman's emotions structured the legal narratives surrounding her behaviour is virtually undiscussed. One of the reasons for this may be the evidentiary structures of criminal trials across Britain, where outside of legal speech-making, narratives were constructed through witness testimony that restricted what could be said about a defendant's internal thoughts or feelings.<sup>67</sup> Witnesses could describe a defendant's actions, behaviours, gestures, and expressions; they might speak to arguments or quarrels or statements of intent or feeling; but they generally did not speculate regarding what was felt. At most, if emotion was visibly performed, such as an expressive display of rage, witnesses could convey their impression of another's feelings. This provided a space that could be filled either by prosecution and defence lawyers, or by an individual's behaviour in the courtroom. In such instances, a woman's performance in the court acted as key evidence of how her pre-trial behaviour should be interpreted by the court, as is suggested in the case of Madeleine Smith.

The prosecution of Eleanor Ryan for her husband's murder provides a useful example of this, and is particularly notable as she was only one of five people tried for the crime. Despite this, at least as represented in the news reports of the trial, it was Ryan, her body, behaviour and emotions, around which the narrative of the trial revolved. Most reports of the trial followed a similar structure, beginning with a description of Ryan, her person and general behaviour.<sup>68</sup> Some then gave a brief account of her co-defendant, Cusack, a clear

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<sup>67</sup> Peter King, *Crime and Law in England 1750-1840: Remaking Justice from the Margins*, Cambridge, 2006, 14–16; John H. Langbein, 'Historical Foundations of the Law of Evidence: a View from the Ryder Sources', 96 *Columbia Law Review* (1996), 1168–1202.

<sup>68</sup> *Roscommon & Leitrim Gazette*, 19 March 1825; see also *Southern Reporter & Cork Commercial Courier*, 15 March 1825; *Waterford Mail*, 16 March 1825.

villain in the narrative: ‘a settled melancholy in his face, which was of a very dark and fiendish hue. He appeared quite unmoved during the trial, and when the verdict was announced, a sort of sneer of contempt quivered on his lips’.<sup>69</sup> The reports then gave opening speeches and witness testimony, occasionally interspersed with commentary on the defendants’ emotional responses to events. The judge’s charge was mentioned in one line, before the verdict was given. This was followed by the events that surrounded sentencing, a paragraph on Ryan’s person and emotions, and a final section on the public response to the case.

Descriptions of Ryan at the outset of the trial noted that she was ‘middle-aged’, ‘well looking, and, indeed, might claim a reasonable share of personal beauty’. She had born nine children, of whom three survived. In court, she dressed neatly in a new blue cloak, lined with silk and edged with fur. It was noted, ‘she bore the trial with a good deal of firmness, yet she was repeatedly overwhelmed in tears’. Her emotions are not mentioned again until her seven-year-old daughter is put on the stand. In contrast, the prisoner Patrick Lennane is recorded as having ‘passionately exclaimed, “Go along you d-n-d perjurer”’, when being identified by a witness. To avoid the emotional showdowns of other trials, the court ‘contrived, that during her entire evidence she did not once see her mother’. Yet, when she left the stand, ‘the unfortunate mother stretched across the other prisoners, to get a last view of her child, and when gone, she leaned upon the prisoner Hall, [???] and seemed to labour under the deepest suffering’. Only Lennane – the ‘passionate’ protestor – was acquitted of the crime, perhaps suggestive that his exclamation in court was compelling for the jury, as it was for the journalist who thought it important enough to record it.

On sentencing, the judge began with Ryan, noting she ‘required all the repentance in her power, before she appeared at the judgment seat ... sending, unprepared, to his last

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<sup>69</sup> *Southern Reporter & Cork Commercial Courier*, 15 March 1825.

account, him whom she was bound and had sworn to cherish'. He also addressed her emotional state, noting 'he did not say this to aggravate her sufferings, or add to her miseries'. Ryan fainted on the pronouncement of the sentence and did not regain consciousness until later that night. The account given of Ryan after sentencing was more ambivalent, noting she was about 'twenty-eight years old... her face bore evident marks of extreme anxiety and depression of mind, which made her look considerably older'.<sup>70</sup> They also reported that she 'perspired copiously during the trial, and frequently wiped her face with a handkerchief. There was something like resignation to the fate which, she must have been confident, awaited her, in her whole demeanour'.

The testimony primarily revolved around descriptions of the murder itself, with Cusack responsible for the physical violence, and Ryan acting as the decision-maker – she sent various people on errands, others to bed, fetched sheets to hide the body, and prevented Cusack from harming her child and her servant (who later testified against them). The others 'aided'. It was testimony that tempered Ryan's humane management of Cusack's violence with a mastery of the situation that belied any presentation of her as an innocent victim. There was no motive given – the closest suggested was by the *Roscommon & Leitrim Gazetteer*, which noted that Cusack was 'not supposed likely to win the affections of so interesting a woman as Mrs. Ryan', and the statement by the judge to Cusack that no one 'could shut their eyes on the fact, that it was owing to his seductions they had been brought to the situation in which they were then placed'.<sup>71</sup> As her mastery of the crime scene suggests, witness accounts do not describe her as emotional during the murder itself. If there was an emotional demeanour suggested, it was calm and control, rather than passion.

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<sup>70</sup> Ibid.

<sup>71</sup> *Roscommon & Leitrim Gazette*, 19 March 1825; *Southern Reporter & Cork Commercial Courier*, 15 March 1825.

As the surviving account of the trial is an incomplete recording of events, some of which, such as witness testimony and Ryan's emotional responses, ran parallel to each other but were told sequentially, it is methodologically problematic to use its structure as a direct representation of the narrative structure of the trial itself. Yet, as the purpose of such accounts was generally to convey to readers the reason why a particular verdict was reached, that the account fills the explanatory gaps in the trial evidence with Ryan's emotions on the stand perhaps reflects similar dynamics within the courtroom itself. From this, it can be argued that the opening affirmation of Ryan's composure, 'she bore the trial with a good deal of firmness', and its subsequent deterioration, through emotional distress at a daughter's testimony, to a conclusion that her resignation to her fate had been marked on her body throughout, perhaps tells a story of how Ryan's emotions – or at least how it was read by others – evolved over the trial in light of testimony. As her composure failed, her anxiety aged her, her sweat demonstrated her concern, and her resignation became evident, so her guilt became apparent. Ryan's body provided emotional evidence of guilt that helped temper the absence of motive and explanation found in the trial testimony itself. Ryan's emotions became an intertwining narrative that supported the prosecutor's case.

#### IV. MRS ELLEN BYRNE

Mrs Byrne first appeared in a court 'filled to the ceiling' on Friday 12 August 1842, having passed through streets 'choked up with anxious crowds', 'thronged, almost to suffocation'.<sup>72</sup>

She was described as about forty-five, with 'fine eyes', 'diminutive', 'well-formed', with

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<sup>72</sup> This account is a composite of Dunckley, *The Trial of Ellen Byrne*; *Dublin Evening Post*, 15 August 1842; *Southern Reporter & Cork Commercial Courier*, 18 Oct. 1842; *Statesmen and Dublin Christian Record*, 16 Aug. 1842.

‘evident traces of having once been handsome’; her hair was ‘jet black’, and hung in ‘luxuriant curls’ about ‘her still rosy cheeks’. Prints of her in the dock reinforced her small stature.<sup>73</sup> She wore black, but was not in mourning apparel. Her shawl was trimmed with sable and she wore a hat with a small veil. One report noted that she walked firmly, but on seeing the crowded court, her ‘resolution failed’ and she ‘burst into tears’. Another thought ‘she appeared much affected, but firm and self-composed at the same time, much beyond what might be expected from a person in her situation’. When asked to plead, ‘with much energy of tone and manner’ or alternatively ‘in a firm and determined tone of voice, ... and with most marked emphasis’, she announced herself not guilty. Her defence counsel requested a postponement, which was granted.

On Monday 15 August 1842, the court ‘was crowded to excess, and the greatest anxiety was manifested to hear proceedings’. Taken from gaol, Mrs Byrne was conducted to the dock by the son of the gaol’s governor, ‘on whose arm she leaned’, and provided with a seat (a custom reserved for women). She wore a suit of the ‘deepest weeds’ in the most modern fashion, with a double veil of dense crepe that ‘rendered her face almost invisible’, reflecting as Lacey notes ‘an appropriate feminine reluctance to submit to the public gaze’.<sup>74</sup> In her hand, she held a rich bouquet of flowers, like other prominent female defendants of the period.<sup>75</sup> She walked into the dock with ‘a firm, unbroken step; and on no moment, except perhaps at the moment when the indictment was being read, did she exhibit the slightest

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<sup>73</sup> *Mrs. Ellen Byrne, as she appeared at the bar on Monday 15 August 1842*, Dublin, [1842-48].

<sup>74</sup> Nicola Lacey, ‘Could He Forgive Her? Gender, Agency, and Women’s Criminality in the Novels of Anthony Trollope’, in Martha C. Nussbaum and Alison L. LaCroix, eds., *Subversion and Sympathy: Gender, Law, and the British Novel*, Oxford, 2013, 176.

<sup>75</sup> Lizzie Borden is perhaps the most famous example.

trepidation'. 'Her demeanour throughout the whole proceedings was characterized by the most unruffled composure, and the utmost self-possession', noted the report of the trial. The *Dublin Evening Post* thought her manner 'firm and collected'.

Mrs Byrne appeared fashionable, attractive and wealthy. She showed admirable self-control and composure, tempered with suggestions of feminine weakness – she leaned on an arm, she displayed occasional trepidation. The only other moment during the trial when her emotions within the court were mentioned was when her lawyer referred to the charge, 'the murder of a husband by his wife'. She then 'became greatly affected and wept aloud'.<sup>76</sup> Coupled with her trepidation during the indictment, such emotion may have spoken as much to horror at such a crime, as to guilt. Mrs Byrne was a sympathetic defendant, at least in the eyes of the press. She demonstrated her expected femininity, showing suitable weakness at moments of stress, but otherwise remaining composed and controlled, suggestive of inner character and morality which she maintained throughout the case.<sup>77</sup>

The trial lasted two days. The first day, which ran from ten a.m. to six-thirty p.m., was taken up by the crown's case. Apart from closing speeches, the second day was for the defence. The jury went out at quarter to four in the afternoon and returned with a verdict in half an hour. The crown opened the case with an indictment that specified that Eleanor Byrne murdered Augustine by strangling and choking him to death; there were ten counts each suggesting a method of strangulation, using her hands or different materials in the room. One count suggested she beat him to death.

The case that was constructed told a story of a couple, who if not habitually drunk, every few months locked themselves away in one of the couple's two bedrooms, and drank themselves into a stupor from which they would emerge a week to ten days later. There was

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<sup>76</sup> Dunckley, *The Trial of Ellen Byrne*, 32.

<sup>77</sup> See also Lacey, 'Could he Forgive Her?'.

some suggestion by the prosecution that this was an unhappy marriage, but little evidence emerged of regular fights or quarrels. The case revolved around the testimony of Mrs Byrne's young children (sons from her first marriage), their two servants, a neighbour, and copious medical experts. The children's, servants' and neighbour's testimony provided a detailed accounting of events during the week that Mr Byrne died, and focused on when the couple were seen, their condition (drunk, conscious, capable), what food they called for and similar minutiae. The medical testimony focused on the time and cause of death.

The key problem for the prosecution, defence and jury alike was that when, on Saturday morning, Mrs Byrne called her sons to help her rouse Mr Byrne, he was not only dead but his body showed significant putrefaction. Mrs Byrne insisted that he must have only died recently, but his body appeared to belie this. The putrefaction had swollen the corpse and made signs of violence, if any there were, ambiguous. The bulk of the medical testimony revolved around different theories as to the implications of putrefaction for the story the body told – was a swollen eye a sign of death by violent struggle or decomposition? Timing of death was important too. If Mr Byrne had died several days before, say Tuesday, then Mrs Byrne had been sober enough to direct servants and purchasing for the household. She also called for food for two people to the room after that date. This would suggest that Mrs Byrne had hidden the death, an act that implied guilt, at least for the prosecution. Had Mr Byrne died on Saturday morning, or even during the preceding night, Mrs Byrne's behaviour was less culpable.

Queen's counsel Abraham Brewster, an able and popular barrister who would later rise to the highest judicial office of lord chancellor of Ireland, opened the case. He had a difficult case to make. First, he had a sympathetic middle-class female defendant, whose character he had to destroy, and he had to convey some very technical medical evidence to a

jury, during a period where such testimony was a relatively new feature of trials.<sup>78</sup> He had to do this in Ireland during a period where sentimental and passionate rhetoric was preferred as a vehicle for truth. Brewster largely met this challenge by providing a relatively dry close-reading of the evidence he would present and the implications he wished the jury to take from it, and combining it with a rousing conclusion. Aware that he would have to make some comment on Mrs Byrne's character, he began by apologizing for the medical evidence that would cause the jury 'very considerable difficulty', but remarked on 'these difficulties having, I am afraid, all of them, been caused by Mrs Byrne'.<sup>79</sup>

Perhaps unwilling to lose the sympathy of the jury by being too insulting to a delicate female, however, he then pulled his punches. When describing the couple's drunken behaviour, he apologized, noting 'Of course, you will understand that her habits or her general character are not in the slightest degree to prejudice her in your estimation'. He referred to them only as they were material to the case, and to her defence, and thus 'I am not guilty of any unfairness towards her'.<sup>80</sup> He repeatedly referred to 'fairness' to the prisoner when describing the legal evidence. On summing up, he tried to raise the disgust of the jury by noting that 'you will not let the indignation, the just indignation which you may feel at the bestiality and grossness of the life of this woman, sway you in deciding her guilt or innocence'. He also addressed the 'enormity' of the crime: 'There can be nothing so horrible as for a man to meet his death by the hand of his sworn partner, more horrible, if senseless and helpless, she takes advantage of his inability to resist her'. Yet, given that these final

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<sup>78</sup> Steven Shapin, *A Social History of Truth: Civility and Science in Seventeenth-Century England*, Chicago, 1994; Julia Rudolph, 'Gender and the Development of Forensic Science: a Case Study', 123 *English Historical Review* (2008), 924–946.

<sup>79</sup> Dunckley, *The Trial of Ellen Byrne*, 3.

<sup>80</sup> *Ibid.*, 3.



statements were coupled with requests to be fair and convict on evidence, and that it lacked the key rhetorical markers used by orators of the period to sway audiences, it was not the most exciting of speeches (even for Brewster who had a rather bloodless style of oratory).<sup>81</sup>

The testimony was detailed and tedious. The appearance of Mrs Byrne's sons, and particularly her ten-year-old, who called Mr Byrne 'dada', provided a moment of interest but the precise accounting of comings and goings from the bedroom was mostly technical. The medical evidence was lengthy and ambiguous. The experts, some of the most prestigious physicians in Ireland, were happy to make general conclusions, but unwilling to swear conclusively to what happened. They provided complex medical detail, compared the body with an array of other bodies found similarly decomposed, and even read passages from medical textbooks by the leading thinkers. Brewster needed a common sense reading of the evidence – it was unlikely that a badly composed body died recently; some of the marks suggested violence; that she hid the body for so long suggested guilt. The medical experts, caught up in their technicalities, were unwilling to make such statements without embedding them in caveats and conditions.

It was also a case that the prosecution wished to hang on a lack of emotion. In his opening remarks, Brewster had argued that there were only two interpretations of the evidence: that Mrs Byrne had committed murder, or that she was innocent. Manslaughter was

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<sup>81</sup> For a discussion of differences in rhetoric between the speeches of lawyers for the prosecution and the defence, see: Katie Barclay, *Sympathetic Speech: Telling Truths in the Nineteenth-Century Irish Court*, in David Lemmings and Allyson May, eds., *"Criminal" Justice during the Long Eighteenth Century: Theatre, Representation and Emotion in the Courtroom and the Public Sphere*, Routledge, 2018.

not, Brewster argued, a possibility on the facts.<sup>82</sup> ‘Heat of blood and blows’ were required to reduce a charge of murder, but here there was none. Indeed, ‘not a single murmur or a breath’ was heard from the room; there was just ‘dead uninterrupted silence’.<sup>83</sup> As a result, there was little emphasis placed by the prosecution on the couple’s emotions or interactions – Mrs Byrne needed to be presented as cold and capable of premeditated murder. The only discussion of her emotional state was after she was told he was dead, when she cried ‘O, no, no!’, and her behaviour in the days after the event. The coroner noted when he came to the house that she appeared to suffer from an ‘aberration of mind’, although to a ‘stranger she might appear collected’.<sup>84</sup> A friend of her husband who visited the next day thought that she was ‘sober but frightened; she trembled’.<sup>85</sup> The result was a passionless murder.

The prosecution’s case was a damp squib. Mrs Byrne’s lawyer, Mr Hatchell, decided to keep things cool: ‘Viewing this case in a calm, considerate way, divested of previous or popular prejudices, as men of sense, men of intellect...’.<sup>86</sup> On opening his case, he began by addressing the ‘popular delusion’ in Rathmines (the area of Dublin where the Byrnes lived) that led to this prosecution. He noted that in the case of a crime so ‘abhorrent to the natural feelings of our nature, the more improbable it is that it has been perpetrated’, before laying out the ambiguities created by the evidence thus far. He then spoke to the key missing element of the prosecution’s case: motive, and a motive understood in emotional terms. He detailed a history of a marriage ‘lived upon good terms’, except at moments of drunkenness:

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<sup>82</sup> For discussion of law of manslaughter see: W. E. Vaughan, *Murder Trials in Ireland 1836-1914*, Dublin, 2009.

<sup>83</sup> Dunckley, *The Trial of Ellen Byrne*, 8.

<sup>84</sup> *Ibid.*, 31.

<sup>85</sup> *Ibid.*, 31.

<sup>86</sup> *Ibid.*, 39.

‘when they were sober ... they were kind and affectionate towards each other; but when they were drunk ... they might be arguing and brawling, but there never was a blow struck’. Hatchell noted that ‘the three boys spoke with a degree of fondness of him, and called him dada’, so there was no explanation in the family dynamic. ‘Was there any jealousy assigned?’, he asked, knowing there was none.

Hatchell then turned to the evidence of Mrs Byrne’s emotions that had emerged in the prosecution’s case. He pointed to her exclamation of surprise on being told that her husband was dead, her denial, ‘he cannot be’, and that she sent for a doctor. ‘Was this affectation?’, he asked. Hatchell described how the doctor found her with the body, washing it. ‘Is there not a feeling of dislike amongst culprits to approach the body of the person they have murdered?’ he wondered, drawing on an old superstition. He concluded his speech with a moving statement that clearly impressed the judge who later referred to it: ‘May that Almighty God, to whom all hearts are open, all desires known, and to whom no secrets are hid, inspire you with a ray of his divine wisdom, to lighten you to a verdict that will bring consolation and comfort to the bosom of the afflicted family of this wretched and unhappy woman’.<sup>87</sup> Hatchell’s short case consisted of more medical evidence, speaking to its inconclusiveness, and an apothecary who treated Mr Byrne for the effects of his drinking.

Hatchell’s defence rested on the fact that without emotion the prosecution’s case lacked force. It was emotion that provided motive; it was emotion that generally provided the context for violent murders. Here there was none, and indeed the prosecution’s case required this to be the case. Mrs Byrne’s emotions in court had been exemplary – controlled, composed, feminine; there were no signs of guilt to be found in her body. Through his judicious introduction of the Byrne family’s emotion into the trial, Hatchell also rebuilt the family’s character and placed the crime into question. Without testimony to contradict it, the

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<sup>87</sup> Ibid., 32–44.

presentation of the Byrne family as fond and loving, if flawed, made the murder of the patriarch unimaginable. Mrs Byrne was acquitted.

And here this case might end, if it were not for the historian, who in surveying the trial was alerted to the curious reading not of Mrs, but Mr Byrne's emotions. In his closing remarks, Hatchell had made much of the boys' fondness for their stepfather, even noting that 'they appeared to be fond of him, for they did not like to disturb him in his orgies, lest it should displease him'.<sup>88</sup> This referred to a number of stories from the children that they avoided Mr Byrne when he was drinking. It included testimony that the boys did not try to aid their stepfather when he collapsed from drink as 'when he got well, he would be very angry; he did not like us to know that he drank', and that on one occasion they prevailed on their mother to lie in bed with Mr Byrne. When asked why, Luke, the middle son, replied 'I thought if she did not go down, he might get up'. They also reported that his bedroom was kept locked, on a spring lock, and they were not allowed to enter. The children presented the picture of a household where they were required to dance around drunken parents. They told a story of needing to get their mother's key, but she refused to give them entry to the room. The boys tried to force entry, knocking her over. They then decided to send the youngest brother to run across the room to get the keys as 'she would not mind him so much'.<sup>89</sup>

Hatchell referred to this testimony in an attempt to redeem the character of Mrs Byrne, noting that her habits were those of him who 'should have been her protector and guardian, who should have controlled, corrected, and warned her against the effect of such vices'.<sup>90</sup> Yet, whilst Mr Byrne was painted as drunk and angry, no one discussed the implications of Mr Byrne's emotions for the dynamics of the household. Hatchell may have

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<sup>88</sup> Ibid., 39.

<sup>89</sup> Ibid., 8–13.

<sup>90</sup> Ibid., 40.

avoided doing so, as removing a controlling man who, if not violent, certainly caused the family to live in fear was a credible motive for murder. Yet, neither did Brewster make mention of this in his prosecution.

In a nineteenth-century context, it may be that challenging Mr Byrne's behaviour as abnormal would have stood in tension with his rights as the household patriarch and similar patterns of drinking amongst men of that class. If abusive husbands and fathers were a feature of nineteenth-century life, and emotional abuse was developing as a concept in the public and legal imagination, the bad-tempered patriarch had perhaps not yet strayed beyond the boundaries of the acceptable.<sup>91</sup> In such a context, the stories children told of dancing around an angry parent were not recognized as signs of a difficult or abusive household, but as children making space for the foibles of a beloved patriarch. Fear, or at least awe, of a parent remained a feature of parent-child relationship, where obedience was evidence of a child's love.<sup>92</sup> Such stories not only highlight what remained acceptable in the emotional dynamics of nineteenth-century households, but suggest that narrative gaps in legal cases can be the production of emotions that have no explanatory place within contemporary cultures.

## V. CONCLUSION

Emotion plays a central role in the construction of legal narratives. Not only does emotion feature in the course of testimony, as motives and explanations for behaviour, but the emotions displayed on the bodies of those in court can shape the dynamics of the trial. In

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<sup>91</sup> Elizabeth Foyster, *Marital Violence: an English Family History, 1660-1857*, Cambridge, 2005.

<sup>92</sup> Peter Stearns, 'Obedience and Emotion: a Challenge in the Emotional History of Childhood', 47 *Journal of Social History* (2014), 593–611.

such instances, bodily emotion not only speaks to a defendant's guilt or innocence, providing a piece of evidence that forms part of a larger story, but emotions can become narratives in their own right, working with, against or in relationship with the other stories being told in court. Emotions as narrative can complicate readings of legal evidence, provide doubt or reinforce other forms of proof; emotions can evolve over the course of the trial, holding unstable meanings that can be held against or with other stories to provide meaning. Emotions can also be marked by their absence – an aperture that can act as a potent reminder of the necessity of emotion to interpreting evidence and human behaviour and to enabling judgement. In such contexts, emotions are not straightforward or easily read, but are shaped by context and by the expected behaviours associated with particular bodies. This might be gender and class as discussed in this article, but it could as easily be race or other markers of identity.

The women accused of murdering their spouses in nineteenth-century Ireland often found their emotions and those of others forming a central part of trial evidence and playing an important role in shaping the meanings produced in that space. Emotions might humanize the murderer; they might reduce the threat of violent women, restoring social order for observers. They might disrupt court proceedings, demanding that an alternative account of a story be told. As in the Byrne case, they might also be marked by their absence. Accounts of murderous behaviour, and particularly when prosecutors wished to avoid a verdict of manslaughter that was so closely associated with 'passion' in the moment, may be articulated as passionless and jurors directed to physical or direct evidence. Yet, as the Byrne case suggests, that emotion played such a significant role in human behaviour, and particularly in providing the motivation for action, ignoring emotion could be fatal to a legal case. It may also provide an opportunity for another to provide an alternative narrative of emotion,

whether through the performance of an emotional body in court or a story of an affectionate family caring for a drunken parent.

Whilst a focus on gaps in legal narratives might highlight the importance of emotion to the law, they also raise interesting questions for both lawyers and historians. What emotions matter; whose emotions count; and whose emotions are implicated in the making of a particular event, become decisions – choices made by lawyers, particular cultures and peoples, or indeed historians. In such cases, other emotions are sidelined or ignored, but may, like the children of the Byrne family, haunt a case, suggestive of an alternative truth, an alternative story waiting to be told. They are reminders of the fragility of truth and the contingent nature of the tales we produce. The story of the implications of such emotional gaps for history and law waits to be told.

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### **Note on Contributor**

Katie Barclay is a Senior Research Fellow in the ARC Centre for the History of Emotions, University of Adelaide, Australia.