INNOCENT UNTIL PROVEN UNGRIEVING: HOW THE CONFLATION OF 'INAPPROPRIATE' GRIEF WITH GUILT COMPROMISES THE SIXTH AMENDMENT RIGHT TO FAIR TRIAL

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Abstract

On an imperfect American criminal legal landscape, evidence about a defendant's inability to appropriately perform grief about and/or towards a victim often colors how judges, juries, and the public understand their relationship to criminality. It is on this imperfect American criminal legal landscape that the subject of this paper—grief performance and its relationship to constructions of guilt—is born.

I argue that a real ritual dissonance transpires when an individual loses someone close to them to a traumatizing form of death—that is, in an extremely violent or unexpected way. On the one hand, one's body finds itself expected to conform to social norms regarding grief and mourning. On the other, one's experience is so anomalous as to potentially make it unfathomable for them to do so. The resulting grief performance is one that is at once produced by the grieving self to process incomprehensible trauma and recognized by a perceiving community as a social oddity, a ritualized failure incapable of being understood by the surrounding community. Because the community cannot comprehend the griever's performance, suspicion begins to surround the griever. People begin to realize, "she did not cry"; "she was cold"; "she did cartwheels"; "she spoke on television"; "she spent exorbitant amounts of money," and so they assume she must have had a hand in orchestrating the death of the person close to her. This process can be understood as creating a "grief-guilt" complex, as improper grief performance produces and generates presuppositions of a person's guilt.

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As I demonstrate, the construction of a grief-guilt complex does not live in isolation—if it did, the isolated phenomenon would be theoretically interesting but pragmatically insignificant. Instead, the criminal legal system absorbs the assumptions that a person who performs inappropriate or non-normative grief must necessarily be guilty of a crime. To precisely demonstrate the ways in which this unfolds, I focus on three high profile cases: Amanda Knox, Pamela Smart, and Erik and Lyle Menendez. My analysis draws on the language and affective displays that unfolded in the trials to demonstrate how the grief-guilt complex enters into the courtroom. It also highlights the ways in which media coverage preceding and surrounding the trials helped breed heightened suspicion around each of the defendants in ways that hampered their ability to fully access their Sixth Amendment rights to a fair trial unimpeded by prejudicial biases about grief performance and guilt.

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Introduction

Fundamental to the legitimacy of the American criminal legal system is a sense of authorized and authorizing investment: just as the people of the United States vest the criminal legal system with a sense of trust—so profound, in fact, that they allow actors on behalf of the State to title themselves "the People" in pursuing prosecutions—so too does the system necessarily rely on the investment of the people. If the support of the people so significantly shifts, that, acting as an almost uniform whole, they revoke their willingness to allow the State to conduct itself on their behalf, the criminal legal system would crumble. And though the proliferation of knowledge about systems of mass incarceration,[1] racial injustice,[2] and class inequity[3] has drawn many Americans to challenge the efficacy of the criminal legal system, a majority of Americans surveyed hail it as "fair."[4] While even courts have recognized that "fairness is a relative, not an absolute concept,"[5] the American criminal legal system has long relied on due process and rules of evidence to "administer every proceeding fairly."[6]

Perhaps this explains American legal scholars' infatuation with Albert Camus's *The Stranger.* A 1942 existentialist text preoccupied with the disruption of systemic and systematized social norms, *The Stranger* tells the tale of a man named Meursault who, after murdering an unnamed character referred to only as "the Arab,"[7] is brought before a

1. *See, e.g.*, Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010); James Kilgore, Understanding Mass Incarceration: A People's Guide to the Key Civil Rights Struggle of Our Time (2015); Marie Gottschalk, Caught: The Prison State and the Lockdown of American Politics (2014); Nicole Fleetwood, Marking Time: Art in the Age of Mass Incarceration (2020).
2. *See, e.g.*, Eduardo Bonilla-Silva, Racism without Racists: Colorblind Racism and the Persistence of Racial Inequality in the United States (5th ed. 2018); Jill Nelson, Police Brutality: An Anthology (2001); Andrea Ritchie, Invisible No More: Police Violence Against Black Women and Women of Color (2017); Meilan Solly, *158 Resources to Understand Racism in America*, Smithsonian Mag. (Jun. 4, 2020), https://www.smithsonianmag.com/history/158-resources-understanding-systemic-racism-america-180975029 [https://perma.cc/2Z8Z-BYCV]; Steven L. Foy, Racism in America: A Reference Handbook (2020).
3. *See, e.g.*, Carroll Seron & Frank Munger, *Law and Inequality: Race, Gender . . . and, of course, Class*, 22 Ann. Rev. of Socio. 187 (1996); Ganesh Sitaraman, The Crisis of the Middle-Class Constitution: Why Economic Inequality Threatens Our Republic (2017); The Class Politics of Law: Essays Inspired by Harry Glasbeek (Eric Tucker & Judy Fudge eds., 2019).
4. *Table 2.45: Respondents reporting whether they think the criminal justice system is fair in its treatment of people accused of committing crime*, Source Crim. Just. Stat. 1, 139 (2003), https://www.albany.edu/sourcebook/pdf/t245.pdf [https://perma.cc/2Y6F-5DSA].
5. Snyder v. Massachusetts, 291 U.S. 97, 116 (1934).
6. Fed. R. Evid. 102.
7. For more on the colonialist revolutionary undertones in *The Stranger*, *see* David Carroll, Albert Camus the Algerian: Colonialism, Terrorism, Justice

French court to face murder charges. When Meursault arrives at the trial, however, he finds that the "evidence" brought against him at trial is derived neither from circumstantial evidence about the chain of events that led him to murder the Arab nor from physical evidence from the crime scene. Instead, his trial revolves around his inability to perform appropriate grief at the death of his mother, who died only days earlier.

In many ways, there are two trials simultaneously occurring within *The Stranger*. The first begins with the opening lines of the book, in which Camus almost immediately draws the reader to begin crafting her own judgments about Meursault: "Maman died today. Or yesterday maybe, I don't know. I got a telegram from the home: 'Mother deceased. Funeral tomorrow. Faithfully yours.' That doesn't mean anything. Maybe it was yesterday."[8] The temporal uneasiness of these opening lines—the shift between a "today" that may have been a "yesterday" harkening towards some uncertain "tomorrow"—bespeaks for the reader a sort of distancing from time. In a Heideggerian sense,[9] Meursault's attempt to

(2007). *See also* Louise K. Horowitz, *Of women and Arabs: Sexual and racial polarization in Camus*, 17 Mod. Language Stud. 54 (1987); Jan Rigaud, *The Depiction of Arabs in L'Etranger, in* Camus's L'Etranger: Fifty Years On 183 (Adele King ed., 1992).

8. Albert Camus, The Stranger 3 (Matthew Ward trans., 1988).

9. *See* Martin Heidegger, Being and Time 100 (Joan Stambaugh trans., 1996) ("As being-in-the-world, Da-sein [human existence] essentially dwells in de-distancing. This de-distancing, the farness from itself of what is at hand, is something that Da-sein can *never cross over.* It is true that Da-sein can take the remoteness of something at hand to be distance if that remoteness is determined in relation to a thing which is thought of as being objectively present at a place which Da-sein has already occupied. Da-sein can subsequently traverse the 'between' of this distance, but only in such a way that the distance itself becomes de-distance. So little has Da-sein crossed over its de-distancing that it rather has taken it along and continues to do so *because it is essentially de-distancing, that is, it is spatial.* Da-sein cannot wander around in the current range of its de-distancings, it can only change them. Da-sein is spatial by way of circumspectly discovering space so that it is related to beings thus spatially encountered by constantly de-distancing."). I take Heidegger to mean here that one's ability to exist in the world (Da-sein) relies inherently on a form of "de-distancing" from some other—that is, immersing oneself in proximity to others, generating what Heidegger later terms "Being-with." In many ways, Heidegger's work appears to live symbiotically with Martin Buber's *I and Thou*: in suggesting that the creation of a self ("Being-in-the-world" for Heidegger, "I" for Buber) depends on the ability to recognize and appreciate the other ("Being-with" for Heidegger, "Thou" for Buber), both recognize the necessity of human interdependence and relationality. For Heidegger, though, this relationality is interwoven with temporality: the "Being-towards-death," as he understands it, moves in an almost vector-like trajectory towards her own demise, as "as born, [Dasein] is already dying, in the sense of Being-towards-death . . . birth and death are 'connected' in a manner characteristic of Dasein . . . Dasein is the 'between.'" Heidegger, Being and Time at 426–27 (John Macquarrie & Edward Robinson trans., 1962). All of this to say, then, that Camus' initial preoccupation with distance and temporality bespeaks a Heideggerian consciousness to the ways in which Meursault is unable to de-distance himself from his mother, and

distance himself from time is an attempt at distancing himself from the very essence of being, not only within his own body but also with another (namely, his Maman). Indeed, the opening lines are rife with oscillation in degrees of interconnectedness: from the caring visions of a "Maman"[10] to the estranged imagination of her dwelling at "*the* home"; from the cold and isolated "died" to the gentler, more formal "deceased"; and from the flippant remark fronting temporality, "yesterday maybe, I don't know," to the pensive rebuff foregrounding an uncertainty that is grammatically isolated from time, "*Maybe* it was *yesterday*." The only constant throughout Meursault's vacillating musings on his mother's death is his discomfort. Even amidst attempts to bring himself closer to his mother through his reliance on the child-like term "Maman," he fails to fully do so, unable to bring himself in proximity to her. These brief ruminations on the nature of his loss almost demand that the reader subject Meursault to his first trial, asking: does he even *care* that his mother has died? And even if he does, how does his inability to grieve inflect upon my ability as a reader to trust him as a narrator, a son, a human being?

The second of Meursault's trials—his murder trial for killing the Arab—is more literalized, though preoccupied with the same questions that riddle his first. Taking center stage at the trial, at which Meursault faces the death penalty, is his inability to appropriately perform guilt in response to his mother's death. Providing the most compelling character testimony is the director of his mother's nursing home:

> To another question he [the director of Maman's nursing home] replied that he had been surprised by my calm the day of the funeral. He was asked what he meant by 'calm.' The director then looked down at the tips of his shoes and said that I hadn't wanted to see Maman, that I hadn't cried once, and that I had left right after the funeral without paying my last respects at her grave. And one other thing had surprised him: one of the men who worked for the undertaker had told him I didn't know how old Maman was.[11]

Latent within the director's discussion is a clear and concise vision of what appropriate performances of grief ought to look like. Per the director's account, a grieving person ought not to be "calm"; they ought to want to see the body of the dead, to sit with it, perhaps; they should certainly cry; and they should re-immerse themselves within the space of the dead by paying last respects at the grave. In failing to perform any of these to conform his body to the expectations of others in light of his own loss, Meursault made himself an object of suspicion to those around him. Had he *done* all of these things, even if he had not truly *felt* them, he would have been able to acculturate himself to the expectations of others, to fulfill his social obligations to them as a mourner. In

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perhaps others, and to re-place himself in a position to appropriately grieve her loss.

10. Camus, *supra* note 8, at vii.
11. *Id.* at 89.

other words, it did not matter in his second trial whether Meursault was emotionally distraught at the loss of his mother, whether he had been rife with tremendous sorrow. What mattered was that he did not use his body to display his trauma to others, did not execute his role as son and griever properly, and as such, was deemed abnormal—so abnormal, in fact, as to be perceived as capable of committing the murder of which he was accused.

Critical scholarship has remained infatuated with the two trials in *The Stranger*, focusing "on the funeral and the emphasis placed upon Meursault's lack of emotion at his trial."[12] The centrality of Meursault's "lack of emotion at his trial" and, perhaps more notably, the novel's inability to precisely locate grief, only heightens the questions that percolate throughout the text: how are societal responses to *l'etranger*—the "stranger," the "foreigner," the "outsider"[13]—inherently mediated by an inability to approximate and recognize difference? How does the imposition of a set of legal norms onto the unacculturated bodies of "others" improperly demand acceptance of foreign moral concepts in ways that confuse the boundaries between justice and injustice? And who really is *l'etranger*: "us" or "them"?

For legal scholars, sitting with these uneasy questions requires grappling with issues of *right* and *wrong*, of *truth* and *untruth*. Jonathan Masur argues: "It is . . . necessary for Camus to demonstrate that Meursault should not have been convicted and executed, and that he would not have been convicted had it not been for the irrelevant evidence from his mother's funeral . . . But close scrutiny of the circumstances of Meursault's crime, and the law that governs it, compels a different conclusion."[14] Here, I take Masur to mean that, in *The Stranger*'s attempt to exaggerate the readerly audience's attention to social injustice, its conflation of moral imperatives and legal standards, misreads what French law actually required at the time. In other words, despite Camus' representation, there is nothing fundamentally abhorrent about Meursault's conviction. He was charged with assassinating the Arab. Under French law at the time, assassination was defined as a murder "'committed with premeditation, or with lying in wait,'" and "assassination was punishable under all circumstances by death."[15] Though it is not inherently clear that Meursault's act was "considered and weighed" per definitional requirements of premeditation, significant evidence—namely the decision to fire four shots at the Arab and the fact that the Arab had assaulted Meursault just hours before—points towards the possibility of premeditation.[16] The

12. Jonathan Masur, *Premeditation and Responsibility in The Stranger, in* Fatal Fictions: Crime and Investigation in Law and Literature 212, 213 (Alison LaCroix, Richard H. McAdams, & Martha Nussbaum eds. 2017).
13. *See id.* at 212-213.
14. *Id.* at 214.
15. *Id.* at 216 (citing Code Pénal [C. Pén.] [Penal Code] arts. 295, 304 (Fr.) (1810)).
16. *Id.* at 222–224.

case, by Masur's account, is quite clear: Meursault was guilty, and a jury was entitled under French law to put him to death.

Perhaps, Masur is right. It appears irrefutable that Meursault pulled the trigger, that he committed murder. But others, such as Richard A. Posner, ask whether, even in spite of culpability, the procedural requirements of an American criminal legal system would have, at the very least, protected Meursault from the prosecutor's attempts at introducing evidence about how Meursault grieved for his mother. Posner writes:

> What will strike an American lawyer as particularly odd is how evidence of Meursault's 'bad' character (bad in the conventional sense rejected by the novella) is allowed into the trial and indeed becomes the decisive factor in his condemnation. In an American trial the character evidence so damaging to Meursault's chances would not have been let in. Character evidence is not admissible in our courts to show that the defendant acted in conformity with his character in the incident for which he is being prosecuted. It is admissible to prove motive, knowledge, and other dispositions or facts that bear directly on an issue in the case rather than on the defendant's general propensity to do bad things, but Meursault's behavior toward his mother and his rejection of Christianity are too remote from the crime to be admissible for any of these purposes."[17]

Posner's argument—that evidence of "Meursault's behavior towards his mother and his rejection of Christianity" could never have been admitted into a court of American law—appears consistent with the letter and spirit of the Federal Rules of Evidence, which bar the introduction of character evidence to "prove that on a particular occasion the person acted in accordance with the character or trait."[18] The particular oddity of Meursault's trial, by Posner's account, is that his inability to adequately perform grief towards his mother was character evidence in his case. Unlike the demonstrative, circumstantial, and direct evidence that Masur relies upon to argue that Meursault would have been deemed guilty, Posner contends that, so long as the character evidence in question was not invoked to "prove motive, knowledge, and other dispositions or facts," it could never have been introduced. Fear not, Judge Posner thus reassures his American reader. The egregious injustice that took place at Meursault's trial could never take place in an American courtroom, where evidentiary safeguards protect defendants and ensure that trials are "fair."

Though a compelling understanding of the letter of the law, Posner's argument poses pragmatic crises. Namely, his neat distinction between "motive, knowledge, and other dispositions" and a "general propensity to do bad things" lives in text alone. On an imperfect American criminal legal landscape, evidence about a defendant's inability to appropriately perform grief about and/or towards a victim often colors how judges, juries, and the public understand their relationship to criminality. It is on this imperfect

17. Richard A. Posner, Law and Literature 42 (1998).
18. Fed. R. Evid. 404(a)(1).

American criminal legal landscape that the subject of this paper—grief performance and its relationship to constructions of guilt—is born.

I argue that, as Albert Camus begins to document in *The Stranger*, a real sort of ritual dissonance transpires when an individual loses someone close to them to a traumatizing form of death—that is, death that occurs in an extremely violent or unexpected way. On the one hand, one's body finds itself expected to conform to social norms regarding grief and mourning. On the other, one's experience is so anomalous as to potentially make it unfathomable for one to do so. The resulting grief performance is at once produced by the grieving self to process incomprehensible trauma and recognized by a perceiving community as a social oddity, a ritualized failure incapable of being understood by the surrounding community. Because the community cannot comprehend the griever's performance, suspicion begins to surround the griever. People begin to realize, "she did not cry"; "she was cold"; "she did cartwheels"; "she spoke on television"; "she spent exorbitant amounts of money," and so they assume she *must* have had a hand in orchestrating the death of the person close to her. This process can be understood as creating a "grief-guilt" complex, as improper grief performance produces and generates presuppositions of a person's guilt.

As I will demonstrate, the construction of a grief-guilt complex does not live in isolation—if it did, the isolated phenomenon would be theoretically interesting but pragmatically insignificant. Instead, the criminal legal system absorbs the assumptions that a person who performs inappropriate or nonnormative grief must necessarily be guilty of a crime. To precisely demonstrate the ways in which this unfolds, I focus on three high profile cases: those of Amanda Knox, Pamela Smart, and Erik and Lyle Menendez (the Menendez brothers). My analysis draws on the language and affective displays that unfolded in the defendants' trials to demonstrate how the grief-guilt complex enters the courtroom. It also highlights the ways in which media coverage preceding and surrounding each trial helped breed heightened suspicion around each of the defendants in ways that hampered their ability to fully access their Sixth Amendment rights to a fair trial unimpeded by prejudicial biases about grief performance and guilt.

I do not attempt to argue here that the conflation of nonnormative grief performance with criminal legal guilt is *always* wrong. In fact, if the Subpart on the Menendez brothers demonstrates anything, it is that, sometimes, nonnormative grief performance does accompany some form of criminal culpability. However, this paper seeks to illustrate how (a) the potential for inaccuracy and inefficacy in the employment of grief metrics to ascertain guilt poses such a significant threat to the sanctity of the criminal legal system's goal of achieving justice that it ought not to be weaponized without regulation and conscious forethought; and (b) even where criminal culpability does accompany nonnormative grief performance, an individual's right to fair trial can still be compromised through the introduction of

grief evidence.[19] As such, though it is likely impossible to fully preclude the inclusion of grief evidence entering the courtroom through either express reference to grief performance or implicit conflations of grief and guilt in the pretrial media, this paper advocates for a radical transformation of how grief evidence enters the courtroom.

Part I of this paper brings together ritual studies, performance studies, and trauma theory to construct a newfound theory of *why* the performance of nonnormative grief by those close to a murder generates community suspicion, and how that suspicion generates a precursive nod towards culpability. Reading the law through a lens of performance, Part contends that the communal conflation of nonnormative grief performance with guilt bleeds into the courtroom both through actual criminal legal engagement with nonnormative performance and through media coverage of defendants that reifies the construction of a grief-guilt complex. To illustrate this point, Part offers an in-depth examination of the cases of Amanda Knox, Pamela Smart, and the Menendez brothers to illustrate how the improper admission of grief-type evidence threatens the Sixth Amendment guarantees of a fair trial. In concluding, Part offers a series of potential solutions in the hopes of undermining the use of grief metrics in the courtroom to better preserve defendants' ability to access real and meaningful justice through the American criminal legal system.

I. A Traumatizing Ritual Other: Understanding Performances of Grief

If Claude Levi-Strauss's account of cultural universals—those "basic social and mental processes of which cultural institutions are the concrete external projections or manifestations"[20]—holds true, then among those universals must necessarily be grief rituals. From the descriptions of grief rituals in the Hebrew Bible[21] to Robert Hertz's accounts of the funerary

19. Note that "grief evidence" as it is theorized here should not be confused with demeanor evidence. Demeanor evidence consists of "the nonverbal cues given by a witness while testifying, including voice tone, facial expressions, body language, and other cues such as the manner of testifying, and the witnesses' attitude while testifying." Demeanor evidence has been legally recognized as important for determining a witness' credibility and is therefore permissible in a court of law. Gregory L. Ogden, *The Role of Demeanor Evidence in Determining Credibility of Witnesses in Fact Finding: The Views of ALJs*, 20 J. Nat. Ass'n of Admin. L. Judges 1, 2–3 (2000). Demeanor evidence is distinct from grief evidence, however, because grief evidence is born outside the courtroom: while demeanor evidence lives exclusively in the courtroom and is based in how witnesses perform on the stand, grief evidence emerges in the days and weeks prior to a trial and is therein introduced at trial. The two are, though, still correlated: demeanor evidence may be an indicator of grief evidence (for example, if an individual cries on the stand, or if they display affect), just as grief evidence might bear on demeanor evidence (for example, if an individual is hysterical prior to a trial but is calm, cool, and collected on the stand, expressing limited visible remorse).

20. Claude Levi-Strauss, Structural Anthropology ix (Claire Jacobson & Brooke Grundfest Schoepf trans., 1963).

21. *See, e.g., Genesis* 37:34 (New Standard Revised Version) ("Then Jacob tore

rituals of the Dayak community of Borneo[22] and experiences of contemporary grief rituals among both religious and secular communities, grief rituals occupy a central role in constructing, deconstructing, and reconstructing social spaces in light of death. This Part brings together ritual studies, trauma theory, and performance studies to craft a comprehensive analysis of (a) how the individual body comports itself in response to death through the performance of a series of grief rituals, (b) how the performance of these grief rituals necessarily "orders" the interstitial, chaotic postmortem space, and (c) how, in turn, the individual body's ability to ritual*ize* grief through ritual allows for a "return to normalcy," therein inviting her reimmersion within a non-grieving social body.

As I will demonstrate, the aforementioned process of ritualized grief performance is characteristic when one encounters what I term *"traumatic death"*—that is, that form of death imbued with the traditional forms of trauma associated with loss, yet which is ritualized, naturalized, and arguably expected. In contrast, "*traumatizing death*"—a form of shockingly violent and unanticipated death, an almost unassimilable and unfathomable loss that occurs when a person suffers from an accident or an attack—poses a unique problem for the grief ritual.[23] Through the introduction of Trauma Theory into the realm of Ritual Studies and Performance Studies, I will argue that the loss of a person to a traumatiz*ing* death is not merely a loss, but a sort of absence and theft, one which destabilizes and denaturalizes the ritualization of grief rituals. The body of a person grieving a traumatiz*ing* death cannot necessarily be expected to reorder itself to social spaces that have inflicted violence upon it. As such, she may perform grief "wrong": she may not cry, she may seem cold, she may even act in complete contradistinction to traditional grief performances, going so far as to smile or to laugh or to do cartwheels.

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his garments, and put sackcloth on his loins, and mourned for his son many days); *Deuteronomy* 34:7–8 (New Revised Standard Version) ("Moses was one hundred twenty years old when he died; his sight was unimpaired and his vigor had not abated. The Israelites wept for Moses in the plains of Moab thirty days; then the period of mourning for Moses was ended."); *2 Samuel* 14:2 (New Standard Revised Version) ("Joab sent to Tekoa and brought from there a wise woman. He said to her, 'Pretend to be a mourner; put on mourning garments, do not anoint yourself with oil, but behave like a woman who has been mourning many days for the dead.'"); *2 Samuel* 1:11–12 (New Standard Revised Version) ("Then David took hold of his clothes and tore them; and all the men who were with him did the same. They mourned and wept, and fasted until evening for Saul and for his son Jonathan, and for the army of the Lord and for the house of Israel, because they had fallen by the sword.").

22. *See generally* Robert Hertz, Death and the Right Hand (Rodney Needham & Claudia Needham trans., 1960).

23. These are not the only circumstances in which I would argue grief rituals might be disrupted. For example, when violence has been inflicted by the dead upon the mourner (for example, if the deceased was an abusive parent or spouse who harmed their child or partner), they might also be incapable of assimilating their bodies to the normative expectations of grief rituals. Here, however, I am most interested in the implications of violent deaths on grievers.

My argument here, then, is to suggest that, in many ways, those grieving traumatiz*ing* deaths—those whom we might call "traumatized ritual others"—cannot assimilate their bodies to the normative expectations of an ordered world. As a result, their (mis)conduct threatens the social body seeking to reorder itself, thereby leaving the social body with two options: to allow the traumatized ritual other to denaturalize the totality of its ritual performances, or to oust her altogether, deeming her a "stranger," a "foreigner," an "outsider" (*l'etranger*).

What rituals *are* tends to be less important to the relationship between the American criminal legal system and performances of grief than what rituals *do*. No single body of work on the ritual process has been more pivotal in both synthesizing existing thought and extending it into the realm of the contemporary than Catherine Bell's *Ritual Theory, Ritual Process.* For Bell, ritual is a dialectical act wherein the body and its environment mutually constitute one another:

> The implicit dynamic and 'end' of ritualization—that which it does not see itself doing—can be said to be the production of a 'ritualized body.' A ritualized body is a body invested with a 'sense' of ritual. This sense of ritual exists as an implicit variety of schemes whose deployment works to produce sociocultural situations that the ritualized body can dominate in some way. This is a 'practical mastery,' to use Bourdieu's term, of strategic schemes for ritualization, and it appears as a social instinct for creating and manipulating contrasts. This 'sense' is not a matter of self-conscious knowledge of any explicit rules of ritual but is an implicit 'cultivated disposition.'
>
> Ritualization produces this ritualized body through the interaction of the body with a structured and structuring environment. 'It is in the dialectical relationship between the body and a space structured according to mythico-ritual oppositions,' writes Bourdieu, 'that one finds the form par excellence of the structural apprenticeship which leads to the em-bodying of the structures of the world, that is, the appropriating by the world of a body thus enabled to appropriate the world.' Hence, through a series of physical movements ritual practices spatially and temporally construct an environment organized according to schemes of privileged opposition. The construction of this environment and the activities within it simultaneously work to impress these schemes upon the bodies of participants. This is a circular process that tends to be misrecognized, if it is perceived at all, as values and experiences impressed upon the person and community from sources of power and order beyond it. Through the orchestration in time of loose but strategically organized oppositions, in which a few oppositions quietly come to dominate others, the social body internalizes the principles of the environment being delineated. Inscribed within the social body, these principles enable the ritualized person to generate in turn strategic schemes that can appropriate or dominate other sociocultural situations.[24]

24. Catherine Bell, Ritual Theory, Ritual Process 98–99 (1992).

Insofar as Bell recognizes the "implicit dynamic 'end' of ritualization" as the production of a "ritualized body," she underscores the ways in which ritualization—that is, a "strategic *way* of acting"[25] that culturally differentiates bodies in connection with the social environments in which they find themselves—centers the body as a site of meaning making. Though the body immersed in ritualization may not always recognize the explicit processes whereby it has been ritualized, as the rituals might be so culturally ingrained as to become subconscious and invisible, ritualization illuminates how rituals are process-based. Just as the-body-in-ritual creates meaning, ritual-in-the-body reciprocally creates meaning. The individual body performing ritual constructs its environment, just as the environment necessarily constructs the individual body engaging in ritual. To participate in ritual, then, is to both create and to be created.

So too is ritual space—and, more specifically, grief ritual space—a site of performativity, requiring a phenomenological (re)acculturation of the body to the world in which it finds itself. Ritualization necessarily requires that the ritualized body come to embrace a social *habitus*: "the 'acquired ability' and faculty' . . . In [*habitus*] we should see the techniques and work of collective and individual practical reason rather than, in the ordinary way, merely the soul and its repetitive faculties."[26] The ritualized body's *habitus* is, in many ways, the fundamental representation of its ritualization. That is, if ritualization is the process whereby the body becomes ritualized, *habitus* represents the culmination of that process, the ways in which the ritualized body performs the traits, values, meaning, and culture it has acquired vis-à-vis ritualization. That "different conditions of existence produce different *habitus*—systems of generative schemes applicable, by simple transfer, to the most varied areas of practice"[27] underscores how (1) ritualization is not merely a static process, but rather a dynamic one, constantly in flux, and (2) a single "ritual body" might occupy and embrace various *habitus* depending on the social circumstances in which the individual finds herself.

The "ritual body" immersed within grief spaces, then, can be understood as stepping into what we might understand as a grief *habitus*, one specifically responsive to the social conditions that surround it. Consider, for example, the non-Orthodox Jewish shiva ceremony in America. The shiva—traditionally a weeklong ritual in which the mourner performs rites in and amongst community members immediately following the burial of the deceased—depends on the acculturation of both the grieving ritual body (the mourner) and the recognizing ritual body (the bodies of those who are not grieving but who are acknowledging the grief of the mourner). At the home where the shiva ritual is taking place—often

25. *Id.* at 7.
26. Marcel Mauss, *The Notion of Techniques of the Body*, 2 Econ. & Soc. 70, 73 (1973).
27. Pierre Bourdieu, *The Habitus and the Space of Life-Styles, in* The People, Place, and Space Reader 139 (Jen Jack et al. eds., 2014).

that of the deceased but sometimes that of a mourner—the recognizing ritual observers are asked (a) to simply enter the unlocked door without knocking or ringing a doorbell, (b) to remove their shoes prior to entrance, and (c) to cleanse their hands at the front door prior to entrance. The mourner, who wears a black ribbon on her clothing known as a *keriah*, is traditionally expected to sit on a low chair or box and may cover all the mirrors in the home, both as acts of humility and remembrance of the deceased. Indeed, the culmination of the shiva process is when a rabbi enters the home to lead all those gathered (whether grieving or recognizing) in the Mourner's Kaddish.[28]

Though it obviously brings bodies together in grief, what is of particular interest about the non-Orthodox Jewish shiva ritual is the ways in which it is often not exclusively a site of sorrow: because it serves as a site of community gathering, the shiva may be a place where gossip is exchanged,[29] where laughter is shared, and where good food is eaten.[30] In fact, in the experiences of many American Jews, the only time where express solemnity is truly required at the shiva is during the recitation of the Mourner's Kaddish, where the presence of a rabbi reciting prayer reminds participants that the primary purpose of their gathering is to grieve. The shiva, then, illustrates that a "ritual body" immersed within a social environment (e.g., grief space) does not shed its quotidian *habitus* upon entrance into the space of mourning, but rather inculcates a ritual performance that is additive to that *habitus*. In other words, *habitus*-formation

28. For a more comprehensive examination of Jewish shiva rituals than is necessary here, *see generally* Vanessa L. Ochs, *Jewish Mourning Practices, in* 2 Religions of the United States in Practice 284 (Colleen McDannell ed., 2018).

29. Gossip is of particular importance in the construction of a ritualized social corpus. Taking George Eliot's *Middlemarch* as his subject, D. A. Miller has argued that gossip functions to emphasize the creation of weak and strong differences among individuals in ways that allow communities to congeal by synthesizing an "us" drawn in direct contradistinction to some "them." To illustrate his point, Miller uses the metaphor of a train: an 11AM train, though the same on the surface, is different each and every day insofar as the people who take the train and the physical train itself vary, even as the "train" reaches its end-destination at the same time every day. Similarly, gossip helps mask the weak differences (e.g., family, social status, etc.) of those within a community by emphasizing the strong differences (e.g., in *Middlemarch*, class) external to it. *See* D. A. Miller, *George Eliot: "The Wisdom of Balancing Claims," in* Narrative and its Discontents: Problems of Closure in the Traditional Novel 107, 107–120 (1981). In the context of the shiva, then, it should not be particularly surprising that participants—especially those who are not mourning directly—use the ritual space as a site of gathering such that the ritual social body might be (re)constituted.

30. *See* Jack Wertheimer, The New American Judaism: How Jews Practice Their Religion Today 51–53 (2018) ("'shiva is pretty much the last hurrah of deli food.'"). *See also* Rukhl Schaechter, *Shiva Shifts Towards Shorter and Livelier Jewish Mourning for Dead*, Forward Mag. (Mar. 18, 2014), https://forward.com/news/194589/shiva-shifts-toward-shorter-and-livelier-jewish-mo [https://perma.cc/H3WW-ZYAK].

is a process of accumulation wherein compounding *habitus* might, at various times, come into contact and/or conflict with one another.

The expectation, however, is that the "ritual body" weaving between spaces will inevitably return exclusively to occupying its pre-ritual *habitus*: the mourner will not forever be in a process of mourning. In *The Rites of Passage*, Arnold van Gennep theorized this sort of oscillation between ritual(s) as a tripartite, performative process:

> I think it is legitimate to single out *rites of passage* as a special category, which under further analysis may be subdivided into *rites of separation, transition rites,* and *rites of incorporation.* These three subcategories are not developed to the same extent by all peoples or in every ceremonial pattern. Rites of separation are prominent in funeral ceremonies, rites of incorporation at marriages. Transition rights may place an important part, for instance, in pregnancy, betrothal, and initiation; or they may be reduced to a minimum in adoption, in the delivery of a second child, in remarriage, or in the passage from the second to the third age group. Thus, although a complete scheme of rites of passage theoretically includes preliminal rites (rites of separation), liminal rites (rites of transition), and postliminal rites (rites of incorporation), in specific instances, these three types are not always equally important or equally elaborated. Furthermore, in certain ceremonial patterns where the transitional period constitutes an independent state, the arrangement is reduplicated. A betrothal forms a liminal period between adolescence and marriage, but the passage from adolescence to betrothal itself involves a special series of rites of separation, a transition, and an incorporation into the betrothed condition; and the passage from the transitional period, which is betrothal, to marriage itself, is made through a series of rites of separation from the former, followed by rites consisting of transition, and rites of incorporation . . . [31]

In van Gennepian terms, rituals might be understood individually as "rituals of separation," or "rituals of transition," or "rituals of incorporation." However, van Gennep articulates how each ritual of separation has elements of separation, transition, and incorporation. Funerary rites—those rites deemed classically separational by van Gennep, as they symbolize the literal separation of the dead from the living community—exemplify the ways in which overarching rituals of separation involve tripartite separation-transition-incorporation stages from the perspective of the mourner:[32] the mourner is "separated" from the community through her demarcation as mourner; throughout the funerary process, she lives in an interstitial space between memory of the past and

31. Arnold van Gennep, The Rites of Passage 10–11 (Monika R. Vizedom & Gabriel L. Caffee trans., Univ. of Chi. Press 1960).

32. So too do funerary rites have elements of separation, transition, and incorporation for the deceased. First, in the separation stage, the deceased individual is demarcated as deceased and ritually prepared for burial. Second, in the liminal stage, she becomes a centerpiece in the process of worship, prayer, and memory, awaiting burial. And finally, in the incorporation stage, she is buried, allowed to be fully incorporated into the "community" of the lost.

a trajectory towards the future, a present-as-absence; and in the (re)incorporation stage, she is brought back into the community of the living alone, moving forward.[33] On the one hand, van Gennepian ritual analyses emblematize the aforementioned compounding nature of *habitus*, showing how it is necessary to recognize that one does not merely add and retain cumulative *habitus*. Rather, ritual *habitus* lives in a constant state of flux, ebbing and flowing between states of being depending on circumstances, environmental changes, and communal expectations. On the other hand, van Gennep's analysis highlights the dual operations of ritual: ritual functions both as a process of consolation for the mourner and as a process of reaffirming the boundaries of community.

But before a grief ritual can even begin to reassert the boundaries of community, there must first be a death. By its very definition, death—no matter its form—is a fundamentally traumatic experience. Affecting the individual and social ritual body, the trauma associated with death necessarily marks loss as a form of violence against the mourning individual. In Barthesian terms, death-as-trauma can be understood as the inextricable suffering that lives in opposition to *jouissance*: upon the metaphysical end of death and the grief ritual, the "subject returns, not as an illusion, but as *fiction* . . . This fiction is no longer the illusion of a unity; on the contrary, it is the theater of society in which we stage our plural: our [suffering] is *individual*—but not personal."[34] Where applying Barthes' theories to death-as-trauma allows for the possible "return" of the grieving subject, Cathy Caruth identifies trauma as non-vector-like, as a process of turn and return that challenges the boundaries of time and space:

> In its general definition, trauma is described as the response to an unexpected or overwhelming violent event or events that are not fully grasped as they occur, but return later in repeated flashbacks, nightmares, and other repetitive phenomena. Traumatic experience, beyond the psychological dimension of suffering it involves, suggests a certain paradox: that the most direct seeing of a violent event may occur as an absolute inability to know it; that immediacy, paradoxically, may take the form of belatedness. The repetitions of the traumatic event—which remain unavailable to consciousness but intrude repeatedly on sight—thus suggest a larger relation to the event that extends beyond what can simply be seen or what can be known, and is inextricably tied up with the belatedness and incomprehensibility that remain at the heart of this repetitive seeing.[35]

33. Though outside the scope of this paper, it is interesting to think about how memory confounds the neat delineations between separation-transition-incorporation. Indeed, memory (re)places the "incorporated" mourner in the space preseparation, threatening the ability of the mourner to fully accept her status as incorporated back into the realm of the living.
34. Roland Barthes, The Pleasure of the Text 62 (Richard Miller trans., The Noonday Press 1975).
35. Cathy Caruth, Unclaimed Experience: Trauma, Narrative, and History 91–92 (1996).

Though Caruth's initial definition allows for a sort of boundedness for the realm of the traumatic, I want to suggest that trauma—and, namely, the trauma embodied through all death—exceeds those boundaries. Trauma is everywhere. If the most significant aspect of the traumatic is its effect on the human psyche, its "immediacy [that] may take the form of belatedness," living through the death of an/other necessarily imputes belatedness through memory. That is to say, the manifestations of grief, whether in the immediacy of loss or, more commonly, in random moments of the everyday in which the body of the griever is overwhelmed by memories of the deceased, bespeak a sense of the traumatic. Indeed, the experience of a death is necessarily continuous, belated, and incomprehensible, a process of repetitive seeing—not necessarily of the event of the death itself, but rather of the emptiness of the loss, of the spaces that others should occupy but do not.

The "nightmare" that is the remnants of death, then, is the trauma linked to the specific pains of loss. As Dominick LaCapra explains, loss is highly particular—a source of trauma that, unlike absence, lingers in the minds of the affected individuals, in ways "unavailable to the consciousness but [that] intrude repeatedly on sight"[36]:

> [A]bsence is not an event and does not imply tenses (past, present, or future). By contrast, the historical past is the scene of losses that may be narrated as well as of specific possibilities that may conceivably be reactivated, reconfigured, and transformed in the present or future. The past is misperceived in terms of sheer absence or utter annihilation. Something of the past always remains, if only as a haunting presence or revenant. Moreover, losses are specific and involve particular events.[37]

LaCapra understands loss—that which, I argue, characterizes all forms of normative death—as the experience whereby that which *was* no longer *is*; and yet, even amid the transition from present to past tense, "loss" is unique in the sense that the past always lives choked in the throat of the present, "if only as a haunting presence or revenant." Likewise, loss is specific and particular: one cannot lose that which one never had. Absence, however, is the experience wherein that which *could have been* never *was.* An absence is quasi-ethereal, the antithesis of presence, that which cannot linger in the world(s) of those remaining because it never actually materialized in the first place.

In the language of absence and loss, we find a meaningful distinction between the two ritual bodies attenuating themselves to death. As mentioned earlier in this Part, I understand there to be two different types of death. The first is *"traumatic death"*—that form of death imbued with the traditional forms of trauma associated with loss, yet which ritualized, naturalized, and arguably expected. Traumatic death more often

36. *Id.*
37. Dominick LaCapra, "Trauma, Absence, Loss," 25 Critical Inquiry 696, 700 (1999).

than not generates the preconditions for performance of grief rituals in ways that conform to social expectations. Normative death typically breeds normative responses. In contrast, "*traumatizing death*"—a form of shockingly violent and unanticipated death, an almost unassimilable and unfathomable loss that occurs when a person suffers from an accident or an attack—poses a unique problem for the grief ritual and for those whose bodies are expected to acculturate themselves to it. In response to traumatizing death, the griever may experience, in LaCapra's terms, a loss-turned-absence: the "haunting presence or revenant" generated by loss may be precisely what could have been but never was for the griever of a traumatizing death, as the loss itself may be so unfathomable to the bereaved as to render the past constantly, irrevocably, and uncomfortably accessible in the present. Traumatizing death is necessarily violent, necessarily disruptive of the quotidian, necessarily violative of the griever's conception of time and space.

As such, traumatizing death may breed nonnormative responses, if only because it introduces tremendous, human-generated physical pain into the space of death. Of course, many forms of death carry the tragedy of physical pain; however, what makes traumatizing death unique is that the physical pain imprinted upon the deceased's body was unnatural. It was not the product of disease or disaster. It was the product of an individual—perhaps randomly—being taken from the world by the hands of another. It transcends the traditional constructions of physical pain as Elaine Scarry understands that pain. Scarry writes:

> Physical pain is exceptional in the whole fabric of psychic, somatic, and perceptual states for being the only one that has no object . . . pain is not "of" or "for" anything—it is itself alone. This objectlessness, the complete absence of referential content, almost prevents it from being rendered in language: objectless, it cannot easily be objectified in any form, material or verbal. But it is also its objectlessness that may give rise to imagining by first occasioning the process that eventually brings forth the dense sea of artifacts and symbols that we make and move about in . . . [it] begin[s] the process of invention.[38]

The physical pain of traumatizing death certainly remains exceptional in the fabric of "psychic, somatic, and perceptual states," but, in the context of traumatizing death, it is not precisely objectless. Rather than envisioning physical pain as a locus of corporeal particularity, I want to suggest that, in this context, it moves into the realm of the global. Where Scarry distinguishes physical pain from, say, hunger, which is located in the stomach and leads to a longing *for* something, or love, which is slightly more ephemeral but often envisioned as lingering in the heart and is pointed towards (*of*) something, I understand pain not as "objectless" but as entirely referential. That is, pain is that which touches the entire

38. Elaine Scarry, The Body in Pain: The Making and Unmaking of the World 161–62 (Oxford Univ. Press, Inc. eds.,1985).

body—even if it does not explicitly state so, even if it moves between the boundaries of the physical and the imagined. It is so universal in its deep affective impacts on the person that its seeming "objectlessness," its bringing forth of imagination through symbols, is actually a product of its total-object nature: it is in, of, and for the body. Traumatizing death is evidence of this total-object nature of physical pain, as the deceased emblematizes the totality of this violent destruction of the body.

But there is also the psychic pain that Scarry does not attend to in her work, which is arguably more important in the context of traumatizing death because it threatens to destabilize the entire ritual process, to destroy the ritual body, and to undermine the stability of community in the reintegration phase. In certain cases of traumatizing death, the experience of absence culminates in an additional way—as the absence of "appropriate" grief performances. Traumatizing deaths not only disrupt the lives of those who are taken, but they also interrupt the *habitus* formation of those who are expected to grieve. Because they are by definition unexpected, and because they involve the imposition of physical pain onto a body in ways that can feel completely incomprehensible, the griever may find herself confronted with a situation where affective feeling and expressive performance emerge in conflict. That is, regardless of how the griever feels in response to the loss of the deceased, she may be incapable of naturalizing and normalizing her grief into the traditional *habitus* accompanying grief rituals. To do so would normalize the abnormal. As a result, it may be incredibly difficult—if not impossible—for the griever to perform her grief in ways that respond to history and tradition, to acculturate her body to the ritual environment, and to occupy a ritual body seeking to generate a *habitus* in the space of a grief ritual.

While potentially understandable, the inability of those grieving traumatizing deaths to acculturate their bodies to the expectations projected upon them by community members—whose own bodies read and understand the death differently, and who thereby begin the process of seeking to reintegrate the griever into the community by occupying their own *habitus* in expectation of the grief ritual—may threaten those community members. If, as stated earlier, the grief ritual serves as a site for not only the reintegration of the griever into the community, but also for the reaffirmation of the community itself, the griever's inability to conform to the grief space transforms the nature of the grief ritual. Rather than focus on both the deceased and the community, the ritual instead turns to the *habitus* of the griever. The griever thereby transitions from a space of "weak difference" to one of "strong difference,"[39] an individual whose inability to form a *habitus* in response to the grief ritual generates suspicion and distrust. This suspicion is not necessarily well-placed. Rather, it is the result of the misinformed communal expectation that an

39. *See* D. A. Miller, *George Eliot: 'The Wisdom of Balancing Claims*," in Narrative and its Discontents: Problems of Closure in the Traditional Novel 107 (Princeton Univ. Press eds., 1981).

individual grieving a traumatizing death *can* readily acculturate her body to the normative grief ritual space. As a result, the community—the social ritual body—may begin to read the griever as a threat. In the interest of self-preservation, then, this collective may be faced with two choices: to allow the traumatized ritual other to denaturalize the totality of its ritual performances, or to oust her altogether, deeming her a "stranger," a "foreigner," an "outsider" (*l'etranger*).

As I argue in Part , the fact that a griever's response to traumatizing death may threaten the community's ability to reaffirm itself matters because the suspicion generated often percolates into the criminal legal space. To deem the griever of traumatizing death *l'etranger* is to necessarily mark a failed reintegration of her body by virtue of her failed *habitus*, her unassimilable (non)ritual body. The language of suspicion that emerges in response to this failed reintegration is replicated again to project guilt onto the body of the griever. In other words, where there is a traumatizing death that resulted from murder, for example, the socially deviant conduct of the griever becomes a site of preoccupation that leads community members—and, more often than not, policing bodies, government officials, and courts—to automatically assume that she must have had some role in *producing* the traumatizing death. This is especially important in the context of high-profile murders, as will be discussed in the next Part, because the expansion of community boundaries from the local to the national and sometimes the global leads to the proliferation of suspicion in ways that transform not only the body of the defendant but also the very nature of the courtroom itself.

II. "Law in Action": High Profile Case Studies

As a general matter, understandings of traumatizing death-response and community reaffirmation are theoretically interesting. More importantly, though, they hold significant pragmatic implications, especially when the criminal legal system comes into contact with the bodies of a griever exhibiting signs of "inappropriate" grief as a reaction to traumatizing death. Where Judge Richard Posner argues that evidentiary safeguards adequately protect against the intrusion of evidence that would warp the courtroom's ability to ascertain judgments of guilt and innocence,[40] I will point towards a series of high-profile cases where failures to acculturate the ritual body to the social expectations of grief ritual and performance led to heightened suspicion and sociocultural determinations of culpability. Here, sociocultural determinations of culpability—those decision(s) made by the public that the inappropriate griever of traumatizing death must have necessarily orchestrated that death, typically through the commission of murder—are just as important as courtroom judgments. In other words, when society deems a

40. *See* Posner, *supra* note 17, at 42.

person guilty, it can matter just as much as, if not more than, when a judge and jury do.

In recognition of the pivotal role society plays in determinations of guilt and innocence, the following analysis lives at a distance from interpretations of the law tied to text. It recognizes, in the words of Jack Balkin and Sanford Levinson, that law exists not as it is written, but as it is practiced: "'Law on the books'—that is, legal texts—by themselves do not constitute the social practice of law, just as music on a page does not constitute the social practice of music. Law and music require transforming the ink on the page into the enacted behavior of others. In an important sense, there is *only* "law (or music, or drama) in action."'"[41] Indeed, if Julie Stone Peters is correct to distinguish "law as performance" as "the *enactment* of law through performance: trials, policing, public punishment, etc.,"[42] then the law as it is understood here—in the context of

41. J. M. Balkin & Sanford Levinson, *Law as Performance, in* 2 Law and Literature 729, 729 (Michael Freeman & Andrew Lewis eds., 1999). Though the central claim of Balkin and Levinson's paper is convincing—that the law exists as it is performed, rather than as it is written—I take issue with their subsequent contention that "poetry or fiction . . . do not require performance but can be read silently to one's self." Here, I want to argue that Balkin and Levinson seem to miss the critical intersection between performance studies and material culture. The bodies that come into contact with text do not simply sit idly, nor do the poetic and fictitious texts that live on the pages simply exist in isolation. To read is necessarily to perform: to flip pages, to move one's eyes, to acculturate the body to the literary space. Indeed, the symbolic referentiality of text necessarily renders it an *active* form of engagement, one that demands the presence and attention of the body. Consider, for example, Wallace Steven's "The Man on the Dump." Between stanzas three and four, an indentation separates "the trash" phrase that appears at the end of the third and "That's the moment . . . " that begins the fourth. The indentation is a uniquely perfect size: it invites the eyes to push the two stanzas together, to envision the possibility that "the trash" might sit quietly next to "That's the moment . . . " This experience emblematizes the active form of participation that poetry and fiction invite, even if that invitation is silent, the ways in which the quiet engagement with poetry and fiction are performative by their very nature. Wallace Stevens, The Collected Poems of Wallace Stevens 202 (Vintage Books Edition, eds., 1990). Even if Balkin and Levinson understand poetry and fiction as distinct in that they do not require the act of being read out loud to be understood, this is a misnomer: music, drama, and legal texts can all be read to oneself without completely obfuscating meaning, just as poetry and fiction can be read aloud to community audiences. Here, then, I want to suggest that the law—just as with poetry and fiction—lives not only in the traditional and unnuanced visions of performance (stage, actors, audience) that Balkin and Levinson seem to cling to, but in tandem with the performative nature of the text itself, in the ways in which the words jump off and through the page. Ultimately, if Levinson and Balkin's argument is an attempt to distinguish legal realism from textualism, then, I believe it is only in this interpretation—one that acknowledges the limits of textualism by suggesting that textualism fails to account for the worlds that live on the page *and* fails to acknowledge the lived experiences of the courtroom—that their argument can fully succeed.

42. Julie Stone Peters, *Mapping Law and Performance: Reflections on the Dilemmas of an Interdisciplinary Conjunction*, The Oxford Handbook of L. and Human. Online 1, 6 (2020), *available at* https://www.oxfordhandbooks.com/view/10.1093/

extra-legal ritual, grief, and trauma—is the mechanism through which the body mediates social meaning-making. Law understood in this sense is not a mode of textual citationality; the Federal Reporter tells only part of the story. Instead, the law is the ways in which a judge participates in the constructions of a neutral persona each time she places her robes upon her body; the ways in which a prosecutorial gesture towards a defendant reorients a courtroom in ways that generate skepticism; and the ways in which the spectatorial eyes of the public gaze upon the defendant's body, making decisions for themselves as to what they believe the verdict ought to be, independent of that which the jury ultimately lands upon.

As such, it is important to recognize that, just as there is a *habitus* to ritual, so too is there a *habitus* to the courtroom.[43] The adversarial nature of the courtroom, the occupation of various "roles" (e.g., prosecutor, defense attorney, judge), and the presence of policing bodies, for example, define the space in ways that drive all who enter it to revise their bodies to match the space—to embrace a *habitus* of the courtroom. The acculturation of one's body to the courtroom requires a new form of self-constitution, one which threatens to destabilize a person's self-subjectivity by rendering her an object for the consumption, perception, and judgment of others, a being to *be produced*, rather than to *produce herself*: "social agents *constitute* social reality through language, gesture, and all manner of symbolic social sign . . . [but] there is also a use of the doctrine of constitution that takes the social agent as an *object* rather than the subject of constitutive acts."[44]

For the defendant who has experienced a traumatizing death, and whose experience of tumultuous grief has already generated the conditions whereby the *habitus* expected of her in the context of a grief ritual conflicts with the extraordinary burden of coming to terms with her relationship to the traumatizing death and her experience as a survivor, the added burden—that, given heightened suspicion towards her, she occupy a *habitus* of the defendant—sitting at the nexus of her experience threatens the equilibrium of her being. Layering the production of a *habitus* upon production of a *habitus* in the context of a traumatizing death-turned-trial places an inordinately high demand upon the body of the defendant, a burden that the community spectates and yet does not face itself. Grief ritual is a medium through which the law manages to prioritize the social corpus over the individual corpus: the community matters more than the individual. The individual, then, finds herself in a position not entirely unlike Isaac awaiting an almost-certain death in the

oxfordhb/9780190695620.001.0001/oxfordhb-9780190695620-e-42 [https://perma.cc/Y936-E7L8].

43. *See* "'What Do We Need To Piece Her Back Together': *Captivated*, The Camera, and the Courtroom." (2020) (unpublished paper, J. D. Harvard Law School).

44. Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 Theater J. 519, 519 (Dec. 1988) (citing the phenomenological philosophies of Edmund Husserl, Maurice Merleau-Ponty, and George Herbert Mead).

Akedah.[45] Her society (Abraham) waits to bring about her almost certain (social) death; sometimes, God (the courtroom) intervenes for the sake of justice. Sometimes, God (the courtroom) does not.

Though the experiences of *habitus* formation occur just as regularly on a small scale as they do in high profile cases, I am interested here in the relationship between high profile murders and grievers of these traumatizing deaths because of how the notion of community becomes nationalized and, sometimes, globalized. Whereas community in the case of someone like Sabrina Limon was localized to the Silver Lakes region of California[46]—at least, at the time of the trial—community in the case of a high-profile case takes on a new meaning, percolating beyond the boundaries of local space and extending across the nation. "Society" in a small-scale trial, then, and "society" in the context of a high-profile case take on two, almost entirely separate meanings. The lessons learned from high-profile cases can be transplanted onto the small-scale trial space in ways that are significantly more difficult to probe in the reverse.

For the practitioner in non-nationalized cases—the vast majority of American criminal cases, which are likely covered by local press—these lessons are perhaps more significant. Local news reporting, laced as it is with suggestions linking an arrest and initial criminal charge to guilt, uses images in ways that crystallize perceptions of the accused as guilty. Even absent explicit testimony about grief, the proliferation of

45. The Akedah—also referred to as the binding of Isaac—is the Hebrew Bible narrative contained in *Genesis* 22. The text states that God commanded Abraham to "'offer [Isaac, his only son] as a burnt offering on one of the mountains.'" *Genesis* 22:2. In response, Abraham gathers a group of young men and goes to the top of Mount Moriah. *Id.* Along the way, Isaac asks questions of his father, and Abraham does not tell him that he plans to sacrifice him to God. *Id.* At the top of the Mount, just as Abraham prepares to sacrifice his son, an angel of God intervenes and tells him "not [to] lay your hand on the boy or do anything to him; for now I know that you fear God . . . " *Genesis* 22:12. In the place of Isaac, a ram appears on the Mount and is ultimately sacrificed. *Id.* The angel later returns to Abraham to notify him that, as a result of Abraham's loyalty, God will bless him and his offspring. *Id.* The Akedah plays a significant role in both Jewish (for example, in the form of the shofar blown on Rosh Hashanah as a reminder of the exchange between Isaac and the ram) and Christian (for example, as it relates to the later sacrifice of Jesus) traditions. (Note that it also maintains significance in Islamic tradition, but Muslim scholars generally believe that the child to be sacrificed was Ishmael, Abraham's other son with his concubine).

46. *See* Aly Vander Hayden, *Religious Firefighter Stops To Pray Before Killing His Lover's Husband*, Oxygen, Oct. 22, 2019, https://www.oxygen.com/a-wedding-and-a-murder/crime-news/robert-limon-murder-plot-wife-sabrina-jonathan-hearn [https://perma.cc/GYZ3-HWMA]. Note, however, that the story eventually became national news when it became the plot of a Dateline NBC episode in 2018. *See* Harold Pierce, *Sabrina Limon denied a new trial, sentenced to 25-years to life prison term*, Bakersfield.com, Feb. 21, 2018, https://www.bakersfield.com/news/breaking/sabrina-limon-denied-a-new-trial-sentenced-to-25-years-to-life-prison-term/article_e67f7fec-171d-11e8-8620-afa520f4e994.html#:~:text=Kern%20County%20Superior%20Court%20Judge,of%20her%20husband%2C%20Robert%20Limon [https://perma.cc/4YLK-AL2X].

mug shots featuring the prospective criminal defendant—often captured in moments of heightened vulnerability—tend to tell grief stories that point towards guilt. The prospective criminal defendant looking stoic, depressed, or exhausted is necessarily read as caught in the act, remorseless, guilty; the prospective criminal defendant who smiles is read as relishing in the details and nature of the crime, literalizing a connection to it; and the prospective criminal defendant who looks put-together, perhaps wearing makeup, is too conscious of appearance in ways that reflect a lack of empathy and must necessarily tie them to the crime. Presented with these images, the *a priori* determination of a lack of grief all but forecloses the ability of a criminal defendant to be found anything but guilty. Local practitioners in non-nationalized cases thus must be conscious of any sort of grief performance that follows: as the stories of Amanda Knox, Pamela Smart, and the Menendez brothers demonstrate, grief imperfectly performed, no matter its iteration, can lead to almost immediate community rejection—especially where the community is tight-knit and its visions, though diverse, run the risk of becoming narrowed by desires to excise individuals perceived as threats.

Indeed, nothing helps facilitate the dissolution of community boundaries and the explosion of the realms of the social more than media coverage. Studies have demonstrated that the introduction of cameras into the courtroom and especially into the pretrial courtroom alters legal-juridical spaces for both the public and a jury:

> In the United States, the political and legal choices to permit a free press can produce significant problems for defendants whose cases have been covered in the media. Indeed, media stories that contain information about a defendant's criminal record, incriminating statements, or a confession are particularly biasing. Judges have employed a variety of methods to attempt to reduce potential jury prejudice resulting from pretrial publicity . . . . Each of these methods possesses certain flaws . . . [Additionally] just as media accounts of the legal world substantially influence citizens' views and attitudes about law, general media coverage can influence jurors' decision making in the courtroom.[47]

That the media serves as a "particularly biasing" influence for *both* the public and jurors matters significantly. Because cameras are neither objective nor neutral,[48] they retain the ability to transform the relationship

47. Valerie P. Hans & Juliet L. Dee, *Media Coverage of Law: Its Impact on Juries and the Public*, 35 Am. Behav. Sci. 136, 143–145 (1991) (citations omitted).

48. Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 Ariz. St. L.J. 1489, 1505 (2012). *See also generally* Carl Plantinga, *Indices and the Use of Images,* in Rhetoric and Representation in Nonfiction Film (1997) (noting that "photographic evidence is often ambiguous because *seeing itself* is ambiguous and subject to interpretation . . . Photographic evidence in nonfiction films cannot be wholly discounted, but it is problematic. When we ask for evidence for a claim or implication, we would ideally like indisputable proof. Images used in nonfiction films rarely, if ever, provide such proof in themselves, apart from our independent knowledge of contextual and historical factors.").

between a social corpus and the individual corpus through the use of various forms of manipulation and editing. Though no concrete studies currently exist to corroborate the contention that cameras fundamentally alter the courtroom, it remains clear that cameras (and the images they produce) have the power not only to sway the operations of individual and social bodies but also, as was the case in the 1988 presidential election,[49] to transform the political life of an entire nation. This remains important in the context of individuals grieving traumatizing deaths, as media misunderstanding and misrepresentation threatens their Sixth Amendment right to a fair trial. Though evidentiary protections exist, the public—from whom the jury pool is selected—cannot avoid infusing its own bias into the courtroom[50]: "when the public is exposed to information that is incomplete, factually incorrect, or, even worse, purposefully manipulated, the knowledge gained is injurious to the judicial system. When jurors are selected from *the same general public* that is exposed to

See also André Bazin, *The Ontology of the Photographic Image*, 13 Film Q. 4, 8 (1960) ("In spite of any objections our critical spirit may offer, we . . . accept as real the existence of the object reproduced, actually *re*-presented, set before us, that is to say, in time and space. Photography enjoys a certain advantage in virtue of this transference of reality from the thing to its reproduction.").

49. For more on the ways in which images transformed Michael Dukakis's 1988 political campaign and ultimately lost him the election, *see* Peter Baker, *Bush Made Willie Horton an Issue in 1988, and the Racial Scars Are Still Fresh*, N.Y. Times, Dec. 3, 2018, https://www.nytimes.com/2018/12/03/us/politics/bush-willie-horton.html [https://perma.cc/VFG4-6HVL]. *See also* Thomas Byrne Edsall & Mary D. Edsall, Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics 232–234 (1992).

50. To this, many would likely respond that judges at least attempt to put up safeguards to protect against this sort of bias. However, none of the safeguards put in place by judges to protect against juror bias fully manages to do so. "Voir dire has not been shown to be particularly effective in determining which prospective jurors are prejudiced . . . Often, voir dire can be conducted with groups of prospective jurors, so that jurors can learn from others' responses the 'correct' answer to a voir dire question . . . Judicial instructions appear to be generally ineffective in reducing bias from pretrial publicity [because] judicial instructions on most topics are presented in obtuse and convoluted legalese that is difficult for lay jurors to comprehend. But even with perfect instructions, requesting jurors to set aside extremely significant information—such as a defendant's past record or a confession—may simply be incompatible with people's information-processing capabilities. Trial delay, another alternative, has been shown to be effective in reducing bias from factually damaging publicity in one realistic jury simulation experiment. However, in the same study, prejudice from emotionally biasing publicity was unaffected by delay. In the real world, the start of a trial is often accompanied by media updates on information presented in prior stories, a practice that could cancel out any beneficial effects of delay. Moving the venue or place of a trial is a final option, but most judges eschew changes of venue, citing the burdens of relocating the trial on participants as well as the value of holding a trial in the jurisdiction in which the alleged wrongdoing occurred." Hans & Dee, *supra* note 47, at 143–144 (citations omitted).

such tainted information, the defendant's liberty and the court's integrity are in jeopardy."[51]

In what follows, I bring together the high-profile cases of Amanda Knox, Pamela Smart, and the Menendez brothers to identify the ways in which the grief expressions of individuals seeking to rationalize the traumatizing deaths of loved ones have been met with skepticism by both the public and the court system. Each of these high-profile cases showcases how non-normative grief responses percolate into both the initial suspicion that leads to an individual's indictment and ultimate determinations of guilt and innocence as rendered by courts of public opinion and juries. All three also demonstrate how the presence of cameras exacerbates public skepticism surrounding these non-normative grief responses, especially in pre-trial moments, in ways that influence the outcomes of an individual's trial. I do not attempt to argue here whether any of the individuals studied *is* actually guilty or innocent. However, I do hope to show that, when frameworks of ritual grief fail to enter the legal equation, courtrooms' ability to oversee justice falters, as the (re) inscription of normative expectations onto non-normative circumstances misunderstands the ongoing tumult that grievers of traumatizing death must move through before reassimilating into community space—if they are given the chance. It is the obligation of courts, then, to facilitate the individual ritual body's transition through non-normative grief responses by countering, rather than reinstating, the suspicion translated onto the bodies of those grieving traumatizing deaths.

A. *Criticizing Cartwheels: The Amanda Knox Case*

The first of the cases I turn to is that of Amanda Knox, which captivated the American public from 2007 until Knox's eventual acquittal in 2015. The Knox case, which took place entirely on Italian soil, epitomizes how the public, and inevitably jurors, have a propensity to conflate atypical emotional responses to traumatizing deaths with proclamations that the non-normative griever was responsible for bringing about that death.

In 2007, Amanda Knox—then, a 20-year-old student at the University of Washington—made the decision, like many college students, to study abroad in Perugia, Italy.[52] While there, she lived with her roommate and United Kingdom national, Meredith Kercher, in an apartment at Via della Pergola 7.[53] In the apartment below them lived four male Italian students.[54] As she began to acclimate to life in Perugia, Knox took a job at

51. John C. Meringolo, *The Media, the Jury, and the High-Profile Defendant: A Defense Perspective on the Media Circus*, 55 N.Y.L. Sch. L. Rev. 981, 994 (2010) (emphasis added).
52. Melissa Chan, *Revisiting the Amanda Knox Case, Italy's Trial of the Decade*, Time, Sept. 29, 2016, https://time.com/4513505/amanda-knox-case-what-to-know/ [https://perma.cc/KU2G-866H].
53. *Id.*; Sandra Stevens, *Inside the Amanda Knox trial*, Worldation, May 8, 2017, https://www.worldation.com/stories/amanda-knox/ [https://perma.cc/YS2B-QKQ3].
54. Martha Grace Duncan, *What Not to Do When Your Roommate is Murdered in*

a local bar and started dating Raffaele Sollecito, a twenty-three-year-old student of computer science at the University of Perugia.[55] However, the two had only been dating for one week when tragedy struck.[56]

On November 1, 2007, Meredith was found dead inside her locked bedroom, partially naked and wrapped in a bloody blanket.[57] At the scene of the crime, police determined that Meredith had been stabbed multiple times in the neck and was sexually assaulted.[58] All signs pointed to murder. Police began hastily collecting forensic evidence,[59] and there was immediate interest in Knox and Sollecito, though both had (albeit conflicting) alibis.[60] By November 3, 2007, crowds, led by Meredith's friends, had gathered on the steps of the duomo in Piazza IV Novembre to commemorate her life; but Knox and Sollecito elected not to go to the vigil, instead waiting until it was over to visit a nearby boutique and buy underwear for Knox.[61] Closed-circuit television footage shows Knox "kissing Raffaele and laughing with him as they hold up various G-strings. In one still shot taken from the footage, Raffaele is standing behind Amanda with his hands on her hips and his groin pressed into her."[62]

Slowly but surely, suspicion against both Sollecito and Knox, but especially Knox—likely because of her proximity to Meredith—built. When Knox arrived at the same police station that Meredith's boyfriend Giacomo was at, he remarked, "'I couldn't help thinking how cool and calm Amanda was . . . Meredith's other English friends were devastated and I was upset, but Amanda was as cool as anything and completely emotionless. Her eyes didn't seem to show any sadness . . . "[63] Meredith's friend Amy Frost would later add that she was "deeply offended by Amanda's conduct . . . 'Everyone cried except Amanda and Raffaele. They were kissing each other.'"[64] Another friend, Natalie Hayward, remarked that she hoped Meredith hadn't suffered too much, to which she claimed Amanda replied, "What do you fucking think? She fucking bled to death."[65]

Already deemed cold and crass, Knox and her response to Meredith's death would captivate international audiences when her infamous

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Italy: Amanda Knox, Her 'Strange' Behavior, and the Italian Legal System, Harv. J.L & Gender 1, 8 (2017).

55. Laura Smith-Smart et al., *Amanda Knox trial: Who is Raffaele Sollecito?*, CNN, Mar. 26, 2015, https://www.cnn.com/2013/03/26/world/europe/italy-raffaele-sollecito-profile [https://perma.cc/KD3M-ZC85].
56. Chan, *supra* note 52.
57. *Id.*
58. *Id.*
59. *See* Barbie Latza Nadeau, Angel Face: Sex, Murder, and the Insider Story of Amanda Knox 53, 93–94 (2015).
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*

"cartwheel" incident became publicized. Shortly after Meredith's death, rumors began circulating in major newspapers that, as she awaited questioning, Knox decided to do "'the splits . . . then later, after she had been questioned all night, she burst into tears.'"[66] Later works would contextualize the story as being the product of a uniquely male-police gaze, raising questions that sit at the intersection of patriarchy, power, and pain:

> While her boyfriend was destroying her alibi, Amanda was outside the interrogation rooms, doing yoga stretches in the hallway. An interested male cop watching her asked if she could do a cartwheel, too. Amanda obliged him. A number of female police . . . later said they had witnessed this gymnastics display and that they had been horrified. They had already developed a distrust of the loud American with the cool arrogance, the sudden tears, and the flirtatiousness with men. Now she was doing what looked to them like *velina* moves, right in the hall of the questura [Italian police station], practically dancing on the corpse of her friend.[67]

Note, here, that the "yoga stretches" that Knox was performing outside the interrogation rooms—likely related to either seeking internal calm or seeking to find a way to pass the time—became "the splits" when reimagined on a public scale. Indeed, police officers taking center stage would describe Knox as behaving "not appropriate(ly)," as having a "strange attitude."[68] It was this "*lack* of remorse that [began appearing] in new stories and legal opinions"[69] that helped point towards the public's and, eventually, the courtroom's eventual sense that Knox had some hand in Meredith's death.

To this day, Knox vehemently denies having done cartwheels, adding that though she may have done splits once, she " 'was reacting in an upset manner. And I was upset. And I could've been more sensitive *to the people around me.* That's what I think was the major issue—was I could've *been more sensitive to the people around me.*' "[70] Sollecito would later add that he felt Knox was " 'having a breakdown.' "[71] It is important to recognize, however, that Knox understands her gravest error throughout the entirety of her public and courtroom trial to have been a failure to be "more sensitive to the people around me." Here, her concern clearly

66. Nick Squires, *Amanda Knox did cartwheels and splits at police station after Meredith Kercher murder*, The Telegraph, Feb. 27, 2009, https://www.telegraph.co.uk/news/worldnews/europe/italy/4863279/Amanda-Knox-did-cartwheels-and-splits-at-police-station-after-Meredith-Kercher-murder.html [https://perma.cc/9RHS-DS7F].
67. Nina Burleigh, The Fatal Gift of Beauty: The Trials of Amanda Knox 193 (2011).
68. Squires, *supra* note 66.
69. Duncan, *supra* note 54, at 2.
70. Pamela Engel, *Amanda Knox Explains Why She Acted So Weird After Her Roommate's Murder*, Bus. Insider (May 1, 2013, 1:04pm) (emphasis added), https://www.businessinsider.com/amanda-knox-explains-bizarre-behavior-2013-5 [https://perma.cc/GV7D-DFV6].
71. *Id.*

hints towards a sense that, in response to Meredith's traumatizing death, she had an obligation to "the people around me" to assimilate her body to a *habitus* of grief that, at the time, did not feel fitting to her. Though the loss was clearly not hers alone, as a primary griever—grappling with the difficult knowledge that tremendous violence had taken place in her home—she failed to assimilate her body to the ritual expectations of the community around her. Her "inappropriate," "strange" behavior ultimately contributed to creating heightened suspicion towards her. That the narrative surrounding "cartwheels"—a story which, though infamous, may not have occurred—became the locus for reifying Knox's outsider-ness, the community's willingness to excise and literally separate her through incarceration underscores the very centrality of the individual ritual body in the construction of a social corpus moving through loss. Even the suggestion of a (mis)contortion, of an unusual twist, an unexpected turn can threaten the collective and lead them to incorrectly infer a person's guilt.

Knox's *actual* response—her inability to cry (and later, emotional outbursts into tears), her kissing Sollecito, her harsh language around Meredith "fucking [bleeding] to death"—all epitomize the ways in which an individual grieving a traumatizing death may fail to acculturate her body to the social expectations of those around her. Still, her response may raise as many questions as it answers. *All* of the grievers of Meredith's death, including Giacomo, Amy Frost, and Natalie Hayward, experienced a traumatizing death and were tasked with the responsibility of grieving, and all but Knox and Sollecito were able to occupy a *habitus* of grief, to conform to a normative grief ritual body. In a way, the town of Perugia and the entire world was traumatized, too. After all, if a young woman living in a historically safe environment could be assaulted and brutally murdered, anyone could. Why should Knox's response alone have been so drastically different?

As I will contend throughout this Part, Knox (and, as we will later see, Pamela Smart and the Menendez brothers) is not so unique as compared with the other mourners surrounding her: she suffered through a traumatizing death. But what makes Knox unique here is her precise proximity to that death, and the theoretical replicability of the experience onto her own corpus. Put more simply—her body, regardless of where she was, who she was with, if she was there, if she did it, if she did not do it, was tied to the scene of the crime. It could have just as easily been her. Knox's death emerges, in La Capra's terms, as an "absence": it is what could have been but never was. Meredith's death emerges as a "loss": she is what was and no longer is. As those around Knox therefore began to actively produce grief ritual bodies, bodies which occupied *habitus* in response to Meredith's loss, Knox's body found itself living through a quasi-dichotomous horror, an obligation to produce a *habitus* in response to Meredith's death while also fully immersed in a *habitus* of its own loss, a *habitus* of self-death. Through this lens, it is easier to contextualize

Knox's completely "emotionless" state, her "cool"-ness, as the byproduct of extreme shock ("how can any of this make sense?"); to understand her kissing her boyfriend as a sign of resolute aliveness ("cherish life; it could have been me"); and to recognize her delayed emotional outbursts as a sign of delayed, traumatic processing ("oh dear God—it was her").

The most concrete example of the self-death *habitus* lives in Knox's remark to Natalie Hayward, in which she said, "What do you fucking think? She fucking bled to death"[72] when asked whether she thought Meredith suffered. Though completely horrifying to those around her, Knox's comment recalls Elaine Scarry's contention that physical pain is "objectless, it cannot easily be objectified in any form, material or verbal. But it . . . may give rise to imagining by first occasioning the process that eventually brings forth the dense sea of artifacts and symbols that we make and move about in . . . [physical pain] begin[s] the process of invention."[73] Embedded in her remarks that Meredith "fucking bled to death" is a conflation of the symbol of blood with the act of extraordinary physical pain and extreme suffering inflicted upon the body. For Knox, the theoretical invention of such agony would not have been fundamentally objectless: two, interchangeable (subject-)objects—Meredith and Knox herself—would have been the primary beings unto whom physical pain could have been inflicted. Rhetorically, Meredith becomes the linguistic symbol standing in for Knox's own potential suffering, for the possibility of her having "fucking bled to death" herself. Indeed, it is in Meredith as symbol for extraordinary agony that the self-death *habitus* lives: the process of invention of a self as murdered other. In the imaginary of physical pain, then, it was Knox who "fucking bled to death," who suffered an extremely violent death. As her own later reflections epitomized, Knox heavily felt the weight of this painful substitution: "My friend had been murdered and it could just as easily have been me. Somehow she had died in the house where we were living and it could have been me."[74]

Still, it was an imagined response, living exclusively in the testimony of a few police officers who claimed to have witnessed it, that became the locus for (ir)rationalizing Knox and predetermining her guilt: an infamous cartwheel[75] would become synonymous with Amanda Knox. Initial

72. Nadeau, *supra* note 59, at 63.

73. Scarry, *supra* note 38, at 161–162.

74. *Amanda Knox: "I Was In The Courtroom When They Were Calling Me A Devil,"* Bus. Insider (May 1, 2013, 15:52 IST), https://www.businessinsider.in/amanda-knox-i-was-in-the-courtroom-when-they-were-calling-me-a-devil/articleshow/21141891.cms [https://perma.cc/D26E-CNRD].

75. Though outside the scope of this paper, plenty could also be said about reporting regarding Knox's MySpace name ("Foxy Knoxy"), visions of her promiscuity, and the prosecutorial/public decision to deem Knox a sexual deviant. For more on the role of sex in the Amanda Knox case, *see generally* Nadeau, *supra* note 59; James Bowman, *Sex, lies & Amanda Knox*, The New Criterion, Nov. 2011, https://newcriterion.com/issues/2011/11/sex-lies-amanda-knox [https://perma.cc/QMP2-UYN7]; Siobhan Holohan, *(A)moral Representation: The Hypersexual Construction of Amanda Knox*, *in* Transmedia Crime Stories: The

accounts of Knox's cartwheels migrated from the questura to local and national news, with publications like *Rolling Stone* and *The Wall Street Journal* offering coverage of the account.[76] The *Sunday Business Post* would later report that the example of Knox "turn[ing] cartwheels" in the police station helped explain "the reasons why so many people had come to regard her with suspicion."[77] That the public clung to "Amanda's notorious cartwheel"—an act not only irrelevant to the homicide, but also potentially fabricated—as a means of determining she was "evil, depraved, or dangerous"[78] illustrates how the community was incapable of understanding a self-death *habitus*, was unable to understand how someone who believed that "it could have been me" could have failed to acculturate her body to their social expectations. Indeed, the social imaginary surrounding the cartwheel bespeaks how the "failed" ritual body—the one that (sometimes literally) choreographs different modes of grief performance—not only generates heightened suspicion, but through the captivation of international attention, also manages to congeal a social body, an international community ("us") that excises the non-normative individual (an "evil, depraved . . . dangerous" her) in order to maintain that coalescence.

If initial print reporting on cartwheels helped contribute to the sustenance of an international community rooted in normative ritual mores, it was cameras that exacerbated the public's readings of Knox as socially irredeemable, criminally culpable, and ultimately heinous. In the moments after Kercher's body was discovered, cameras immediately captured Knox and Sollecito embracing, an act which led lead prosecutor Giuliano Mignini to remark, "I asked, 'Is a monster responsible for this?' Outside, I saw two young people. They were comforting each other with an affection inappropriate for the moment."[79] The specific "affection" that Mignini describes is a certain, bonded closeness, a kiss that shows both Knox's and Sollecito's eyes closed. (Appendix 1). Just a few seconds later, Knox and Sollecito pull away, and the look on Knox's face is one of stark disorientation: her brow is furrowed, her lips are pursed, and her

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Trial of Amanda Knox and Raffaele Sollecito in the Globalised Media Sphere 69 (Lieve Gies & Maria Bortoluzzi eds., 2016); Stevie Simkin, Cultural Constructions of the Femme Fatale from Pandora's Box to Amanda Knox (2014); Stevie Simkin, *'Actually evil. Not high school evil': Amanda Knox, sex and celebrity crime*, 4 Celebrity Stud. 33 (2013).

76. *See* Nathaniel Rich, *The Neverending Nightmare of Amanda Knox*, Rolling Stone (June 27, 2011 5:45pm), https://www.rollingstone.com/culture/culture-news/the-neverending-nightmare-of-amanda-knox-244620 [https://perma.cc/88AL-QQDQ] ("Officers would later complain that Knox, after sitting for hours in the stiff waiting-room chairs, had started to do cartwheels and even splits. Convinced that she was psychotic, the guards begged her to stop.")

77. *Double jeopardy: Amanda Knox profiled*, The Sunday Bus. Post 1, 2 (May 5, 2013).

78. Duncan, *supra* note 54, at 4.

79. Amanda Knox 0:11:19–0:11:50 (Netflix Original Film, Brian McGinn & Rod Blackhurst, dir., 2016).

eyes, gazing away from Sollecito, reveal a sort of lachrymosity. Sollecito's jaw is clenched, and he looks down at the ground, as though struggling to understand what is happening. (Appendix 2). Neither looks well, but it is Knox who appears particularly distraught.

But here as before, it is the kiss that captured the attention of international audiences, not the obvious pangs of remorse (and, likely, trauma) that seem to live in the unspoken voids of Knox's face. Arguably, this act of looking at the camera only through a narrow lens participates in the phenomenon wherein the social body literally de-faces (read: dehumanizes) the individual in order to facilitate in her social excision in order to reaffirm the boundaries of community. A person's face is, in many ways, the means by which she is recognized as a subject by an/other: whereas preemptive thoughts about her existence can lead to objectification and, by extension, dehumanization, the ability to attach a face to a person is, in essence, the ability to see and understand her as human. Emmanuel Levinas, an ethicist concerned with constitutive selves, understood the face itself as the site of social recognition: "The face is not the mere assemblage of a nose, a forehead, eyes, etc.;it is all of that, of course, but takes on the meaning of a face through the new dimension it opens up in the perception of a being."[80] For Levinas, the face served as an access point for understanding both self and other, as (in Lacanian terms)[81] the ability to perceive the possession of flesh allows the self to gaze into a mirror and perceive her existence; by extension, in the "mirroring" of the self through the image of the other, she can recognize the humanity of that other.[82] Thus, for Levinas, an inability to access the face of the other not only reduced the other to an abject object, but also foreclosed the individual's ability to conceptualize herself: "The other is always already a *Thou*, because she has a face; she foredooms every effort to reduce her to an *It*, because objects do not have faces . . . The *I-Thou* relation is constitutive of the self, not the other."[83] The social rejection of the face in the context of Amanda Knox's experience—that is, the prioritization of the act of kissing, which involves turning the face away from the camera, instead

80. Emmanuel Levinas, *Ethics and Spirit, in* DIFFICULT FREEDOM: ESSAYS ON JUDAISM 1, 8 (Sean Hand trans., 1990).

81. *See generally* Jacques Lacan, *The Mirror Stage as Formative of the I Function as Revealed in Psychoanalytic Experience, in* ÉCRITS, THE FIRST COMPLETE EDITION IN ENGLISH 75, 76 (Bruce Fink trans., 1977) ("It suffices to understand the mirror stage in this context *as an identification* in the full sense analysis gives to the term: namely, the transformation that takes place in the subject when he assumes [*assume*] an image—an image that is seemingly predestined to have an effect at this phase, as witnessed by the use in analytic theory of antiquity's term, 'imago.'").

82. For more on the role of the face in constructing perception, imaging, and imagining, see generally Emily Chazen, "Ethics and the Face in Samuel Bak's *Adam and Eve* Collection" (April 20, 2018) (unpublished manuscript) (on file with Haverford College Institutional Scholarship).

83. D.G. Myers, *Responsible for Every Single Pain: Holocaust Literature and the Ethics of Interpretation*, 54 COMP. LITERATURE 266, 274 (1999).

of the actual contours of her face—speak to an act of failed recognition. The "perception of [her] being" cannot be actualized by the gazing social other(s), who thereby cannot adapt to and understand her humanity.

Of course, the refusal to recognize Knox's humanity through her face participates in what might be understood as a sort of "chicken-and-egg" situation. One might ask: does the process of viewing *first* erase Knox's face in favor of understanding her as a ritual other? Or does the process of understanding her as a ritual other, threatening the boundaries of community, lead to the public erasure of her face in favor of the kiss? Though at its core the question cannot be answered, I want to suggest that the public's act of clinging to the kiss and foreclosing the possibility to read Knox's face as one rife with lament is an act of visual confirmation bias: Knox "lack[ed] remorse" because the international public *wanted* her to lack remorse, as that was the narrative that had been presented to them. As Carl Plantinga's argument in "Indices and the Use of Images" suggests, *seeing*—an ambiguous act rife with interpretive possibility—became a site of flattening her humanity, of generating a singular narrative, of delimiting who Knox was and who she could be.[84] To rephrase Plantinga, the public would (or, more precisely, could) *see* Knox's remorse only when they *believed* it.[85]

Though Brian McGinn and Rod Blackhurst's documentary *Amanda Knox* would eventually ask its viewers to "look again,"[86] to re-face Knox and challenge their assumptions about her performances of grief, it was her trial where the de-facing of Knox took center stage. Much could be said about how the cameras present in the courtroom fundamentally altered the nature of Knox's experience, and her fundamental ability to occupy a/the *habitus* of a defendant.[87] However, I contend that, despite

84. Plantinga, *supra* note 48, at 63.

85. *Id.* at 64.

86. McGinn and Blackhurst do this by duplicating the voiceovers that are placed upon the videographic images of Knox and Sollecito kissing. As mentioned above, at 0:11:19–0:11:50, Knox and Sollecito's kiss and turn away is accompanied by the voiceover of the prosecutor, who questions the response that Knox had. Just ten minutes later, however, the video recurs. Amanda Knox, *supra* note 79. This time, it is Knox's voice which precedes the video, stating, "The police, like, kicked us all out of the house, kicked down Meredith's door, and they were saying that her—like, there was blood everywhere and that her throat had been slit and . . . And, so that's how I was told that Meredith was dead." *Id.* at 0:22:35–0:22:54. Knox's narrative is followed by quiet music playing over the image of her kiss and the ultimate (re)turn to her face. *Id.* 0:22:54–0:22:55. In this second moment, the viewer is invited to sit with Knox and Sollecito alone: to renarrativize their bodies in the context of Knox's, rather than the prosecutor's (and, by proxy, the public's) perceptions. As a result, the documentary begins to undermine the de-facing and dehumanizing process that characterized the Knox trial by re-facing her body.

87. Numerous legal scholars have theorized the ways in which the camera actually changes the courtroom space itself, arguing that Sixth Amendment fair trial concerns arise through the presence of cameras in the courtroom. For more on this, *see generally* Marder, *supra* note 48. *See also generally* Marjorie Cohn,

existing evidentiary safeguards, irrelevant pre-trial conduct captured on cameras enters the courtroom in ways that (1) draw on, affirm, and reify the potentially unjustified suspicions of a community incapable of comprehending the ritual body of a griever of traumatizing death, and (2) harmfully conflate the determinations of courts of public opinion with those of criminal courtrooms, thereby compromising the judiciary framework of "truth" and "justice" that has for so long sustained the legitimacy of the court system.

Italian courts heard Knox's case three times: first, it was heard by the Court of Assizes of Perugia, presided over by Dr. Giancarlo Massei, at which time Knox was found "guilty of the crimes ascribed to" her.[88] At her second trial and first appeal, the Second Court of Assizes of Appeal of Florence, presided over by Dr. Alessandro Nencini, determined that the "penal responsibility of [Knox for] the crimes contested . . . [was] clearly established and supported by a body of multiple pieces of circumstantial evidence, of univocal meaning and convergent, so much as to become full proof beyond every reasonable doubt."[89] Ultimately, however, the Supreme Court of Cassation of Italy "annulled without appeal [Knox's] challenged sentence."[90]

Both the Court of Assizes of Perugia and the Second Court of Assizes of Appeal of Florence *expressly* referenced Knox's seemingly "cold" demeanor, either admitting evidentiary testimony (in the former) or using it to substantiate their affirmative findings (in the latter). To Judge Richard Posner's initial point,[91] the permissibility of the Court's ruminations on this evidence is not entirely surprising: under Article 132 of the Italian Penal Code, a judge may take into account an actor's "behavior at the time of or subsequent to the offense."[92] Still, the Court's language remains notable because of the value placed in assessments of others' readings of Knox's behavior over and above Knox's own narrative and repeated attempts at self-vindication.

At the Court of Assizes of Perugia, the Court discussed Knox's remorselessness at length in a segment entitled "Meredith's Girlfriends."[93]

Cameras in the courtroom: television and the pursuit of justice (1998); Scott Campbell et al., *The Impact of Courtroom Cameras on the Judicial Process*, 3 J. Media Crit. 101 (2017); Alex Kozinski & Robert Johnson, *Of Cameras and Courtrooms*, 20 Fordham Intell. Prop. Media & Ent. L.J. 1107 (2009–2010); Susanna Barber, News Cameras in the Courtroom: A Free Press-Fair Trial Debate (1987); Frank W. White, Cameras in the courtroom: A U.S. Survey (1979); Christo Lassiter, *Put the Lens Cap Back on Cameras in the Court Room: A Fair Trial is at Stake*, 122–123 Christian L. Rev. 111 (1994).

88. Corte d'Ass. Perugia, 4 marzo 2010 (ud. 4–5 dicembre 2009) 1, 396.
89. Corte d'ass. d'app., Firenze, 29 aprile 2014 (ud. 30 gennaio 2014) 1, 328.
90. Cass., sez. cin., 7 settembre 2015 (ud. 25 marzo 2015) 1, 48.
91. *See* Posner, *supra* note 17, at 42.
92. It. Art. 132 cod. pen.
93. Corte d'Ass. Perugia, *supra* note 88, at 34–38. Additional references to Knox's seeming lack of remorse continue throughout the Court's opinion. *See, e.g.*, *id.* at 292 ("[O]n November 4 . . . the personnel from the *Questura* [who were]

In addition to direct citation to Amy Frost's account that "Amanda's behavior at police headquarters seemed inappropriate . . . affectionate and she was poking out her tongue and making faces"[94] and Robyn Butterworth's reference to Amanda's failure to "show[] any feelings: everyone was upset, while she did not seem to show any emotions or even to feel any emotions,"[95] the section offers a play-by-play account of what transpired in the days and weeks following Meredith's death. This section is notable because it *precedes* the Court's analysis of Knox's own testimony. Unlike later evidentiary information, such as the survey and evaluation of forensic evidence and genetic investigations, the circumstantial narrative surrounding assessments made about Knox comes before Knox's own story. Implicitly, the text of the Court's decision seems to posit a sort of hierarchy of credibility: witnesses to the event seem to take precedence over Knox's own account, and their assessments of the way she literally contorted her body in response to Meredith's death became more significant than the tale of the affective experience and the situation as Knox would recall it.

The Court of Assizes of Perugia's textual prioritization of witness testimony over Knox's own story—which, unlike that of "Meredith's girlfriends," they inevitably distrusted, writing an entire section entitled "Inconsistencies and denials in Amanda Knox's tale"—raises questions as to narrative construction within the courtroom. In the face of circumstantial evidence, whose story matters (more) in the criminal legal world: that of the defendant, or that of those who claim to have encountered her? How does the imbalance of narrative worth bespeak an inequitable construction from the moment defendants enter the courtroom? What happens when sensory conflicts live in the narratives themselves—for example, Butterworth's *perceptions* that Knox did not "feel any emotions" versus Knox's actual affective experience? And if courts proclaim their fundamental role to be in approximating truth and advocating for justice, how can they even begin to attempt to do so in the face of transparent yet unacknowledged biases in favor of certain narratives?

At its core, the content of "Meredith's Girlfriends'" narrative also reminds us that, amidst these questions, lives a sense that the court cannot fundamentally escape the communal milieu in which it finds itself. Though the Italian courts were not beholden to the American Constitution, the Italian courts' engagement with community sentiment parallels the Sixth Amendment's guarantee of a jury trial. The nature of the Sixth Amendment guarantees for a fair trial require a sense of community engagement—the creation of the jury is, in essence, representative of the

present on that occasion, reported Amanda's severe and intense emotional crisis [in response to seeing the knife that had been used to kill Meredith]. This circumstance appears significant both in its own right and also when one considers that Amanda had never previously shown signs of any particular distress and emotional involvement.").

94. *Id.* at 37.

95. *Id.* at 35.

judiciary's desire to immerse itself within some sense of community.[96] That said, the infusion of witness testimony to Knox's perceived emotionlessness emblematizes how it is not simply community members that enter the courtroom, but communal sensibilities—namely, the suspicion generated by failed ritual conformity—as well. Especially in the case of an individual subject to hyper-scrutiny in the face of a broad, international audience, the apparent social consensus conflating seemingly inappropriate performances of grief with inevitable guilt completely transforms the space of the courtroom. Rather than serving as a site of equitable power distributions in which the defendant and the prosecutor are each given space to make their cases, the introduction of specific reflections on Knox's failed ritual body illustrates how the courtroom is always already a space rife with prejudice, epistemological violence against the defendant, and inequity.

The initial hints of judgment based in prejudicial inequity against Knox that were born in the Court of Assizes of Perugia's opinion culminate in the Second Court of Assizes of Appeal of Florence's later determinations that Knox was someone who was inherently "indifferent to the human suffering she caused."[97] In initial interviews with the police, Knox believed that a man named Patrick Lumumba, the owner of the bar where she had worked, might have been responsible for Meredith's murder, as "police, using her phone as evidence, told her that [a text she sent stating *Ci vediamo piu tardi*[98] meant] they planned to meet up later that night . . . they convinced her that she was either hiding something or had repressed a memory . . . [at which time she convinced herself] she had flashes of her apartment, hearing Kercher's screams, and seeing Lumumba in a brown jacket."[99] The court hyper-analyzed this moment,

96. *See generally* Valerie P. Hans & Neil Vidmar, Judging the Jury (1986) (providing a historical overview of the jury trial and assessing the efficacy of the jury in a number of contexts) *see also* John Gastil et al., The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation (2010). *But see generally* Jacinta M. Gau, *A jury of whose peers? The impact of selection procedures on racial composition and the prevalence of majority-white juries*, 39 J. Crime & Just. 75 (2016); Robert C. Walters et al., *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 S.M.U. L. Rev. 319 (2005); *and* Darren Wheelock, *A Jury of One's "Peers": The Racial Impact of Felon Jury Exclusion in Georgia*, 32 The Just. Sys. J. 335 (2011).

97. Corte d'ass. d'app., Firenze, *supra* note 89, at 99.

98. *Ci vediamo piu tardi* translates literally to "I'll see you later." The police attempted to suggest to Knox that, though the colloquial turn of phrase was traditionally understood as a way of saying goodbye in English, the Italian (which she was not fluent in) actually meant that she would literally see Lumumba later—that he would meet up with her later, likely to commit murder. Johnny Brayson, *Why Amanda Knox Might've Accused Patrick Lumumba,* Bustle (Sept. 30, 2016), https://www.bustle.com/articles/186092-why-did-amanda-knox-accuse-patrick-lumumba-a-new-netflix-doc-digs-into-the-situation [https://perma.cc/TB79-RWAN]

99. *Id.* For more on repressed memories, false memory, and the ways in which these experiences can influence police encounters, *see generally* Saul M. Kassin, *False*

bringing together Knox's "coldness" in relation to Meredith's death generally and her allegations against Lumumba to suggest that she was an almost irredeemably cruel person:

> Amanda Marie Knox repeated the allegations [against a man named Patrick Lumumba] before the magistrate, allegations which she never retracted in the following days . . . To make such a very damaging denunciation meant causing the detention for numerous days of a person she knew to be innocent, completely indifferent to the human suffering she caused him. This conduct, undeniable in terms of facts and in terms of what it represents in legal terms, requires an explanation. But such an explanation cannot be found in the young woman's supposed weakness of character. Indeed, from the immediate aftermath of the discovery of poor Meredith's battered body she showed coldness to the outside world—or even a blatant, exaggerated indifference. This was noticed by more than one of the people who [were] touched by the tragic events at the time . . . [100]

Where the Court of Assizes of Perugia commented on the presumptive "coldness" that Knox performed in relation to Meredith's death, the Second Court of Assizes of Appeal of Florence offers an opinion almost fixated on her apparent "indifference." Twice in their invocation of Knox's indictment of Lumumba, the Court draws on the quasi-legalistic language of indifference ("completely indifferent to the human suffering" and "blatant, exaggerated indifference") in ways that conflate her inability to occupy a normative *habitus* of grief with culpability.

Unlike the Court of Assizes of Perugia, however, the Second Court of Assizes of Appeal of Florence quite literally places Knox's failed grief performance in the context of the law in ways that seem to suggest a sense of presumptive illegality in the face of "coldness." Under Article 108 of the Italian Penal Code, "anyone . . . who commits a non-negligent crime against life or individual safety [and] discloses a special inclination towards crime which is caused by the *peculiarly wicked disposition of the offender*, shall be found to be a delinquent by propensity."[101] The Italian Penal Code's language resonates with the conditions whereby an individual can be convicted for reckless murder ("wicked, depraved, or malignant heart" murder) in the American context: "peculiar wickedness" parallels the notion of "extreme indifference to the value of human life."[102] Though the former emphasizes the totality of a person's character whereas the latter focuses on their momentary mindset, both suggest a

Memories Turned Against the Self, 8 Psychological Inquiry 300 (1997); Julia Shaw & Stephen Porter, *Constructing Rich False Memories of Committing Crime*, 26 Psychol. Sci. 291 (2015); Elizabeth F. Loftus, *Creating False Memories*, 277 Sci. Am. 70 (1997); Elizabeth F. Loftus, *The repressed memory controversy*, 49 Am. Psychologist 443 (1994); *and* Linda A. Henkel & Kimberly J. Coffman, *Memory distortions in coerced false confessions: a source monitoring framework analysis*, 18 Applied Cognitive Psychol. 567 (2004).

100. Corte d'ass. d'app., Firenze, *supra* note 89, at 98–99.
101. It. Art. 108 cod. pen.
102. A.L.I., Model Penal Code & Commentaries Pt. II § 210.2(1)(b), 21–22 (1980).

sort of moral failure on the part of the actor. Here, the court's repetitious reference to Knox's seeming "indifference" harkens back to the sort of "depraved heart" inklings of reckless murder. In essence, then, the language of the Court implies that to emerge as "cold" and "indifferent"—to perform grief inappropriately, in ways that fail to assimilate to the cultural expectations to "more than one of the people . . . touched by the tragic events at the time" is essentially an indictment of one's guilt. Put more simply: though one who is found guilty of murder need not necessarily be indifferent (as demonstrated by the criminalization of other forms of purposeful murder[103]), one who is indifferent must necessarily be guilty of murder. One cannot simply have a depraved heart—she must necessarily have committed a depraved heart murder. Thus, the court's creation of a sort of hybrid law living in the spaces between text and performance rests upon notions of ritual failure, demonstrating the ways in which courtrooms can—and do—criminalize individuals whose grief performances threaten the boundaries of the community.

The Supreme Court of Cassation would eventually overturn Knox's sentence. Their decision was rooted in the notion that the media circus surrounding Meredith Kercher's death likely influenced the ways in which the investigation was conducted and thereby the value of the evidence introduced:

> [A]n unusual media fuss about the crime, caused not just by the dramatic modalities of the death of a 22-year old woman, so absurd and incomprehensible in its genesis, but also by the nationality of the persons involved . . . prompted the investigation to suffer from a sudden acceleration, which, in the spasmodic search for one or more culprits to be delivered to international opinion, surely didn't help the search for substantial truth, which, in complex murder cases like the one examined here, has an ineluctable requirement both for accurate timing, and also the completeness and the accuracy of the investigation activity.[104]

Their return to the "unusual media fuss about the crime" (re)calls attention to the nature of the camera, and the ways in which the camera can fundamentally alter the nature of not only the pre-trial experience but, by proxy, the outcome of a trial altogether. If "substantial truth" should remain the overarching goal of the judicial process—though we might ask, can it ever? How can we *ever* begin to piece together that which happened in the past, begin to reconstruct a deconstructed "truth" which belongs to no one or, maybe more dangerously, to everyone? Then the court's assessment might be sound: cameras should not *so* significantly alter the nature of the courtroom as to eliminate a fair trial by hampering a favorable outcome for the defendant.[105]

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103. *See, e.g.*, *id.*
104. Cass., sez. cin., *supra* note 90, at 22.
105. Of course, this is not to say that cameras and the media should be excluded entirely from conversations around criminal trials. Debates surrounding the intersections between the First and Sixth Amendments are robust and cannot

All the same, the Supreme Court of Cassation's emphasis on Knox's "nationality," rather than the hyper-focus on her comportment that was a mainstay of the first two court's assessments, shifts the assessment in ways that skirt around significant conversations about the conflation of "coldness" and an improper grief *habitus* with inevitable guilt. This phenomenon, equally present on the American landscape, is one that courts ought to pay close attention to, not only in the text of their actual decisions, but in the space of the courtroom. As Subpart will demonstrate, this obligation is heightened on the American landscape, as it is in courtroom encounters, in the ways that prosecutors, witnesses, defendants, judges, and juries physically and socially interact with one another, that the conflation of failed grief rituals and guilt becomes a live concern.

B. *Choreographies of Self-Representation: The Trials of Pamela Smart*

Where the slippage of evidentiary boundaries in Amanda Knox's case could potentially be attributed to the location of the murder and the trial itself in Italy, Pamela Smart's case epitomizes how the inability of a griever of traumatizing death to acculturate her body to the expectations of the society around her can ultimately lead to hasty determinations of her guilt in the American context. In 1989, Pamela Smart married her husband Gregory, whom she had met at a party in New Hampshire while she was visiting her family for a college break.[106] The beginning of their married life was, according to Smart, quite happy.[107] Her husband worked as an insurance agent, and he got her a dog that she named Haylen after her favorite band, Van Halen.[108] She worked as a facilitator for a high school self-esteem program at a high school in southeastern New Hampshire.[109]

However, things changed when Smart learned that her husband, to whom she had not yet been married a year, cheated on her and had a one-night stand.[110] Smart was hurt, and when a fifteen-year-old student named Billy Flynn showed an interest in her, they began an affair.[111]

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be easily reduced to a simple answer (one cannot simply say "prioritize the First Amendment" or "prioritize the Sixth."). Rather, the relationship between the media and the judiciary ought to be managed carefully, with courts conscious to the impact of cameras in and out of the courtroom—a fundamental goal of this paper—*and* with the media assuming a heightened responsibility towards defendants in order to ensure fair trials.

106. Manuel Roig-Franzia, *The Enduring Appeal of Pamela Smart, New Hampshire's Misunderstood Murderess*, The Wash. Post (Jan. 1, 2019), *available at* https://www.vnews.com/The-enduring-appeal-of-Pamela-Smart-the-misunderstood-murderess-22881180 [https://perma.cc/57LC-RLEE].
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*

Smart and Flynn slept together more than five times over the course of about two months.[112]

On May 1, 1990—six days before her first wedding anniversary—Smart returned from a school meeting to find her twenty-four-year-old husband dead, lying in a puddle of blood on the floor of their condominium.[113] Almost immediately, the media began to swarm. People had started to speculate that Gregg's murder had been the result of either a burglary or drug deal gone wrong.[114] News reporters would later go on to express skepticism about Smart's potential role in the murder, contending that Smart "did not shy away" from the attention that they showered her with and therefore must have been responsible. One news reporter would remark:

> Early on, Pam Smart did not shy away from press attention . . . She didn't hesitate to talk about how her husband wasn't into drugs, and how she was defending his honor, and there was a feeling that she actually enjoyed the attention she was getting being the widow on TV.[115]

Another added:

> She's dressed beautifully, full on makeup. She looks *hot*, like she was going to a party. She told me that she had wanted to be a television news reporter—she wanted to do what I did . . . wouldn't it be good if you got a shot of me looking at it [her wedding cake]? . . . she's attempting to produce the story that I'm working on.[116]

Attempts at "production," at appearing like a put-together widow, seeking to defend her husband's "honor," automatically pointed in one direction for those around her: "she was guilty."[117] In these formative stages, the conflation of guilt with attempts at choreographing representation illustrates: (a) consensus that the normative grieving body ought to be in complete and transparent disarray, incapable of maintaining composure sufficient to protect her deceased husband's reputation; (b) that, by extension, Smart's ability to exercise restraint in front of cameras and audiences violated the expectations of the newscasters who encountered

112. *Id.*
113. *Id.*
114. Captivated: The Trials of Pamela Smart, 0:04:41–0:05:28 (Hard Working Movies, Jeremiah Zagar, dir., 2014).
115. *Id.* at 0:05:00–0:05:28.
116. *Id.* at 0:05:54–0:06:29. The comment here is bizarre, especially given the commonplace assumption that spouses are, more often than not, suspects when murder is committed. *See, e.g.*, F. Lee Bailey, When the Husband is the Suspect 8 (2008) ("'The husband is often the suspect, but why? . . . He's the suspect in part because of statistical probabilities.'"). Logically, it might make sense that Smart was defensive over her image, for the sake of avoiding the public transitioning towards an assumption that she had a hand in her husband's death. Though it ultimately backfired given the ways in which the public weaponized her "image control" as a means of vilifying her, the underlying desire to control an image bespeaks not an inherent recognition of her own guilt, but a potential attempt at self-vindication.
117. Zagar, *supra* note 114, at 0:06:29.

her, leading them to assume—without ever actual witnessing her grief experience outside the space of the camera—that she was essentially at ease; and (c) that, insofar as they assumed her body *before* the cameras was the same as her body *beyond* the cameras, their sense of her failed grief stimulated heightened suspicion that allowed them to deduce "she was guilty."[118]

But it was not the case that Smart was constantly living in a placated state; as others would later recount, she was distraught, grieving privately even if she failed to lament publicly. Throughout the investigation that followed Greg's death, Smart's mother, Linda Wojas, described Smart as living in a "frenzied state, alternating between depression and mania . . . Wojas said she took Smart to a residential mental health facility. The facility was about to admit her when both mother and daughter hesitated."[119] Smart's emotional oscillations "between depression and mania" live in direct and obvious conflict with the images captured by cameras: whereas the media portrayed a vision of a woman completely stable in the aftermath of her husband's murder—so stable, in fact, that she was capable of coiffing her hair and placing makeup on her face—the actual emotional turmoil that wreaked havoc upon Smart's body told an altogether different story of a woman struggling to rationalize her grief.

That public performances of grief—or, as it seemed in Smart's case, a lack thereof—would become the central fixture of the suspicion that followed Smart illustrates how cultural expectations placed upon the ritual body hold fundamental significance in the eyes of the community. And if the viewing public cannot see a person's grief playing out readily before them, if it cannot comprehend or rationalize the performances of a ritual body, that public will be inclined to assume that the *habitus* matches the affect—that the person who does not perform must not feel. It did not matter for Smart that she might have been suffering internal tumult: "she was guilty"[120] because she failed to show her pain. Such is the problem of performance that emerges in a Western, ocularcentric[121]

118. *Id.* at 0:06:29.
119. Roig-Franzia, *supra* note 106.
120. Zagar, *supra* note 114, at 0:06:29.
121. In "The Disenchantment of the Eye: Surrealism and the Crisis of Ocularcentrism," Martin Jay takes as a given that Western sensory hegemonies have led to the prioritization of eyesight over and above other senses: "traditional hierarchies of European life [assumed] the domination of sight, long accounted the 'noblest of senses.'" Martin Jay, *The Disenchantment of the Eye: Surrealism and the Crisis of Ocularcentrism*, 7 Visual Anthropology Rev. 15, 15 (1991). Though Jay's overarching argument focuses on the role that post-first World War surrealists played in questioning what he calls "the crisis of visual primacy," ocularcentrism—that is, "the term used to describe a paradigm or epistemology based on visual or ocular metaphors"—remains the prioritized mode of engagement across the vast majority of the Western world. *id.;* Donncha Kavanagh, *Ocularcentrism and its Others: A Framework for Metatheoretical Analysis*, 25 Org. Stud. 445, 445 (Mar. 2004). *See also id.* at 446–47 ("[W]e can characterize western culture [in modernity] as an ocularcentric paradigm, based as it is on a vision-generated,

society where, to paraphrase Carl Plantinga, the public can *see* only what they *believe.*[122]

A month after Smart's struggle with mental illness, two of Billy Flynn's friends turned themselves in to the police and pleaded guilty after agreeing to cooperate in exchange for reduced sentencing.[123] The two boys, Pete Randall and Vance Lattime, Jr., told police that Lattime bought bullets with money given to him by Pamela Smart; Randall had pointed a knife in front of Greg's face; and, they said, Flynn had shot Greg in the head.[124] Later, after learning that they would be charged and tried as adults, they told investigators that Pamela Smart had been responsible for orchestrating the killing: leaving the front door unlocked so they could surprise her husband when he arrived home, instructing them to make it look like a burglary, and offering to pay them each $500.[125] Smart has always denied these allegations, though she has reflected that Flynn might have misunderstood her when she remarked, "I can't . . . do this because I have a husband," leading him to believe that, if he eliminated Smart's husband, he might have had a chance with her.[126]

The boys' interpretation of the events that transpired, coupled with Smart's account that none of this actually happened, bespeaks the limits of reliance on linguistic interpretation. Though there is no concrete evidence demonstrating what precisely was said, the conflict between the boys and Smart harkens back to the *Ci vediamo piu tardi* text Amanda Knox sent to Patrick Lumumba: where one party believed with concrete certainty that the other conveyed a highly particularized meaning (for Smart, the boys' notion that she wanted her husband killed; for Knox, the police's idea that she would literally see Lumumba at a later time), the other intended to mean something subtly different (for Smart, that she was incapable of continuing her affair; for Knox, a colloquial goodbye). The limitations of meaning making can be explained through theories of verbal imagery and language:

> Kenner's modernist notion of verbal images as simple, concrete nouns has ample precedent in a body of common assumptions about language that goes back at least to the seventeenth century. This is the assumption that what words signify are none other than our old friends, the "mental images" that have been impressed on us by experience. On this account we are to think of a word (such as *man*) as a "verbal image" twice removed from the original that it represents. A word is an image of an idea, and an idea is an image of a thing, a

vision-centred [sic] interpretation of knowledge, truth, and reality.").

122. *See* Plantinga, *supra* note 48, at 64.
123. Roig-Franzia, *supra* note 106.
124. *Id.*
125. *Id.*
126. *Id.*

> chain of representation that we may depict by simply adding one more link to our diagram of cognition under the empirical model.[127]

Appendix 3[128] represents the ways in which the individual tabulating certain words thinks through images prior to her construction of language itself. Within milliseconds, she visualizes what she means (e.g., the physical and socioemotional separation of bodies); she transforms that into a secondary, more concrete image (e.g., the cessation of an adulterous affair); and she ultimately translates that into language (e.g., "I can't . . . do this because I have a husband."). But, as Smart's and Knox's experience tell us, the problem is not with image construction, but rather with meaning making and image reception. The image in Appendix 3 must necessarily be reversed by a hearer, who first encounters language and not image. He *hears* first (e.g., "I can't . . . do this because I have a husband."); he transforms that into a concretized image (e.g., the image, perhaps, of three people, a woman straddled between two men pulling her in various directions); and he ultimately translates that into what W. J. T. Mitchell calls a verbal image, a re-presented, redefined form of the original speech that mingles the linguistic with the imagistic to create something that, at best, approximates what the original speaker intended (for example, if Flynn had understood completely, the removal of himself from the visual plane) and at worst, redefines the meaning altogether (for example, in Flynn's actual case, actualizes the removal of the other man).[129]

The boundaries of language exposed in this moment not only render questionable judicial, prosecutorial, and police reliance on language itself, but also emblematize the ways in which the pretrial media circus surrounding Smart's trial managed to generate both verbal and linguistic imagery of Smart that publicized an atypical grief performance counter to the one that Linda Wojas attests as occurring privately. Though often perceived as a site of objectivity, the news itself exists as a series of edited videographic images spliced together, allowing the newscasters—much like filmmakers—to "choose the best camera angle for each emotion and story point, which [they] can edit together for a cumulatively greater impact."[130] Even where the footage was not precisely cut, the selection of footage—Smart, say, sitting on the couch, donning a blue dress—involved a marked choice that would inevitably influence how people perceived the young woman. Indeed, as Tom Nickels, a private investigator for the defense reflected, the media's juxtaposition of verbal and visual images

127. W. J. T. Mitchell, *What Is an Image?*, 15 New Literary Hist. 503, 514 (1984).
128. Appendix 3 is taken directly from Mitchell's "What Is an Image?," *supra* note 127, at 514. This paper does not, through its inclusion of Mitchell's image, seek to reify the visions of normative masculinity that are imputed through Wittgenstein's images of "man." Rather, it seeks to simplify a complex construction through reliance on a readily-identifiable (if problematic) verbal image.
129. For a simpler explanation of this, see Appendix 4, in which I re-create the "man" image that Mitchell uses to strengthen this explanation.
130. Walter Murch, In the Blink of an Eye 1, 8 (1995).

led him to read Smart's body as one failing to adequately grieve: "When I watched it on TV, I thought she was guilty. I thought she was, um, pretty conceited. I remember she was sitting on the couch with her dog, and I thought, 'Boy, she's cold.'"[131]

Nickels' direct reference to the moment where Smart "was sitting on the couch with her dog" (Appendix 5)[132] is poignant because it contributes to the verbal-visual breakdown—a sort of conflict between the two spaces—that would define how the public came to understand Smart as performing inappropriate grief. On the visual plane, viewers encountered a vision of Smart that was put-together; she was dressed not like a widower (e.g., in all black) but sits instead in a blue satin dress with her hair styled and her makeup done.[133] The verbal-visual plane presented by the news, mediated through the mouth of a newscaster, echoes the image of an apparent remorselessness: "'Luckily nothing happened to him [her dog],' she says. 'He was locked in the basement when I found Gregg murdered.'"[134] The newscaster's language inhabits Smart's body, claiming ownership over her language ("she says") in ways that attempt to approximate a sense of objectivity for viewers. Despite the fact that he can only ever re-present her words, the newscaster's language literally embodies Smart, forming words for her, in ways that paint a linguistic mirror to the image of the woman wearing blue. Indeed, the suggestive preferencing of the dog's life over that of Gregg ("Luckily nothing happened to him") coupled with the matter-of-fact recitation of events ("I found Gregg murdered") devoid of apparent emotion essentially eviscerates any semblance of possibility for Smart to relay her *own* feelings in relation to the loss of her husband. Not only did the media therefore literally disembody Smart by depriving her of the corporeal space to form words, but they also erased her subjective personhood—her ability to represent the self as a total person with deep and real feelings to a viewing audience. That she might have attempted to "produce the story" thus should be read not as a performance of inappropriate grief but as an attempt to reclaim a sense of autonomy over her personal, affective, human narrative.[135]

131. Zagar, *supra* note 114, at 0:06:28–00:06:40.
132. *Id.* at 0:05:52.
133. The visual was, as one newscaster described it, jarring: "She's dressed beautifully, full on makeup. She looks *hot*, like she was going to a party." *Id.* at 0:05:54.
134. *Id.* at 0:05:43–0:05:54.
135. I would also suggest that Smart's attempts to "produce the story" live as an inclination to return that which the media sought to portray as a faithful image but one which (at best) was a faithless representation or (at worst) was a pure simulacrum with no connection to reality whatsoever. In *Simulacra and Simulation*, Jean Baudrillard distinguishes four phases of the image:
Representation starts from the principle that the sign and the real are equivalent (even if this equivalence is Utopian, it is a fundamental axiom). Conversely, simulation starts from the Utopia of this principle of equivalence, *from the radical negation of the sign as value*, from the sign as reversion and death sentence of every reference. Whereas representation tries to absorb simulation

It was in Smart's actual trial that the verbal-visual breakdown culminated, as the ocular apparatus—that is, the visual representations of Smart as a sort of demonic, griefless woman—came into direct epistemological conflict with her linguistic account of the events that transpired. Smart's trial, which took place in March of 1991 at the Rockingham County Superior Court in Brentwood, New Hampshire,[136] was the first New Hampshire court case to be broadcast gavel to gavel, putting Court TV on the map for years to come.[137] Though Smart's testimony would sit in uncomfortable tension with that of Billy Flynn, Vance Lattime, Jr., and Pete Randall, it was her testimony about the events that transpired following Gregg's murder that would be the site of real tension, as both her account of the tale and *how* she told it would directly conflict with

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by interpreting it as false representation, simulation envelops the whole edifice of representation as itself a simulacrum. These would be the successive phases of the image: 1. It is the reflection of a basic reality [representation]. 2. It masks and perverts a basic reality. 3. It masks the *absence* of a basic reality. 4. It bears no relation to any reality whatever: it is its own pure simulacrum. In the first case, the image is a *good* appearance: the representation is of the order of sacrament. In the second, it is an *evil* appearance: of the order of malefice. In the third, it *plays at being an appearance*: it is of the order of sorcery. In the fourth, it is no longer in the order of appearance at all, but of simulation.

Jean Baudrillard, Simulacra and Simulation 169–170 (1988).

Here, the four stages of representation live in a sort of hierarchy, whereby (1) is an almost sacramental representation that is fundamentally faithful to the sign which it represents, (2) perverts the sign or symbol by failing to faithfully represent but still attempting to, (3) perverts the sign or symbol by pretending to represent the real and yet existing in its own realm of representation, drawn into the world by pure imagination, and (4) exists beyond the sign or symbol, devoid of any relationship to the real. In Smart's case, the newscaster's placement of words over her image while also claiming that she attempted to "produce the story" suggests that the broadcast's representation of her overcame her own perceptions of reality, thereby creating an image that necessarily transformed her basic reality. The visions of Smart as remorseless widower—clearly deviating from that which Smart was actually experiencing based on her initial encounters with mental health facilities, suggests that the cold, crass visions of Smart were actually pure simulacrum: the signifier ("evil Pamela Smart") had no lived sign (for example, no literally evil, remorseless body) towards which to point. Not only does this corroborate Baudrillard's fundamental contention that "official news service [is] only there to maintain the illusion of an actuality, of the reality of the stakes, of the objectivity of facts," *id.* at 205, but it also demonstrates the ways in which Smart's attempts at self-production attempt to reinstate some sense of "actuality . . . of reality of the stakes, of the objectivity of facts" into a realm dominated by pure simulacrum.

136. *Teacher convicted of killing husband shocked by verdict*, Tampa Bay Times (Oct. 12, 2005), *available at* https://www.tampabay.com/archive/1991/03/31/teacher-convicted-of-killing-husband-shocked-by-verdict/#:~:text=Prosecutors%20charged%20Smart%20with%20manipulating,before%20their%20first%20wedding%20anniversary [https://perma.cc/LR9B-Y9BS].

137. Patrick Cronin, *'I never stood a chance': Pamela Smart trial, a three-decades old frenzy, then and now*, Portsmouth Herald (Mar. 4, 2021), http://www.hampton.lib.nh.us/hampton/biog/pamsmart/IneverstoodHU20210304 [https://perma.cc/E9DG-7CUZ].

the notions of the remorseless widower that had proliferated throughout the news. Smart would remember the moments after she discovered her husband's body in flashes, acknowledging the limits of her memory since "it all happened really fast":

> Mark Sisti, Defense Attorney: What did you do when you saw Gregg?
> Pamela Smart: Well—it all happened in a matter of, like, not even a second I don't think. And, I remember seeing things near him, like a candlestick and a pillow and I remember I thought—the first thing I thought was to go get help. And I said, I said Gregg—Gregg's name. And he didn't, he didn't answer, and I ran, I ran out. It all happened really fast. It's hard for me to remember exactly in what order. . . . No, I didn't know what was going on. I thought that someone was in the house still, so I remember thinking that to run somewhere else and call the police.
> Sisti: What did you do?
> Smart: I ran next door, and I started banging on the door. And *(voice cracks)* no one would help me. It—it was taking, it seemed like it was taking forever, and I was ringing on the doorbell, and I was screaming, "Somebody call the police! Someone help me!" And, they didn't come fast enough *(clears throat)*. I—I really, I really . . . I mean, they might have, but it just seemed like forever. And so I ran to the next door and started banging on it. And they didn't come. Then I ran to the next one, and I—by that time, the girl was already coming down the stairs 'cause I guess she had heard me screaming.
> They let me in the house—well, they opened the door and asked me what was wrong. And I said, "There's something wrong with my husband. I don't—*(voice gets quiet, shakes)* someone call the police."[138]

Smart's account in this moment begins to perform a sort of grief that flies in the face of the visual-verbal imagery that news media had constructed around her, complicating visions of her stoicism, her body as a site of griefless corporeality by inviting her to represent her affect unmediated by the voices of others. Embedded in her stuttering ("he didn't, he didn't answer" and "I ran, I ran out") lives the "belatedness and incomprehensibility" that Caruth describes as living "at the heart of [traumatic] repetitive seeing"[139]: Though the nature of the direct testimony requires a streamlined narrative, the hiccupping language of Smart's testimony illustrates a necessary subversion of vector-like directionality. Even as her testimony moves forward, it consistently returns back, an almost polyptoton[140]-like inability to assimilate her narrative to the

138. NH v. Smart: Pamela Smart Part One 1:00:28 – 1:02:03 (Court TV 1991), https://www.courttv.com/title/21-nh-v-smart-pamela-smart/ [https://perma.cc/7HL9-4P2V].

139. Caruth, *supra* note 35, at 92.

140. A polyptoton is a literary tool when author uses the "repetition of words from the same root with different endings." Richard Lanham, ed., A Handlist of Rhetorical Terms 42 (1968). For example, in Shakespeare's Sonnet 30, "*grieve* at *grievances* foregone"; "be*moan*ed *moan*"; and "*pay* as if not *paid*." William Shakespeare, *Sonnet 30: When to the sessions of sweet silent thought*, POETRY

normative expectations of untraumatized speech. Her language is quite explicitly belated, immersed in the trauma of "repetitive seeing" such that she cannot undertake a linear progression but instead, each time she speaks, harkens back with a sort of repetitious "Gregg—Gregg's name" or "he didn't, he didn't answer." Even where her blue dress and smiling figure on the news seemed to present an image of inappropriate grief that failed to conform to the normative expectations of those around her, then, her language materialized a sense of traumatization that, at the very least, performed a quasi-grief *habitus*, and at the most, projected outwards a sense of her internalized suffering that appeared to mirror the social expectations of those around her and muddy the otherwise clear waters of suspicion that had previously surrounded her.

Moreover, the actual tonal inflection that characterized Smart's testimony, coupled with her later account that she didn't "know [because she] was crying,"[141] betrays an affective trauma and performs modes of grief—even outside of the particularly ritualized space of media performance—that contravene the conceptions of Smart as failing to occupy an appropriate grief *habitus*. Throughout her testimony, Smart's voice does not remain monotone; rather, her voice cracks; she must clear her throat; and, perhaps most notably, her voice shakes as though on the verge of tears as she recounts telling the people on the other side of the door to call the police. Underlying these vocalized performances of grief is a sense that, at her core, Smart's affective disposition was one rife with grief. Her narrative was not simply stoic, but instead was filled with "crying" and vocal insinuations of crying, both of which contribute to the normative grief ritual performance that would have been expected by those around her. That the jury's guilty verdict would inevitably mirror the court of public opinion's determination that "she was guilty" illustrates how narrative construction alone is not the sole crisis faced by the griever of traumatizing death. Rather, given the ocularcentric hierarchies that permeate the thinking of American juries and society writ large, Smart's fate demonstrates how the criminal legal system expects the ritual body to occupy a grief ritual habitus legible to their sensory understandings: it is the optics of her grief that matter more than its auditory receptions.

Still, it would be too simple to say that ocularcentrism alone won out in Pamela Smart's case. Public images of Smart sobbing at Gregg's funeral suggest that the visual apparatuses of grief performance were presented to the public, and these images seem to participate in the

FOUNDATION, https://www.poetryfoundation.org/poems/45091/sonnet-30-when-to-the-sessions-of-sweet-silent-thought [https://perma.cc/NH7P-C6PK]. Elsewhere, I have argued that polyptotons emblematize the sort of violent past-present nature of memory, illuminating that wherein a "speaker fights to move forward in his diction, to press onward . . . every time he moves into the future, the past calls him back."

141. NH v. Smart, *supra* note 138, at 1:02:44–1:02:45.

contradiction of Smart's image as a griefless widower.[142] (Appendix 6). Moreover, one of the jurors in the trial, Alec Beckett, would write a piece in the Living Arts section of the Boston Globe shortly after the conclusion of the trial giving insight into what transpired in the jury room. In his article, Beckett suggested that the "[o]ne thing [every member of the jury] agreed on was that the tapes deserved our complete attention."[143] Here, the tapes refer to the wired conversation between Smart and her student assistant Cecelia Pierce, in which the prosecution argued that Smart admitted her guilt. Ultimately, Beckett suggests, it was the content of the tapes that led to the jury's conclusion that Smart was guilty.[144] His account of the trial's outcome initially seems to suggest a sort of merger between sensory modes in order to confirm subconscious biases held by the jury: the visual and auditory images of Smart as an authentic griever (for example, the funeral pictures, the quivering in her voice, accounts of her crying) could not prevail against the strength of the visual and auditory images of Smart as a griefless, vindictive, evil woman (that is, the woman sitting in the blue dress, the content of the tapes).

At the same time, the tapes that served as the backbone of Smart's trial have been consistently questioned, as the prosecutor undertook significant efforts to skew the jury's perception of them. As Jeremiah Zagar demonstrates in *Captivated: The Trials of Pamela Smart*, the content of the tapes was mediated through the quasi-exegetical lens of the prosecutor in ways that damaged Smart's case tremendously. Testimony from Gregg's best friend, Brian Washburn, suggests that Smart, attempting to get answers for herself in order to avoid having to disclose the nature of her affair with Flynn to the police, disclosed to Washburn that she intended to pretend to have been involved with the plan to kill Gregg to see whether Pierce would tell her anything. Washburn advised her not to do so, but the content of the tapes suggests that she disregarded his advice.[145] Regardless, Beckett makes no mention of Washburn's testimony in his article. Though he does nod to the fact that Pam "testified that she had been trying to extract information from Cecelia about what happened to her husband while trying to prevent her from going to the police so that her affair with Bill would remain a secret," he argues that the language Smart used was too "atrocious" to be conceivably related to such an end.[146]

And yet, the tapes themselves can easily be read as pointing exactly to what Smart and Washburn suggested. She states, "You cannot change what you know, you know? You can't. If you tell the fucking truth, you're probably going to be arrested."[147] Smart admits to saying that she was concerned with what Cecelia Pierce could say, but she acknowledges

142. Zagar, *supra* note 114, at 0:09:48, 1:10:08–1:10:18.
143. Alec Beckett, *Why I voted to convict Pamela Smart*, The Boston Globe 33, 38 (Mar. 27, 1991).
144. *Id.*
145. Zagar, *supra* note 114, at 1:09:22–1:09:37.
146. Beckett, *supra* note 143, at 38.
147. Zagar, *supra* note 114, at 1:10:42–1:10:48.

that this was in reference to the affair, saying that she could be sent "to the fucking slammer"[148] for withholding information from the police. However, whereas the construction of the tape made it sound as though Smart must have been discussing the murder, earlier moments withheld from the jury through the use of the term "inaudible"[149] demonstrate that she was referring to her affair. She adds that she'd "never admit to having anything to do with the murder,"[150] a sign that the jury understood to mean she *must* have had something to do with the murder, but one that just as easily could have meant that she would make no admission because she did not have anything to do with it. At the same time, rather than play the actual tapes, the prosecutor elected exclusively to show the jury the transcripts of the tapes—to eliminate the tonal nature of the tapes by flattening it through paper presentation.[151] The jury thus was not given access to the *actual* tapes, but rather to the extracted information that the prosecution wanted them to access, eviscerating the jury's opportunity to *hear* the performances of Smart's affect (as they would have in the trial) and to understand the totality of the tapes themselves.[152] Not only does this moment demonstrate the limitations of speech entering the courtroom given the barriers of meaning making, but it also demonstrates how: (a) the erasure of certain sensory inputs through the use of language alone such as sound and vision can corrupt a jury's ability to form a complete and/or correct image of a defendant; (b) proper performances of grief can be entirely overlooked in order to corroborate the visions put forth by information assumed to necessarily carry "truth" despite its obvious alterations; and (c) as a result, imagistic hegemonies can produce a system wherein even the defendant who occupies a normative grief *habitus* cannot prevail, for the images created around her are so strong as to eviscerate any sort of defense she may present.

Though Beckett would eventually claim that the case had not been tainted by outside influences,[153] Smart's cross examination illustrates why it was nearly impossible to eliminate the media's influence in the courtroom. Inasmuch as the prosecutor's questioning referred to Smart's interview with Bill Spencer, the verbal images of Smart in her blue dress and cuddling with her dog implicitly entered the courtroom, inviting the conflict between images of Smart as failed griever and the linguistic images of Smart as enduring trauma:

> Paul Maggiotto: Do you remember saying to Bill Spencer on Channel 9 on the TV—if I were on the other side of the coin, I would be

148. *Id.* at 1:10:55–1:10:56.
149. *See id.* at 1:10:57–1:11:24.
150. Beckett, *supra* note 143, at 38.
151. Zagar, *supra* note 114, at 1:13:39–1:13:45.
152. A lab report created by Steve Cain and Associates in September 1994 also suggested that the tapes might have been significantly tampered with. Robert E. Juceam et. al., Pet. Form and Materials in Supp. of Pamela Smart's Pet. for Commutation of Sentence D1-D4 (Feb. 26, 2018).
153. *Id.* at 33.

offering all I could, even if I thought it was insignificant, to let the police try and piece it together?
Smart: Yes.
Maggiotto: Do you remember telling Bill Spencer, "you know, one thing Bill I was thinking about was the kid Bill Flynn who I had an affair with? Maybe that's something I should tell the police." Did you tell Bill Spencer anything about that?
Smart: No.
Maggiotto: Do you remember telling Bill Spencer in the same interview, "There will never be an answer. There's so many questions, so many loose ends. I feel like in my heart I can't ask myself any more questions about this. What I think must've happened. What my friends think must've happened. What families think must've happened. We tried to decide for ourselves. We made all kinds of theories, and not any of them makes any sense. It's just a senseless thing."
Smart: Yes, and I still believe it is a senseless thing. And I still don't have any answers . . . .
Maggiotto: Now, I mean, this is a conscious decision that goes back to the very first night of the murder, right? Dan Pelletier comes to see you, and you say to Danny Pelletier, I'll help in any way I can, right?
Smart: Right.
Maggiotto: And shortly after the murder, you start telling Bill Spencer on the TV what a happy marriage you have, and how everything was perfect between you and Gregg.
Smart: I did have a happy marriage.
Maggiotto: Right. But you didn't tell him about the problems and the affairs?
Smart: I don't think it's Bill Spencer's business if I was having an affair.
Maggiotto: Nor was it the police's business in your mind, right?
Smart: Not right then.[154]

In directly invoking Smart's news interviews with Bill Spencer—the infamous interview in which Smart was wearing the blue dress and seemingly performing grief inappropriately—Maggiotto, the prosecutor, introduces into the courtroom a highly particularized vision of Smart. Insofar as the prosecutor referenced Smart's interview with "Bill Spencer on Channel 9 on the TV" without adding additional context for others, his assumption that the jury would necessarily recognize that, at the very least, Smart had made television appearances that prior to, and likely related to, the moments wherein she had been charged as a co-conspirator in the crime. Even the exclusive extraction of language (for example, Maggiotto does not directly refer to how Smart was dressed) introduces into the fold a representational space in which Maggiotto invites the jury to assume that there is an internal contradiction inherent in the interview between the Smart who had "a happy marriage" and the Smart who covered up an affair. Maggiotto thus encourages a neat resolution of Smart's persona: she is not a multidimensional human being capable of, at once,

154. NH v. Smart, *supra* note 137, at 1:58:20–1:59:20, 2:06:51–2:07:30.

being portrayed as griefless (withholding information about her affair) and living full-of-grief (as a result of having "a happy marriage"), but instead must be unidimensional, the griefless, adulterous widower who actually lied about her "happy marriage." In other words, even in the absence of the visual imagery that the news media attached to Smart early on, the lessons of the visual that came through Smart's interviews, embedded directly in her language, entered the courtroom in ways that flattened her human complexities. That the interviews helped point the trajectory of Smart's trial towards an eventual guilty verdict illustrates the ways in which the value attached to the media's past representations of Smart came to supersede the value attached to Smart's present-tense, courtroom representations of herself.

Smart's case demonstrates, then, how the invasion into the criminal legal system of preconceived notions of failed grief performance manages to radically transform the nature of a defendant's trial, making it nearly impossible to avoid a guilty verdict. The intrusion of community suspicions surrounding the atypical grief *habitus* leads to the social elision of affect and potential normative conduct in favor of information supporting notions of guilt ("they can see it only when they believe it"[155]). It also fundamentally compromises individual defendants' Sixth Amendment right to a fair trial by essentially preordaining guilt through the disruption of evidentiary safeguards and the promotion of monolithic modes of juror thought and decision-making.

C. *"Like Hell Had Come to the World"*[156]*: The Menendez Brothers*

Just as Pamela Smart's case had so deeply captivated American audiences that from its very onset the visions of "teacher-seductress-murderer" became a central fixation of both American news and popular culture, so too did Erik and Lyle Menendez's presumptive failure to perform grief emerge as a staple of American spectacular infatuation. In 1960, José Menendez emigrated to the United States where, at the age of nineteen, he married Kitty Andersen and worked part-time as a dishwasher at the 21 Club in Manhattan to help put himself through Queens College.[157] In 1968, their first child, Joseph Lyle, was born;[158] their second son, Erik, followed three years later in 1970.[159] José eventually became a successful young entertainment executive, heading RCA Records throughout the early 1980s, where he signed bands such as Duran Duran

155. *See* Plantinga, *supra* note 48, at 64.

156. The Menendez Murders: Erik Tells All Season One Episode One 23:21–23:23 (Eamon Harrington & Nancy Saslow, dirs., 2017).

157. Dominick Dunne, *Nightmare on Elm Drive*, Vanity Fair (Oct. 1990), *available at* https://www.vanityfair.com/magazine/1990/10/dunne199010 [https://perma.cc/5YF2-JEZA.

158. *Lyle Menendez: Biography*, Biography.com (Mar. 16, 2021), https://www.biography.com/crime-figure/lyle-menendez [https://perma.cc/W8QA-4V8R].

159. *Erik Menendez: Biography*, Biography.com (Mar. 16, 2021), https://www.biography.com/crime-figure/erik-menendez [https://perma.cc/ER2C-XAWT].

and The Eurythmics.[160] Following a clash with a senior executive at RCA in 1986, José devastated Kitty by moving his family to Los Angeles, where he transitioned to a role at International Video Entertainment.[161] Though the family initially lived in Calabasas, they eventually moved to a six-bedroom Beverly Hills mansion on Elm Drive—one of the most exclusive streets in the already-exclusive town—that had previously been occupied by Elton John and Prince.[162]

On August 20, 1989, José and Kitty were shot to death in their Beverly Hills mansion.[163] Beverly Hills police chief Marvin Iannone said, "I have heard of very few murders that were more savage."[164] The boys had presumably been at the movies in Century City but claimed to return to find their parents dead, sprawled on the floor and couch in front of the television.[165] In a hysterical 911 call to the Beverly Hills police around midnight,[166] Lyle cried, "Somebody . . . somebody killed my parents . . . my mom and dad."[167]

Immediately after the deaths of José and Kitty, speculation began that the murder was part of a mob hit.[168] Erik additionally pointed towards Noel Bloom, a distributor of pornographic films and a former associate of the Bonanno organized-crime family, who his father allegedly despised after a failed business deal.[169] However, suspicion eventually blossomed around the boys. "In the aftermath of the terrible event, close observers noted the *extraordinary calm* the boys exhibited, almost as if the murders had happened to another family."[170] Likewise, the boys' spending following the murders also generated suspicion. It was estimated that, "in the first flush of [the] mourning period," the boys spent upwards of $700,000.[171] Some accounts indicate that it was Lyle alone who did the vast majority of the spending,[172] but initial reports at the time suggested that Erik might have also been spending significantly.[173] Most

160. Dunne, *supra* note 157.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. Harrington & Saslow, *supra* note 156, at 0:28:31–0:28:56.
168. Dunne, *supra* note 157.
169. *Id.*
170. *Id.*
171. *Id.*
172. Harrington & Saslow, *supra* note 156, at 0:36:44–0:36:52 (estimating that Lyle spent $314,384.53 in miscellaneous expenses, whereas Erik spent only $9,392.71 in miscellaneous expenses and arguing that this was Lyle's "way of coping.").
173. Dunne, *supra* note 157 ("Erik turned in his Ford Mustang 5.0 hardtop and bought a tan Jeep Wrangler . . . Erik hired a $50,000-a-year tennis coach [though it is unclear whether this was just the tennis coach that the family was already paying] . . . Erik, less successful as an entrepreneur than Lyle, put up $40,000 for a rock concert at the Palladium but got ripped off by a con-man partner and lost the entire amount.").

media outlets (and the police) focused on the Rolex watches that were purchased.[174]

Though Erik would eventually admit that the brothers had killed their parents,[175] and both would claim that they had done so out of fear that their sexually abusive father would kill them,[176] the generation of suspicion surrounding the boys as a result of their (arguably egregious) spending offers an almost textbook demonstration of the ways in which atypical responses to grief produce community suspicion surrounding guilt, regardless of whether that suspicion is justified. Like Knox and Smart, the Menendez brothers experienced—and, in this case, witnessed and perpetrated—a traumatizing death. Though Erik went on to describe the deep distress he felt because of the murders,[177] the readings of Erik and Lyle as performing "extraordinary calm," "almost as if the murders had happened to another family"[178] began to contribute to a sort of communal uneasiness surrounding them. Significantly exacerbating this uneasiness was the subsequent spending, which contravened normative performances of grief at their parents' memorial service in Princeton, New Jersey, where "Lyle and Erik spoke very movingly [and] Lyle read a letter his father had once written him, filled with love and pride in his son."[179] But much like Pamela Smart, the images of hyper-spending coldness superseded the visions of normatively grieving sons, leading both a viewing public[180] and the police[181] to believe that the boys could have had

174. *See id. See also* Harrington & Saslow, *supra* note 156, at 0:36:29–0:36:39 ("They had bought Rolex watches—three of them for the two of them. We kept learning that they were spending money like it was water to them.").
175. *See* Dunne, *supra* note 157 ("On the walk [with Dr. Oziel, a psychologist who had become preoccupied with the Menendez case and sought to earn the boys' trust] Erik confessed that he and his brother had killed their parents.").
176. *See* Harrington & Saslow, *supra* note 156, at 0:21:30–0:21:55 ("Lyle was just staring, and I was beginning to panic. We had made a big mistake asking to go out . . . I felt like my heart was going to explode . . . I felt like my life was over right then."). *See also id.* at 0:21:15 – 0:21:30, 21:41 – 21:46 ("My mother said that I ruined the family. Then my dad came out and took her by the arm and they walked into the den, and then my dad closed the doors. I was sure that was it . . . I just freaked out. I thought they were going ahead with their plan to kill us.").
177. *See id.* at 0:38:20–0:39:10.
178. Dunne, *supra* note 157.
179. Dominick Dunne, *The Menendez Murder Trial*, Vanity Fair (Oct. 1993), *available at* https://www.vanityfair.com/magazine/1993/10/dunne199310 [https://perma.cc/7HZG-5DFK].
180. *Id.* ("It was then they were walking outside after the first service [on Sunset Boulevard in Hollywood] receiving condolences, that the thought came to me. *I wonder*, I said to myself.").
181. *See* Harrington & Saslow, *supra* note 156, at 0:36:00–0:36:17, 0:36:29–0:36:43 ("As our investigation continued, we learned from José's business life that the brothers were given José's credit card so that they could live, and we learned that they were spending, spending, spending . . . They bought a new car each, Lyle bought a Porsche, Erik, a jeep. They had bought Rolex watches—three of them for the two of them. We kept learning that they were spending money like it was water to them.").

some involvement in their parents' murders. Even though the boys had committed the murder, it remains incredibly important that it was neither forensic evidence from the crime scene nor circumstantial evidence that produced the initial suspicion surrounding the Menendez brothers. Rather, it was the specific moments in which they failed to acculturate their bodies to normative social expectations surrounding a grief *habitus* (for example, financial restraint, unusual emotion) that led to eventual conclusions that they must have had a hand in the murder.

It is important to note here that the fact that the Menendez brothers did in fact commit the crime does not detract from the notion that abstract grief metrics and assessments of individual performances of grief in response to traumatizing death ought not to be used as a mechanism for determining individuals' guilt. Embedded in the conflation of atypical grief performances with guilt is a foreclosure of the opportunity for prospective jurors to make a determination absent the external influences of an arguably demanding public. Likewise, as the cases of Amanda Knox most precisely and, less so, of Pamela Smart demonstrate, the process of using grief determinants to construct notions of guilt is a dangerous one. Sometimes, as with the Menendez brothers, the public's suspicion may prove correct—the boys did, in fact, murder their parents; other times, though, the introduction of grief performances obfuscates the possibility for people to see anything beyond guilt in spaces where, despite occupying a non-normative grief *habitus*, an individual may have no connection to a crime. Notably, however, just because they admitted their hand in the murders did not mean that their case was clear cut: they were initially tried separately by two juries in 1993, but both juries were hung, and a mistrial was declared.[182] It was in their second trial, in which they were tried together by a single jury and certain evidence was restricted by the court, that they were eventually convicted.

Even as the suspicion surrounding the Menendez brothers was validated by Erik's eventual tape-recorded admission of the crime to his psychologist Dr. Jerome Oziel,[183] the boys' misperformed grief ultimately led to an unnuanced understanding of their conduct by public, gazing audiences—one that led them to conclude not simply that the Menendez brothers had lied in denying their involvement with the crimes, but additionally that they were characteristically, universally, and unforgivably liars. In his posttrial reflections on the Menendez case, Dominick Dunne, an investigative journalist who wrote consistently for Vanity Fair following the murder of his own daughter Dominique,[184] remarked:

182. *This Day in History: The Menendez brothers murder their parents*, History.com (Aug. 18, 2020), https://www.history.com/this-day-in-history/the-menendez-brothers-murder-their-parents [https://perma.cc/XGX2-ABV7],

183. Dunne, *supra* note 157.

184. *See* Dominick Dunne, *Justice: A Father's Account of the Trial of His Daughter's Killer*, Vanity Fair (Mar. 1984).

> We know that both brothers are *expert liars* . . . Remember their moving eulogies and their 911 telephone call to the police, saying they had come home from the movies and found their parents dead? By now that tape has been played on radio and television hundreds of times. There could not have been a better performance of grief and hysteria. It fooled a lot of people for a long time.[185]

Dunne locates the notion that both boys were, at their core, "expert liars" in their "performance of grief," neatly resolving the questions regarding the boys' post-murder demeanor and, by extension, present-tense positionality ("both brothers *are* expert liars"). Indeed, his specific language of "performance" in this more normative context marks a sense that the boys "act[ed] or play[ed]"[186] a role socially expected of them and, as a result, must have been occupying a façade which lived at odds with their genuine affective experience. Within the rhetorical world established by Dunne's article, there can only be two, dichotomous modes of being: truth-tellers (which the Menendez brothers cannot be, given how they performed their grief) and liars (which the Menendez brothers must be).

The notion that the boys' performance of grief was a lie became a central fixture of Lyle Menendez's first trial, with prosecutors focusing the initial moments of questioning in their cross-examination on the fact that Lyle was both "crying" and "lying" during his 911 call with police:

> Pamela Bozanich, Lead Prosecutor: Mr. Menenedez, in that tape, you're crying, is that correct?
> Lyle: Yes (*bites lip and sighs*)
> Bozanich: At the same time as you're crying, you're also lying [about having killed your parents], aren't you?
> Lyle: Um, yes.
> Bozanich: And, um, you had told the police that you had just come home and found your parents, is that correct?
> Lyle: I said someone killed my parents.
> Bozanich: Right, right. And then you said—you said, um, at page 2, in the middle of the page, the person asked you, "Who shot who?" And you say, "I didn't hear—I don't hear anything, I just came home." Correct?
> Lyle: Right.
> Bozanich: They asked you a number of questions, and when they asked you those questions, you were *crying*, correct?
> Lyle: Right.
> Bozanich: And at the same time, you were lying while you were *crying*, is that correct?
> Lyle: Right . . . .
> Bozanich: Now, when you were growing up, your father taught you to be the master of your emotions, didn't he?
> Lyle: He tried to do that.

185. Dunne, *supra* note 179 (emphasis added).
186. "perform, *v.*" *Oxford English Dictionary* (2021).

> Bozanich: And I believe you testified during your direct examination that, on occasion, if you did poorly at a sporting event, that you would look sad in order to please your father, correct?
> Lyle: Right.
> Bozanich: And I believe you've indicated that, during the period of time that you were growing up in this household, that you learned to mask your emotions.
> Lyle: Well, I didn't do it like he wanted me to, and that was the problem, and that's why I had to go through the trouble of memorizing these things, 'cause that was my flaw—that I seemed to cry even when a man wasn't supposed to. And so, [*muffled*] was happening because I was having problems with that . . .
> Bozanich: And so during the course of your upbringing, learning how to control your emotions was very important, correct?
> Lyle: Right.[187]

Though Bozanich cites Lyle's suggestion that he had just arrived home and found his parents murdered by someone else, her language forges a connection between "crying" and "lying." Twice, she links together Lyle's grief performance with his attempts at concealing the murder ("as you're crying, you're also lying" and "you were lying while you were *crying*, is that correct?"). Her subsequent turn to the notion that "your father taught you to be the master of your emotions" attempts to suggest that Lyle maintained complete and utter emotional control over his affect: if he cried, it was because he was so capable of emotional control that he could turn his grief on and off, almost like a switch, to signal to receiving audiences (his father, when he "did poorly at a sporting event," or to the police, as here) a sense of authentic feeling. In other words, Bozanich positions Lyle's body *not* as a site of genuine affect, but a receptacle for the social expectations of others, one which received input and therefore expelled output in order to manipulate people into believing him. The Lyle of her prosecutorial imaginary cannot feel; he can only replicate feeling. In Bozanich's account, then, the link between Lyle's "crying" and his "lying" is that they are one in the same: he lied, and then he lied some more, because his crying *is* lying.

But if space is given to the notion that the Menendez brothers might have been sexually abused by their father[188] as the jurors would

187. CA v. Menendez: Lyle Menendez Pt. 6 0:12:32–0:20:06 (CourtTV 1993).

188. The boys testified extensively to the nature of the sexual abuse that their father subjected them to, providing vivid accounts of the abuse. CA v. Menendez: Lyle Menendez 1:13:19–1:25:06 (CourtTV 1993) (testifying both to the extensive sexual abuse he experienced and to the fact that Lyle sexually abused Erik in the same way his father did with him) and CA v. Menendez: Erik Menendez 0:24:24–0:37:38 (discussing how the precipitating factor that led to the murders was Erik's disclosure to Lyle that Erik was being sexually abused). Family members also testified that they had witnessed some moments of sexual abuse, as well. *See generally, e.g.*, CA v. Menendez: Diane Vander Molen (CourtTV 1993) *and* CA v. Menendez: Joan Vander Molen & Patricia Anderson (CourtTV 1993). However, the boys only divulged information about sexual

have been asked to do until the prosecution could refute it beyond a reasonable doubt,[189] it is likely that the Menendez brothers could have experienced both relief and grief all at once. As a 2019 study demonstrates, child sexual abuse survivors experience "shock, numbness, relief, sadness, and anger" in response to the deaths of their abusers.[190] The study further documents how "when [survivors of childhood sexual abuse] did experience sadness, love, and compassion, these grief reactions were often met with confusion and even disdain. Family members did not understand the *complex and multilayered* nature of the grief."[191] The complexity of survivors' grief was heightened at funerals for abusers, if the survivors even elected to attend them.[192] The study's findings mirror Erik's account of his experience of his parents' first memorial service[193]: although he claimed to have committed the murders fully convinced that his parents intended to kill him and his brother,[194] he "wasn't able to speak," felt the weight of the trauma of his

abuse at their trial, which led spectators to assume that the story must have been fabricated. Most notably, Alan Dershowitz authored *The Abuse Excuse and Other Cop-Outs, Sob Stories, and Evasions of Responsibility*, in which he argued that "it is certainly possible—and in my view highly likely—that the Menendez brothers concocted out of whole cloth the entire story of sexual abuse by their father." An entire paper could be written on the harm that *The Abuse Excuse* likely caused all survivors of sexual, physical, and emotional abuse in the months and years after the Menendez brothers' trials, but even in itself, the skepticism with which Dershowitz approached the Menendez brothers bespoke an unjustifiable disregard to the Menendez brothers' account of their experience that they should have been afforded in any truly just court of law and/or public opinion. *See* Alan Dershowitz, The Abuse Excuse 21 (1994).

189. *See* Jud. Council of Cal. Crim. Jury Instructions No. 3470 (2020) ("The People have the burden of proving beyond a reasonable doubt that the defendant[s] did not act in lawful self-defense. If the people have not met this burden, you must find the defendant[s] not guilty.").

190. Yu-Ying Lin, Heather L. Servaty-Seib, & Jean Peterson, *Child Sexual Abuse Survivors' Grief Experiences After the Death of the Abuser*, OMEGA—J. Death & Dying 1, 10 (2019).

191. *Id.* at 20.

192. *See id.* at 12–13.

193. Testimony at Erik's first trial mirrors the study's findings, as the defense attempted to argue that Erik's postmurder grief was not fake but rather that Erik suffered from posttraumatic stress disorder as a result of his hand in the murders and as a result of the sexual abuse he suffered. *See generally* CA v. Menendez: Dr. Stuart Hart (CourtTV 1993). *See also* Alan Abrahamson, *Lifelong Abuse Left Defendant Prone to Impulse, Expert Says: Trial: Lyle Menendez's development was so retarded that he lacked the "basic competencies" to control his life, a psychology professor testifies*, L.A. Times (Oct. 22, 1993) (noting that Erik Menendez was unable to develop normatively because of sexual abuse and that Lyle Menendez's spending was likely "an extension of a lifelong pattern of not giving any real value to money.").

194. *See* Harrington & Saslow, *supra* note 155, at 0:19:34–0:19:45 ("Dad wanted us home that night, and why did they want us home that night? It seemed like all the pieces were—were being put together. It became clear to me that our parents were going to kill us".). Legal analyst and former judge Daniel Leddy suggests

abuse weighing heavily upon him, and found himself "falling apart."[195] Erik subsequently became suicidal, dreaming often of death.[196] Erik's account of his emotions in the wake of the murders, which was corroborated by witnesses at his first trial,[197] not only suggests the real possibility that the boys—and especially Erik—did suffer sexual abuse at the hands of the father, but also demonstrates the ways onlookers flattened the possibility of "complex and multilayered" experiences by arguing the boys must necessarily have been "expert liars." To hold both at once—that is, to accept that the Menendez brothers could have murdered their parents *and* the idea that they could have truly and fully grieved for them—was, based on Dunne's account, impossible. And so, instead of working through the possible nuances that proliferate in the wake of traumatizing death, the Menendez brothers' performance of grief was reduced to a single, polarizing experience: they were guilty, and so therefore they were liars.

The socio-legal flattening of the Menendez brothers' grief (and, subsequently, their emerging status as "liars") did not live in isolation; rather, prior to the second and joint trial of the Menendez brothers, the media circulated voluminous information about the brothers that threatened the ability for prospective jurors to form conceptions about the boys based solely on the trial itself. The *Los Angeles Times*, the primary newspaper reporting on the case, published extensively on the Menendez brothers, continuously reiterating the notion that the boys' lone goal in committing the murders was to "collect a $14-million inheritance."[198] *The Wall Street Journal* reported that some described "the boys as 'brats'

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that, given the tension mounting in the Menendez home and the looming threat that Erik and Lyle might have gone public with their experiences of sexual abuse, it is not so farfetched to think that José might have killed his sons rather than be exposed as a serial child abuser. *Id.* at 0:19:50–0:20:06.

195. *Id.* at 0:38:20–0:38:41.

196. *Id.* at 0:38:43–0:39:10.

197. *See* CA v. Menendez: Erik Menendez Opening Statements 0:23:37–0:24:20 (CourtTV 1993) ("Erik Menendez was by this time incapable of functioning. He was falling apart . . . Erik Menendez was obviously, visibly, dramatically hysterical. The prosecution will claim he was faking. Experienced police officers, his tennis coach who knew him and who came to the scene, saw that he was not faking. He was, as one of the officers will testify, *traumatized.*").

198. Linda Deutsch, *Dad's Dead, Sobbing Son Said on 911: Crime: Police tape of one of the Menendez brothers accused of killing their parents is released*, L.A. Times, https://www.latimes.com/archives/la-xpm-1990–05–24-mn-629-story.html (May 24, 1990) [https://perma.cc/DG4R-YVQF]. *See also* Ronald L. Soble, *Younger Menendez Brother Surrenders: Crime: Pair could face arraignment today on charges of killing their parents. Relatives maintain the two are innocent, but police claim they have a solid case*, L.A. Times (Mar. 12, 1990) ("After the arrest of Lyle, Beverly Hills Police Chief Marvin D. Iannone told a news conference that there could be several motives for the slayings. He noted, for example, that the brothers were the sole beneficiaries of their parents' $14-million estate in the event the parents died at the same time."), https://www.latimes.com/archives/la-xpm-1990–03–12-me-241-story.html https://perma.cc/43X7-MFAK

and say Lyle's spending had become a problem."[199] Even American crime television programs, such as CBS's *Jake and the Fatman* would spoof the Menendez brothers' case years prior to its conclusion, preemptively performing for the public how the events in the courtroom would play out well before they ever did.[200]

No story made more waves, however, than John Johnson and Ronald L. Soble's "The Brothers Menendez," which, in July 1990—nearly three years before the boys' trial—sought to offer a play-by-play account of what had occurred in the Menendez household on August 20, 1989. The narrative was, in fact, so significantly biased against the brothers that one reader of the *LA Times* wrote in an opinion piece: "I am shocked that The Times would publish such a far-reaching story about the Menendez brothers prior to their trial."[201] Another would add, "It is appalling that The Times has decided to become judge, jury and executioner for these two young men. Reporters Johnson and Soble have unequivocally pronounced them guilty as charged."[202]

Johnson and Soble's article was overrun with information pointing towards a single motive for the Menendez brothers' actions: greed. Both brothers were closely scrutinized in the article, but Johnson and Soble showed a particular infatuation with Lyle, who they described as a "dominant, emotionally cool older brother."[203] Their attention to Lyle's "cool"-ness—that is, emotional depravity—intimates not only a sense that the young man was bereft of affect, but also a return to a notion of remorselessness resonant with discussions of Amanda Knox and Pamela Smart: Lyle, per their account, lacked the ability to feel, and therefore was capable of murder. Though the article acknowledged that "children who kill their parents . . . frequently do so because their parents exert so much control over their lives that they are robbed of their own identities. In most cases, physical abuse is involved,"[204] Johnson and Soble were quick to dismiss the possibility of this experience for the Menendez

199. Kathleen A. Hughes & David J. Jefferson, *Shattered Family: Why Would Brothers Who Had Everything Murder Their Parents?*, Wall Street J. (Mar. 20, 1990), https://search-proquest-com.ezp-prod1.hul.harvard.edu/docview/398202812?pq-origsite=primo&accountid=1131.

200. *See* Linda Harris, *I realize there's supposedly no such thing . . .* , L.A. Times (Oct. 7, 1990) ("Did [the writers on *Jake and The Fatman*] think the audience wouldn't notice that the season opener (Sept. 12) was a take-off on the Lyle and Erik Menendez brothers' murder case?"), https://www.latimes.com/archives/la-xpm-1990–10–07-tv-2693-story.html [https://perma.cc/ZY5Q-K5DF].

201. John Austin. *Letters to the Editor in response to "The Brothers Menendez."* L.A. Times (Sept. 9, 1990), https://www.newspapers.com/newspage/175301197.

202. Robert M. Rosenkrantz. *"Letters to the Editor in response to "The Brothers Menendez,"* L.A. Times (Sept. 9, 1990), https://www.newspapers.com/newspage/175301197.

203. John Johnson and Ronald L. Soble, *The Brothers Menendez: Jose Menendez Gave His Sons Everything. Maybe Even a Motive for Murder*, L.A. Times (Jul. 22, 1990), https://www.latimes.com/archives/la-xpm-1990–07–22-tm-930-story.html [https://perma.cc/GMK7-7FC6]

204. *Id.*

brothers. "No one can remember Jose Menendez ever striking his sons,"[205] they wrote. They cited a relative who stated, "'I don't ever remember Jose spanking those kids . . . He should have. Maybe they were not strict enough.'"[206] And according to friends, "Jose Menendez may have been a pushy, aggressive, give-no-quarter father, but he was no fool. He tried to show love in the hope that his sons would understand him and what he was trying to do . . ."[207] The decision to place the possibility of abuse in the minds of the public and then eliminate it through external citations—rather than exempt conversations about abuse altogether—was perhaps the most damaging decision that the article could have made. By preemptively presenting information about physical abuse and denying it, the article positioned itself as having "tried" the question and determined a "truth" that ought to satisfy its readers.

Instead of abuse survivors, Johnson and Soble's article contended that the Menendez brothers were spoiled throughout their lives, driven by an overwhelming greed that ultimately led them to kill their parents. Johnson and Soble included a friend's account that he "once chastened Lyle for the imperious way he treated waiters and waitresses. 'I get that from my father,' Lyle replied. 'They're here to serve me.'"[208] The article further recounted an anecdote, claiming "With no chores to do at home, Lyle once tried working in a Princeton restaurant to earn a little extra money. But when he got his $33 paycheck, he sniffed, 'I could find that going through my laundry bag.' He quit after only a few days."[209] In positioning the anonymous friend as "chastening" in the first story, the article envisions the friend as a voice of reason against a portrayal of Lyle who, as is embedded in his language that "They're here to serve me," is coded as entitled and ungrateful. Likewise, the second tale suggests that the article's Lyle not only has an arguably perverse view of money, but also no ambition or work ethic independent of money: rather than seeking a job for the sake of learning or well-roundedness, the article's Lyle is purely motivated by a drive for money.

At no time, however, does the article directly cite Lyle Menendez himself, relying exclusively on the accounts of unnamed friends, relatives, and others who encountered him.[210] This reliance on the voices of others illustrates the ongoing mediation of narrative playing out on its pages and the ways in which the story it tells is unilateral. The article is thrice mediated: first, through the voices of others who offer accounts of the Menendez brothers; second, through the authors themselves, who, at times, refine and transform the language presented by others and likely cherry-pick that which bolstered their apparent

205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *See id.*

agenda; and finally, as with all journalistic pieces, through editors who may have combed through and refined the story further. The narrative that takes place across the spread of "The Brothers Menendez" thus presents a one-sided trial through an increasingly muddled lens: the Menendez brothers, as the jury of public opinion has ascertained, are not only guilty, but they are also greedy, selfish, entitled, incapable of feeling, *evil*—they therefore must have acted out of a desire to "collect a $14-million inheritance."[211]

Though less of a site of intrigue for the authors, Erik is also mentioned in the article, with a particular focus on two plays that he and a friend, Craig Cignarelli, wrote. According to Johnson and Soble:

> The play… opens with the protagonist, Hamilton Cromwell, finding the family will and discovering that he stood to inherit $157 million . . . The murder [in the play] is left to the imagination. Hamilton inherits the family estate, but in the end he is killed—and dies smiling . . . Adding yet another bizarre twist to the tale are reports that the two friends wrote a second screenplay. However, in this one, according to someone close to the case, some of the details of the murders bear a striking resemblance to the ways the murders of Jose and Kitty were actually carried out.[212]

While accounts of the first play had been splayed across the pages of other newspapers,[213] Johnson and Soble include information about the second play in an attempt to concretize the connection between the Menendez brothers' conduct and the plays that Erik wrote, implying with their article that, at the very least, Erik premeditated the murders (by at least two years, no less). Foreclosing the possibility that Craig Cignarelli could have had any hand in articulating the parameters of the play, the article implies that "Hamilton Cromwell" is a stand-in for Erik Menendez; even if the murder in the first play "is left to the imagination," the reader's imaginary is capable of filling in (a) motivation, which the article contends is the goal to "inherit[] the family estate," a parallel (the authors seem to contend) to Erik himself, and (b) the actual conduct, as, even if the "Hamilton Cromwell" of Erik's play did not detail the murders, the nature of Erik's acts can implicitly be substituted. Bolstering this image of Erik as envisioning himself as "Hamilton Cromwell" is the connection that Johnson and Soble draw between the first and the second scripts. By including information that "according to someone close to the case, some of the details of the murders bear a striking resemblance to the ways the

211. Deutsch, *supra* note 198.

212. Johnson & Soble, *supra* note 203.

213. *See* Hughes & Jefferson, *supra* note 199 ("The police have also discovered a screenplay allegedly written by younger brother Erik with a friend two years ago. The script portrays a wealthy teen-ager who murders his parents. In the opening scene, Hamilton Cromwell, 18, reads the family will, which bequeaths him a fortune of $157 million. 'Hamilton smiles sadistically,' says the script. Next, he enters his parents' bedroom. 'Good evening mother, good evening father (his voice is one of attempted compassion but the hatred completely overwhelms it)' the script reads.").

murders of Jose and Kitty were actually carried out," the authors crystallize the mental transplantation of Erik with his protagonists. Erik, they suggest, wrote his actions well before he committed them. Johnson and Soble thus push their readers to conclude that the Menendez brothers *must* have premeditated the murders for financial gain, as that is precisely what Erik's Hamilton Cromwell did.

Ultimately, Johnson and Soble suggest, the misdirected grief performance that the brothers displayed—spending in excess—was not a sort of coping mechanism, as Erik would later suggest,[214] but rather indicated a premeditated, arguably villainous desire for access to resources that their parents threatened to withhold from them. Even if they were able to "'speak about their parents the way they did'"[215] at their memorial services and grieve in socially normative ways, it was only because, in Johnson and Soble's account, they were attempting to mask their fundamental goal of wealth acquisition. Any performance of grief that the boys displayed in the days and weeks following their parents' murders must have been purely performative, intended to maintain their guise of innocence, just as their counterpart Dominick Dunne had suggested, *see supra* at page 65. The "real" Menendez brothers could not feel grief for the loss of their parents, nor remorse for their actions; they acted out of avarice and avarice alone.

The extensive coverage of the Menendez brothers that preceded their trial had a clear impact on how the jury eventually perceived the boys. It was impossible to find jurors who had not heard of the boys, and the rhetoric of many prospective jurors demonstrated how the boys' public trial had led to conclusions before their courtroom trial transpired: "Nearly all prospective jurors called to decide whether Erik and Lyle Menendez murdered their parents described the family in questionnaires Friday as rich or privileged and several said they assume the brothers are guilty."[216] Most acknowledged that television had informed their understanding of the case, saying "they learned about the case from such shows as 'Hard Copy,' 'Inside Edition' or 'A Current Affair.'"[217] Still, prospective and selected jurors insisted that they were capable of disregarding information that had been presented to them prior to the start of the trial.[218]

214. *See* Harrington & Saslow, *supra* note 156, at 0:36:17 – 0:36:29 ("One of the ways that Lyle made himself feel better was by spending money. It's what my mom did, and it's what they did together. So that was just the way they handled depression.").
215. Johnson & Soble, *supra* note 203.
216. Alan Abrahamson, *Intense Coverage Slows Selection of Menendez Jurors: Trial: Most prospective panelists knew of murder charges from news reports, questionnaires indicate. Eight of first 28 people questioned are dismissed*, L.A. Times (Jun. 19, 1993), https://www.latimes.com/archives/la-xpm-1993–06–19-me-4815-story.html [https://perma.cc/JUQ4-VUHL].
217. *Id.*
218. *See id.* ("One juror promised that it would be no problem to ignore the material he had already read or seen about the case. 'I'm aware that I can't take everything for the truth, especially when it comes from the news,' he said.").

This mantra—that jurors could discount the pretrial information presented to them by the media—would be reiterated by jurors even after they had rendered their decision that the Menendez brothers were guilty of murder, unmitigated by claims of self-defense in response to sexual abuse that the Menendez brothers attempted to argue.[219] In an interview after the first trials, Lisa Abramson, one of the brothers' attorneys, and two jurors on Erik Menendez's first trial (which resulted in a hung jury) discussed the impact that media representations had on their perception of the trial. Abramson was highly critical of Dominick Dunne, the investigative reporter for *Vanity Fair* who she claimed "loathed and despised the Menendez brothers," was "completely biased against them," and managed to create a situation where "what the public believes are things like the things that Dominic [sic] Dunne made up."[220] Betty Burke, an alternate juror, stated directly that "'we knew [they were] a couple of rich kids that killed their parents.'"[221] By the time she was questioned, she claimed that "it pretty well lost its power."[222] Hazel Thornton, juror number nine on the Erik Menendez case, claimed in one breath that she was able to "divorce [herself] from the muck [of media representation]"[223] and yet also knew prior to the trial that the Menendez brothers were supposed to be "cold-blooded murderers who were greedy for their inheritance. This is what I heard, and what I believed."[224] Thornton further insisted that "People did very much have a hard time getting over their previously established notions. The only way I can explain it is that they had a prosecution bias going in, so they bought in to all the prosecution's arguments."[225]

Though Burke and Thornton were jurors during Erik Menendez's first trial, in which there was no verdict as the jury was hung, their consciousness to the impact of previous media coverage demonstrates: (a) the ways in which prior exposure to information about the Menendez brothers led to a "prosecution bias" that hampered the brothers' ability to access a fair trial, (b) how even where individual jurors attempted to "divorce" themselves from the media, they still entered the courtroom with (arguably unassailable) preconceived notions about the defendants, and (c) how, if the information about the media's reflections on the Menendez brothers' grief, guilt, and supposed greed was capable of entering the first trial, it almost certainly infiltrated the second given the

219. *See* Alan Abrahamson, *Menendez Jury Told of Sex*, L.A. Times (Aug. 19, 1993) ("The defense concedes the killings but asserts it was an act of self-defense after years of physical, mental and sexual abuse."), https://www.latimes.com/archives/la-xpm-1993–08–19-me-25245-story.html [https://perma.cc/F39Q-AZRZ].

220. *The Appearance of Justice: Juries, Judges and the Media Transcript*, 86 J. Crim. L. & Criminology 1096, 1100–01 (1995–1996).

221. *Id.* at 1106.

222. *Id.*

223. *Id.* at 1107.

224. *Id.* at 1103.

225. *Id.* at 1107.

heightened exposure that would have resulted with added time—even if the courtroom of the second trial was not subjected to as much media presence as the first.[226] On the whole, then, it is clear that, inasmuch as Johnson and Soble's article crystallized a vision of the Menendez brothers as inherently greedy, it weaponized presumptions of improper grief performance—namely, their post-murder heightened spending—as a justification for hyper-scrutiny of their relationship to money in ways that bled into jury determinations and fundamentally transformed the nature of the courtroom on the whole. All the more important, then, that it was in the Menendez brothers' second trial that evidence of sexual abuse was significantly more restricted: they could not begin to argue that their grief *habitus* was part-and-parcel of a complex, affective response to sexual trauma even if they had wanted to do so.

As I have argued, the Menendez brothers' trial was compromised because their initial performances of normative grief were challenged as inherent lies *and* because media involvement generated an almost insurmountably high standard that conflated the boys' post-murder spending with characteristic and motivating greed. Even amidst all the evidence of their experiences of sexual abuse—one to which the boys *and* multiple family members testified[227]—the notion that the Menendez brothers acted out of greed and spite prevailed in the courtroom: they were convicted on counts of first-degree murder, unmitigated by claims of self-defense, and sentenced to two consecutive life terms without the possibility of parole.[228] Taken together with the experiences of Amanda Knox and Pamela Smart, the Menendez brothers' case serves as a harrowing reminder of how non-normative grief performance, and especially non-normative grief performance transmitted through the lens of media coverage, has the power to corrupt Sixth Amendment guarantee of a fair trial and, by extension, to compromise the sanctity of the American legal system writ large.

III. A Cry for Change in the Absence of Tears: Conclusion

How a person experiences grief in response to a traumatizing death is highly personal, even as her performance is being consumed and scrutinized by her peers. She may, in the overwhelming throes of relief at her own safety and sorrow at the loss of a friend, decry those who attempt to

226. *See* Scott Cohn, *Beverly Hills Greed: The missteps that exposed the Menendez brothers*, CNBC (Aug. 20, 2017) (" . . . the second trial [involved] a single jury and cameras [were] barred."), https://www.cnbc.com/2017/08/19/beverly-hills-greed-the-missteps-that-exposed-the-menendez-brothers.html [https://perma.cc/H4JT-CNCC].

227. *See generally, e.g.*, Diane Vander Molen, *supra* note 188 *and* Joan Vander Molen, *supra* note 188.

228. Emily Shapiro et. al., *Menendez brothers burst into tears during emotional prison reunion after decades apart*, ABC News (Apr. 6, 2018), https://abcnews.go.com/US/menendez-brothers-burst-tears-emotional-prison-reunion-decades/story?id=54281350 [https://perma.cc/EB3B-NVCZ].

engage with her, guard her emotions with a wall that people deem cold, and participate in conduct that appears as bizarre as it is cathartic to her. She may, in an act of attempted valor, subject herself to media scrutiny to protect the honor of her husband who was taken from her via traumatizing death, attempting to fortify an image of a supportive and "normal" wife. She may break down, sob, contemplate self-harm, seek anything to help her cope with the pain—even where she had a hand in orchestrating her parents' traumatizing death.

If the public, through its relationship to ritualized performance, operates as a "grief gatekeeper"—that is, as the collective that perceives the performance and renders judgments about how the griever's "correct" or "incorrect" grief response might connect them to the traumatizing death—it is the obligation of a just criminal legal system to wade through the muddied waters of public perception in order to aspire to a fair trial. And yet, the cases of Amanda Knox, Pamela Smart, and the Menendez brothers illustrate how the formal and informal introduction of knowledge regarding grief performance into courtroom settings renders the criminal legal system a space where one is innocent until proven griefless by a hyper-critical public and a preemptively impressed-upon jury. That the media plays a significant role in corrupting the space of the fair trial goes almost without stating: as the intermediary arbiters of the/a public opinion, they retain the power to transform the nature of a trial such that grief becomes a central fixture of criminal legal discourse.

The experiences of Knox, Smart, and the Menendez brothers—though especially disturbing—are not unique in the American criminal legal context. Scott Peterson, a man convicted of killing his pregnant wife Laci and who maintains his innocence,[229] was convicted because the jury perceived him as "a cold blood killer [who] has no remorse" and whose "dispassionate demeanor . . . from the day Laci disappeared Christmas Eve 2002"[230] was sufficiently unsettling to deem him guilty. Angelina Rodriguez, accused of murdering her husband and earning a status as only the fifteenth woman to sit on California's death row, was deemed guilty because "there was a great lack of [tears]. And, as soon as I talk to her, ask her a question, she would immediately snap out of it and answer the questions real quick."[231] For Tommy Odle, who, like the Menendez

229. David K. Li, *Scott Peterson, who killed pregnant wife, faces death penalty at resentencing,* NBC News (Oct. 23, 2020), https://www.nbcnews.com/news/us-news/scott-peterson-who-killed-pregnant-wife-laci-should-again-get-n1244538 [https://perma.cc/JYA5-9B6H]; *See* Adrienne Moore, *Sixteen Years Later, Family Of Scott Peterson Claims New Evidence Proves Innocence*, CBS Sacramento (Dec. 17, 2018), https://sacramento.cbslocal.com/2018/12/17/scott-peterson-family-innocence [https://perma.cc/7UK6-3V22].

230. *Juror: Peterson 'Has No Remorse,'* CBS News (Dec. 21, 2004), https://www.cbsnews.com/news/juror-peterson-has-no-remorse [https://perma.cc/6B8Z-Z6KH].

231. Frank C. Girardot, *How greed kept one woman from getting away with her husband's murder*, Pasadena Star-News (Jan. 23, 2015), https://www.pasadenastarnews.com/2015/01/23/how-greed-kept-one-woman-from-getting-away-with-her-husbands-murder [https://perma.cc/4GCX-LKSH]. *See also*

brothers, lived through extraordinary childhood abuse,[232] it was his "'cool, calm and collected" demeanor that helped point towards his culpability.[233] These cases and others epitomize how widespread the phenomenon of conflating the performance of non-normative grief in response to traumatizing death with an inherent and irrefutable guilt truly is.

To conclude this paper without nodding to means of legal reform would be to offer limited hopes of meaningful change. I propose the following as critical starting points for legal scholars thinking seriously about how to address the urgent crisis of systemic conflations of non-normative grief performance with guilt:

A. *Institutionalize Evidentiary Testimony on Ritual Grief by Permitting Defense Attorneys to Introduce Expert Witnesses Knowledgeable About Grief Performance.*

Under § 702 of the Federal Rules of Evidence, expert witnesses may testify where their "specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue," their testimony is based on "sufficient facts or data" and is the "product of reliable principles and methods," and the expert has "reliably applied the principles and methods to the facts of the case."[234] In *Daubert v. Merrell Dow Pharmaceuticals Inc.*, the United States Supreme Court determined that an expert witness's scientific testimony is admissible only where the underlying testimony could be deemed "scientifically valid" and capable of being "applied to the facts in issue."[235] The *Daubert* standard was extended to all forms of expert witness testimony in *Kumho Tire Co., Ltd. v. Carmichael*, meaning that the admissibility of expert witness testimony is contingent upon the standards laid out in *Daubert*.[236] To facilitate the process of trial judges seeking to render a decision as to whether expert witness testimony is permissible, the Supreme Court established a series of reliability factors in *Daubert*, including "whether the theory or technique in question can be (and has been) tested, whether it has

Anna Gorman, *Wife Gets Death for Killing Husband*, L.A. Times (Jan. 13, 2004) (demonstrating that Angelina insisted her husband committed suicide and that there was "no way she could have made her husband drink antifreeze), https://www.latimes.com/archives/la-xpm-2004-jan-13-me-poison13-story.html [https://perma.cc/4E9H-ANKD].

232. *See* Susan Donaldson James, *Family Mass Murderer Collaborates on Book to Stop Tragedies*, ABC News (Sept. 17, 2013), https://abcnews.go.com/Health/family-mass-murderer-collaborates-book-stop-tragedies/story?id=20272515 [https://perma.cc/9BD7-H46R].

233. Jack Houston, *5 in Family Slain; 18-Year-Old Son Held*, Chicago Tribune (Nov. 10, 1985), https://www.chicagotribune.com/news/ct-xpm-1985–11–10–8503170477-story.html.

234. Fed. R. Evid. 702.

235. *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 593 (1993).

236. *See Kumho Tire Co, Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999) ("We conclude that *Daubert*'s general holding—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge.").

been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant [knowledge] community."[237]

Notably, the *Daubert-Kumho Tire* standard seems to envision expert testimony as a purely scientific and/or social scientific mode of engagement. The most troubling factor, per many courts and legal commentators, has been the focus on testability and error rates—but even this fear finds itself rooted in an emphasis on expert testimony as scientific and/or social scientific, with the particularized concern being raised in the space of psychology and the social sciences.[238] While judicial education—specifically in the domestic violence and Battered Women's Syndrome context—has been prioritized as a tool to help offset some of the risk that judges might exclude evidence on the grounds of their lack of familiarity with the "scientific validity" of a source,[239] the ever-growing concern regarding the proliferation of "junk science"—a phenomenon whereby courts rely on data points that have been unsubstantiated and unsupported[240]—has led to the drawing of almost violently exclusive boundaries in terms of the permissibility of expert testimony. It is scientific and occasionally social scientific evidence that is permitted to enter the courtroom, reifying not only the improper conclusions that "non-scientific" expertise is inherently "junk" motivated by sociopolitical ideological biases, but also the faulty argument that scientific inquiry represents "pure truth" uninflected by sociopolitical ideological biases.[241] Although it has been repeatedly confirmed that juries often reach their decisions about the innocence of criminal defendants based on the opinions of expert witnesses,[242] the hyper-cautiousness with which judges approach the introduction of expert

237. *Daubert*, *supra* note 235, at 580.

238. Michelle Michelson, *The Admissibility of Expert Testimony on Battering and Its Effects After Kumho Tire*, 79 Wash. U. L. Q. 367, 370 (2001).

239. *See Impact of Evidence Concerning Battering and Its Effects in Criminal Trials Involving Battered Women in* The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials: Report Responding to Section 40507 of the Violence Against Women Act 1, 146–147 (U.S. Dep't of Just. & U.S. Dep't of Health & Hum. S. eds., May 1996).

240. *See* David DeMatteo et al., *Expert Evidence: The (Unfulfilled) Promise of* Daubert, 20 Psychol. Sci. Pub. Int. 129, 132 (2019) (citing *McKune v. Lile* (2002) and *Smith v. Doe* (2003), in which Supreme Court relied on outmoded data containing "bare assertions without any supporting citations" to generate case law).

241. *See generally, e.g.*, Frederik Andersen et al., *Philosophical bias is the one bias that science cannot avoid*, 8 eLife 1 (2019) (arguing that ontological, epistemological, and normative assumptions impact scientific research). *See also* Angela Potochnik, *Awareness of Our Biases Is Essential to Good Science*, Sci. Am. (2020) ("Ideological commitments and social and political values have always influenced scientific research.), https://www.scientificamerican.com/article/awareness-of-our-biases-is-essential-to-good-science [https://perma.cc/A9Z4-7DUM].

242. *See, e.g.*, Stacy Lee Burns, *Demonstrating "Reasonable Fear at Trial": Is It Science or Junk Science?*, 31 Hum. Stud. 107, 107–108 (April 2008).

testimony risks the exclusion of witnesses beyond the pale of traditional scientific frameworks.

This becomes a significant concern in the grief-guilt conflation for a number of reasons. The vast majority of traditionally accepted evidence pertaining to grief performance would likely emerge in the context of the social sciences, with a particular emphasis on the experiences of psychologists, social workers, and mental health professionals. Their testimony could be specifically helpful in allowing juries to understand how the particular defendant-as-patient experiences the world in their opinions (for example, entering the courtroom as "Experts on the Defendant") and how others have encountered similar experiences (for example, entering the courtroom as "Experts on the Experience"). However, lower court and trial judge applications of the *Daubert* factors risk enabling "sweeping dismissals of expertise from psychology and the social sciences, as well as expertise based on professional experiences."[243]

Moreover, and perhaps more concerningly, the *Daubert-Kumho Tires* standard all but exclude the possibility of expert testimony that sits at the intersection of ritual, performance, and grief. Though numerous scholars dedicate their careers to studying grief as it is ritualized and performed within anthropological, sociological, and humanities frameworks, their expertise would be unlikely to satisfy the requirements of the *Daubert-Kumho Tires* test: the nature of their research is not concerned with "testability and error rates" in the same ways that the "hard sciences" are, nor is it as beholden to universality and replicability. Rather, it speaks more broadly to human nature and the human condition in ways that, though not statistically testable *per se*, answer questions about how people interact with one another, hope to understand why they do so, and seek to dispel myths and stereotypes that might surround certain communities of people.

My recommendation, then, is not simply an expansion of *Daubert-Kumho Tires* test, which I think ought to be done generally but is insufficient in the grief-guilt complex to amount to significant change. Instead, I would advocate for the institutionalization of specific statutory provisions pertaining to expert witnesses in the areas of grief, performance, trauma, and ritual. This might involve the expansion of § 702 to acknowledge the highly particularized nature of grief expertise, or it might involve an overarching amendment to the Federal Rules of Evidence in order to enumerate grief performance expertise standards and the mechanisms by which humanities-type research can enter the courtroom. Arguably, the precise invocation of grief, performance, ritual, and trauma would help offset concerns of the broad and overreaching possibility of the infiltration of "junk science" within the courtroom: expansion beyond those fields would require additional enumeration under the principles of *expressio unius est exclusion alterius*. At the same time, though, this specific stipulation would allow scholars of Ritual Studies,

243. Michelson, *supra* note 238, at 371.

Grief Studies, Performance Studies, and Trauma Studies—as well as those traditionally accepted experts in the fields of psychology, social work, and mental health—to bring their robust scholarship into the courtroom in ways that would promote juror familiarity with the concepts of grief, ritual, performance, and trauma, and help offset some of the detrimental conflations of nonnormative grief performance with guilt.

B. *Invent and Introduce a Reporting Sunset Order Governing Media Reporting to Help Limit Premature Case Coverage.*

As this paper has shown, there is an exigent conflict between the First and Sixth Amendments: where the guarantees of free press have fulfilled their guarantee of promoting the knowledge of the public, they have often done so at the expense of defendants' rights to a fair and impartial trial. Even where significant protest has been waged—often by defendants who hope to keep their trials personal and out of the public eye—courts "have consistently accorded more weight to the press and have moved the rebuttable presumption of openness to a conclusive presumption of openness."[244] Though the Supreme Court in *American Communications Ass'n v. Douds* determined that the public has a right to "protected from evils of conduct" even when that meant some infringement on First Amendment rights,[245] the compromise of Sixth Amendment rights to a fair trial has often been deemed insufficient to amount to an "evil of conduct" that would supersede the press's promotion of the public's "right to know."[246]

Still, jurisprudence on the conflict between First and Sixth Amendment rights is as uncertain as the question itself. Where the Supreme Court has acknowledged that pretrial publicity's threat to a defendant's right to a fair trial might, based on "the gravity of the evil," justify "an invasion of free speech . . . to avoid the danger," they have established a standard whereby the "gravity of the evil" can be "discounted by its improbability."[247] In *Nebraska Press Ass'n v. Stuart*, the Court deemed unconstitutional a county court order prohibiting newscasters from "releas[ing] or authoriz[ing] the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced" in the face of a high-profile trial[248]; the probability that pretrial publicity would have significant adverse effects, the court felt, was too uncertain

244. Eileen F. Tanielian, *Battle of the Privileges: First Amendment vs. Sixth Amendment*, 10 Loy. Ent. L.J. 215, 216 (1990).
245. *American Communications Ass'n v. Douds*, 339 U.S. 382, 398 (1950) ("The right of the public to be protected from evils of conduct even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by this Court.").
246. *See* Hubert L. Will, *Free Press vs. Fair Trial*, 12 DePaul L. Rev. 197, 201–206 (1963).
247. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976).
248. *Id.* at 575.

to deem the prohibition allowable.[249] In *Richmond Newspapers v. Virginia*, the Court further held that the right to attend criminal trials was a guarantee of the First Amendment, and closure orders absent findings that juror sequestration would be insufficient were unconstitutional. "The trial of a criminal case," they stated, "must be open to the public."[250] And in *Mu'Min v. Virginia*, the Court determined that, in a murder case where substantial publicity had been engendered, there was no affirmative obligation to determine what each juror had been exposed to prior to the trial.[251]

But two cases stand out as unique outliers. In *Gannett Co. v. DePasquale*, the Court determined that the Constitution does not provide "an affirmative right of access to pretrial proceeding[s]" where all litigation participants agreed that the protection of the defendants' Sixth Amendment rights were contingent upon a closure of pre-trial proceedings.[252] And in *Sheppard v. Maxwell*, the Court determined that, where a state trial judge did not make concerted efforts to prevent some level of prejudicial publicity from "saturat[ing] the community," the "disruptive influences in the courtroom" compromised the defendant's right to a fair trial so significantly as to justify a new trial.[253]

Sheppard is the closest case dealing with the crisis at issue in this paper: jurors were "thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers"[254]; jurors were exposed to "newspaper, radio, and television coverage of the trial while not taking part in the proceedings"[255]; and no change of venue was granted "to a locale away from where the publicity originated."[256] Still, no prior case law prohibits any form of press coverage in the immediate aftermath of a suspected murder. It is all but assumed that there is no risk of "evils of conduct" in moments preceding trial: *voir dire* is sufficient to prevent bias entering the courtroom, so long as individuals are honest about their prior exposure and do not indicate that they have "formed an opinion based on the outside information or that it would affect their ability to determine petitioner's guilt or innocence based solely on the evidence presented at trial."[257]

It would behoove courts to capitalize on the gaps between *Sheppard* and *Gannett* and create a new form of court order based in the notion that the Constitution does not provide "an affirmative right of access" to pretrial reporting on defendants such that trial judges have a right to order the temporary postponement of reporting *specifically*

249. *Id.* at 569.
250. Richmond Newspapers v. Virginia, 448 U.S. 555, 580 (1980).
251. *See* Mu'Min v. Virginia, 500 U.S. 415, 431 (1991).
252. Gannett Co. v. DePasquale, 443 U.S. 368, 394 (1979).
253. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).
254. *Id.* at 353.
255. *Id.*
256. *Id.* at 352–353.
257. Mu'Min, *supra* note 250, at 417.

about the defendant to avoid the introduction of "disruptive influences in the courtroom." This order, which we might call a *Reporting Sunset Order*, would require the consent of both prospective defendants (any person accused of a crime) and prosecutors, as well as any other possible litigation participants.[258] Based in the principles of a "sunset clause"—that is, a clause in a statute, regulation or similar piece of legislation that expires automatically" and "provides for an automatic repeal of the entire or sections of law once a specific date is reached"[259]—the court would place a gag order on allowing the media to reach out to the defendant, her family, her friends, or any acquaintances until a specified date after the determination of the individual's defendant status. The media would, however, still have the ability to speak to victims' family members and to report on the nature of the crime, what is believed to have happened, and other details important to satisfying the public's "right to know" without "satur[ating] the community" with potential juror biases. Any footage, however, that contains identifying information about the defendant, her character, or her potential relationship to the crime would need to be withheld until the order was lifted.

The date and time when the order would be lifted would require consideration of whether the prospective defendant had the opportunity to speak to an attorney, whether the initial phases of a trial had been established, and so on; ideally, this would not take longer than sixty to 120 days. In some ways, the *Reporting Sunset Order* would mirror Miranda Rights for a criminal defendant: it would allow her to recognize that anything she says in the public eye, and anything that is said about her, could potentially be used against her in a court of law. A *Reporting Sunset Order* would have been instrumental for someone like Pamela Smart, whose performance of unsettling grief to the media in the days and weeks after her husband's murder played a critical role in her eventual conviction. It would have helped Amanda Knox, as the footage documenting her "coldness" and her perceived strange response would not have reached the public in ways that would have biased their interpretation of her. It would have certainly helped the Menendez brothers, whose post-murder "excess spending" would not have festered for *so* long in the minds of prospective jurors in ways that certainly hampered their access to a fair trial. And most importantly, it would have preserved these defendants' Sixth Amendment right to a fair trial without completely altering the press's rights to publish freely (and fully within a reasonable amount of time) and the public's "right to know" about what had happened in their community.

C. *Assemble Designated, Pretrained, Court-appointed Court Watchers to Actively Participate in Trial Proceedings and Offer*

258. For a clearer explanation of the rationale behind gaining the consent of litigation participants, *see generally Sheppard v. Maxwell*, *supra* note 253.

259. Will Kenton, *Sunset Provision*, Investopedia (Jan. 22, 2020), https://www.investopedia.com/terms/s/sunsetprovision.asp. [https://perma.cc/H3ZZ-SV6U].

Daily Reflections to Jurors on How Issues of Grief and Social Metrics Have Been Unfolding in the Trial.

Since at least the late 1960s and early 1970s, court watching programs have developed in response to growing concerns over the efficacy, fairness, and justice in the criminal courts and the rising sentiment that access to the judicial system ought not to be retained exclusively by the "legally trained elite."[260] Court watch programs exist across the country,[261] advocating for the goal of accountability, accessibility, and reform in a flawed criminal legal system. Unlike participants in a trial, court watchers do not "have a personal stake in the outcome of a case; instead, they go to court to observe proceedings and to assess whether courts are serving their communities fairly."[262] They therein are advised to develop reports analyzing data and making recommendations to the courts; to pursue legislative remedies through advocacy and lobbying; and to report to the public and the media.[263] Court watching programs have promoted significant successes, such as generating greater judicial knowledge about the nature of domestic violence cases,[264] exposing the disparate punishment of communities of color,[265] and demanding bail reform accountability and implementation.[266]

Though court watching offers a fantastic avenue for future reform, its ability to help present defendants is slightly more limited. The acquisition of data promises subsequent change from which defendants experiencing ongoing harm are unlikely to benefit (barring the unlikely grant[267] of a reversal upon appeal). On some level, then, court watching positions present defendants as forgotten data points experiencing harm yet incapable of seeing that harm remedied personally.

Here, I propose the reimagination of court watching programs such that court watchers play an active role in the trial process. Rather than

260. *See* Kenneth Carlson et al., *Citizen Court Watching: The Consumer's Perspective*, Nat. Inst. L. Enforcement & Crim. Just. 1 (Oct. 1977).

261. *See, e.g., id.* at 7–23, 27–33, 36–41 (describing court watching projects in Illinois, New York City, Arizona, California, Ohio, Pennsylvania, and Washington.).

262. *Legal Resource Kit: A Guide to Court Watching in Domestic Violence and Sexual Assault Cases*, Legal Momentum: Advancing Women's Rights 2 (2005), *available at* https://www.legalmomentum.org/sites/default/files/kits/courtwatching.pdf [https://perma.cc/S2R8-HL5M].

263. *Id.* at 6–7.

264. *Id.* at 8.

265. *Court Watch Los Angeles*, Nat. Lawyers Guild of L.A. (n.d.), https://nlg-la.org/court-watch-los-angeles [https://perma.cc/UH4P-9S93].

266. *Court Watch: Eyes on 2020, New York Bail Reform Accountability and Implementation*, Court Watch NYC (Dec. 2019), https://static1.squarespace.com/static/5a21b2c1b1ffb67b3f4b2d16/t/5dfcc0e0bd7c680b8eeffcb9/1576845537691/CWNYC+Eyes+on+2020_FINAL+%282%29.pdf [https://perma.cc/AP3L-5VKF].

267. *See generally* Nicole L. Waters, James Green, and Martha Rozsi, *Criminal Appeals in State Courts*, U.S. Dept. of Just. (Sept. 2015), *available at* https://www.bjs.gov/content/pub/pdf/casc.pdf [https://perma.cc/K2U5-9G9C].

have court watching programs exist outside of (and, at times, in opposition to) the judiciary, American courts ought to absorb volunteer court watching programs into their fold in the context of the criminal legal system. Almost no additional funding would be required to do this: not only would the volunteerism of the program be built into it, but the training and other programming that the organizations do would also be covered by the existing programs. Courts, however, could stipulate particular areas of interest, including but not limited to, trainings in grief performance (both as it occurs on the stand and as it is brought into the trial) and other forms of bias and their intersection with sexism, racism, xenophobia, homophobia, ableism, and classism. Though engaged court watchers, as I understand them, would not enter the courtroom as witnesses, the court could invite predesignated and trained court watchers to provide the judge and the jury at the end of each day with a synthesized account of what they witnessed in the courtroom. They would do so in the absence of all witnesses and other parties. Engaged court watchers might, for example, call attention to the ways in which the normative expectations of American grief were projected onto a noncitizen defendant in ways that misunderstand social inequity. They might also point out how a witness's testimony bespeaks certain stereotyped racial and/or gendered attitudes. Their daily reports would not necessarily need to be entered into evidence; rather, they would just provide a sort of framing for juries who might be less familiar with biases that might bubble to the surface within a trial.

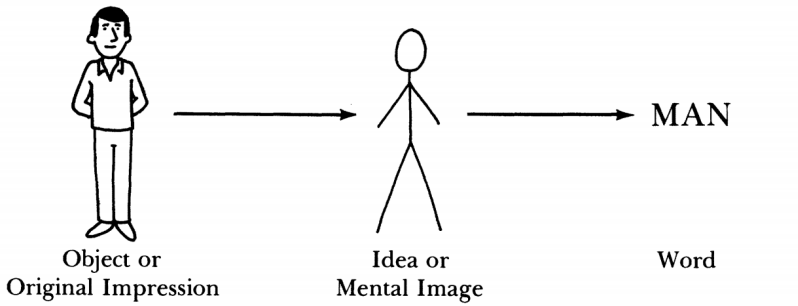
These solutions only begin to scratch the surface of what might be done to help rectify the mechanisms by which grief metrics enter the courtroom. This paper has demonstrated how, despite Judge Posner's earnest protestations to the contrary,[268] the American criminal legal system makes "Meursault" figures of its criminal defendants, ostracizing those deemed *l'etranger* and, in essence, removing them from society through determinations of guilt in order to maintain the boundaries of normative community. It has sought to offer a smattering of solutions, and yet, in the absence of a push towards social change, American society perpetuates a tremendous harm against its own denizens. The sacrifice that emerges out of this harm—not only to the individuals who fail to acculturate their bodies to social expectations of ritual grief, but also to the virtue of the Sixth Amendment guarantee of a fair trial—is great. In the event of a failure to meaningfully address the systemic injustice of grief-guilt constructions, *The Stranger*'s opening lines may hold an ominous meaning for the American criminal legal system. It is our "Maman," our trust in the legitimacy of a legal system that works to foster a vision of justice and equity across the American landscape, that will have "died today."[269] Or worse—maybe it was yesterday.

268. *See* Posner, *supra* note 17, at 42.
269. Camus, *supra* note 8, at vii.

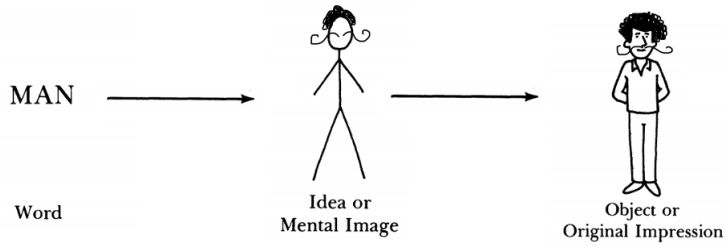
Appendix 1: The Kiss

Appendix 2: Knox's Expressive Face

Appendix 3: Image – Language



Appendix 4: Meaning-Making: Language – Image



Appendix 5: Pamela Smart "Put Together"

Appendix 6: Pamela Smart's Visible Funerary Grief