

THE TRIAL OF ALICE CLIFTON: JUDICIAL CATHARSIS IN INSTITUTIONAL BIAS

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ABSTRACT

This is a critical introduction and rhetorical analysis of a moment of criminal crisis at a time of profound institutional bias: the 1787 infanticide trial of a young Philadelphia slave and rape victim named Alice Clifton. A dramatic view of the case—in the tradition of Kenneth Burke—reveals the law’s inherent symbolic action in shaping social reality and its cathartic potential when resolving conflict and judging conduct. Judicial catharsis—the official apparatus for channeling the manifold cathartic pathways that converge upon a criminal crisis—is the procedural and ritualistic dramatism of the law. It provides the serial victimage necessary to feed the insatiable appetite of symbolicity’s categorical guilt. Accused persons stand for, or stand in for, generalized fears and tensions on the assumption that labeling and punishing them somehow remediates past events or external conditions. In that sense, the community treats criminals for its own benefit. Whether convicting or acquitting, punishing or pardoning, acting upon a defendant tends to purify the group. But ritual-induced unity is more of a temporary diversion of collective attention than a persistent change in collective attitudes or social conditions. Institutional bias—such as slavery or disparate treatment of unwed mothers—politicizes judicial catharsis by creating underlying circumstantial guilt that cannot be directly discharged through criminal adjudication. Nor is catharsis through judgment the same thing as justice; the ritualistic sacrifice of a scapegoat can bring a false sense of redemption to the community by masking bias and social division. Thus, the rhetoric of the law is compensatory, not curative—a perpetual cleansing of what can never be made clean. In the case of Alice Clifton, the law required a criminal scapegoat and the privileged hierarchy required a political scapegoat. To serve as both, the respective burdens of law and policy had to be reshaped to match the scapegoat’s back. By condemning and then pardoning—symbolically taking her to the edge of death and then restoring

her to life—the process hybridized the resolution, claiming authority over the awesome powers of justice and mercy to reaffirm the existing social order.

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DEDICATION

For Colette, my partner and best friend.

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CHAPTER 1. INTRODUCTION AND RATIONALE

On 5 April 1787, in Philadelphia, Alice Clifton, an unmarried slave, slit the throat of her just-born daughter, wrapped the body in a petticoat, and stuffed it in the bottom of a linen chest. Neither she nor her defense attorneys ever disputed these facts. The attorney general obtained a criminal indictment and put Alice on trial. The jury convicted her, and the presiding judge sentenced her to hang. This sequence of events, validated in the historical record, appears to represent the authoritative application of state power to enforce a valid law against a deservedly accused criminal, resulting in a verdict and sentence that were proportional under existing law. But a post-conviction petition for a pardon, drafted by the same jurors who had just convicted Alice and delivered to the same judge who had sentenced her, suggests ambivalence about their having condemned Alice to die. With the benefit of more than two centuries of hindsight, scholars can safely wonder why, if the jury doubted her guilt, they convicted her. Likewise, they can wonder why, if they were convinced of her guilt, they sought her pardon. Similarly, the presiding judge seemed to reveal his own ambivalence about the outcome of the trial: he endorsed the jury's petition to Pennsylvania's Supreme Executive Council (SEC) by appending his own concurrence and recommending mercy for Alice. The SEC thereafter issued a stay of execution. Alice did not hang, and, possibly because she did not hang, her story became an anonymous historical footnote.¹

Now faded from history, Alice Clifton's trial was recorded in official documents of the Pennsylvania Supreme Court and the SEC and transcribed into a pamphlet, the de-facto title of which comes from its opening line: *The Trial of Alice Clifton for the Murder of Her Bastard-Child* (hereafter referred to as *The Trial of Alice Clifton*). Published not long after the trial, it constitutes a window into a criminal crisis at a time of social change: post-Revolutionary, pre-

constitutional United States. A new edition of the pamphlet, the first since its initial publication in 1787, was prepared to facilitate this critical analysis and is attached as Appendix A.² Now available to contemporary readers, *The Trial of Alice Clifton* can enter the anthology of early American crime literature, providing opportunities for additional scholarly analysis of a largely unexamined historical text.

Then as now, a public trial served as the authoritative means for resolving social crises occasioned by crime. The crisis in the trial of Alice Clifton, as declared in the indictment, was maternal infanticide, that special species of homicide in which a mother murders her own neonate. Yet, the pamphlet reveals a secondary narrative in the trial—a kind of factual insurgency of Alice’s life experience as representative of the social incongruence of institutional bias. The social context also included gradually changing laws and social attitudes about women and slaves, changes that were resisted by some within the existing hierarchy. For example, seven years earlier, Pennsylvania passed An Act for the Gradual Abolition of Slavery and, just seven months before Alice’s trial, Pennsylvania amended its infanticide statute to provide additional procedural protections to unwed mothers (both laws will be discussed below). But gradual abolition had come too late to liberate Alice from slavery, and a careful examination of her murder case suggests that she may have been convicted based in part on jury instructions that did not give Alice the full benefit of the newly amended law. Even though Alice never spoke a word in the trial, her specific circumstances—a young victim of racialized rape without legal redress—put a face to the reality of life at the margins of early American society. These parallel narratives, one criminal and one cultural, enable us to dissect the divergent tensions behind the case and the ways in which the trial ritual helps the hierarchy to maintain a sense of order and ease social tension by imposing judgment. On its face, the written record affirms an official resolution to the

case in the form of a procedural compromise of stern justice tempered by compassionate mercy. But a closer examination raises questions about the validity of the justice and the sincerity of the mercy, the sequential combination of which may have helped to temporarily mask the incongruity of institutional bias in America on the eve of the Constitutional Convention—to be convened just down the street in the weeks ahead.

Background and Relevancy of the Text

The Trial of Alice Clifton and related official records preserve both the tragedy of infanticide and the reality of institutional bias in eighteenth-century America. In addition to the quasi-verbatim pamphlet, the case exists in the form of a few official, hand-transcribed records. Unlike most criminal narratives from that period, the pamphlet shows very limited third-person mediation, giving readers greater access to the case as it was tried in court. Twenty-first century readers can see most of the original questions, answers, and arguments, rather than historical nuggets that were thereafter appropriated or misappropriated by publishers, preachers, or politicians to appeal to constituencies or customers. The trial pamphlet and the related clemency papers (transcribed here as Appendix B) merit analysis for their historical value and for their rhetorical insight.

The pamphlet functions as a hybrid text, bridging the genres of criminal narrative—infanticide narrative in particular—and trial report. Perhaps because she did not hang, Alice’s case was never mediated into a cautionary tale—such as an execution sermon or dying speech—or a sentimental novella. Alice was tried beneath the weight of a privileged hierarchy and its attendant, codified biases against women—unwed women in particular—and people of color—slaves in particular. That institutional bias barred Clifton, a slave, from being a witness against a free person, thereby preventing her from asserting on her own behalf that she had been raped by

a white man (not her master). And despite the recent change in the infanticide law, the trial report contains evidence that the presiding judge, Chief Justice McKean, may have instructed the jury to apply elements of the original infanticide law with its presumptions against unwed defendant mothers, improperly shifting to Alice the burden of proving that the child had ever been alive. That distinction may have been dispositive in the outcome of the case. As a result, she, an unwed slave who delivered her child in socially imposed isolation, could never affirmatively prove that the child was born dead because she could not be a legally competent witness of her own delivery. She would be criminally liable for the child's death without the prosecution ever establishing that it was alive. In the case of a similarly situated married woman, the state would first have to prove that the child was born alive and that the mother had killed it.

Given its thick contextual subject matter, Alice's murder trial presents a concentrated case study of the challenging social issues facing the newly independent American states. Yet despite its rich potential as source material for social commentary and academic study, it has remained largely invisible. Even exhaustive studies regarding rape in early America—which identified and recounted the previously untold stories of rape and sexual coercion involving women of color—failed to locate Alice's case; she has persisted as one of early America's "erased women" (Block, *Rape & Sexual Power* 4). In extant records, Alice would not be readily identifiable as a rape victim since the allegation that she was raped is mentioned only obliquely in her murder trial. Then, in the subsequent trial of her rapist—John Shaffer, a white merchant of uncertain connection to Alice's master and mistress—his victim is never mentioned by name. Alice's erasure from the official record may have been because she, as a slave, was not permitted to testify against a free man, meaning that the only witness to Shaffer's crime could not be a witness (discussed in Chapter 2). Regardless, consistent with other cases in early America,

Alice's erasure from the legal record in favor a white man's acquittal was one of the "privileges afforded to whiteness" at that time (4).

That *The Trial of Alice Clifton* was ever published is an indication of the general interest in its subject matter. Even today, the notion of maternal infanticide frightens and fascinates people. Although it has always existed, societies have long described it as an unnatural and incomprehensible crime. As Susan Sage Heinzleman notes, "like witchcraft, with which it is often connected, [maternal infanticide] is the *crimen exemplum*, the sure sign of Satan in the world, the work of hidden and unknowable forces" ("Going Somewhere" 73-74). Regardless of the motive, it is understood to be the senseless slaughter of the most innocent and vulnerable by those who are primarily responsible for their care and protection. Historians look to infanticide and its prosecution for evidence regarding the status of women and servants within a community and how that community deals with the problem of unwed mothers (Rowe, "Infanticide" 200). The way societies define, describe, and prosecute infanticide also provides insights into their attitudes, values, and fears, as well as their economic situations and prosecutorial priorities. In colonial North America, as in England, maternal infanticide was perceived as a significant problem requiring special laws. Social norms regarding chastity and legitimacy forced many young women into difficult choices at a moment when they were most vulnerable. After killing or concealing their infants, they frequently took their own lives as well (204). The special infanticide laws, such as the one amended by Pennsylvania just months before Alice was charged, contributed to the tendency of unwed mothers to conceal the deaths of their infants; these laws required the mothers to prove—by means other than their own testimony—that the baby was either stillborn or died from natural causes. In the calculus of the unwed mother,

silence held out the possibility of permanent concealment, avoiding shame and indictment, whereas disclosure meant guaranteed scorn and probable conviction.

These competing interests—circumstantial realities versus sociolegal expectations—covertly compelled negotiated judicial settlements and created gripping subject matter for popular narratives. At the time of Alice’s trial, criminal narratives tended to reinforce civil order and conformity by imposing a structure on otherwise socially disruptive experiences (Williams, *Pillars of Salt* x). They were also more susceptible to market pressures than other forms of literature (xi). Evidence of this phenomenon in the original version of the pamphlet can be found in its opening line: *The Trial of Alice Clifton for the Murder of Her Bastard-Child*. The word “Murder” spans an entire line of the otherwise compactly printed text. Visually arresting, it appealed to audience appetites for illicit sex, illegitimate children, and the horrors of maternal infanticide. More important than its accuracy was the degree to which it conformed to the hierarchy of social values as reflected in existing laws by immediately placing Alice’s case within a preexisting narrative that stereotyped murdering unwed mothers. The centered, outsized “Murder” anchors the page as an established fact; “Bastard” defines both the child and the mother as illegitimate and implies a motive for the murder. Readers would read on, not to find out whether there was a murder—because that appeared to be a given—but rather to explore the details that led her to kill. Ironically, the subsequent content of the pamphlet would reveal to readers an unexpectedly sympathetic view of Alice just as it would raise a significant question about whether there was even a murder. She was a sixteen-year-old slave who was raped by a white man whom she could never marry and who, after he learned that she was pregnant, directed her to kill their child when it was born. If her child had lived, it would have been her owner’s property, not the father’s free-born bastard (discussed in Chapter 2).

Supplementing *The Trial of Alice Clifton* (Appendix A), are transcriptions of the original clemency papers, which are publicly available here for the first time in Appendix B. My analysis provides a brief critical introduction to the texts in their sociolegal context. I then examine the case and its representations through the analytical lens of dramatism as developed by Kenneth Burke. Dramatism asserts that language is a symbol-based mode of action, not just a tool for human communication, in which both drama and catharsis are implicit (*Language as Symbolic Action* 18). From a dramatistic perspective, law functions as a specialized linguistic terminology and infrastructure, shaping the hierarchical social reality humans create for themselves, defining and judging action and providing the means of resolving inevitable conflicts and tension. Bias in the law—institutionally differentiated treatment of similarly situated persons—contributes to social tensions and complicates the resolution of individual conflicts. Dramatism is particularly well suited to analyzing Alice Clifton’s case because of its ability to track the rhetorical trajectories of early American infanticide in their social settings, from the legal enactments that differentiated persons and conduct to the performative public rituals that adjudicated them.

Historical Documents

The historicity of the trial pamphlet is established through official archives of the state of Pennsylvania pertaining to the criminal prosecution of Alice Clifton. Extant records, all handwritten, which have been microfilmed but never published, include a brief entry in the “Docquet of Oyer and Terminer and General Gaol Delivery for the State of Pennsylvania,” the “Transcript of the Record of Conviction of Alice Clifton for Murder,” and the “Petition of Jury and recommendation of the Judges in favor of Alice Clifton.” In addition to the verdict and death sentence, the docket entry reflects that Alice “is of the value of Forty Pounds,” which would have been paid to her owner had she been executed.³ The “Petition of Jury” was signed by all

twelve jurors, and the “recommendation of the Judges” was addressed to “His Excellency Benjamin Franklin Esquire, President of Pennsylvania.” It was signed by Chief Justice McKean and Associate Justice William Atlee; McKean noted that Jacob Rush concurred with his fellow justices but was absent at the time of signing.

The docket entry for John Shaffer’s rape trial does not mention his victim by name. The inference that it was Alice Clifton is based primarily on the following factors: (1) Witnesses in Alice’s trial repeated her story that she had been “debauched” by Shaffer; (2) William Bradford’s decision, after Alice’s murder trial, to put Shaffer on trial for rape; and (3) Bradford’s later literary allusion to a rape trial matching the circumstances of John Shaffer and Alice Clifton—the victim and only witness to the crime who could not testify because she was a slave (Bradford, *Enquiry* 44). Historian G. S. Rowe also concludes, in his research regarding infanticide prosecutions in Pennsylvania, that Alice was Shaffer’s alleged victim (“Infanticide” 200). Shaffer’s trial reunited many of the judicial actors from Alice Clifton’s trial. Chief Justice McKean and Associate Justice Bryan convened a grand jury on 12 February 1788, the result of which was a true bill of indictment against Shaffer for rape. William Bradford prosecuted the case on February 15 in Philadelphia. The docket entry reflects that even though the jury did not convict Shaffer of rape, they convicted him of fleeing the state to avoid being prosecuted for it. The apparently conflicted outcome—acquittal on the substantive matter and conviction on the collateral matter—suggests that the jury believed that he was, in fact, guilty but that the law did not allow them to convict him because his victim—and the only witness—was a slave. Shaffer was sentenced to pay a surety bond in the amount of one thousand pounds, along with five hundred pounds from a third party to ensure his good behavior for a period of three years.

The trial pamphlet in its original form, known as *The Trial of Alice Clifton for the Murder of Her Bastard-Child*, comprises fourteen pages of a sixteen-page volume published without attribution in Philadelphia shortly after the one-day trial. The contents are not reproductions of official records, nor are they part of an organized legal digest of court decisions. The pamphlet presents itself as a quasi-verbatim transcription of the trial. Sparse interjections by the anonymous reporter suggest that some elements of the trial were not transcribed. There are no known media reports of the trial. Nor do references to the trial appear in the personal writings of its participants.

Historical Figures

Pennsylvania Attorney General William Bradford prosecuted the case. He was born in Philadelphia in 1755, the namesake son and great-grandson of the prominent patriot printers of the middle colonies. He served briefly in the American Revolution, serving for a time as an aide to General Washington. After resigning his commission due to illness, he became Pennsylvania attorney general in 1780. He later served on the Pennsylvania Supreme Court and as the second U.S. Attorney General under President Washington. He died in 1795 (“William Bradford,” *Penn Biographies*).

Alice Clifton was represented by two defense attorneys. The pamphlet identifies them as “Messrs. Sergeant and Todd” (Appendix A). Although not named by historian Rowe, he suggests that Alice’s lawyers were prominent abolitionists and among the best in Philadelphia (227). Although little is known about Todd, he was probably John Todd, a young Philadelphia lawyer who, like his co-counsel Sergeant, died in the Yellow Fever epidemic of 1793 (Bradford died in the outbreak of 1795). His young widow, Dorothea “Dolley” Payne, would later marry James Madison and become one of the most famous First Ladies in U.S. history: Dolley Madison.

Sergeant was Jonathan Dickinson Sergeant, former attorney general of Pennsylvania. He was born in Newark, New Jersey, in 1746. He served as attorney general from 1777 – 1780 when he went into private practice in Philadelphia. He died in 1793 (“Jonathan Sergeant,” *Penn Biographies*).

Pennsylvania Supreme Court Chief Justice Thomas McKean presided over the trial. Rowe observed that “[a]t one time or other McKean’s official titles included president of the Pennsylvania Provincial Conference (1776), president of Delaware (1777), chief justice (1777-89) and governor (1799-1808) of Pennsylvania, and president of the Continental Congress (1781)” (Rowe, *Thomas McKean* xii-xiii). He also participated in the Stamp Act Congress and signed both the *Declaration of Independence* and the *Articles of Confederation*. In his role as chief justice, McKean presided over cases of significance to the state and the new republic. The trial of Alice Clifton, of course, did not merit much attention at the time and was quickly forgotten. Yet the case gives contemporary audiences insight into the mind of a prominent but lesser-known figure of the Revolutionary era. With the retrospective self-regard common among his contemporaries, McKean considered his participation in the creation of the American republic the “pivotal event in his life—and in the history of mankind” (83).

Research Question and Analytical Context

Alice Clifton’s case brought together an influential cast at an influential time. The men who decided her fate did so according to the legally defined roles and socially accepted customs of the time. Any examination of the case or of the conduct and motives of its participants should employ a theoretical lens that can fairly consider the case in its own context and critique that moment in time according to its own terms. In many ways, *The Trial of Alice Clifton* was also a legal drama in the midst of an evolving social and geopolitical drama. Thus, the theoretical lens

should be able to explain how the linguistic framework of the law defines, represents, and judges human action, and provides a coping mechanism for the tensions, conflicts, and crises that are inevitable with human action. Specifically, using *The Trial of Alice Clifton* as the case study, how does dramatism illuminate the law as symbolic action and judicial catharsis at a time of institutional bias?

The law, as a subset of language, defined Alice Clifton's status as an unwed slave and imposed corresponding consequences. Neither that status nor its consequences were products of the natural world; they were symbolic constructs that augmented social reality. Likewise, the law created the concept of infanticide as a crime against nature and imposed sanctions on those adjudged to have violated it. Adjudication would come as the culmination of a performative public ritual—a trial—in which narrative arguments for and against the defendant would guide jurors toward a verdict—a collaborative pronouncement of the truth about what happened—after which the defendant would be labeled and either punished or liberated. Along the way, language would be used to bring the past into the present, not only to represent past events but to persuade and to generate ideas and emotions that would find outlets in responses and resolutions that would likewise be physiological and linguistic. Naming, defining, advocating, persuading, deliberating, deciding, and judging are modes of action, not just communication. They add to reality and alter individual responses to it. Kenneth Burke's dramatism accounts for the full range of the law's symbolic action, from the way it shapes and influences social reality to the way that it simultaneously generates and alleviates tensions and conflicts, both of which are inherent in the linguistic differentiations of symbolicity (*Language as Symbolic Action* 2, 15, 18).

American culture has always defined infanticide as a crime requiring judicial resolution. Past actions alleged to be crimes must somehow be represented in the present within the symbol

system of the law and its institutions. A story of the infanticide must be told so that the law can judge it, combining the required legal and evidentiary elements with the rhetorical and aesthetic potential of language into expressive and persuasive narratologies. Judgment, in the form of a verdict, ideally brings both a sense of moral conclusion to the story and a perception of emotional cleansing of the crime. Early American culture also defined “slave” and “unwed mother” as distinct symbolic categories with legal consequences. When the law institutionalizes bias by treating similarly situated persons differently it alters the representation and resolution of crimes, not because the physical conduct of the actor is different but because the symbolic category of the actor is different. It adds an established, legally uncontestable backstory about what kind of person the defendant is before advancing a story about the defendant’s alleged misconduct. No judicial outcome can alter past actions, but representations and judgments of past actions resolve them to the extent that they alter present perceptions of past actions through completion, redefinition, and transcendence. All narrative structures within the rituals of the law invoke the concept of dramatism—or the analysis of language as modes of action and cathartic resolutions—ascertaining motives behind all human action.

Dramatism asserts that language is symbolic action, that drama is implicit in all human action, and that a form of catharsis is implicit in all drama (Burke, *Language* 18). Language did not emerge merely as a tool for human utility: “The instrumental value of language certainly accounts for much of its development . . . but to say as much is not by any means to say that language is in its essence a tool. Language is a species of action, symbolic action—and its nature is such that it can be used as a tool” (15). Humans use and misuse symbols, including the creation of the social negative, by which they are at once moralized and separated from their natural condition, goaded to a sense of order by a spirit of hierarchy (16). As a key component of

the symbolic universe, the law—as enacted, institutionalized, and executed—is symbolic action that contributes to the symbolic reality. Indeed, peoples’ notion of reality is affected by the law because “idealistic fictions have been written into the very law of the land, and the law is our ‘reality’ insofar as it is a public structure of motives” (*Grammar of Motives* 174). Language is constitutive of reality in its deceptions and its ideals, “just as a lie is ‘creative’ in the sense that it *adds* to reality . . . an *idea* of justice may make possible some measure of its embodiment in material situations,” serving as a “standard, guide, incentive—hence may lead to new real conditions” (174). Laws form linguistic codes, or charts, that can be analyzed as grammatical structures and as institutions for mapping motives (172-173). The law’s framework of shared standards for interpreting actions encompasses the power to name and to judge social action and to persuade societies to adopt certain attitudes or actions (*Philosophy of Literary Form* 281). For Burke, the law has a collective dream-like quality, expressing an idealized self-image of society; it masks social inequalities by imposing a sense of order that is at once antiseptic and analgesic (*Grammar of Motives* 373). As societies become more complex, they require increasing levels of engagement with the law. Punishing a criminal on behalf of societal ideals provides a form of civic catharsis; a common scapegoat redeems the common ground of social ideals. But the cathartic purge can conceal social injustice as society emerges reborn but with a false perception of social order (*Rhetoric of Religion* 141). For example, a corrupt regime might create the perception of a threat to the community that only the hierarchy can resolve by manufacturing a crime and providing a sacrificial criminal. In executing justice, the community perceives not only a sense of order but also a sense of the goodness and power of the regime.

Law operates and derives meaning primarily through narrative. Burke says that to address the question of meaning in a symbolic system, one “must have some word that means the act

(names what took place in thought or deed), and another that names the scene (the background of the act, the situation in which it occurred); also, [one] must indicate the person or kind of person (agent) performed the act, what means or instruments he used (agency), and the *purpose*” (*Rhetoric of Religion* xv). This pentad—act, scene, agent, agency, purpose—is the grammar of symbolic interaction and the composition of drama, revealing motives and achieving rhetorical objectives. Whether in the competing trial narratives of prosecution and defense, or in an appellate court’s review of prior evidentiary proceedings, narrative’s influence is pervasive (Brooks, “Narrative in and of the Law” 415). Different versions and different interpretations of the facts arise because the narrative glue that binds them into a meaningful story is different (417). Narrative’s persuasive power comes not just from recounting events but in making them concrete and particular, giving them both shape and direction toward a specific result (419, 423). But narrative’s rhetorical power in the law is a bit of a mixed bag. While concreteness and particularity can give shape and meaning to ideas and perspectives that might otherwise be excluded, it can also presume a logic in events that may not exist in real life, which can lead to judgments based on fiction, not reality (24, 33).

The narrative theory of law can extend beyond advocacy and judgment to the enactment of codes, which have traditionally been regarded as non-narrative. Codified law can posit a sort of virtual narrative, a paradigmatic *if ... then* model of circumstances—sometimes explicit, more often implicit—that equates to an iterative *whenever ... then* logic of a narrative (Sternberg, “If-Plots” 42). The implicit logic of the law-code shares three key features with ordinary narrative: suspense, curiosity, and recognition (51). Suspense develops between the crime and the punishment. Curiosity is a feature of trials and judgments through the retelling of the crime by those seeking conviction or acquittal. And recognition is manifest in case law as the precedent or

in the trial as the match between the codified *if ... then* and the factual context of the current case (51).

Jurist and theorist Richard Posner defines narrative as “a true or fictional account of a sequence of events unfolding in time, the events being invented, selected, emphasized or arranged in such a way as to explain, inform, or edify” (737-738). Advocacy is essentially storytelling but advocates’ stories lack the narrative closure of completed plot structures. Rules of evidence and criminal procedure disrupt advocates’ narrative flows, the fragments of which must then be reassembled by finders of fact in their deliberations. As Posner states, “Plaintiff and defendant in a trial each tell a story, which is actually a translation of their ‘real’ story into the narrative and rhetorical forms authorized by law, and the jury chooses the story that it likes best” (738). For example, is Alice an unwed mother who killed her child to conceal her shame, or is she the victim of social and sexual abuse who delivered a stillborn infant? To avoid the “credulous and sentimental intuitions” of undue myth-making, narrative anecdotes must be accurate types of the general symptoms (743). For example, the validity of a story of Alice being oppressed depends on the story being an accurate representation of the oppression. Otherwise, a story too detached from facts becomes more mythology than reality, suggesting causal connections that do not exist or reducing evidentiary narratives to frivolous stereotypes (743-744). Ideally, the competing narratives in a trial become a sort of dialectic, a truth-seeking exercise in which the deciders of truth are distinct from the dialecticians. In *The Trial of Alice Clifton*, the jurors rendered a final a verdict but continued the dialect by requesting a pardon. The give-and-take of legal converse, with its real consequences, defined and redefined the interaction between the verbal and non-verbal realms, a completion of cooperation and a cooperation of completion (*Grammar of Motives* 403).

A trial's cooperation of completion, similar to that of dramatic tragedy, promotes catharsis, or the purging or cleansing of emotions. Aristotle asserts that tragedy achieves its cathartic potential through imitation of actions that produce pity and fear or similar emotions (*Poetics* 1449b21-29). Trials are among the inherently cathartic forms that tragedy imitates. Catharsis in drama, even when intended, is not inevitable. As Burke suggests, drama is essentially entertainment and incidentally catharsis. In trials, catharsis is not only inevitable, it is essential, not only through the civic purgation of ritualistic scapegoating but also through the linguistic purification of individual expression. With regard to civic purgation, "criminals, either actual or imaginary, may thus serve as scapegoats in a society that 'purifies itself' by 'moral indignation' in condemning them, though the ritualistic elements operating here are not usually recognized by the indignant" (*Grammar of Motives* 406). And in "Croce's calculus, which equates catharsis with expression," Burke notes that "in the course of 'purifying' a terminology, poetry also 'purifies' the self that participates in such a process" ("On Catharsis" 354, 340). But the cathartic delight or purification inherent in exercising the power of symbols is not limited to the poetic, because the rhetoric and the poetic overlap considerably, and the distinction can become confused (Burke, *Language* 295, 302). Even though catharsis is usually considered "in terms of . . . sacrifices and victimage as attain their fulfilment in the ritualistic use of the 'scapegoat,'" (308) it can be found in more individual and intellectual exercises, as when "the symbol-using animal experiences a certain kind of 'relief' in the mere act of converting any inarticulate muddle into the orderly terms of a symbol-system" ("On Catharsis" 364). For example, a criminal investigation might begin with evidence and circumstances that first appear as a confusing muddle, but after individual or collective examination, the muddle might be

transformed into an orderly explanation aligned with the law, providing a sense of relief or satisfaction.

Given the connection between catharsis and motivation, the analytical value of viewing a trial as catharsis is that the catharsis of a trial is not only therapeutic, but it also is diagnostic. Individuals and groups seek resolution in the symbolic ritual of judgment because both the ritual and its outcome resolve the crisis and bring a sense of transitory improvement to the human condition, transitory in the sense that the relief they bring may be momentary at best. Whether relief means validation, vindication, commiseration, exultation, or any other emotional engagement, the participation in, or observation of, human action offers emotional release. That is not to say that emotional ventilation—or purgation or purification—constitutes objective healing. In the complex flow of human interaction, improvement in individuals' emotional states will be defined differently by similarly situated persons; they do not share either the same consciousness of conflict or tension or the same motivations for resolving it.

Since it is the momentary, subjective perception of improvement that drives symbolic action—not an objective standard of absolute or perpetual wellbeing—catharsis can be self-interested even within the context of external constraints, such as a legal duty or civic responsibility. An example of self-interested appropriation of a judicial arena would be a judge who abandons the law or a legal duty to achieve a partisan objective, rationalizing the departure by invoking the name of the law or appealing to others' sense of civic duty. Ideally, the formal structure of criminal trials will generally bring the personal agendas and legal duties of individual judicial role-players into alignment because of their identification with a common purpose.

An unstated purpose behind the public ritual of early infanticide trials was to affirm the underlying infanticide laws and the institutions behind them. They were historical events with official records. In that sense, they were real things. Yet their proceedings depended upon adversarial discourse—arguments attached to competing, manufactured narratives rooted in law and social tradition. Unlike drama, however, these trials tended not to follow a single narrative trajectory or a single cathartic pathway. Where dramatic tragedy created a self-contained universe that directed the audience’s emotional response, the adversarial narratology of criminal trials meant that opposing sides would introduce themes seeking opposing responses as verdicts. In Alice’s case, the prosecution emphasized her deception and violence to evoke fear and indignation while the defense emphasized her vulnerability and social isolation to evoke pity and sympathy. In tragedy, the narrative arc culminates in purgation, such as tears, to alleviate the excess pity generated by witnessing the tragedy. But the audiences in Alice’s case—jurors or readers—witnessed a legal drama in which they absorbed competing narratives and navigated their own collateral sources of psychological tension into their judgment or reaction. Despite their individual emotional responses, a jury’s duty was to decide what the official historical truth would be by deciding which narrative would prevail. In theory, they were to apply the law and pretend that their own attitudes and life experiences did not intrude upon their judgment.

By examining the potentially intense emotional engagement of infanticide prosecutions, researchers can see how participants in the broader process of civic judgment—advocates, judges, jurors—would need to balance competing psychological tensions in executing their official responsibilities. The artificial trial environment could never completely restrain their individual interests, loyalties, and prejudices. Judges in particular should adopt a heightened professional duty to check their individual and social baggage at the courtroom door as they

mediate between competing parties. They are deemed impartial. But to deem is merely to create a legal fiction; impartiality in fact is never possible. And whether their prejudice in a given case would detectibly or substantially alter the proceedings or affect the outcome, it would reveal itself in the rhetoric they deployed. All advocates, whether lawyers or judges, inject new information into the consciousness of other participants (primarily jurors), with either “medicinal” or “emetical” effects on the predominant social narratives with which they identify, evoking cathartic responses that either validate the “medicine”—thus persuading by purifying the corresponding emotion—or else eject the excess negative emotion in some other way like an emetic on poison. Tracing the cathartic arcs in Alice’s trial reveals multiple sources of conflict and tension in individual participants and the body politic.

Preview of The Dissertation

In Chapter 1, I introduce *The Trial of Alice Clifton*, an eighteenth-century trial report in pamphlet form, which I have edited and attached to facilitate further examination. I provide preliminary background information regarding the relevance of the text, justifying its selection for extended rhetorical analysis. I also introduce the theoretical framework of the analysis that follows: a dramatic perspective culminating in an examination of the trial as judicial catharsis in a period of substantial institutional bias.

In Chapter 2, I provide an overall summary of the case and a more detailed summary of the contents of the trial report and related records. I then explore that content in the context of the law, early American criminal narratives, prevailing discourses of infanticide and rape, historical biography, and one of the most celebrated criminal cases of eighteenth-century Pennsylvania: the infanticide trial of Elizabeth Wilson.

Chapter 3 provides the analytical framework and introduces the concept of judicial catharsis, more as institutional apparatus than specific process. I demonstrate its application in resolving an instance of criminal crisis during an era of institutionalized bias. The crisis was the allegation that Alice Clifton committed infanticide. The bias arose from the existing sociolegal order that defined her as an enslaved, unwed mother of a bastard baby. The language of the law provides the grammatical structure for labeling certain actions as criminal within a community. Even though the legal elements of infanticide have changed over time, American culture has always defined it as a crime requiring judicial resolution. To be resolved, infanticide must be represented within the symbol system of the law and its institutions. A story of the infanticide must be told so that the law can judge it—that is, conclude the story, identify the defendant-actor, and label her action as criminal and punishable. As a story aligned with the law, a representation of infanticide merges the rhetorical and aesthetic potential of language, persuading with technical information, packaged in creative, imaginative, and expressive narratology. Judgment in the form of a verdict—declaration of truth—ideally is not only final but ethical, bringing both a sense of moral conclusion and a perception of emotional cleansing. These performative legal narratives invoke the concept of dramatism, or the analysis of language as modes of action and cathartic resolutions. This dramatistic view of catharsis occurs in the Aristotelian tradition of audience engagement in emotional cleansing by witnessing dramatic tragedy—or imitations of actions in which a main character experiences great suffering, generally because of a flaw, moral weakness, or extreme circumstances. Kenneth Burke develops the theory of dramatism and extends Aristotle’s interpretations of dramatic catharsis to include civic contexts and individual expressions, all of which is contemplated under the umbrella of judicial catharsis.

In Chapter 4, I analyze *The Trial of Alice Clifton* as a legal drama and manifold cathartic ritual. Dramatism tracks judicial ritual from the law's symbolic inception to its cathartic redemption: if law then action; if action then drama; if drama then conflict; if conflict then guilt; if guilt then victimage. Drama is implicit in law as a subset of language, and catharsis is implicit in its drama. In the judicial context, catharsis operates on multiple levels and its purification can be considered from individual and civic or political points of view. Preexisting social tension and irresolution can be consolidated into the specific case at issue; that is, intimate and socio-political cathartic potentials are equally and simultaneously available. Suffering and victimage are implicit in criminal crises, which are communicated in trials as narratives containing representations of pain in the physical body, or manifestations of power in the physical world, or as abstractions in the body-politic. The dramatistic paradigm of catharsis aligns artifacts, actors, and abstractions into ideas and images for unclean, clean, cleansing, cleanser, and cleansed. The process does not simply go from "unclean" to "cleansed," and each moment can be dwelt upon in formal isolation. Since any "cleanser" takes on some of the uncleanness, dramatic catharsis is cyclical in its "completion."

The indictment defined the ways in which Alice was unclean. The prejudicial classifications of "unwed mother" and "slave" established categorical guilt without the need of evidence or the opportunity of rebuttal, and they affected the application of the substantive law of infanticide. The indictment also established the provisional narrative for the subsequent adversarial dialectic. The trial was the cleanser, a public ritual in which the state attempted to persuade the community to reaffirm the social order by resolving the criminal crisis through a conviction. The state presented a narrative of Alice as the stereotypical unwed mother: she concealed and denied her pregnancy; she did not prepare clothing for the baby; she delivered in

secret; and she concealed the baby's body. Further, she cut its throat. The defense, on the other hand, introduced the complex particularity of Alice's personal history: she was a young slave who was repeatedly raped by a white man who persuaded her with threats and promises to kill the baby when it came. The trial pamphlet revealed evidence of physical catharsis associated with pregnancy and birth, of physio-emotional catharsis associated with bodily secretions in the form of tears to bridge the gap between the rational and physical selves, of cognitive catharsis associated with the displacement of incorrect or inchoate notions, of procedural catharsis associated with judgment, sentencing, and clemency, and of political catharsis associated with Chief Justice McKean's final displacement or covering of the legal process in a way that reaffirmed the existing hierarchy. Together, these operations demonstrate the apparatus of judicial catharsis.

In Chapter 5, I address the implications and conclusions of the dramatisitic analysis of *The Trial of Alice Clifton*. She was convicted of murder but spared execution. She returned to the Bartholomew home as their slave, where she would remain for the rest of her life unless sold. The jury's petition for clemency and the judges' recommendation of mercy appear to have achieved the same result: the SEC agreed with them and Alice's execution was stayed. But whereas the jury personalized Alice and requested a pardon by attributing responsibility to the father of the child, the recommendation drafted by McKean depersonalized Alice and reasserted both her innate inferiority and status as a slave. Viewed together, McKean's jury instructions and post-conviction recommendation politicized the judicial process, first by focusing on the former concealment statute to justify a policy of bias against unwed mothers, and then by deploying stereotypes in the recommendation that justified racial hegemony. McKean made Alice a political scapegoat, thereby signaling to the community that the existing hierarchy need not

change because it was capable of justice and mercy in managing such crises. Alice was spared but not saved, pardoned but not freed. In the cathartic process of justice, mercy served mainly to reinforce the institutional hierarchy at a time of cultural change. She walked from the public trial to anonymous bondage. The pardon at once prevented and perpetuated an injustice.

Alice Clifton's trial, like all justice rituals, was inherently cathartic, not incidentally so, but that realization should not suggest either uniformity in cathartic trajectory or an objectively therapeutic process. Communities treat criminals more for their own benefit than for the good of the criminal, and not everyone suffers from the same dis-ease or responds to the medicine in the same way. Infanticide trials in particular create complex cathartic matrices. As Alice's case shows, more than one story can be true at the same time and the unification of a single verdict does not represent solidarity in attitudes.

CHAPTER 2. TEXT AND CONTEXT

In this chapter, I provide an overall summary of the case and a more detailed summary of the contents of the trial report and related clemency records. I then explore that content in the context of the law, early American criminal narratives, prevailing discourses of infanticide and rape, historical biography, and one of the most celebrated criminal cases of eighteenth century Pennsylvania: the infanticide trial of Elizabeth Wilson.

Summary of the Case

The Reporter

Edward Burd was the prothonotary, or chief scribe, of the Supreme Court of Pennsylvania in 1787, and his initials appear on the official record of conviction for Alice Clifton's case. It was most likely he who transcribed the proceedings for the trial pamphlet. Since transcription was neither required nor common at that time, the fact that Burd did so in this case suggests that Thomas McKean, as presiding judge and chief justice, either requested or approved publication. McKean's possible political motives will be discussed in Chapters 4 and 5, but the motive may have been purely commercial as well. Why would Burd have seen commercial potential in the trial of an obscure slave? The reason might lie in the fact that infanticide trials had always commanded public attention throughout the colonies. Not only were the cases interesting in themselves but they were capital cases, meaning that they frequently ended in public executions, enhancing their marketability. Further, Alice's case would be the first infanticide trial in Pennsylvania since the celebrated trial and execution of Elizabeth Wilson. Wilson's published narrative was widely read throughout New England and would remain a popular topic for decades. Burd may have hoped that Alice's case could become a sequel of sorts to Wilson's narrative.

Burd was a nephew of Pennsylvania Chief Justice Edward Shippen, with whom he studied law as a young man. He was a member of the Berks County Bar, practicing in Reading until 1776 when he joined the colonial army as a volunteer. He was captured at the Battle of Long Island in that same year. Despite being freed, his ill health kept him from re-enlisting. Instead, he continued his legal career, winning an appointment to the High Court of Errors and Appeals. In 1778, he married Edward Shippen's daughter Elizabeth, which likely was a chief motivation behind Burd's appointment by his uncle—now father-in-law—as Prothonotary of the Supreme Court of Pennsylvania, a position he held until 1805.

Despite his role as chief custodian of the court's written proceedings, Burd's words did not give him nearly as much lasting notoriety as his face. In 1820, Burd sat for a portrait by Charles Willson Peale, the celebrated American painter responsible for more than twelve portraits of George Washington. Peale gave the portrait to Burd's niece, Eliza Burd, on the occasion of her marriage to Peale's son Rubens. The portrait was exhibited at the Pennsylvania Academy of Fine Arts in 1822 and hung for a time at Peale's museum in New York (*ANB Online*).

The Case

As the probable narrator, Edward Burd prepared the trial report almost as if it were an official record, without an introduction or explanation, and with limited narrative interjections. The following historical summary is assembled from bits of information contained in the pamphlet and official records, supplemented with genealogical research.

In June of 1770, Alice Clifton was born a slave, the property of Edmund Milne of Philadelphia. Although a contemporary namesake of Milne had been a renowned silversmith whose clients included George Washington, little is known about Alice's master. His daughter,

Mary Milne, born in 1763, was seven years older than Alice. The two grew up in the same home. In March 1780, during the Revolutionary War, the Pennsylvania legislature passed An Act for the Gradual Abolition of Slavery. According to the Act, Alice, and all persons born to slave mothers prior to the passage of the Act, would remain slaves for the rest of their lives. But any children born after the 1780 Act, including any children born to Alice, would be their masters' indentured servants until they reached the age of twenty-eight, at which time they would be emancipated.

On 11 December 1783, three months after the formal conclusion of the war, Mary Milne and John Bartholomew married at Christ Church in Philadelphia. The couple apparently received Alice Clifton as a wedding gift. In 1785, John and Mary had their first of eight children, a boy whom they named after Mary's father, Edmund.

In August 1786, John Bartholomew opened a shop of some kind on the corner of Market Street and 2nd Street in Philadelphia. For three months, the family lived in a residence on Church Alley ("Church-alley" in the trial report) before moving into a home connected to the Market Street ("Market-street" in the trial report) store. Sometime in September, while the family was still at Church Alley, John Shaffer, a Philadelphia merchant with unknown connections to the Bartholomew family, "debauched" Alice for the first time. (Although the trial report refers to Shaffer's treatment of Alice obliquely as debauchery, Shaffer was later indicted for rape.) Shaffer sexually assaulted Alice multiple times while she lived with the Bartholomews at Church Alley. Alice soon recognized that she was pregnant. Shaffer instructed her to deny being pregnant and then to kill the baby when it came. Alice agreed; true to her commitment, she consistently denied being pregnant, even when challenged repeatedly by her master and mistress.

At the first of November, John Bartholomew moved his family to the residence on Market Street. Alice did not see Shaffer again. Around the second week of March 1787, Alice was injured when a large log fell on her waist as she tried to move a cord of wood. She was severely bruised and in considerable pain for several days but continued to work. Then, a few days before her premature delivery, she was again injured while trying to carry wood. On that occasion, John Bartholomew held a light for Alice as she went down the cellar steps. Alice either fell down the stairs or fell while lifting wood at the bottom of the stairs. After a few minutes she was able to get up and go back to work.

On the morning of 5 April, Alice got up as usual to start a fire for the family in the parlor. She strained herself while trying to lift a large log. The exertion caused great pain and induced labor. She managed to finish lighting the fire before retiring upstairs to rest. She discovered that the bedroom normally occupied by Mrs. Bartholomew's brother and other "boys from the shop" was empty so she lay down in the bed. She remained alone until Mrs. Bartholomew found her there at about 12:00 PM. Upon seeing Alice, Mrs. Bartholomew suspected that she was in labor and said so. Alice denied it, admitting only to not feeling well. Mrs. Bartholomew left her alone for about an hour. When she returned, she found Alice in the same condition and left her alone again. When she returned again she found Alice walking around the room, feeling somewhat better. Mrs. Bartholomew suspected that Alice had delivered a baby. Alice denied giving birth but asked Mrs. Bartholomew if she could borrow some old clothes. By this time, Mrs. Bartholomew had been joined in the room by her sister-in-law, also named Mary, and perhaps others from the household. They looked around the room for a baby, even in the fireplace, but found nothing. Miss Bartholomew searched the room directly across the hall. Inside a trunk, below a large roll of linen, she found a bundle consisting of a petticoat wrapped around a small

object, which she suspected might be a baby. She took the bundle to Alice and asked her what it was. Alice did not say anything, but she opened the petticoat herself, picked up the baby, and laid it beside her. Both Mrs. and Miss Bartholomew observed that the child was dead. Miss Bartholomew asked Alice if she had killed the baby, and she said that she must have lain on it and that she could not help it. Neither woman saw any wounds on the baby or blood in the area. They left the room and Alice was alone again. The Bartholomews notified the authorities. A coroner's inquest arrived shortly thereafter; they found Alice sitting on the floor with the baby. She repeated that the child had been born dead. When they examined the child, they discovered that its neck had been cut. Alice admitted that she had cut her baby's throat with a razor she found in the window. She was arrested and indicted for murder.

The Witnesses

Because Alice's was a capital case—murder—the Pennsylvania Supreme Court had original jurisdiction over the matter. For this reason, three of its justices presided over the general criminal court, known as the Court of Oyer and Terminer (French for “to hear and decide”) and General Gaol (jail) Delivery, for the trial held at Philadelphia on Wednesday, 18 April 1787.

Although Attorney General William Bradford and lead defense counsel Jonathan Sergeant probably gave opening statements to the jury, Burd did not record them. As an employee of the Supreme Court, he instead focused on the role of the court and the content of witnesses' testimony, which consisted in their answers to questions posed by the justices, lawyers, and unspecified members of the Supreme Executive Council (SEC), who were also present. If Benjamin Franklin—then President of the SEC—was present he was not mentioned by name. The questions came in no particular order, with no discernible separation between

witnesses for the prosecution or the defense, and with no distinction between direct examination and cross examination. Burd did not record closing statements by the prosecution or defense. However, he transcribed what appears to be the entirety of Chief Justice McKean's instructions to the jury. Burd's redaction of the lawyers' arguments narrows readers' interpretation of the evidence, focusing on the way it was contextualized by the Chief Justice. Compared with how the trial would have been experienced in court that day, Burd's editorial decisions altered the in-print presentation of the competing theories of the case. Burd bolstered McKean's speech, not only as the authoritative interpretation of the evidence for any subsequent readers but also as the rhetorical climax of the trial narrative.

Seven witnesses testified. Their names and order of appearance are identical in the published report and in the official docket book: John Leacock, Coroner; Mrs. Mary Bartholomew; Miss Mary Bartholomew; Samuel Bulfinch; Doctor Jones; Doctor Foulke; Nathaniel Norgrave, a member of the coroner's inquest; and Mr. Bartholomew. As was noted above, the trial did not proceed along distinct adversarial paths, nor was there any particular order to the questioning. Rather, judges, lawyers, and council members all asked questions randomly. Based on Burd's transcription, "Court"—probably McKean in most instances—generally asked the first question of each witness. Such an introductory question is implied but not recorded for four of the witnesses who begin testifying without a preceding interrogatory.

John Leacock. Coroner John Leacock answered twenty-one questions: thirteen from "Court," seven from "Council," and one from "Attorney-general" (William Bradford). Neither Sergeant nor Todd asked Leacock any questions. Leacock appeared to have arrived at the scene after other members of his inquest and to have taken a somewhat passive role in the investigation. He did not ask Alice any questions and it was not he who discovered the cut on the

infant's throat. He even admitted that the room was so congested with people that he was crowded into a corner, making it hard for him to hear at times. He heard Alice say that the child was born dead but also that she had cut its throat at the express command of the father, John Shaffer, for fear it might cry. He observed that the child was a female, had hair and nails, and appeared to have been viable. When Council wanted to know whether the child's father induced Alice to commit the crime, Leacock deferred to "Captain Bullfinch." The Court chided Leacock for not having made an examination in writing.

Mrs. Mary Bartholomew. Mary Bartholomew, Alice's mistress, answered fifty-seven questions: eighteen from the Court, six from Council, ten from Bradford, sixteen from Sergeant, and seven from Todd. She testified that she had suspected that Alice was pregnant about five or six months earlier but that Alice consistently denied it. Mrs. Bartholomew did not see Alice on the morning of her delivery but she assumed that it was Alice who had made a fire in the parlor before going back to bed in an upstairs bedroom. Mrs. Bartholomew first saw Alice at about noon and checked on her several times over the next couple of hours. The first time, Alice was lying under the covers; she denied that she was in labor, admitting only to feeling poorly. Mrs. Bartholomew returned about an hour later and found Alice in the same condition. She returned a third time about fifteen minutes later. Alice was walking around; she said that she felt better and asked for some old clothes to put on. Mrs. Bartholomew suspected that Alice had delivered a child; she looked for it in the closet and chimney but did not find anything. Mrs. Bartholomew's sister-in-law, also named Mary, found the baby in a trunk in another room and brought it to Alice. Mrs. Bartholomew did not see a wound on the child or blood in the bedding.

Burd interjected that Mrs. Bartholomew became upset while testifying and Mr. Bartholomew had to briefly speak on her behalf. He said that the scene in Alice's bedroom also so upset Mrs. Bartholomew at the time that she had to leave the room.

When Mrs. Bartholomew resumed testifying, she recalled that Alice was injured about a month earlier when she fell down the cellar stairs while carrying a log, resulting in severe bruising on her hip. Alice was injured again a few days before her delivery. According to Mrs. Bartholomew, Alice was in the bedroom directly above the parlor where the family were eating and that even though the door to the bedroom was open no one heard a baby cry. Alice went into the room that was normally used by her brother and the "boys of the shop." That room had two razors in the window.

Miss Mary Bartholomew. Miss Mary Bartholomew, John Bartholomew's sister and Mary Bartholomew's sister-in-law, answered twenty-seven questions: eleven from the Court, five from Council, three from Bradford, one from Sergeant, and seven from Todd. She testified that she found the child at about 2:00 PM. It was in a trunk in the room directly across the hall from where Alice lay, wrapped in Alice's petticoat under a large roll of linen. Alice opened the petticoat herself and laid the baby beside her on the bed. Alice said that she had killed the child by lying on it. Miss Bartholomew did not see blood or a wound but the child appeared dead. Miss Bartholomew left Alice alone for about ten minutes while she went downstairs to talk to her sister and send for the jury (coroner's inquest). When the jury arrived, Miss Bartholomew left the room.

Samuel Bullfinch. Samuel Bullfinch, referred to by Leacock as Captain Bullfinch, answered nine questions: six from Sergeant, two from the Court, and one from a member of the jury (the only recorded question directly from a juror). When Bullfinch arrived, Alice was sitting

on the floor, the child leaning over her arm, its head close to its chest. Alice said that it was her first child and that she believed that she had overlaid it. Although no wounds were visible on the child in its current position, Mr. “Naglee or Norgrave” (actually Norgrave) discovered that the child’s throat was cut. Alice said that she did it out of fear that the child might cry and because she had been told to do it by the child’s father, John Shaffer. Bullfinch saw no blood and believed that the baby had been washed before he saw it. Alice persisted in saying that it was born dead. Bullfinch thought that the baby appeared to have come to full term.

Doctor Jones. Dr. Jones (no first name provided) answered eighteen questions: two from the Court, fourteen from Bradford, one of which is more of an admonition not to repeat anything that Alice told him after the coroner’s inquest had left the scene, and three from Sergeant. Jones saw Alice a few minutes after the coroner’s inquest left and after Dr. Foulke had taken the child away to preserve it for further examination. Alice told him that the child was born dead, although Bradford objected to Jones having repeated the statement. He saw the child the next day and said that from its size and appearance he was convinced that it was not born alive, despite its throat being cut. He believed that the child died in the womb when Alice suffered injuries, first while carrying wood several weeks before delivery and then again more recently. He confirmed that a dead child could remain in the womb for a month or more.

Burd recorded that during Dr. Jones’s testimony, Mr. Milne, Alice’s original master, was called upon to confirm Alice’s age, which he said was two months shy of seventeen.

After he examined the child, Dr. Jones confirmed that its windpipe had been severed, side to side, a wound that it could not have survived if it had been born alive.

Doctor Foulke. Dr. Foulke (no first name provided) was the only witness to be “affirmed” rather than “sworn,” suggesting that he was a Quaker. He answered twenty-three

questions: nine by the Court, eight by Bradford, and six by Sergeant. Todd addressed the Court twice but did not ask a question.

Before Dr. Foulke arrived, several members of the coroner's inquest had already examined the corpse. Based on their observations that its throat was cut, Dr. Foulke made a preliminary determination that the child must have been murdered. The room was crowded, so he withdrew. After the inquest left at about 4:00 PM, he returned to the room and spoke to Alice privately. After speaking to her and examining the child's body, he became convinced that the baby must have been born dead. He referred to the time of conception, the time of delivery, the injuries to Alice during her pregnancy, the circumstances of the premature birth, and the physical appearance of the child. He preserved the corpse for further examination and offered to produce it for the benefit of the judges and jurors. In his opinion, his examination of the body was consistent with Alice's statement that conception occurred around the end of September. Alice also told Dr. Foulke that she delivered the baby while on her back. If true, even if the child had been alive at the moment of birth, it could not have survived the birthing position; it necessarily would have suffocated. Alice also told Dr. Foulke that John Shaffer was the father who, she said, persuaded Alice to kill the child.

It is important to note that Bradford initially objected whenever Dr. Foulke began repeating anything that Alice told him (Appendix A 194, 196). Bradford had done the same with the other key defense witness, Dr. Jones (191, 193). Bradford signaled the procedural reason for preventing them from relating Alice's story in his first objection to Dr. Jones: "You are not to relate what she said afterward, as that cannot be received as evidence" (191). By the time the doctors spoke to Alice that day, the coroner's inquest had already concluded, so anything she said thereafter would have been inadmissible as hearsay. The obvious irony was that the Act for

the Gradual Abolition of Slavery prevented her from speaking for herself in court because to do so would have been to speak against Shaffer. However, the Court intervened to ask Dr. Foulke about what Alice had told him. Bradford could not object to questions directly from the Supreme Court, so Alice's story was able to come in through Dr. Foulke.

According to Alice, Dr. Foulke revealed, Shaffer promised her that if she did away with the child he would purchase her freedom and treat her "as fine as a wife." If she did not do what he said, however, she would suffer immensely. Whether to overcome objections from Alice or to bolster his argument, Shaffer also told her that if she killed the baby, she would have nothing to fear because there was no God or devil or heaven or hell and that no one was smarter than he (Shaffer). He also admitted that in a prior relationship he had persuaded a milk-girl to do the same thing (i.e. destroy the baby when it was born). According to Alice, Shaffer first "debauched" her on the Bartholomew property around the end of September, sometime after they moved to Church Alley. Alice explained that about three weeks before her delivery, a large log fell on her hip. Then, two or three days before her delivery, she fell downstairs, an incident witnessed by her master. On the morning of her delivery, she strained herself while lifting a large log, which caused great pain and immediately hastened labor. After the baby was born, she and the baby lay still for half an hour. During that time, the baby neither breathed nor cried. Alice then took the child in her arms; she lifted its right eyelid but it fell down instantly. She suspected that the child was dead, but remembering her promise to Shaffer and fearing that it might cry and alarm the family, she took a nearby razor and cut its throat, deeply, to the bone, but very little blood discharged.

Dr. Foulke observed that the child was feeble and imperfect. It was small and its limbs were not fully developed. He guessed that it had died in the womb as a result of the injuries to

Alice and that it was delivered at about seven months. His opinion was based on his experience and by comparing Alice's child with his collection of corpses of other infants at various stages of development. As he spoke to Alice, she held the baby in her arms, stroking it and looking at it occasionally. She did not cry. But as Dr. Foulke prepared to take the baby away, Alice became sad. Dr. Foulke saved the child's body in a glass jar.

Burd reported that Dr. Foulke was asked to bring the specimen to the courtroom, which he did, along with forceps so that the body could be extracted from the jar and examined.

Nathaniel Norgrave. Nathaniel Norgrave, a member of the coroner's inquest, answered eleven questions: one from Council, three from Bradford, and seven from Sergeant. During the inquest, Alice told Norgrave that John Shaffer was the father. She gave birth while on her back. The baby was born dead, but she cut its throat with a razor because Shaffer had directed her to "pinch its throat." Alice said that Shaffer was married to Chevalier's daughter and that she had not seen him recently. Norgrave believed that the child had developed about seven months and that it would not have been possible for Alice to deliver while on her back as she said. He conceded, however, that children cry when they are born alive.

Mr. John Bartholomew. John Bartholomew, Alice's master, answered twenty questions that are recorded in the trial report and others that Burd refers to or summarizes. The Court asked ten questions, Bradford seven, and Sergeant three. Bartholomew and his family lived at the corner of Market Street and 2nd Street, which was where the incident occurred. He had been Alice's master for about three years; she was raised by his father-in-law, Mr. Milne.

Bartholomew moved to Church Alley about eight or nine months prior and stayed there about three months. By referring to receipts, he later confirmed that they went to Church Alley on 2 August and left on 1 November. For a few months, he owned the properties on Market Street and

Church Alley at the same time. He observed that Alice suffered two injuries before her delivery. First, about a month before, she fell while carrying a log; this accident occurred within Bartholomew's hearing. Second, about three days before, she fell down the cellar steps while carrying a log; Bartholomew witnessed this accident as he held a lit candle for Alice. He suspected that she was pregnant from her bulk, but she denied it.

Burd did not transcribe any closing arguments but instead recorded that “[t]he Council and Attorney-general having finished their pleadings, his Honor the Chief Justice gave a charge to the Jury” (204). McKean's instruction to the jury is examined in Chapter 4.

The jury deliberated for three hours before returning a verdict of guilty.

The Appeal and Petitions

Burd recorded how, on Saturday morning, when Alice Clifton was brought back to court to be formally sentenced, Todd and Sergeant appealed for a new trial based on the previously undisclosed prejudice of one of the jurors. Specifically, they alleged that on the day before the trial, one of the jurors—Edward Pole—stated that Alice must be guilty. Todd alleged that if this fact had been known to the defense at the time of jury selection, Pole would have been eliminated from the jury, either for cause or peremptorily. The court denied the motion and sentenced Alice to hang.

Burd concluded the report by recording that subsequent to the sentencing, Alice was granted a reprieve by the SEC. He did not explain how it came about. However, the SEC's unpublished clemency files contain two handwritten petitions in Alice Clifton's behalf (Appendix B). According to these records, on the same day as the failed appeal and formal sentencing, all twelve jurors, led by Edward Pole, signed a petition to Chief Justice McKean and his associate justices requesting that they seek a pardon for Alice from the SEC. The jurors cited

Alice's young age, inexperience, and their belief that she was "seduced to the perpetration of the said crime by the persuasions and instigations of the father of the child" (210). McKean, for his part, accepted the jury's petition and delivered it to Benjamin Franklin, then President of the SEC, adding a note of his own. Like the jurors, McKean referred to Alice's "tender years" (211). But instead of commenting on the actions or accountability of the child's father, McKean focused on Alice's "situation in life, being a Mute Slave, illiterate and ignorant" as justification for recommending her as "an object of Mercy" (211).

The Official Record

Only a few official archives pertaining to Alice Clifton's trial exist. Extant handwritten records, which have been microfilmed but never published, include a brief entry in the docket book, miscellaneous Pennsylvania Supreme Court papers, and clemency papers from the SEC. Because Alice was indicted for a capital crime, the Supreme Court had original jurisdiction. They empaneled the grand jury and presided over the trial court. The "Docquet of Oyer and Terminer and General Goal [sic] Delivery for the State of Pennsylvania Commencing April 1787" records that a grand jury of twenty men, which was convened on 16 April, returned a true bill of indictment charging Alice with murder. She was arraigned before Chief Justice Thomas McKean and associate justices William Augustus Atlee, Jacob Rush, and George Bryan she was tried before a twelve-man jury on 18 April. That same day, the jurors delivered their verdict that Alice was guilty of murder. The jury performed the additional task of assessing Alice's value as property—forty pounds—because of an unusual provision of Pennsylvania's Act for the Gradual Abolition of Slavery (1780), which required jurors in capital cases involving slaves to establish the amount that the state would reimburse a convicted slave's owner if the slave were executed.

The docket entry concludes with the judgment of the court that Alice should be “hanged by the neck until she be dead” (*General Gaol Delivery Dockets*).

The Supreme Court and SEC papers include the “Transcript of the Record of Conviction of Alice Clifton for Murder,” which was read into the SEC on 23 April 1787 (*Clemency File*). It consists of three handwritten, tri-folded pages. According to the record, Attorney General William Bradford, Jr. prosecuted the case; Alice’s defense counsel is not named. It records the state’s indictment against Alice, assembling allegations of fact into a narrative that aligned with the statutory elements of the crime: Alice Clifton was an unmarried slave; she became pregnant; she gave birth to a female child; the child was born alive; the child was legally a bastard; Alice, with malicious intent, took a shaving razor in her right hand and cut her daughter’s throat; the wound was four inches long and one inch deep and instantly caused the death of the child “against the peace and dignity of the Commonwealth of Pennsylvania.” To communicate how these facts can be understood in a more nuanced manner, I later compare and contrast the indictment with the prosecution’s case and the presiding judge’s charge to the jury.

The post-conviction “Petition of the Jury and the Recommendation of the Judges in Favor of Alice Clifton” was read into the SEC on 2 May 1787 (*Clemency File*; Appendix B). It consists of two short documents, one signed by the twelve jurors and the other signed by McKean and Atlee, with a statement affirming that Rush concurred with the decision but was not present at the time of signing. On the basis of the petition and recommendation, Benjamin Franklin and the SEC granted Alice a reprieve until the end of the next session of the General Assembly. Because the SEC did not take up Alice’s case again, the reprieve became permanent. She was never executed.

Factual revelations during the trial—specifically that Alice had been raped and that her rapist then directed her to kill the child—factored into the jury’s decision to petition for her pardon. As cited above, they found it “more than probable” that Alice had been “seduced to the Perpetration of the said Crime by the Persuasions and Instigation of the Father of the Child” (210). Those same facts formed the basis of Bradford’s subsequent pursuit of an indictment against John Shaffer, the accused rapist. On 12 February 1788, McKean and Bryan convened a grand jury, which issued an indictment for rape against Shaffer. Three days later, the trial took place in Philadelphia, with Bradford again leading the prosecution. The jury acquitted Shaffer on the rape charge. As a practical matter, they could not have convicted him due to the lack of legally admissible evidence as described below. However, the jury convicted Shaffer for unlawfully fleeing to avoid being prosecuted for the rape. Shaffer’s flight probably explains the eight-month delay following Alice’s trial. An acquittal on the substantive rape violation and a conviction on the more procedural charge may seem like a contradiction, but the partial victory actually suggests that the jury may have recognized Shaffer’s factual guilt for the rape but that the law at the time did not allow them to convict him of it because his victim—the only witness—was a slave who, by law, could not testify against him. Shaffer was sentenced to pay a surety bond in the amount of one-thousand pounds, along with five-hundred pounds from a third party, to ensure his good behavior for a period of three years.

The Trial Pamphlet

As a physical artifact, the trial-report pamphlet known as *The Trial of Alice Clifton, for the Murder of Her Bastard-Child* comprises fourteen densely-printed pages of a sixteen-page booklet published without attribution in Philadelphia shortly after the one-day trial (entitled *The Trial of Alice Clifton* in this edition, Appendix A). The remaining two pages of the original

pamphlet contain another summary—*The Trial of James M'Glochlin, for feloniously entering the house of James Byrne*—and a brief description of Fredrick Erdman's acquittal for burglary.

These last two cases occupy pages fifteen and sixteen of the pamphlet and may have been included as filler to complete the printer's four-by-four page printing format.⁴ The pamphlet's contents are not reproductions of official records, nor are they part of an organized legal digest of court decisions. Such law reports for legal professionals were not issued in the United States until 1789.⁵ Rather, the pamphlet was published and sold for popular entertainment. But it was unlike most early American criminal narratives. According to historian Daniel Williams, writers, preachers, and publishers of crime stories and gallows literature tended to select information, whether factual or otherwise, and arrange it into a coherent—if not accurate—narrative that established clear causal connections between conduct and consequences, thereby making crime and punishment comprehensible to average readers; by laying out linear relationships between disparate events, they imposed structure on disruptive social experiences (Williams, *Pillars of Salt* x). Unlike such literature, *The Trial of Alice Clifton* is largely a transcription of the trial as it unfolded in the courtroom and not a heavily mediated narrative. With the exception of some editorial redactions and summaries as described above, the report provides insight into the different theories of the case and the different interpretations of the evidence. These theories are assembled on unstated narrative structures through the question-and-answer format of witness testimony. Readers can assume the role of secondary jurors in a real criminal case and not just primary consumers of a mediated popular pamphlet.

Yet, even though *The Trial of Alice Clifton* presents itself as a quasi-verbatim trial transcript, it still demonstrates sensitivity to market pressures and prurient interests in true-crime literature. The descriptive title, which also serves as the first line of the text, demonstrates its

opportunistic appeal to popular appetites for true-crime literature. The word *Murder* spans a full line, its massive font dwarfing the surrounding text, boldly advertising the infanticide tragedy. In my analysis, I reveal the unintended irony of this de-facto titling: it presupposes that Alice's child was murdered and that the trial neatly resolves the simple question of fact as to her obvious guilt. The publisher's propaganda concealed the true stasis, or central issue of fact in the case: Was there even a murder? That is, if Alice's baby was stillborn as she claimed, she could not have killed it. Further, even if the facts showed that Alice was the agent of a mortal wound, did the fact of her being an unmarried slave, along with the evidence of her being sexually abused and psychologically coerced, affect her criminal liability? As I show, evolving perceptions about the broader social questions and the particular circumstances of Alice's pregnancy may have altered the presiding judge's choice of law in order to control the outcome.

The Law

Race and Slavery

Although "black" and "slave" were not synonymous in early Pennsylvania and the other American colonies—in that not all black people were slaves—race was always inextricably connected to slavery, and by the late eighteenth century all blacks suffered from the taint of racialized slavery, legally and socially. In historical records, the distinction between free blacks and slaves was not always clear, a problem reflected in subsequent historical research, which does not always distinguish between the two.

The first Africans forcibly removed to North America held the same status as other indentured servants, including whites brought from Europe and Native Americans captured in the colonies (Friedman, *A History of American Law* 85). Indeed, slavery was not yet defined in the law and did not exist in England; the colonies created it to satisfy the growing appetite for

perpetual free labor. It was peculiarly associated with blacks. At the end of the statutory period of indenture, Europeans were released. Even Native Americans could generally expect eventual release, but blacks were retained. Since the law did not yet countenance slavery, it had to catch up with the emerging cultural practice. Slavery in America evolved into the innovation of legalized human property, a new form of categorical, race-based bondage. It happened neither instantly nor uniformly, but by the end of the seventeenth century, the result was a new and definite legal status that led to taxable, inheritable human capital (86).

Not even God could save Christian blacks from slavery; the original notion that Christians should not be slaves gave way to the need for more legal protections for slave owners.⁶ The newly defined slaves could not vote, own property, or legally marry. Changing circumstances exposed technical gaps in the slave codes. For example, it was one thing to place chains on the offspring of slave parents, but what about the offspring of a free father and slave mother? According to English legal tradition, bastard children of freemen, though illegitimate, were still free. To avoid the legal and social complications associated with probing into the paternity of children born to slaves, the colonies developed another new legal theory. As early as 1662 in Virginia, the law was changed so that children of slave mothers would themselves be slaves, regardless of the race or status of the father (86). One of the intended effects of this change was to maximize masters' property increases, even if by physical abuse. An unintended but inevitable secondary effect was the redefinition of race: one could be legally black and a slave while having a free white father and few or no physical markers.

As the economy became more dependent upon human property, the law became more dependent upon racial differentiation. And as the law codified racism, the legal and social position of all blacks deteriorated (89). There were many freed slaves in the colonies in the

eighteenth century, and the laws against them became increasingly harsh, reducing them to half-slave status in some parts of the country. Legal historian Lawrence Friedman summarizes the downward spiral toward generalized discrimination that grew out of racialized slavery: “Law and society debased this class and used their low status as an excuse for further debasement” (89). This ancillary debasement of blacks became rooted to the social ground outside the institution of slavery, forging chains that emancipation would not break.

Consistent with the attitudes of most white citizens in other colonies, Pennsylvanians assumed the innate inferiority of all blacks (Rowe, “Black Offenders” 686). Despite a long-standing and eventually successful abolitionist movement in the state, free blacks were excluded from public life and prohibited from activities available to whites (689). Those opposed to abolition argued, among other things, that blacks were habitually criminal and congenitally violent (688). Ironically, these racist assumptions meant that blacks were frequently held to a lower standard in judging criminal conduct; officials even condoned some varieties of crime, presuming such behavior was inevitable among blacks (687). In 1705, Pennsylvania passed An Act for the Trial of Negroes, creating special courts to deal with crimes committed by blacks, slave and free. A new state constitution in 1776 left the status of blacks unclear, but, because of reduced activity in the courts during the Revolution, the changes had little impact.

The 1780 Act for the Gradual Abolition of Slavery resolved residual ambiguity about the status of blacks in Pennsylvania, at least in terms of the law. It became a model for other abolitionist movements, codifying the notion that all “inhabitants of the . . . earth [are] the work of an Almighty Hand,” even though different “in feature or complexion,” and that “those who have lived in undeserved bondage” should move toward “universal civilization” by having their sorrows removed (Statutes at Large of Pennsylvania from 1682 to 1801, vol. X, 1779-81). An

important concrete step was its call for Pennsylvania's "black brethren" to be granted "the common blessings they were by nature entitled to" including "equal justice." Specifically, all blacks and mulattos, whether slave or free, had the right to be "adjudged, corrected and punished in like manner as the other inhabitants of [the] state." On its face, this law was both a significant aspirational step toward equality and an important procedural protection. But the attitudes of many toward blacks—slave and free—did not change with the change in the law.

After 1780, the dominant discourse of white patriarchy and its prevailing ideology of black inferiority persisted along with the remnants of legalized slavery. The influence of that ideology was distinct from the individual actions of specific actors; that is, even though the existing order established the social lens through which characteristics and conduct would generally be judged, it did not predetermine individual attitudes and choices within that order. Still, the criminal justice system in place at the time of Alice Clifton's trial ensured that even though she technically would be tried in the same courtroom as white male defendants, she would experience due process through racial and gender filters: those who decided her fate were all white men. Despite the 1780 Act, Pennsylvania law still specified that jurors would be men, selected from the rolls of property ownership, thereby ensuring that they would be white (Pennsylvania Charter and Laws, 100, 1682). Further, despite its progress in leveling the scales of justice for blacks, the Act prohibited slaves from testifying against free men, thereby limiting slave victims' access to redress and protecting accused whites from justice (Section 7). Finally, the law in Pennsylvania and throughout America prevented women from practicing law and serving on juries.⁷ So just as she had been at the time she gave birth, at trial Alice was "silent and alone" (Appendix A 205). She was silent in the sense that she could not speak for herself because testifying against the free white man who had raped her would violate the 1780 Act. And she was

alone in the sense that neither her race nor her gender was represented among those who would determine her fate in court that day.

Infanticide Statutes

Special infanticide statutes contributed to the underlying sociolegal designation of unmarried mothers and their offspring as illegitimate. America inherited its infanticide laws from England. In the seventeenth and eighteenth century, those laws exemplified the inherent inequalities of many capital crimes as they were defined and enforced, distinguishing between wed and unwed mothers. Strictly speaking, the infanticide law applied to unmarried women was not really a homicide statute at all; it was a law against concealing the deaths of bastard children by their unwed mothers. Concealment might begin during the pregnancy itself, when the mother would hide her condition; persons around her might never know of the child's eventual birth, thereby concealing its entire existence. These laws were enacted primarily to address the social costs associated with bastard children and the inherent difficulty in proving infanticide (Rowe, "Infanticide" 202-3). The original law in England was 21 James I, c. 27 (1624), a law "to prevent the destroying and murdering of bastard children." It became the law in Pennsylvania and throughout the American colonies by the eighteenth century and dictated that mothers of stillborn bastards must die unless they could prove with at least one other witness that the baby was born dead:

[I]f any woman . . . be delivered of any issue of her body . . . which being born alive, should by the laws of this realm be a bastard, and that she endeavor privately . . . either by herself or the procuring of others, so to conceal the death thereof . . . whether it were born alive or not, but be concealed: in every such case the said mother so offending shall

suffer death as in case of murder, except such mother can make proof by one witness at least that the child . . . was born dead.

This law, which remained unmodified in Pennsylvania until the end of 1786, essentially operated as a murder statute without the element of murder. A conviction required the prosecutor to prove only that the defendant was the mother, that the child was a bastard, and that the death or stillbirth had been concealed. Since the stigma of illegitimacy drove unwed women, including slaves like Alice who had been raped, to conceal both pregnancy and childbirth, they rarely had attendants to aid them in giving birth or to serve as witnesses to corroborate a stillbirth. And even though an unattended birth would likely have increased the risk of non-violent infant mortality, the law presumed that any stillbirth or natural post-partum death involving an unwed mother was equivalent to homicide. Simply speaking, an unmarried woman was presumed to have had a live birth. If she alleged a stillbirth, she would have to prove it “by one witness at least”; otherwise, having presumably concealed the child’s death, whether it occurred naturally or by violence, her deed warranted execution under the law (202). If the mother was married, however, she would be prosecuted under the traditional homicide statute. She was presumed innocent and would not need a corroborative witness. Instead, the state would first have to prove that the child was born alive. The choice of law under which a woman would be prosecuted would have a material impact on the direction and outcome of such cases.

Perhaps to ease the harshness of strict interpretations of the concealment law, juries began to require some evidence of a live birth or the mother’s intent (Bradford, *Enquiry* 39; Appendix A 206). For example, they might seek to learn whether the mother demonstrated appropriate “maternal affection,” which the defendant could show by preparing linens and clothing for the infant (Hoffer and Hull, *Murdering Mothers* 68-9). This so-called “benefit of

linen” as evidence of maternal affection would become an issue in Alice’s case. After she delivered, but before the baby was discovered, Alice asked Mrs. Bartholomew for some old clothes to put on (Appendix A 182). Her lack of preparation other than this request could have been construed as evidence of premeditation or of premature miscarriage; that is, since the baby came suddenly, after only seven months, she did not have time to prepare linens. Likewise, observations by witnesses about whether she cried and, if she cried, whether her tears were for the loss of her child or for her own fate—thus showing natural maternal affection—became an issue (Rowe, “Infanticide” 221).

In September 1786, almost seven months before Alice was criminally charged, Pennsylvania codified its revision to the concealment statute, bringing the law into closer alignment with the complex practical realities. Under the revision, concealing a dead bastard baby would, in theory, no longer “be sufficient evidence to convict the party indicted without probable presumptive proof is given [sic] that the child was born alive” (Pennsylvania Statutes at Large, XII, 1786). The state now had the obligation to offer probable presumptive proof that the child was born alive. Alice’s case would be the first tried under the new law. The indictment against her reflected the statutory change by alleging that Alice’s child was born alive, an element that the state would now have to prove. Even though it emphasized the illegitimacy of her child, the indictment alleged that she caused its death and not merely that she concealed its corpse.

Early American Criminal Narratives

Just as Alice’s trial came at a time of social and political revolution, the pamphlet about her trial came at a time of literary evolution. American crime literature began with the printing of religious sermons preached at public executions. Using the prisoners’ despicable deeds and

imminent deaths as object lessons, preachers turned the gallows into a pulpit from which to exhort the community. Both the execution's ritualistic killing and religious ceremonial preaching were designed to reinforce the powers of Church and State. As historian Daniel Williams expresses, "The gallows was a symbol of order, and those who mounted it were there to legitimize the power of those who erected it" (*Pillars of Salt* 11). Execution sermons were nearly as popular as executions. The texts were frequently printed and sold. Whether their popularity grew out of humble piety or morbid curiosity, execution sermons formed the foundation of early American crime literature and influenced trends in popular culture (4; Cohen, *Pillars of Salt, Monuments of Grace* ix). Death sells, and cases ending with the prisoner being "turned off" the executioner's ladder also tended to turn up in print—either in a sermon or newspaper notice—more frequently than cases that ended in acquittal or a lesser sentence (Harris, *Executing Race* 8). Although Alice's case resulted in a death sentence, it did not end with an execution. Still, a publisher believed that the trial had enough public appeal to become a pamphlet, perhaps in anticipation or in lieu of a hanging that did not happen. Regardless, the story of a young slave secretly slaughtering her infant daughter apparently gave someone a marketing opportunity. The fact that the pamphlet did not achieve wide distribution or require subsequent reprinting suggests that public interest in Alice's case declined when the gallows did not go up.

Pennsylvanians' interest in crime grew out of their general interest in law. From the early years of the state, publishers regularly printed details of legislative changes and civic controversies. By the late 1720s, they began to chronicle crime and criminals, with newspapers providing limited coverage of the general criminal courts, the courts of Oyer and Terminer, as described earlier in this chapter (Marrietta and Rowe, *Troubled Experiment* 158-159). Around the same time, execution sermons began appearing, followed by the occasional inclusion of "last

statements” by the condemned (158-159). Initially, the last statements, or dying speeches, were generally confessions scripted by the preachers to reinforce the theme of the sermon. Social historian Sharon Harris describes how the criminal was often told that "God had selected her to play out the death role in this public drama: she could not escape death, but . . . earlier humiliation for the exposure of her crime [could be] displaced by her new role as penitent” (*Executing Race* 35). The defendant’s mortification and subsequent confession would not only acknowledge the sin by publicly turning away from it, but would also demonstrate the eternal justness of the law and the power of the preacher in eliciting the redemptive confession.

Public interest in the lives of the criminals and what they had to say grew quickly. Preachers and publishers adapted. And “whether their motives were spiritual or commercial, ministers and printers who attached confessions, interviews, and eyewitness accounts to published sermons established conventions of documentary reportage that would endure into the modern era” (Cohen, *Pillars of Salt* 10). Even though the factual integrity of many of these accounts ranged from suspect to absent, they gave a forum to many individuals who would otherwise be excluded from public discourse, specifically women and minorities. Harris considers the irony of disenfranchised women finding influence through deviance:

[R]esponses to criminal acts are as much about controlling public discourse, especially by unruly women, as they are about meting out punishment. Yet, in all times, a few notable women find alternative ways to influence the political anatomy, to challenge the systemic erasure of their self-authorization, and to influence a legal system that willingly punishes them but bans them from participating. (67-68)

Criminal narratives were among the exceptions to this general exclusion of women and minorities from colonial literature in America (Cohen, *Pillars of Salt* 78-9). Through the

pamphlet about her trial, Alice's was one female voice that emerged despite a system designed to silence her. Her case is all the more intriguing because her story appears to have influenced others even though she never opened her mouth in court; her story had to be repeated by "competent" witnesses.

The adversarial nature of trials made trial reports inherently more democratic than traditional execution sermons. Within the limits of legal procedure, and accounting for unavoidable editorial discretion, trial reports presented criminal contests in their social contexts. Trial advocates embedded legal theories within narrative structures designed to persuade jurors and judges. The most compelling courtroom themes found eager secondary audiences through publication, their popularity likely linked to cultural affinity. The theme, story, or version of events that most closely aligned with community perceptions would generally carry the day with jurors and then would generate interest with the general public who consumed them in published form. In this sense, the trial began to reflect and feed community attitudes on a host of issues, which may or may not have been directly related to the cause of action in the legal case. Friedman describes the thematic connection between the courtroom and Main Street: "[A]rguments presented in trials are often important clues to what stories count as good, or true, or compelling stories, within a particular culture ("Law, Lawyers, and Popular Culture" 1595). Of course, early American juries did not represent a cross section of the broader community—limited as they were to white, property-owning males—so written reports also enabled variability in the perception of truth through their mass distribution to diverse consumers.

Alice's case and its outcome suggest that disparate versions of the same facts can be perceived as simultaneously true. In the pamphlet about her trial, readers were permitted to see competing interpretations of the same evidence showing how she could be both culpable and

pitiable. As print media, the pamphlet is an example of how mediation by lawyers began to replace the traditional mediation by clergy in gallows literature; as such, the content of the discourse became both more complicated and richer. The public learned, or were at least permitted to glimpse, that there was more than one way to view a tragedy and that the definitions of good and evil do not always fit conveniently into social perceptions or essentialist constructs of the law. In Alice's case, the defendant could also be a victim. And if so, was it then possible that other accused criminals might also be victims in some fundamental way?

Consistent with the trial-report genre, the pamphlet about Alice's trial generally tracked the procedural flow of the actual trial, a format that was relatively rare in the eighteenth century. Verbatim and quasi-verbatim narratives as trial reports and their offspring did not broadly replace other forms of criminal narrative until the nineteenth century (Cohen, *Pillars of Salt* 26). Trial reports were the logical next step in the evolution of the production and consumption of true-crime literature. The public had grown dubious of narratives manipulated by the offenders themselves or by the clergy who condemned them, both sides having a vested interest in their respective versions (28-29). Trial reports filled the gap, "not by suppressing ambiguity and disagreement, but by providing a literary vehicle designed to present and fairly evaluate competing factual accounts and legal interpretations of disputed events" (28). *The Trial of Alice Clifton* conveys the case's complexity, ambiguity, and competing versions of facts and law. Readers find themselves in the position of the jurors who convicted Alice and then requested clemency in her behalf. By supplying the underlying facts of the case, the pamphlet provided a potential platform for community debate about some of the major ideological questions of the day, including the status and treatment of slaves, abusive sexual norms, and infanticide.

The Discourse of Infanticide

Although special infanticide laws evolved to address the problem of unwed pregnancy, and setting aside particular legal classifications of potential criminal actors and potential victims, infanticide is, at its factual core, simply homicide. Yet the incongruity of maternal infanticide—where the life-giving mother becomes the destroyer of her own offspring—challenges fundamental notions of racial survival and social responsibility, especially in a patriarchal order that depends upon the cooperation of mothers for both. Maternal infanticide historically has been represented as incomprehensible, an unnatural crime in its domesticity and subversive attack on patriarchal reproduction (Heinzelman, “Going Somewhere” 74). An act that would be viewed as reprehensible for a father becomes inconceivable when committed by a mother, not only because maternal infanticide violates human expectations for “natural maternal affection” but also because it violates a woman’s biblical obligations to husband and child. Mothers were long seen as symbols of the Church and the nation, and women who killed their bastards—as defined by the law at the time—were threats to the republican experiment in colonial America; the Word and the Law were inexorably melded in so far as religious discourse permeated legal discourse (Harris, *Executing Race* 28). Ironically, the submission required of women to their fathers and husbands undermined attempts to clearly establish their moral agency in criminal acts such as infanticide. Opposing camps conducted a war of interpretation regarding the agency of “the bad mother figure,” simultaneously defining them as fully responsible moral agents and as victims of individual men and of patriarchal society (Ashe and Cahn, “Child Abuse” 84). Could women both have agency and be submissive to the men in their lives?

In the eighteenth century, the question of agency implicated gender and race, and the ideologies of both informed the discourse of infanticide and the constructions of evidence and

guilt (Harris, *Executing Race* 28). So strong were the combined social pressures on women to be chaste and obedient that throughout the eighteenth century almost no one would ask why a woman felt that murdering her child was her only option when giving birth outside of marriage. Women had no legal capacity to shape the laws that were designed to control the most intimate aspects of their lives, nor could they always control the circumstances of conception. But they could sometimes control whether a pregnancy was discovered or whether the baby would survive. In response to this potential for agency, bastard concealment laws reasserted a degree of patriarchal control over female reproduction. The laws and their selective enforcement defined deviance not only based on conduct but on immutable characteristics and individual status. These legislative responses “expose[d] cultural attitudes toward women in general, toward women’s sexuality more specifically, and equally toward racial dynamics. Infanticide became a gendered crime in the late seventeenth and eighteenth century” (26). The criminal calculus was not only gendered but economic. Infanticide laws, like criminal laws in general, expressed then-current standards of morality and became vehicles for economic and social engineering and barometers of hierarchies of power (75). Because of their clearly stated goal to excise certain cancers from the community, these laws are important evidence of how the ruling class diagnosed the disease. As such, infanticide laws and prosecutions provide historians of criminal justice with evidence of the status of women and servants and how communities addressed the perceived problem of unmarried, pregnant females (Rowe, “Infanticide” 200).

Sociolegal solutions to unmarried pregnancy generally focused on the unwed mother. Throughout British North America, with few exceptions, women alone bore the burden of fornication, as well as its potential outcomes and subsequent illegitimacy. Evidence of the tragic, indirect costs of disparate legal scrutiny can be found in the fact that, all too frequently, unwed

pregnant females chose suicide in addition to infanticide (204). Harris identifies race as an additional aggravating factor and how sociolegal responses to infanticide varied greatly if the defendants were of African or Native American descent: “Between 1670 and 1780, black women were found guilty of. . . infanticide at a rate one and one-half times that for white women, despite the fact that blacks (men and women combined) constituted only 3 to 4 percent of the New England population” (39). Although, these statistics do not strictly distinguish between free and slave blacks, most of the women of color who were tried for infanticide were either slaves or indentured servants (39-40).

Pennsylvania matched other colonies in incidence of crime and severity of enforcement. It certainly was not the peaceable kingdom of William Penn’s “Holy Experiment” as it has been portrayed by many early historians (Marrietta and Rowe, *Troubled Experiment* 1-5). Rates for violent crimes such as homicide (including infanticide) were comparable to the rates in North Carolina, which had a reputation for being particularly violent. Infanticide was considered an especially serious crime in Pennsylvania and it was prosecuted aggressively (Rowe, “Infanticide” 201). The problem of unwed pregnancy and aggressive infanticide enforcement had a disproportionate impact on the most vulnerable defendants. With few exceptions, the women tried for infanticide or bastard concealment in Pennsylvania’s courts were young, sexually inexperienced, uneducated, passive, and dependent (222). Such pitiable circumstances were not lost on juries, which frequently acquitted defendants despite sufficient evidence to satisfy the low threshold of the concealment law (222). In Alice’s case, she fell into a legal and cultural gap that, in light of Chief Justice McKean’s instructions to the jurors, gave the jury little room for acquittal. They were, however, able to request an executive pardon, which saved her from the noose.

The Discourse of Rape

The fact that Alice had been raped was addressed only obliquely in the trial, not so much out of subject-matter delicacy but rather out of sociolegal blindness; neither the law nor the culture openly acknowledged the dark reality of slaves being sexually violated by white men. In a culture in which rape in general was both pervasive and invisible, sexual attacks on enslaved women went largely unreported, unacknowledged, and un-remedied (Block, *Rape and Sexual Power* 1, 241). Although Alice's clemency papers do not openly disclose the abusive circumstances of her pregnancy, her case was still an exception to the general rule that slave victims had no redress. Bradford eventually put Shaffer on trial for rape. Although Bradford failed to get a conviction, his efforts called attention to the specific case and raised awareness of the broader issue of slave victims being prohibited from testifying as witnesses in their own rape cases. So unusual was the occurrence of a white man being held to account in a racially charged slave-rape case that the trial took place "before a great crowd" who pushed and shoved until "one of the windows was broke" (Marrietta and Rowe, *Troubled Experiment* 143). Bradford probably knew that a conviction was not possible. Years later, he formally expressed his frustration with the law that practically assured acquittal by excluding the only possible evidence—the testimony of rape victims who were slaves (*Enquiry* 44).

In early America's person-as-property economy of slave labor, one would expect to see bias on display throughout the justice system. Available historical records suggest that criminal proceedings resulted in disparate treatment for blacks and whites. Although race was not always discernible in the records, slaves could usually be identified due to the absence of surnames, and they were significantly overrepresented as rapists and underrepresented as rape victims (Block, *Rape and Sexual Power* 13-14). Court dockets in early Pennsylvania did not always specify the

status of blacks so it is not possible to establish accurate statistical patterns regarding outcomes for free blacks versus slaves (Rowe, “Black Offenders” 704). In contrast to the relative underrepresentation of blacks in general as victims, legal authorities openly advocated the protection of white women. Coincidentally, McKean—father of six daughters and the presiding judge in Alice’s infanticide case and Shaffer’s rape case—made impassioned pleas on behalf of white rape victims. In one case, he referred to the “virginal innocence” of an eighteen-year-old white rape victim, and in another he lamented that “mothers, wives, sisters, daughters cry out for justice” (Block, *Rape and Sexual Power* 182). He is not known to have made any similar comments in cases involving free-black or slave victims, including in Shaffer’s prosecution for raping Alice Clifton.

Even without the additional handicap of institutional bias, rape was difficult to prosecute. Part of the difficulty came from the fact that rape was a capital crime in Pennsylvania from 1718 to 1794, making it hard for juries to convict when the facts of the case resulted in the perception that executing the defendant would be an extreme result. But most of the challenges stemmed from cultural attitudes about sex, race, and gender roles, which influenced the law, both as written and applied. As in other areas of the law at that time, doubts tended to be resolved in favor of men. For example, conception was considered a defense to rape instead of possible evidence of it. The reasoning was something like this: conception requires orgasm; orgasm is pleasurable; pleasurable intercourse is consensual; thus, conception equals consent (Marrietta and Rowe, *Troubled Experiment* 140). This after-the-fact definition of consent is not the only example of how the law and cultural norms privileged men. Men’s racial and class identities permitted them to coerce sex, redefining coercion into the appearance of consent, while women’s identities made them vulnerable to elite white sexual aggression (Block, *Rape and Sexual Power*

4). Respectable women were expected to resist all illicit sexual advances, but men were expected to be sexually aggressive, giving men the opportunity to redefine temporary resistance as eventual consent. Women were unreliable witnesses—and in the case of slave women, incompetent witnesses—to their own resistance, making it difficult to prove rape (12).

For slave women, respectability was not contemplated and acquiescence was expected; physical violence was not necessary for white males to dominate slave victims. Their peripheral social standing made enslaved women especially vulnerable to the kind of verbal abuse that coerced what was considered to be consent for sexual abuse. Sharon Block cites the example of Rachel Davis, a young slave who was repeatedly raped by her master, William Cress. Cress's social standing permitted him to tell Davis what she must do; racial privilege was as overpowering as superior physical force. Phrases such as "He said I must" succinctly captured the social reality for Davis and similarly situated women. Verbal commands functioned like physical violence, creating the appearance of consent as it was interpreted at the time. (239). In the case of Alice Clifton, John Shaffer used similar language to not only coerce sex but to instigate infanticide: "[He] had persuaded her to do it . . . and [said] that he was to marry a fine woman . . . and that if she did not do [what he said] she should suffer immensely" (Appendix A, 22). Perhaps in recognition of the futility of Alice's position, neither the attorney general nor the Court ever asked the witnesses whether she resisted.

Historical Biography

Alice Clifton

Without these hearsay glimpses of Alice Clifton's life she would have remained one of the "erased women" of early America. Her only appearance on the public stage came during her murder trial. The portrait of Alice that emerged from the trial pamphlet is illuminating but

incomplete. She was the household slave of Philadelphia merchant John Bartholomew. She had been a wedding gift from Bartholomew's father-in-law, who had raised her. Although not explicitly stated in the pamphlet, the content and circumstances suggest that she was the only servant in the household. Under uncertain circumstances, she came into contact with John Shaffer, also a merchant in Philadelphia. When Alice was sixteen, Shaffer began coercing sex from Alice; she soon became pregnant. Shaffer directed her to conceal her pregnancy and then cut the baby's throat when it was born; she did both. After being pardoned, she would have returned to the Bartholomew's home. Because she was born prior to the passage of the Act for the Gradual Abolition of Slavery in 1780, Alice most likely would have remained a slave for the rest of her life. Whether she survived the outbreaks of Yellow Fever that claimed so many or lived to see the next century is not known as this trial is the only historical mention of her life.

Additional details about what kind of life Alice lived can be gleaned from histories about early Philadelphia. By the end of the eighteenth century, Philadelphia was an intellectual and social center and would become the interim capital of the newly established United States in 1790. It became a battleground over what the new Republic would look like. As the newly independent Americans implemented principles of Enlightenment, they confronted the conceptual problem of women and blacks, slaves in particular (Lyons, "Sex Among the Rabble" 183-84). Those conceptual problems persisted through the Constitutional Convention, just weeks after Alice's trial. Had she eventually been hanged, George Washington and the other delegates might have witnessed the execution. The black population of Philadelphia rose steadily from about 150 in 1684 to nearly 2,500 in 1790, about five percent of the population, divided almost equally according to sex. That number included native-born blacks and those who had been imported from the Caribbean or directly from Africa (Gross, *Colored Amazons* 13). Most were

the property of merchants and lived with their owners. Beyond the moral degradation of their status, most of Philadelphia's slaves led hard, isolated lives; persistent hunger and susceptibility to disease resulted in a mortality rate fifty percent higher than European Americans.

William Bradford

Where Alice Clifton's life was that of an anonymous slave, William Bradford began life as the namesake descendant of famous pilgrims and patriots and died young while serving as United States Attorney General in George Washington's administration. Although he had become a successful prosecutor after serving in the Revolutionary War, he is perhaps best known as an effective and persuasive writer, not surprising given his education at Princeton University alongside classmate and future president James Madison. Such skills were central to the rhetorical education he would have received both in lower and higher schooling. Bradford eventually employed his communication skills in advocating changes in the laws that he had formerly executed. He became a critic of the overly expansive application of capital punishment in general and in cases of bastard concealment in particular. His writing aptitude was recognized early by his professors and peers. At Princeton, he achieved distinction for his elegance in English composition (Dwight, *Life and Writings* 3). After serving briefly in the Continental Army during the war, he returned to law. In 1779, at age twenty-five, the SEC appointed him attorney general of Pennsylvania, a position he held for eleven years before being appointed associate justice of the Pennsylvania Supreme Court. His experience as a prosecutor and his studies in philosophy equipped him for a special assignment from the governor in 1792 to examine the appropriate bounds for the use of capital punishment. The result, *An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania*, gained lasting notoriety and prompted revisions in the Pennsylvania Penal Code, restricting capital punishment to cases of

murder and high treason. The law passed in 1794, the same year that Washington appointed Bradford to his cabinet. His persuasive, well-reasoned writing also was credited with helping to suppress the Whiskey Rebellion. The fact that “the dignity of the state was maintained, while conciliation was secured, were chiefly from the pen of Mr. Bradford” (4). Like many of his generation, he survived the Revolution only to succumb to Yellow Fever, dying in 1795. One diarist noted the solemnity of the cortege for the young Revolutionary hero: “The bells muffled this morning for William Bradford, Attorney General. He died near Frankford—the funeral passed by our door—perhaps 20 carriages attended” (Drinker 275).

Bradford’s first-hand experience with the tragedy of crime and the potential excesses of its enforcement contributed to his moderate tone in shaping legislative revisions. In his *Enquiry*, Bradford called for a more enlightened approach to civic punishments in post-Revolutionary America: “[S]anguinary punishments, contrived in despotic and barbarous ages, have been continued when the progress of freedom, science, and morals renders them unnecessary” (5). For Bradford, the only appropriate role of human punishment was the prevention of crime; a criminal should not be put to death merely to avenge the wrongs of society in general or of any individual in particular. Indeed, no form of punishment can “recall past time [or] undo what is already done,” so if the offender can be prevented from repeating the offense, or if others can be deterred others from its commission by any means short of capital punishment, the lesser punishment should be preferred (5-7). From personal experience, Bradford also observed how the severity of a potential death sentence could affect jurors’ appetites for a conviction in the trial or the likelihood of a pardon thereafter. Either exception—unwarranted acquittal or executive pardon—undermined justice on the merits and as deterrence: “[It is] doubtful, whether capital punishments are beneficial in any cases, except in such *as exclude the hopes of a pardon*. . . .

[T]he imagination is soon accustomed to over-look or despise the *degree* of the penalty, and that the *certainty* of it is the only effectual restraint” (9).

Bradford reserved special criticism for the bastard concealment law, which he viewed as morally abhorrent, legally inconsistent, and ineffective in practice. In his view, the essential role of good government in a civil society was to preserve innocent life, even if doing so required the execution of deliberate killers. Although he did not believe that capital punishment was necessary, even in cases of intentional murder, “it were better that ten such atrocious criminals should suffer the penalty of the present system, than that one worthy citizen should perish by its abolition” (35-36). Yet, Bradford could not justify a law that equated concealment with murder, in part because proof of concealment was not proof of murder; nonetheless, there was no differentiation in sentencing: “Whatever be the punishment inflicted on the highest degrees of murder it ought to be *widely* different from that of every other crime” (36).

Bradford saw how the “horrid severity” of the concealment statute affected defendants and jurors. An infant could die from many non-violent causes, especially in an unattended birth to an inexperienced mother. An unwed mother delivering alone could never legally prove a stillbirth and a death due to natural causes was treated as a homicide anyway. She was forced to either “reveal her shame”—a phrase that itself says all that needs to be known about the cultural context—or else attempt to conceal the death, whether due to stillbirth, natural causes, or homicide. In Bradford’s thinking, if society wanted to make concealment an executable offence, it should do so transparently and not borrow evidence from one crime to convict on another: “To make the concealment a capital crime is one thing: but, to say, that when the concealment is proved, the jury must, at all events, believe the murder to be committed—is a very different one” (40). As a result, jurors began the “humane *practice*” of requiring some proof that the child was

born alive (39). By the time of Alice's trial, the exceptional practice of requiring evidence of life had been written into the statute. However, as prosecutor in that case, Bradford did not offer any medical experts to counter the doctors who testified that Alice's child was stillborn; instead, he advanced evidence of concealment—in addition to the marks of violence—as proof of murder.

Thomas McKean

Alice's trial was not the first that Bradford had prosecuted with Thomas McKean on the bench, nor would it be his last. And even though they would eventually serve briefly together on the Pennsylvania Supreme Court, they came from different generations and their records suggest that they held differing views on social issues. McKean was certainly not the only Founding Father to risk his life for the cause of human liberty while living as a lord over human property, yet he was one of a relative few who served in positions from which they could effectively transform slavery from a peculiar practice into a legal entitlement. Like many Scotch-Irish Protestants, he accepted slavery, both from the bench as an influential jurist and at home where he personally owned black servants (Rowe, *Thomas McKean* 232). As a practicing lawyer and then as a judge, he helped slave owners reclaim their runaways and affirmed the contractual property rights of owners of human property. He also promoted the American legal innovation that slave bastards followed the condition of their mothers rather than becoming their fathers' free-born but illegitimate children, as it was in the English system (232). This new legal theory meant that not only were slaves property, not persons, but that the owner derived the benefit of the increase in his property, whether it resulted from consensual intercourse or physical abuse. Slave bastards became part of the owner's inheritable estate, whereas under English villeinage (slavery in the feudal system), bastards were freeborn but ineligible for their father's inheritance.

McKean not only supported the institution of slavery but he openly expressed his personal reservations about a black person's ability to function in white society (232). For example, in the 1786 case of *Respublica v. Negro Betsy*, just ten months before Alice's trial, McKean denied an effort to free the slaves of an owner who had failed to comply with the 1780 Act for the Gradual Abolition of Slavery. Because the Pennsylvania Supreme Court did not have a quorum at the moment, a final decision was deferred until September 1789, five months after Alice's trial. Not only did McKean remain steadfast in his defense of the slave owner's rights, but he justified it by suggesting that blacks were better off with white masters than if freed:

If [the Negro Betsy] were discharged from her Master, she would be incapable to take care of herself, and her parents are unable to educate her: she cannot suffer so much by living with a good master, as being with poor and ignorant parents, by a contrary judgment, she . . . would be little benefitted to her master, who hitherto has derived no advantage from her services, and has been subjected to considerable expenses for her food, clothing, and lodging, would be a great sufferer; so that the balance on this consideration seems, likewise, to preponderate on the side for which I have declared my opinion. (Dallas, *Reports of Cases* 471-472)

McKean's reasoning is revealing, especially since he was not required to give any. He could have limited his decision to a strict interpretation of the law. Instead, he insists that not only is the slave best served in slavery but that the master would be "a great sufferer" if he were deprived of his investment. McKean's associate justices, who were with him on the bench in Alice's case, did not agree. They dissented and the slave children of the master were freed. McKean's attitudes as reflected in the *Negro Betsy* case provide insight into an analysis of his recommendation to the SEC in the Alice Clifton case, as discussed in Chapter 4.

Elizabeth Wilson's Legal and Literary Wake

When Alice entered the public stage as the defendant in a murder trial, she did so in the legal and literary wake of Elizabeth Wilson, an unwed white woman hanged for killing her twin daughters. Although much of Wilson's notoriety was based more on myth than fact, hers was the most sensational murder case in Philadelphia during the late eighteenth century (Lyons, *Sex Among the Rabble* 371). She was convicted in 1785 and eventually executed in 1786. According to a pamphlet published following her execution, sometime after her trial she claimed that the twins' father had actually been the one to kill them. *A Faithful Narrative of Elizabeth Wilson* became one of the most widely read criminal narratives in early America. Her case's relevance to Alice Clifton's is not just subject-matter similarity or even sequential coincidence. Wilson's case demonstrates the power of myth to fill a factual vacuum and create an influential social perception capable of altering cathartic trajectories. Further, although Wilson was convicted of murder, not concealment, her posthumous narrative may have contributed to changes in the concealment statute, or at least may have accelerated the change, and at a pace beyond the willingness of judicial role players like McKean to absorb and accept. While it is not possible to quantify the extent to which the case and its accompanying popular representations influenced public perceptions, at a minimum, the ballad of Elizabeth Wilson was the sentimental song of seduction and betrayal playing in the background when Alice was tried, convicted, and pardoned.

Wilson's case began in December 1784 when the dog of an unidentified passer by discovered the bodies of two female weeks-old infants under some brush by the side of the road. *The Pennsylvania Journal* (5 January 1785) and *The Independent Gazetteer* (8 January 1785) printed identical reports indicating that the unnamed mother, who had been seen nursing the children near that spot sometime before they were discovered, was charged with their murders.

She denied killing her daughters but admitted leaving them by the side of the road in hopes that someone might pick them up and care for them.

Official records of the Pennsylvania Supreme Court and SEC show that Wilson was indicted for murder, but not until 27 June 1785. According to the “Transcript of the Record of Conviction,” Elizabeth Wilson gave birth to two girls, legally bastards, on 1 October 1784. Then, “on the thirty-first [sic] day of November,” Wilson, with “malice aforethought,” placed her daughters “in the cold air on the ground . . . without any sustenance or covering,” where they languished for twenty hours before dying (*Clemency File*). The trial did not occur until 17 October 1785. According to the record, the trial confirmed the facts as stated in the indictment with no indication of a defense. The jury found Wilson guilty, and when she was offered the opportunity to say something on her own behalf, she declined. She was sentenced “to be hanged on Wednesday the 7th of December ‘85.” Even though the extant clemency file does not contain any other documents, a temporary stay of execution must have been issued by the SEC before 7 December because Wilson was not hanged until 3 January 1786. The SEC file contains no indication of a second stay.

On 14 January 1786, both local newspapers again published identical reports, this time regarding Wilson’s execution. The story makes no mention of a dying speech by Wilson or an execution sermon by any of the preachers who attended her while she was in prison. Nor does the newspaper report a dramatic, last-second appearance by Wilson’s brother with a reprieve from the SEC. Shortly after the execution, however, *A Faithful Narrative of Elizabeth Wilson* was published at Chester, Pennsylvania, containing a version of Wilson’s story that bore little resemblance to the official record. But it immediately became the predominant if not preferred collective recollection of the case and would be reprinted at least three times before the end of

the year. It would make its way around the colonies and remain in print for years. Wilson's "faithful narrative" contained representations that Wilson did not make during the trial or at the gallows and that contradicted the story she had told since she was first arrested. In the posthumous narrative, allegedly as told to her preachers, Wilson's infant daughters did not die because she stripped them and abandoned them; they died because their father, a previously unknown man named "Deshong," stomped on their chests while pointing a loaded gun at Wilson. In the published narrative, Wilson's loyal brother only learned the truth about the infants' real killer just before his sister was to be executed. In that version, he raced to Philadelphia and obtained a temporary stay so that he could investigate the mysterious Deshong. Wilson's brother claimed to have uncovered evidence to corroborate his sister's story but, regrettably, he was delayed in returning and mistaken about the exact date of his sister's rescheduled execution. He obtained another stay from the SEC and galloped to Chester, arriving just minutes after Elizabeth had been launched into eternity; the narrative poignantly claims that she died in his arms.

Just as the outcome of Wilson's trial demonstrates how the absence of a defense narrative facilitates conviction, her *Faithful Narrative* demonstrates the power of myth to influence attitudes and actions. For example, whether coincidental or inevitable, the Pennsylvania legislature passed long-sought revisions in the infanticide statute that September, seven months before Alice Clifton's trial. Wilson's narrative also demonstrates how myth can reshape memory and history. For example, a private diarist like Elizabeth Drinker might be excused for accepting *A Faithful Narrative* as factual, but it is harder to accept the fact that someone personally acquainted with the case, like Charles Biddle, could abandon his actual experience in favor of a popular tract that was "[d]rawn up at the request of a friend unconnected with the deceased" (*A Faithful Narrative* title page).

Biddle was vice-president of the SEC at the time of the trials and clemency proceedings of Elizabeth Wilson and Alice Clifton. Although he never referenced Alice's case in his personal writings, his experience in both matters would have influenced his later reflections on infanticide cases in general, and he was a well-positioned witness and participant in the clemency process. Yet, he did not record his recollections of the Wilson case until long after her sentimental narrative had become a fixture of popular culture. His recitation of the events proves him to be an unreliable fact witness who, openly relying on Wilson's popular narrative rather than official records and contemporaneous newspaper notices, places himself in the story.

Biddle served on the SEC from October 1785 to October 1787. As vice president, his position was equivalent to lieutenant governor to the president of the SEC, who at that time was Benjamin Franklin. Biddle's autobiography, summarized here, describes how in the spring of 1786 a young white woman named Elizabeth Wilson was condemned to die for murdering her bastard children. Her brother, William Wilson, came to Biddle at the SEC with a petition for a stay of execution. Based on his meeting with Wilson, Biddle became convinced that Elizabeth was innocent. A mister "D," Sheriff of Sussex County, New Jersey, had seduced Elizabeth and was the father of the twins. After they were born, he visited her, led her into the woods, stomped on the girls, and threatened to kill Elizabeth if she ever told anyone what he had done (Biddle 199).

According to Biddle, the SEC reviewed Wilson's petition and he immediately granted a respite—or stay of execution—for 30 days to enable Wilson to go to New Jersey to get proof that "D" had been in Philadelphia with Elizabeth and was, in fact, the real killer. But Wilson got sick and was delayed. He returned to Philadelphia on the day of Elizabeth's execution, mistakenly thinking that he was a day early. He went to Benjamin Franklin's house, but despite his

entreaties, could not convince Franklin to give him a note to the Sheriff to delay the execution. Rather, Franklin sent Wilson to Biddle, who immediately wrote a note for Wilson to give to the Sheriff directing him not to execute Elizabeth until the SEC could reconvene.

Although he had no personal knowledge of what Wilson allegedly did after their meeting, Biddle dramatically describes how Wilson, still ill, galloped off, the fresh note in his hand, down bad roads for an hour and a quarter, before arriving just minutes after Elizabeth had been “turned off” the executioner’s ladder. He then describes another scene that he could not have witnessed: “What a dreadful sight for an affectionate brother! They immediately cut her down, but although every means were used they could not restore her to life” (Biddle 199-201). The following editorial footnote appears in Biddle’s autobiography:

A full detail of the unhappy event will be found in a tract entitled, “A Faithful Narrative of Elizabeth Wilson,” who was executed at Chester, January 8, 1786, charged with the murder of her twin infants. . . The wretch for whose crimes she suffered called himself Joseph Deshong, and first met her at the Cross-Keys Tavern, in Chestnut Street, Philadelphia, where then lodged. The murder was committed in East Bradford Township, Chester County. Her trial came off on the 17th October, 1785, before Judge Atlee; the respite did not reach the ground till twenty-three minutes after she was turned off. There is no doubt that the poor girl was innocent. (201)

That Biddle would so closely align himself with the sentimental narrative about Wilson is an indication of its persistent credibility and marketability. Meredith Peterson Tufts challenges the reliability of Biddle’s account and the legend that grew out of Wilson’s narrative, arguing that it lacks both historical and logical consistency (“A Matter of Context” 149-176). Tufts identifies a number of problems with Biddle’s version. First, it was written 30 years after the fact, resulting

in factual errors, possibly due to memory gaps. For example, Biddle indicates that Wilson's trial took place in the spring of 1786 instead of the winter of 1785. He could otherwise be excused for confusing the dates by a few months, but, in this case, the alternation may have been intentional and not accidental since the minutes of the SEC meetings on 5-6 December 1785 do not show Biddle as being present. The discrepancy is material since it was at this time that Biddle claimed that Elizabeth's brother William had appealed to him personally at the SEC. Finally, William did not die shortly after Elizabeth as Biddle describes.

Tufts suggests that:

it was precisely the historically amorphous, indeterminate nature of Elizabeth Wilson's identity that enabled different authors to shape her story to their own purposes and allowed her to become variously an example of redemption through faith; an emblem of motherhood in the new republic; and a seduced and abandoned innocent serving as a moral lesson for succeeding generations. (151)

William Bradford, who prosecuted Elizabeth Wilson and Alice Clifton, articulated the emotional ambiguity of such cases from a legal perspective in his *Enquiry*: "If death is the punishment of the mother, what punishment is too severe for the villain who seduces, and afterwards abandons the wretched mother?" Yet, if he had been sympathetic to Wilson, he could have proceeded under a charge of murder, knowing that the evidentiary burden would be much higher, making an acquittal more likely. Further, unlike Charles Biddle and his reconstructed memory based on sentiment, William Atlee, the associate justice who presided over Wilson's trial and sentenced her to hang, apparently did not come away from the experience with any sympathy for Wilson. He wrote to his wife on the night of the trial (not years later or after the publication of Wilson's narrative) that he "had the disagreeable task this morning of pronouncing the sentence of death

on two poor wretches . . . [one] a wicked abandoned woman for the murder of her two infant children—twins—a few weeks old at the time of her perpetrating the horrid deed (William Atlee to Esther Atlee, *William Augustus Atlee Papers*).

The tendency exemplified by Biddle to view women, especially young women, as objects of compassion or pity was a particularly strong social dynamic from 1780 to the end of the century (Rowe, “Infanticide” 222). Both the “literature of seduction”—essentially cautionary tales warning single women of the moral dangers of the city—and the rising image of the Republican wife and mother were premised on social concern for virtue in citizens of the new republic (Tufts, “A Matter of Context” 175). By contrast, if there was potential for Alice’s story to be a cautionary tale, it may have been more to warn society of the dangers of institutional bias than to warn single women of the dangers of sexual promiscuity. As a member of the person-as-property class, she could never be a citizen, much less an ideal republican wife and mother. Yet despite Alice’s inferior legal status, her trial contained the kind of particularized narrative that Wilson’s lacked. Wilson had given no judicial defense, no counter-narrative, and therefore no opportunity for the community to settle upon a sense of meaning or resolution. Wilson’s posthumous narrative filled the factual gap and claimed a new center of emotional gravity for the otherwise incomprehensible criminal crisis. Wilson’s *Faithful Narrative*—even if it was her narrative—contrived a story in which she was deprived of agency over her fate and that of her daughters, making her satisfyingly sympathetic to audiences; if the legal case was wrongly decided, popular culture would set the record straight and lay blame at the feet of the mysterious Deshong. After all, how could any mother choose to do what she was accused of doing? Alice’s personalized story, on the other hand, demonstrated her actual lack of physical and legal control over her own life and body, all of which complicated judgments about her premeditation or

volitional conduct within the essentialist narrative contemplated by law. The legal conclusion to her trial apparently did not resolve the real issues in her case so extralegal clemency and a subsequent indictment of Shaffer were necessary to partially correct a potential injustice.

Wilson was the last person executed for infanticide in eighteenth-century Pennsylvania (Rowe, “Infanticide” 209). According to Tufts, even though her narrative may have lacked factual integrity, it drew attention to a persistent problem:

In life, she was not the wronged innocent whose moral misstep proved tragically fatal, but was one of thousands of women of the “lower sort” who lived difficult lives under staggering burdens of gender-based social and legal disability. Nonetheless, Wilson’s portrayal in the popular press gave an identity and a human face to one of these disabilities: the unjust concealment statute. (175)

Wilson’s narrative gave her a sympathetic identity in death that she did not deserve in life, and if it gave voice to an exculpatory story, it is a story that she did not raise in court but could have. Alice Clifton would be the next unwed woman to face possible execution for infanticide, and the next face of women with legal disabilities. Unlike Wilson, even if Alice wanted to raise her voice in court, she could not. And even though the concealment statute had been revised, the shadow of its legacy would cloud the deliberations of her case.

CHAPTER 3. THEORETICAL CONSTRUCTS FOR ANALYSIS

In this chapter, I introduce the concept of judicial catharsis, more as an apparatus than specific process, and I demonstrate its application in resolving an instance of criminal crisis during an era of institutionalized bias. The crisis was the allegation that Alice Clifton committed infanticide. The bias arose from the existing sociolegal order that defined her as an enslaved, unwed mother of a bastard baby. The language of the law provides the grammatical structure for labeling certain actions as criminal within a community. Even though the legal elements of infanticide have changed over time, American culture has always defined it as a crime requiring judicial resolution. To be resolved, infanticide must be represented within the symbol system of the law and its institutions. A story of the infanticide must be told so that the law can judge it—that is, conclude the story, identify the defendant-actor, and label her action as criminal and punishable. As a story aligned with the law, a representation of infanticide merges the rhetorical and aesthetic potential of language, persuading with technical information packaged in creative, imaginative, and expressive narratology. Judgment in the form of a verdict—declaration of truth—ideally is not only final but ethical, bringing both a sense of moral conclusion and a perception of emotional cleansing. These performative legal narratives invoke the concept of dramatism, or the analysis of language as modes of action and cathartic resolutions. This dramaturgical view of catharsis occurs in the Aristotelian tradition of audience engagement in emotional cleansing. Witnessing dramatic tragedy—or imitations of actions in which a main character experiences great suffering because of a flaw, moral weakness, or extreme circumstances—produces a release of emotions that restores them to equilibrium. Kenneth Burke develops the theory of dramatism and extends Aristotle's interpretations of dramatic catharsis to include civic contexts and individual expressions, all of which are contemplated under the

umbrella of judicial catharsis. No judicial outcome can alter past actions, but representations and judgments of past actions can resolve them to the extent that they alter present perceptions of past actions through completion, redefinition, and transcendence.

Infanticide is a special kind of social problem, and institutional bias complicates its ethical resolution by redefining the crime according to human characteristics and circumstances rather than universal proscriptions and individual misconduct. The criminal-justice system—by which I mean the social infrastructure deployed to apprehend, judge, and punish violators of the moral or penal code—is inherently cathartic in that it processes, resolves, and brings to an official conclusion imbalances and ambiguities resulting from individual wrongs. I do not view judicial catharsis as a new or discrete cathartic process, but rather as the authoritative apparatus for channeling other cathartic forms through judicial action, especially in trials and their associated proceedings. Defining the concept of judicial catharsis requires an amalgamated theoretical foundation based on dramatism, including symbolic action and narrative theory, and catharsis, all within the context of the institutionalized grammar and rhetoric of the law. Since Alice’s trial occurred during a post-Revolutionary era of well-defined institutional biases, it provides an opportunity to imagine judicial catharsis within the stark rhetorical, diagnostic, and curative applications of resolving criminal crisis amidst turbulent social change.

As Chapter 2 demonstrates, Alice Clifton was indicted for violating a special homicide statute, specifically, a recent revision of an existing law relating to infanticide by unwed mothers (Pennsylvania Statutes at Large, XII, 1786: 284). Although I will argue that she may have been improperly convicted under the lapsed prior version of the law (21 James I, c.27, 1624), the key for the moment is that she was found guilty of murder and sentenced to hang. The law did not specify whether the primary purpose of her execution would have been to ensure that she did not

kill again, to deter other similarly situated young women from killing their infants, to alleviate the community's collective anxiety about the crime, or merely to punish her. Although differing views on the utilitarian and retributive theories of justice may have been contemplated, the sociolegal context suggests that murderers were executed not primarily to prevent future crimes or deter future criminals but because murderers deserved to hang and the state deserved to watch. The law simply stated that "the said mother so offending shall suffer death." A state-sanctioned, ritualistic killing, visible to all, somehow resolved an unlawful killing witnessed by no one. Regardless, the men charged with implementing the law in Alice's case ultimately did not agree with the men who had enacted the law; they sought to pardon and not kill her. Whether because they doubted her guilt, or because they doubted whether she had sufficient agency to be legally culpable, or because they questioned the proportionality of the sentence, for some reason, they decided that the sentence prescribed in the infanticide statute would not resolve this issue for them and they did not feel comfortable in carrying it out. The judicial outcome was not the proper—or complete—cure for the real dis-ease as they had come to perceive it. Alice's personal narrative as presented in the trial seems to have complicated rather than clarified the meaning of the four-inch gash across the nameless baby's neck. Although the circumstances of the crime and those of its procedural resolution were all real, historical events, they were not real in the same way. Only the nonverbal actions of conception, birth, cutting, and death represented properties of the natural, physical world. The law itself, as enacted, institutionalized, and executed at trial, were rhetorical actions, products of the symbolic reality created through the deployment of symbols. But seizing and publicly hanging a person would have extended the symbolic ritual of final judgment into the physical reality of irrevocable execution. Condemning and then pardoning Alice—symbolically taking her to the edge of death and then restoring her to life—

hybridized the resolution, somehow offering satisfaction to those hungry for eye-for-an-eye justice as well as those inclined to mercy.

In this critical edition of the *The Trial of Alice Clifton* and the attendant clemency documents, I use the context of Burke's theories of dramatism to explore how the law functions as symbolic action and reveals the apparatus of judicial catharsis, creating a hierarchical subset of language's symbolic reality that enables the essential but ever-illusory promise of redemption through public ritual. By establishing biased civic ideals regarding the status of different persons, the law at Alice's time moralized not only certain conduct but certain characteristics and circumstances into categories of guilt that required individual and institutional resolution. Just as "murder" was a physical act defined and prohibited by the law, "slave," "unwed mother," and "bastard" were concepts created by the law with distinct sociolegal consequences. Collectively, they created what dramatism would consider an inherently biased symbolic reality that defined and adjudicated infanticide according to a moralized social hierarchy, which could, in some circumstances, require judicial actors to balance between enforcing the law as written and defending the institutions of the law. This kind of balancing may explain the hybrid outcome in Alice's case. Burke's dramatism enables twenty-first century readers to identify the motives behind the modes of action as manifest in this eighteenth-century law, its argumentation, and its resolution. Because the law at that time was beginning to transition toward gradual emancipation of slaves and away from bias against unmarried women in infanticide cases, its execution in Alice's case provides an opportunity to view various sources of individual and communal disease channeled through the cathartic apparatus of the criminal justice system to resolve the particularized narrative of one slave mother accused of murder. Dramatism enables human comprehension of law's full range of symbolic action, from its grammar that defines and judges

social action, through its poetics that express collective ideals, to its rhetoric that invites identification with a social order that has power over redemptive rituals. In this sense, judicial catharsis should not be viewed as an alternative mode of persuasion or a new process of catharsis but rather as the official apparatus that includes every mode of persuasion and every symbolic resolution, whether individual or civic, formalistic or sacrificial.

Language and Law as Symbolic Action

Burke's dramatism derives from his definition of humans⁸ as the symbol-using animals. Human-created symbol systems, including language, are responsible for much of what we mean by 'reality' (*Language as Symbolic Action* 5). Language, of which law is a particularly moralizing subset, is a symbol-based mode of action—not just a tool—which creates ideas, concepts, and images of identity and community (2, 15). Dramatism asserts that drama is implicit in all human action, and that a form of catharsis is implicit in all drama (18). From this foundation it can be inferred that law, a linguistic terminology and infrastructure, is symbolic action in which drama and catharsis are implicit, not merely incidental. But first, it is important to summarize Burke's calculus of symbolicity; humans are

- the symbol-using (symbol-making, symbol-misusing) animal[s],
- inventor[s] of the negative (or moralized by the negative),
- separated from [their] natural condition by the instruments of their own making,
- goaded by the spirit of hierarchy (or moved by the sense of order), and
- rotten with perfection (16).

Taken together, Burke's axioms suggest that humans differentiate themselves from their world and each other through the creation of moralizing symbol systems that at once infer ideals of social order and the inevitability of disorder. Since Burke's dramatism focuses on motivation—

as revealed through choice—he views humans’ creation and use of symbols as evidence of their dual nature, merging their physicality and their symbolicity, connecting the nonverbal world with the verbal. In that limited sense, language functions as sets of labels or signs for negotiating the world (5). Like all forms of language, law can be analyzed grammatically as publicly shared motivations for naming and judging human actions. Exchanging shared symbols not only permits persons to navigate the nonverbal world and communicate with each other, it enables them to shape their social reality and enhance their knowledge and awareness of the world far beyond the limited sliver of reality that we each experience firsthand (15).

As a specialized terminology, law, like history, augments human understanding beyond what one’s physical senses could otherwise absorb. That is, language enables historians who did not experience past events to describe and interpret those events for others; likewise, language enables lawyers to assemble and narrate interpretations of matters about which they have no personal knowledge for others to judge. For example, in *The Trial of Alice Clifton*, the prosecution and defense bring the circumstances of past events to the present awareness of persons in the courtroom who otherwise might not have known about them; they then place those events in procedural contexts that did not previously exist. In doing so, these judicial actors are not merely holding up a mirror to label the physical world; they become transcendent, creative subjects in a new symbolic sphere that is oriented to the physical world but distinct from it. Burke explains this relationship by describing how words are more like screens than mirrors: “Even if any given terminology is a *reflection* of reality, by its very nature as a terminology it must be a *selection* of reality; and to this extent must function also as a *deflection* of reality” (45). Although not theorized with lawyers in mind, Burke’s notion of “terministic screens” has special relevance to what lawyers do, given their specialized nomenclature that necessarily

directs audiences' attention into some directions rather than others (45). Opposing lawyers attempt to persuade by openly providing different interpretations of the same subject matter. Burke compared this kind of terministic screening to the creation of different photographs from the same subject using different filters and techniques (45). One key difference between the work of lawyers and that of photographic artists is that unlike "competing" photographs of the same subject, between which audiences can choose which interpretation they prefer, competing legal arguments require judges or jurors to decide not only which interpretation they prefer but which one is "true." In Alice's case, for example, the prosecution's terministic screens directed attention to her failure to prepare swaddling as evidence of her intent to kill whereas the defense directed attention to her premature, traumatically induced delivery to show that she would have had no time to prepare clothing. The terms they employed reflected the motives behind their messages and affected how the new reality was perceived or reconstructed in the courtroom. The ambivalence of the trial's outcome—conviction, then pardon—suggests that portions of both versions may have been accepted as true.

Symbols can label or signify the natural world—such as *bird* or *flower*—but they also augment the natural world by representing abstractions, including characterizations in the social world—such as *friend* or *foe*—and products of the purely symbolic world—such as *guilt* or *innocence*. Symbols implicate the idea of the negative, which does not exist in nature. Symbolic negativity occurs on one level in the sense that symbols can never be what they represent; their addition to the universe is a product of human symbol systems (9). More important, however, at least from a legal and dramatic perspective, is the negative's inherent potential to create unattainable ideals of perfection that lead to unfilled expectations from which the notion of guilt arises. Since the negative is pure symbol, it is "a *principle*, an *idea*, not a *thing*" (10). As such,

the implied perfection of the negative resides only in the mind. When applied to symbols representing the physical world, the negativity gap between the ideal and the real is largely qualitative; the mind can always imagine more than the physical world can deliver. But when applied to purely symbolic abstractions, characterizations, and concepts, negativity moralizes the gap: individually and collectively humans fail to live up to their own ideals. Some of negativity's ideals operate as expectations or injunctions. Although people may not be able to generate a perfect "idea of nothing," they can perfectly understand the "idea of no" (10), even if it is only through their perception of its opposite. That is, they understand what it means *not to kill* in relation to their understanding of what it means *to kill*. A sense of guilt fills the gap created by the unfulfilled expectation of the negative. As a result, the way in which a symbol system defines its ideals and expectations defines or contributes to the inherent guilt implied by those ideals. Religion and law are obvious sources of these definitions, as well as the associated "spirit of hierarchy" or "sense of order" (16).

According to the "principle of perfection" that is implicit in the nature of symbol systems, the creation of an ideal implies the creation of the "not ideal" (17). Just as the negative alienates humans from the natural world, it moralizes them by implying what every ideal is not. The notion of *justice* can only be understood in juxtaposition with its opposite, which is *injustice*. The law empowers itself to strive for justice by defining and regulating injustice; the amorphous ideal cannot be imposed so the invented opposite must be avoided. For example, "peace" cannot be attained but "conflict" can be controlled. The dissonance between justice and injustice goads humans into social hierarchies in the quest for a sense of order (15). Order becomes the surrogate for justice by defining deviance and then purging it, as when the law creates a new crime and

punishes it. Humans' unquenchable desire for unattainable perfection, which is implicit in the nature of any symbol system, ultimately settles for a quest for perpetual order.

The law contributes to the symbolic universe by formalizing the approved hierarchies and ideals of social order, calling citizens to observe and obey those ideals. Written constitutions and their subordinate enactments, like all definitions, are symbolic acts, but hold a privileged place because they are enforceable by the power of the state (14). Burke refers to legal constitutions in a broad sense, representing formalized legal enactments in general, all of which have an anticipatory and dramatic effect on social interaction: "A legal constitution is an *act* or body of acts (enactments), done by agents (such as rulers, magistrates, or other representative persons), and designed (*purpose*) to serve as a motivational ground (*scene*) of subsequent actions, it being thus an instrument (*agency*) for the shaping of human relations" (*Grammar of Motives* 341). These collections of enactments define and transcend social differentiations, serving as motive and justification for future actions. Burke's analysis of constitutions tracks his dramatic pentad, or his five key terms of dramatism concerned with attributing motives to human thought in the world as they experience it (xv). These five key terms are act, scene, agent, agency, and purpose. In deploying them, he queries how any deliberative body, including those involved in legal judgments, settles upon the meaning of events outside their own experience (xv). Since third-party experiential meaning is not self-evident, Burke's pentad provides the interpretive framework for deciphering and bridging the gap between an event and the creation of meaning within an audience by evaluating the ratios among the pentad.

As a practical matter, Burke says that to address the question of meaning in a symbolic system, one "must have some word that means the act (names what took place in thought or deed), and another that names the scene (the background of the act, the situation in which it

occurred); also, [one] must indicate the person or kind of person (agent) performed the act, what means or instruments he used (agency), and the *purpose*” (xv). Act, scene, agent, agency, and purpose are the grammar of symbolic interaction, and life experience constitutes the palette from which rhetorical artists, such as judicial actors, select symbols to compose drama and reveal motive by enhancing, shading, defusing, and labeling events in order to achieve a rhetorical objective. According to Burke, motivations behind the application of judicial doctrines offer one of “the best illustrations of the concerns we place under the heading of Grammar” (xviii). Because criminal justice concerns itself with not only actions but also motives, Burke’s pentad can reveal the “how” and “why” behind the law as written, enforced, and adjudicated.

Bias in the law—that is, codified discrimination for or against individuals or classes of persons—reveals a hierarchy’s motives regarding a preferred social order. Bias also judges characteristics or circumstances before judging conduct. It establishes a hierarchy of ideals that create notions of guilt based on status that affects determinations of guilt based on actions. For example, an infanticide statute that treats women differently depending upon their marital status must necessarily judge their status before it can judge their crime. Bias, enacted or codified in this way, articulates the “not ideal;” it need not be inferred from the creation of the ideal. In that sense, unmarried women are already “guilty” before they are judged. The law stresses and judges the woman’s social circumstance (*scene*), establishing a first level of guilt that then determines how she will be judged for the substantive crime (*act*).

As described in Chapter 2, the infanticide law’s stated purpose was to name and judge past conduct while an unstated purpose was to influence future decisions by delegitimizing sexual relationships outside marriage. It promoted a symbolic ideal by criminalizing the alternative. Another obvious example of codified bias is slavery, which, in states like

Pennsylvania, not only articulated and stigmatized a “not ideal,” it legitimized strong financial and cultural incentives to establish and maintain a system of human bondage; codifying those motives within the law justified widespread abuses of basic human rights. Such written enactments are symbolic actions performed as commands, demands, or permissions that declare what should be or can be, thereby defining a scene for future action (*Grammar of Motives* 362). Constitutions and subordinate enactments create their own scene by establishing an approved context—either through selective history, precedent, or fiat—which then forms the mythology and methodology for future judicial decisions. This comprehensive institutionalization of the sociolegal scene creates the shared standards for interpreting actions and situations in a normative way. That is, constitutions and enactments name and judge social action in a way that conveys a sense of common past, present order, and perpetual social integration. Because symbols are intrinsically negative, in that the *real* or *natural* is always deficient when compared to the *ideal*, the creation of an ideal in the name of the law implies the power to judge what is *not ideal* according to the law.

Dramatism asserts that moralization through symbols is inherent in their use. By adding the verbal to the non-verbal, humans create negative acts, states, and commands, including the moral and social prescriptions for law, justice, and conscience (Ruekert, *Kenneth Burke* 130). For example, Burke’s reference to social differentiation through the creation of property rights (*Language* 15) raises an unstated but important corollary in the context of early America: the right of some persons to possess other persons as property. Property rights empower someone to claim a piece of the planet—or a person on it—as his or her own, with the additional implied symbolic action of warning others not to trespass. The associated property right becomes linked to identity, whether as owner or owned. John Bartholomew was a property owner; Alice Clifton

was his property. Alice Clifton was the slave of John Bartholomew. If she suffered execution, he suffered property loss. The recognition and preservation of rights requires a hierarchical order that is capable of translating the inherent negativity of symbolicity into a positive ideal of orderly society. The divisive negative of property rights becomes an aspirational positive through the symbolic justification of a natural right—such as the state compensating John Bartholomew financially if he had lost his slave to hanging—even though neither the rights themselves nor the notion of rights in general occur naturally. They are purely symbolic.

The symbols necessary for order constitute ideals of perfection that establish the criteria used to evaluate—or judge—others. Against the ideal of perfect order, humans will always be more or less disorderly. In dramatism’s theory of human relations, people are forever guilty of not living up to their own ideals. This categorical guilt drives the unending dialectic of order and disorder. The symbolically generated ideals of order imply disorder and produce guilt that can only be transcended through symbolic redemption. Burke argues that the categorical guilt of modernity, reflected in individual and collective anxieties about personal failings and hierarchical differentiations, can be redeemed—although never completely or permanently—through forms of victimage. A common form of victimage is the sacrifice of scapegoats in the name of transcendent ideals, an example of which is the conviction and punishment of criminals. Burke views punishment as a public ritual that not only disposes of the problem of individual crimes and criminals but also reaffirms social order in general. Law legitimates modern social hierarchy, like a set of god-terms, or transcendent, unifying concepts (*Language* 478). For example, the “rule of law” encompasses manifold and potentially divisive particulars—such as property rights and legitimacy—and translates them into an aspirational sense of political cohesion under the “rule of law.” Like a collective dream, the law expresses society’s ideals and

collective consciousness. Its symbolism expresses an idealized self-image, providing both the means to strive for the social ideal and the means to cloak its social inequalities (373). As inequality and disunity increase, the law tends to become more assertive and ritualized to counter the increasing disorder. The greater the complexity in society, the greater the need for law's cathartic dream.

Perhaps the best way to envision dramatism's full application to the rhetoric of law is through the lens of Burke's rhetoric of religion. Like religion, which communicates and persuades through social dramas played out on earth before God, the law communicates and persuades through social dramas played out in judicial arenas before its authorized representatives. Burke wrote his *Rhetoric of Religion* in order to show how theological principles have secular analogues (2). In this context, legal order is a polar, dialectical proposition that implies disorder (195). Societies strive for order by repressing the tendency to disorder. This repression implies the responsibility to accept or resist the repression. With the responsibility comes guilt that implies the need for redemption through sacrifice, which allows for substitution (315). Law, like an article of faith or prayer, persuades communities to identify with its social order through ritualistic dramas of vicitimage and redemption. Persuasion implies governance, which in turn implies the need for sanctions occasioned by guilt (287). Sanctions are just when they are proportional with the offense, merciful when they are disproportionately favorable, and unjust when they are disproportionately unfavorable (179).

Within the dramatic rituals of the law, punishment of a criminal scapegoat in the name of symbolic ideals provides a cathartic release that can unify the community that is grounded in shared social ideals. For example, a defendant like Alice Clifton can represent divisions and disorder that threaten social solidarity, becoming a vessel with which the community can identify

and into which the community can pour its individual and collective sins. From the perspective of defendants, their mortification, or self-humiliation in rejecting the disorderly side of their identity, purifies their mortified self by projecting their internal conflict onto their rejected self, which becomes its own sacrificial vessel (190-91). Burke cautions that the emotional power of purgative catharsis can blind society to its underlying injustice; the community can emerge from the ritual with a perception of rebirth and a false perception of order. Cathartic rituals, then, become a source of power in the hierarchy of authority that can occlude factual inequalities and social injustice.

Yet, even though Burke may be troubled by the inevitability of the law's tendency to protect the hierarchy, he sees its potential as a democratic platform. Since the law is both a language and an institution with shared meanings that categorize and interpret social life, it offers the potential to negotiate the meaning of a "just and orderly society" and to redefine ideals of individual morality (i.e., what one ought or ought not to do). In this sense, law's symbolicity is inherently creative and re-creative. Its transcendence contemplates both negative and positive consequences and idealizes malleable concepts of justice and guilt, both acts of creation. These ideas add to reality and enable their own embodiment in new material conditions, providing standards and incentives (174). By envisioning ideas as guides toward and through new conditions, one can begin to see the law's political potential as symbolic action to reshape society.

Narratology of the Law

Advocacy, Persuasion, and the Path to Catharsis

Dramatism analyzes language and thought as modes of action rather than means of communication. Its extended equation begins with symbols and culminates in catharsis,

propelled by dramatic narrative: If action then drama; if drama then conflict, including guilt; if conflict then victimage; if victimage then catharsis and the principle of the scapegoat (Burke, *On Symbols and Society* 125). Every term has dramatic flow, suggesting interrelated narrative structures and implying variations of guilt and resolution. Legal rhetoric resides among the secular analogues of religious rhetoric that Burke argues involve rhetorical choices designed not only to communicate but to induce audiences into adopting certain attitudes or actions (*Philosophy of Literary Form* 281). That is, law creates, communicates, and persuades using narrative structures that give order to experience (Fisher, "Narration" 246). For example, prayer, an act of communion, employs shared imagery to express a wish and induce alignment of attitudes; that imagery includes faith narratives that invite adherents to identify their life stories with the imagery. Similar to prayer, legal argumentation is a petition that persuades and permits communion by integrating ideas into narratives that align with human experience.

Walter Fisher incorporates and extends Burke's definition of humanity into the *homo narrans* metaphor in which humans are essentially storytelling animals. The narrative paradigm of human symbol-use and communication identifies enacted narrative as the essential genre for characterizing all human action ("Narration" 240). In defining the narrative paradigm, Fisher not only relies upon Burke but also on related work regarding the narrative foundations of legal rhetoric (241). Although forms of communication vary, the elements of moral argument and decision-making, including law and ethics, are rooted in humans' inherent narrative rationality (247). Humans understand their lives as stories, and narratology satisfies the judiciary's rhetorical need to integrate legal abstractions, technical data, and unique facts into comprehensible stories that are susceptible to human judgement.

Law and its narratology are inevitably hierarchical and variable; civilizations have always privileged key story-makers, however chosen or sanctioned, in shaping a culture's story-structure (248). And although people tend to recognize and prefer what seems to be true and just, the narrative paradigm does not deny that either they or the elite gatekeepers of the socialization of narratives can be wrong in the sense that they promote or accept as true narratives that are fundamentally unfair or that do not match life experience (249). That is, narratives based on false ideology—bias—or false information—error—will ultimately fail tests to their rationality. To paraphrase Gordon Livingston, if the map doesn't agree with the ground then the map is wrong. Fallibility connotes variability, and social narrativity relies upon the constant reevaluation of existing stories and the adoption of new ones that ring truer with their life experience. Narrative rationality counters elitist politics because anyone can be rational in the narrative paradigm (249). That is not to say, however, that all stories are equally coherent and reliable, or that elites and the powerful cannot impose self-serving narratives despite their incongruence with popular sentiment. Still, if prevailing narratives do not stand the tests of probability and fidelity, as well as demonstrate attention to societal views and values, then people will adopt new stories that align more closely with their lives (249). An example of this adoption of changing stories is early America's transition from a sociolegal narrative of race-based slavery to a gradual abolition of slavery.

New or evolving narratives explaining new or evolving circumstances are frequently tested in trials. Since, as Fisher argues, all forms of human communication can be seen fundamentally as stories—interpretations of the world occurring in time, shaped by history, culture, and character—the judicial system depends upon legal narratology. Law is a social enterprise and individual cases generally represent broader social issues. Procedural limitations

require the compression of facts, experience, and law into a contrived cohesion that must feel logical and natural. However defined, the facts and circumstances of life events demand some sort of narrative that can combine them into a coherent pattern (Goldberg, *Theology and Narrative* 242). Narrativity lies at the ontological heart of rhetoric and is paradigmatic of all rhetoric (Fisher, *Human Communication* 17, 65). Stories enable people to understand and judge the actions of others and themselves, and compelling stories persuade (Fisher, “Narration” 248).

Not only is narrative present in the law, but storytelling also is at the heart of what lawyers do. In practice, the law always begins in story, such as the stories clients tell their lawyers, and it ends in story, as in a verdict, judgment, or agreement that defines what happened and what it means (White, *Hercules’ Bow* 168). In between the story at the beginning and the story at the end is the contest of narratives during the trial or written pleadings. Jurist and legal theorist Richard Posner defines narrative as a “true or fictional account of a sequence of events unfolding in time, the events being invented, selected, emphasized or arranged in such a way as to explain, inform, or edify” (737-738). Posner’s definition emphasizes the importance of sequence and context to have meaning and achieve a purpose. To paraphrase Aristotle, a story must have structure, with a beginning, middle, and end linked such that the listener can comprehend the end as being entailed by the same process with which it began (Brooks, *Law’s Stories* 17). An ending—perhaps even *the* ending—is inferred from the beginning. In a trial, opposing parties each tell a story. Their stories are translations of historical events into narrative and rhetorical forms that are—or should be—consistent with legal rules and boundaries. As jurors occupy a space between the opposing sides, they choose the story they find most believable (Posner 738). Their verdict not only encompasses the satisfaction of narrative resolution, but it has the force of law.

Applying the principles of narratology to the practice of law presents unique considerations. Law's stories are privileged in that they influence authoritative outcomes; but that privilege does not mean that the stories are infallible or even reliable. Narrative coherence does not assure historical accuracy, and legal narratology is susceptible to the same benefits, flaws, and biases as any other narrative construct. For example, stories—legal or otherwise—can break stereotypes, but stereotypes are also stories, and all stories contain stereotypes (Brooks, *Law's Stories* 17). As essentialist narratives rooted in community experience, stereotypes are efficient cultural shorthand, facilitating both identification and prejudice, such as the stereotype of the unwed mother implied by the law and custom in Alice's time. Legal stories rely on stereotypes for persuasive momentum and rhetorical juxtaposition. But reducing everything to a narrative in legal argumentation can undermine the essential requirement of actual evidence. Intelligible stories can ring true within a community regardless of their relevance or evidentiary authenticity, uprooting ethical judgment and replacing it with preexisting and potentially prejudicial narrative standbys. Posner suggests that legal narratology also presents problems of mythology—creating stories unrooted to reality. Since, for example, the relevance of a story of oppression depends on its representativeness, a narrative anecdote must be an accurate type of the general symptom (743). Those responsible for judgment cannot evaluate general policy based on one case unless it represents material frequency in practice. Vivid or mythical stories can improperly yet persuasively suggest causal connections without ever proving them. In law, proof should be required to avoid judgments based on sentiment or intuition (743).

Despite the inherent risks of narratology, it is central to law's dialectic, not only in the competing narratives of prosecution and defense but also in an appellate court's weighing of narratives from lower courts. Narrative rationality makes different versions of the same facts

possible. Narrative is the glue that combines incidents and events in varied but still meaningful ways (Brooks, “A Narrative of the Law” 417). Culture contributes to different and sometimes biased ideologies about definitions of “proper behavior” or “reasonable choices” or what is acceptable. For example, the sexual norms in early America permitted men to reconstruct an otherwise abusive sexual encounter into an acceptable narrative of consent. Brooks claims that, for better or worse, “Narratives do not simply recount happenings; they give them shape, give them a point, argue their import, proclaim their results” (419). Storytelling can also serve to bring excluded or marginalized legal thinking into the mainstream (Brooks, “The Law as Narrative” 14). For example, by introducing the story of the abuse that Alice had suffered, the defense introduces social and legal perspectives that were marginalized in early America. But even as marginalized narratives can contribute to ethical debate, they also risk presuming a logic of events that does not exist in real life. Lawyers on either side can embed their arguments within established, essentialist narratives to leverage their proven persuasive power. By forcing what happened into prepackaged narrative shapes, advocates risk falsifying the real story—to the extent that it can be discerned—thereby leading to legal judgments based on fictions.

The law narrates and argues in the abstract as well as the specific, and from one to the other. Similar to the arguments and themes presented at trial, the penal code resides on a narrative substrate. Whereas legal argumentation creates a narrative from events that have already occurred, codified law creates a hypothetical narrative to which future facts and circumstances can be applied. Codes posit paradigmatic models of circumstances that will become relevant whenever the circumstances contemplated by the code occur in the future (Brooks, *Law’s Stories* 93). For example, the original infanticide statute posited a paradigmatic model that implied a narrative of an unwed mother, a bastard child, and a concealed death. Once

codified, the law frequently assumes an if-then or whenever-then logic; in the case of the infanticide statute, whenever the essential elements of the paradigmatic narrative have been met, the crime is proved. The enacted code becomes an utterance that creates consequences for those charged on its basis, backed by the power and authority of the state. In this sense, the law demonstrates that whether in codified enactment or performative argumentation, narratives are social practices, constituting their own context, and not just stories told within existing social contexts (Ewick and Sibley, “Subversive Stories” 211). At trial, the law operates as circulating narratives, against each other and toward the hypothetical conditions contemplated in the code, appealing to the social narratives that are generally accepted as true. Disruptions to the law or its social systems can come from changes in the law that either lead or trail socio-cultural crises that challenge the ideals and assumptions of the law and the institutions it protects. Elizabeth Wilson and Alice Clifton may have been disruptive, though in different ways, challenging assumptions about the legal treatment of unmarried women or slaves in infanticide cases. Whether entirely mythical or factual, their narratives generated emotional energy that preceded official actions, a change in the law after one case, and a change in the outcome for the other.

Advocacy as Unfinished Narrative

Although storytelling is at the heart of advocacy, litigation stories differ structurally from other kinds of stories. Although all narratives must have a beginning, middle, and end, litigation stories, whether criminal or civil, are necessarily incomplete; they can only imply an ending since they lack the narrative closure of a completed plot structure (Meyer, “Storytelling,” *ABA Journal*). The verdict completes the story, not only deciding which side’s story wins but also how it ends. Lawyers present fragmented narratives against competing fragmented narratives. They must weave narrative themes into their legal theories. Procedural rules and the adversarial

nature of the proceedings fracture narratives into evidentiary pieces that must be assembled by fact-finders in their deliberations. Legal argument must contain a viable legal theory and a plausible narrative theme. The narrative includes a past-tense evidentiary rendering of what happened before the trial and the present-tense story of the trial itself. The jury—or in some cases the judge—performs the perlocutionary function of determining what impact the prevailing narrative will have on the outcome of the trial. To this end, they attach an ending to the performative, historical narratives in the form of the verdict (Meyer). The narrative themes are the glue that binds the strands of evidence and legal theory together, inviting an implied ending. The narrative theme, as distinct from the legal theory, roots itself to something deeper in the communal psyche, such as betrayal, conspiracy, racism, or suspicion of the state. The jury is asked to advance a broader theory by deciding the case in a certain way. In this way, the trial becomes a vehicle for the civic catharsis of deep social anxieties as well as the cathartic resolution of the individual case. For example, in *The Trial of Alice Clifton*, the prosecution presents a story in which the child is born alive and Alice kills it, and the defense tells a story in which the child is stillborn so that she could not have killed it. But the stories bring with them social prejudices and anxieties that complicate and contribute to the decision of how the story should end.

Trial as Catharsis

The state resolves criminal crisis by asserting its power to enforce the law, generally culminating in a trial, which is the public stage on which judicial role-players express the judgment of the community. The trial constitutes a stage for performative legal drama and a platform for launching a network of cathartic pathways to relieve interrelated tensions, whether individual or civic, emotional or social. Although trials enact legal dramas, they proceed as

incomplete and adversarial narratives and not as unified or complete tragic plots. Unstated cathartic trajectories are revealed through narrative content and conclusions are revealed through judgment, verdict, or other post-trial commentary.

Aristotle proposes that perceptible physio-emotional outcomes can result from the artificial experience of dramatic tragedy because an audience's engagement with the on-stage imitation of human action heightens their emotions, including pity and fear, to the point of release, amounting to a purge. According to Aristotle in the *Poetics*:

[A]n imitation of an action that is serious and complete, and which has some greatness about it. It imitates in words with pleasant accompaniments, each type belonging separately to the different parts of the work. It imitates people performing actions and does not rely on narration. It achieves, through pity and fear, the catharsis of these sorts of feelings. (1449b21—29)

The paradigmatic Aristotelian tragedy is Sophocles' *Oedipus Rex* in which the audience is forced to watch a man freely choose actions that, despite his best intentions, bring about his own ruin and that of his family. Plot progression agitates audience emotions, bringing both to a climax that resolves the plot and purges the emotions, thereby restoring them to a state of equilibrium. A judicial analog from the *The Trial of Alice Clifton* could be an essentialist plot of unmarried Alice making unrestrained decisions about her sexual behavior, then lying about it, while the consequence of her decisions literally grows within her until it is exposed and she is forced to secretly kill her own offspring to conceal her shame. Subsequent interpretations of how catharsis happens have been consistent but not unified ("Catharsis" *Stanford Encyclopedia of Philosophy*). For example, many suggest that not only does the audience undergo catharsis, but the actors themselves and even the plot can be the subjects of catharsis and may experience some form of

purgation. Further, the catharsis can be cognitive and structural and not just emotional, and it can consist in purification and not just purgation. For example, just as blood can be cleansed through filtration rather than letting, the emotions can be purified without being removed. Aristotelian tragedy is the dramatic portrayal of a story, yet any story is potentially cathartic. To this end, because trial stories are interpretations of actual events rather than imitations of them, they are essentially cathartic rather than incidentally so.

Burke takes an interest in the dramatic and formalistic potential of catharsis arising out of its symbolicity. Viewing the law as symbolic action on narrative structures enables one to focus on how the processes of Burkean identification and victimage—as enacted at trial—create both a sense of social order and civic catharsis (*Rhetoric of Religion* 55). For Burke, the basic element of rhetorical persuasion is identification, and the law persuades people to identify with the social order through the enactment of ritualistic dramas of victimage and redemption. Thus, a criminal trial is “scapegoating,” or surrogating suffering, through ritualized legal drama. The defendant represents the division and disorder that threaten social solidarity, becoming the symbolic vessel with which people can identify and into which they can pour their personal and social sins. The human ability to identify with the defendant relies, in part, on the public matrix of motives and meaning provided by the law itself. For example, the law assures the public that the criminal scapegoat is a willful violator of social order and a worthy object of their hidden rejection through the determination of guilt. Rejection implies identification with the criminal, and by punishing him or her, people symbolically punish and purify themselves. The criminal’s punishment redeems the community from its own sins in the name of justice. The basic formula of the rhetoric of law is the tragic rhythm of pollution (i.e., the crime), purification (i.e., the punishment), and redemption (i.e., return to the sense of order). Thus, as a drama of

transcendence, the trial announces the birth, or rebirth, of a sense of social order from the disorderly world represented by the criminal and her crime.

Prior to his *Poetics*, Aristotle's discussions of *catharsis* had been purely medical, referring to the evacuation of *katharma*, or "that which is thrown away in cleansing," such as menstrual fluid (Belifiore, *Tragic Pleasures* 300). In that sense, Alice's delivery could be a form of post-rape cleansing of her body but a cleansing that thereafter taints her socially. In *Poetics*, dramatic catharsis becomes an emotional metaphor derived from its physical origin. According to Burke, the concept of purging the diseased, damaged, or dangerous applies not only to impurities in physical bodies but symbolically to expendable persons in communities; that is, human refuse could be sacrificed for the good of the state:

"It was the custom in Athens," lexicographers inform us, "to reserve certain worthless persons, who in case of plague, famine, or other visitations from heaven, were thrown into the sea," with an appropriate formula, "in belief that they would cleanse away or wipe off the guilt of the nation." And these were the *katharmata*. ("Othello" 166)

Identifying a marginal member as a common enemy reunifies the rest of the group. Excising or ostracizing the common enemy as a scapegoat carries off the negativity or ambiguity internal to the group, leaving it solidified and momentarily cleansed (*Grammar of Motives* 406-8). Alice Clifton could play the role of scapegoat who, once condemned, could carry off the negativity and anxiety of the community. But, as with any treatment, dose and disease can be the difference between medicine and poison. What can give the perception of healing in one case can potentially do harm in others, as would be the case if there were doubt about Alice's culpability. Cathartic rites can close wounds or open new ones. Burke's continuum of healing runs from "food" to "medicine" to "poison" (15).

In terms of cathartic effects on performers, poets, or other role-players, Burke describes three ways in which people are cleansed formalistically, that is, without the direct involvement of victimage (“Catharsis—Second View” 127). Even though the “full body” of catharsis involves victimage, other forms of expressive engagement with the symbol-system are cathartic:

(1) hitting upon a course of action after a period of indecision; (2) fully immersing oneself in a symbol-system such that a new quality or order of motives emerges from within; and (3) reaching a goal or complete fulfillment. Each has its own kind of gratification, corresponding to the beginning, middle, and end of a project. (127)

Symbols as language, which is poetics, not only tend to purify the terminology but also those who express it (Burke, “On Catharsis” 340). Yet, the cathartic properties of language are not limited to specific applications because “problems of ‘catharsis’ are situated precisely at that point where analysis of language in terms of poetics both sums up the field of Poetics proper and through sheer superabundance inclines to ‘spill over’ into the other areas of linguistic action” (340). Legal narratology is one of those areas of linguistic action.

Burke suggests that this kind of formalistic catharsis is grounded in Croce’s calculus of catharsis expression (364). He believes that the symbol-using animal “experiences a certain kind of relief in the mere act of converting any inarticulate muddle into the orderly terms of a symbol-system” (364). The structure and content of trials, within the symbol-system of the law, would seem to offer numerous formalistic opportunities for catharsis beyond the obvious elements of victimage. For example, making an argument or an appeal or even asking or answering a question could be expressive forms of catharsis. The role of the advocate would not be unlike that of the poet, who “is cleansed by identifying a theme and its implications [and] . . . through the fulfillment of taking it to its conclusion” (364). Immersing oneself in a judicial role, such as

advocate, juror, or judge, would raise a new “order of motives” for each participant. Finally, completion of the trial as a discrete project could bring its own satisfaction—though not necessarily enjoyment—such as through articulating a verdict or imposing a sentence.

Nonetheless, it is in the realm of victimage that the trial’s full potential as ritualistic catharsis is manifest. Symbolic catharsis is the kind of action that can bridge the gaps that differentiate humans from the natural world and from each other. Even semi-passively witnessing a legal drama can unify a social group:

When a social group of humans share a common biologic reaction (as to a tragedy), the differences between the individuals . . . are at least for a moment overcome in a biological sense of unity which restores the sense of solidarity within the group. Having a victim in common provides catharsis for the group. (*Language as Symbolic Action* 186)

Thus, the addition of a scapegoat can enhance the cathartic engagement, regardless of its role.

The scapegoat can personify good or evil because purifying symbols function in either terministic direction and can be ambivalently both good and evil (“On Catharsis” 361).

Anticipating applications to a trial setting, Burke indicates that the victim-scapegoat materializes an idea and gives body to vague fears and hatreds. Competing legal narratives label the scapegoat differently, contextualizing how or why the defendant should or should not be feared or hated, both of which are forms of blame. Legal argumentation’s inherent variability permits multiple and divergent anxieties to be condensed into a single subject, “giving the audience as it were fresh meat to sink their claw-thoughts into (Burke, “Othello” 169). In Alice’s case, the prosecution concentrates the power of collective fear onto her. The defense can only deflect by attempting to unite the jury behind a counter-identity with an opposing cathartic terminus (or her blamelessness as a victim of abuse), such that she, through acquittal, can act as scapegoat by

eliminating a different kind of fear for the jury—that of false identification or unwarranted condemnation.

Burke demonstrates that people who cleanse themselves through the use of a scapegoat must first identify with the scapegoat in some way. Only then can the scapegoat become a *vicar*, or substitute, for themselves. They must divide themselves from the scapegoat, loading their burdens upon it and then alienating it from them, thereby reaffirming their unity having been purged of their burdens. A criminal may meet group needs for a scapegoat; through moral indignation, the group cleanses itself of its own shortcomings (*Grammar of Motives* 406-7).

The cathartic effects of a trial can extend beyond the courtroom. From the Greek model of tragedy, Burke saw the civic potential of catharsis: “[T]ragedy concocts a remedy” for any “pollutions,” even those that have civic nature (“Second View” 107). Of course “criminals, either actual or imaginary, may thus serve as scapegoats in a society that ‘purifies itself’ by ‘moral indignation’ in condemning them, though the ritualistic elements operating here are not usually recognized by the indignant” (*Grammar of Motives* 406-7). This kind of naming or labeling by issuing a verdict is also formalistically cathartic for those exercising vicarious judgment on behalf of the community; persons who can unite on nothing else can unite on the basis of a common enemy or a scapegoat (“Hitler’s ‘Battle’” 189). Once the enemy has been essentialized, the proof is automatic. The power of prejudice—pre-judging, without specific evidence—explains the allure, in criminal contexts, of casting the defendant into preexisting essentialist narratives, whether fearful or pitiable, as evidentiary shorthand in creating a compelling story that warrants conviction or acquittal. Such an approach may not be ethical, but it can be effectual. Race-based characterizations, for instance, certainly are prejudicial stereotypes that can supercharge and accelerate the distortion of the defendant’s status as an enemy or an outsider.

The categorical dignity of superior race can be a perfect recipe for such an accelerant (“Hitler’s ‘Battle’” 195). Indeed, I would argue that the categorical dignity of superior race permeates all sociolegal discourse in early America, and it is a factor in understanding the argumentation and judgements in the *The Trial of Alice Clifton* and its attendant legal documents as described in Chapter 4.

The law’s treatment of race, like other kinds of symbolic differentiation, creates its own forms of categorical guilt, necessitating reiterative forms of symbolic resolution. Rationalization of racial differentiation—one manifestation of the law’s symbolic catharsis—comes through the creation of such physiological or theological stereotypes as black inferiority and the moralization of female status. These stereotypes complicate definitions of guilt, adding layers of complexity to its resolution. Since the essence of trial is catharsis, it can radiate outward to encompass individual and collective irresolutions within the scope of its victimage, just as generalized social conflict can be reduced to the dramatization of a single relationship (Burke, “On Catharsis” 369). One might be unclean due to categorical, hierarchical, or codified guilt; yet, one can become clean through some combination of victimage and mortification. Regardless of the context, however, “[t]he paradigm of catharsis must contain ideas and images for at least these major elements: unclean, clean, cleansing, cleanser (personal and impersonal), cleansed” (367). The trajectory is neither fixed nor unidirectional: “The cleansing process [does not always] go simply from unclean to cleansed, since the cleanser in some way takes over the uncleanness, which must then be disposed of.” Burke is clear that “dirt has to go somewhere. It cannot be eliminated; nature conserves it. So far as the paradigm of catharsis is concerned . . . the cleansing of one place incidentally involves the polluting of another” (367). In this way, catharsis can progress in two directions at the same time. Even though judicial catharsis might appear to cleanse, the pity

or fear it engenders is contaminated. The “moving closer” of pity is contaminated with implied indignity on the pitied individual who has the tragic flaw. An overt demonstration of charity can conceal latent attitudes of superiority, complicating, for example, perceived motives behind acts of judicial mercy or executive clemency.

Burke makes an important etymological observation about pity as understood by the Greeks at the time of Aristotle’s *Poetics*. Pity was synonymous with mercy, in a biblical sense. Mercy was a god-like quality that balanced the demands of sacrificial and retributive justice. In a biased society, mercy reinforces the hierarchical power of the keepers of the god-terms. Since catharsis is a symbol-based theory of human relations, the same tendencies toward hierarchical control over definitions of deviance also manifest themselves in the hierarchical control over redemption and mercy. The ritualistic cleansing of civic pollutions is intrinsic to the nature of the state and hierarchical gatekeepers will strive for control over each portal as “purgative journeys lead one *from* there, *through* here, *to* that place yonder” (Burke, *Poetics* 226). Hierarchical gatekeepers will strive for control over each portal because the ritualistic cleansing of civic pollutions is “intrinsic to the nature of the state” (225). They will not lack for work; in addition to the momentary crises of individual crimes, “[a] state of social tension just *is*,” like “a stagnant miasmatic swamp” (273).

Out of the miasmatic swamp of inevitable social tensions, moments of crisis in the form of discrete instances of crime emerge as violations of law’s symbolic ideals. Advocates become poetic narrators who translate competing visions of ineradicable social tensions into progressive plots that account for the facts and circumstances of the specific case in a way that can explain and bring temporary relief to collective anxiety. Given the nature of symbolically generated social tensions, the relief can never be unified, complete, or permanent. Still, the advocates

contrive narrative recipes that permit the release of social steam within the controlled environment of the trial ritual. The defendant plays the role of scapegoat and a concentration of power by becoming the focus of generalized anxiety through contrived narrative structures (*Grammar of Motives* 407). As discussed above, criminals, whether imaginary or real may serve as scapegoats for communities that purify themselves through their moral indignation and condemnation (406). They can do so only within the context of a story that warrants moral indignation that rings true with lived experience. Each narrative's curative potential resides in its irreversibility as a dramatic form ("On Catharsis" 366). That is, the curative effect comes from a sense of narrative direction that necessarily implicates the audience in a way that cannot be undone, as in a feeling of "going somewhere" (366). Once heard, a story cannot be unheard, only processed. For this reason, purgative rituals are frequently structured as a procession (366). A trial is structured as a ceremonial procession that leads irreversibly to narrative closure and legal judgment. *The Trial of Alice Clifton* shows, through the sequence of verdict and pardon, that there can be ambiguity in finality.

In the quest for narrative arcs that can perform the impossible duty of satisfying diverse emotional appetites while remaining faithful to the facts and law, historical facts can get buried under essentialist themes as the scapegoat's back gets shaped to match the burden. As Susan Sage Heinelman observes, "[W]hen one relies on essentialist narrative as a way of explaining crisis and rendering judgment, one acts 'under cover' of an ahistorical and generic identity" (81). By this, she means that prosecutors and defenders tend to mask defendants under stereotypical identities that can efficiently persuade because they appeal to preexisting bias. Depending upon the point of view, murdering mothers are portrayed as either prototypically evil or helplessly victimized. The mother becomes the concentration of power, the focus of a host of social

anxieties. She is either demonized as “the representative of evil, the personification of all that must be cut out from the body politic” (81) or else she is portrayed as incapable of independent thought or individual agency. Unchecked or unrooted to actual experience, indignation and compassion can both result in injustice.

Heinzelman explains catharsis in a Burkean sense, claiming that it is a civic ritual in which the trial becomes an “ethical reading” of a defendant’s particularized story. A more narrative and less adversarial approach to civic judgment is capable of mediating between the demands of the adversarial system and unchecked compassion. A trial, like a Greek tragedy, figuratively embodies the sickness of the state, and its participants, both as individuals and representatives of the community, “cathartically purify (and thus cure) themselves through pity and fear, and thereby restore the state to health. This relationship between representation and response enables both compassion and judgment” (75). Implicated narratives, as managed accounts of individual actions in their cultural contexts, can negotiate transformative social, moral, and judicial compromises. This kind of transformation is “is enormously complicated when the community is heterogeneous, distinguished by marks of race, gender, ethnicity, religion, class, and culture” (77); however, by replacing dueling essentialist narratives with a more dialectical approach, the trial can begin to free itself from persistent barriers of institutional bias. Particularized legal narratology permits cathartic identification with offenders and victims, producing the kinds of ambivalent sentiments rooted in real cultural contexts that lie at the heart of ethical civic judgment.

Surrendering to the complexity of particularity requires not only the abandonment of the hierarchical and stereotypical; it requires the acceptance of principles that transcend them both.

As a practical matter, the procedural dilemma manifests itself in the presence of competing moral injunctions. But there is nothing inherently absurd with moral ambiguity:

Often the attempt to obey one moral injunction may oblige us to violate another. There is *nothing essentially* absurd in such a conflict. But it is true that, unless we are to remain undecided, the solution will require a new act of us, a “leap.” To take this step, we have to go from a principle to a principle of principles (from the dialectical order to an ultimate order of terms)—and such “incommensurability” may be called a “leap” from morality to religion. (Burke, *Rhetoric of Motives* 253)

If the law as-enacted does not account for circumstances requiring transcendent morality—as opposed to verdicts—then the leap must come outside the law. For example, if the judicial resolution, or verdict, in Alice’s case leaves the moral dilemma unresolved, ultimate resolution must come from executive action, such as clemency, a form of procedural or hierarchical catharsis.

Institutional bias implies a legally marginalized ideal of social equality; the resulting dissonance creates generalized anxiety within the existing social structure and moral ambiguity in specific applications. A trial then becomes a tragedy with a political platform. Burke argues that Aristotle always intended to view catharsis from a civic perspective: “Those paragraphs [about catharsis] in *Politics* at least give reason to infer that the treatment of *Poetics* was not essentially different, and that the kind of ‘purge’ produced by tragedy may have been specifically considered from the ‘civic’ point of view (as a species of political purge)” (“On Catharsis” 337). If tragedy is to be considered from a civic point of view, then it encompasses ethical—not just aesthetic—considerations. In so doing, Aristotle introduced a kind of vicarious catharsis in which specific individuals and relationships represent broader social tensions. For example, “conflicts

of a general nature can be dramatized by reduction to terms of conflict within a single family” (369). Similarly, the conflicts “dramatized” in a trial are frequently reductions of broader social conflicts. Alice Clifton and John Shaffer can represent the oppression of race-based bondage and its impact on the agency of the subaltern. The general sacrificial motive brooding over society concentrates on a single crisis in a ritualized legal drama.

The trial, as a narrative-based public ritual, is creative, a kind of performance art. Audiences like finality in art, and death is about as final image as one can imagine (339). In capital cases, the possibility of death hangs over the trial proceedings, not like the playacting of dramatic tragedy, but rather like killing a bull in a Spanish bullfight or throwing Christians to the Lions in the Roman Circus (339). Since Aristotle’s *Poetics* focuses on the *imitation* of suffering, not on actual acts of physical violence, the trial can be considered more purely cathartic than a dramatic tragedy. The essence of dramatic tragedy is not suffering; it is entertainment. The essence of the trial is suffering and victimage. But sacrifice is not synonymous with the kill, so Burke warns that “we must always be ready to modify this stress” so that one’s attention is not always and immediately brought to the kill (339-40). On the continuum of tragic finality, between the general notion of sacrifice and the extreme terminus of the kill, lies the scapegoat, which provides the “tragic pleasure” of “vicarious sacrifice,” cathartic in its “sympathetic meditation on sufferings undergone by persons not ourselves.” In the trial context, the ritual itself and the risk of death are cathartic and tragically pleasurable even if the sentence is not carried out. Placing the defendant in peril allows the audience, and by extension the community, to meditate on the suffering and fate of someone other than themselves, thereby alleviating or ventilating their own guilt.

According to Burke, the tragic pleasure derived from vicarious suffering is not the perfected form of catharsis. Rather, “perfect catharsis [arises] from a sense of universal love” (Burke, “Second View” 109). Since sensations and expressions of love may not be possible or permissible in certain circumstances, radical pity becomes a surrogate or bridge. Fear, on the other hand, is not directly cathartic, “but it is cathartic indirectly, insofar as it sets up the conditions for the feeling of pity” (109). Fear of witnessing or causing undue suffering can lead to pity. Aristotle observes that audiences pity undeserved suffering, even in an adversary or enemy, if they perceive their punishments as worse than they would have imposed (107). Recognizing this connection between pity and fear resolves what might otherwise appear to be a logical inconsistency. For example, intense pity arises when people fear for someone’s happiness or safety. In this sense, the cathartic efficacy of a trial is analogous to the appeal of tragedy:

[T]ragedy might be said to appeal, not merely by *resolving* a psychological conflict that the logic of our moral categories spontaneously transcends, but rather by also causing us somehow to *re-enact* this conflict. Thus, to be ‘cured’ of a ‘disease’ that we already have (a ‘dis-ease’ whereby it seems perfectly reasonable to us that we can’t feel ‘pity in the absolute,’ but can feel pity only if it is alloyed by fear), we should first be subjected to a much heavier attack of the disease. (“On Catharsis” 341)

In the case of a trial, a state of dis-ease already exists in the community based on the law’s symbolically generated differentiations. The crisis of individual crime heightens the generalized anxiety by concentrating the dosage of dis-ease through the performative re-enactment of the facts and circumstances of the case in narrative forms. Where people might have been unable to feel pity in the abstract, they theoretically develop the inklings of pity out of a particularized sense of fear, first at the circumstances themselves, and then at the prospect of new or

undeserved suffering. The fear-pity continuum could explain otherwise inexplicable departures from statutory sentencing guidelines, including abandonment altogether through executive clemency.

Just as Burke's recognition of the relationship of fear and pity helps explain the potential for civic applications of catharsis, his theories of cathartic fragmentation clarify those applications by freeing people from the trap of viewing a cathartic event as a unified or progressive whole rather than a cluster of related cathartic episodes. He argues that "[f]ragmentation' arises from the fact that the sacrificial motive can be broken into several moments, each of which has its own kind of universe" (116). The criminal justice system, for example, divides each case into different procedural steps and those steps are further divided into narrative segments that support the overall process. Many formalistic cathartic steps comprise the broader sacrificial motive. If the ritual as whole is one of general purification, there will be intermediary "rites" in which participants formalistically purify themselves and the process. For example, a murder trial is a dramatic tragedy performed in multiple acts, each with opportunities for expression and representation that can be analyzed separately as self-contained units. Burke suggests that fragmentation alters but does not eliminate the relationship between the different steps in the sacrificial cathartic paradigm. He states: "The cathartic process of a drama occurs in an irreversible temporal order. But its 'moments' along the way are also related like a set of terms that mutually imply one another, without regard to any temporal or narrative arrangement" ("Second View" 117). Significantly, any step in a cathartic process "can be dwelt upon in formal isolation, as one station along the way. . . . Such 'fragmentation' makes elements of the cathartic process liable to displacement so that, even when these elements are all there, they may not be in their 'proper' order" ("On Catharsis" 367-8).

Summary of the Theoretical Approach to Analysis

In this critical introduction to *The Trial of Alice Clifton*, the first edition of the original pamphlet since its initial printing in 1787, I edit the text (Appendix A) and provide a close reading to establish its sociolegal context. Within that context, dramatism provides the overall theoretical lens, from the cradle of the law's symbolicity and its inherent negativity to its cathartic conclusions. I consolidate Burke's dramatism into a theory of judicial catharsis, asserting that justice as a process is cathartic and that justice as an aspirational outcome is catharsis, but without a fixed or universally therapeutic trajectory. Dramatism enables us to identify the law, as enacted and as institutionalized in 1787, as a foundational element in the biased symbolic reality out of which Alice Clifton's case emerged as a moment of crisis within the ever-present social tension caused by symbolic differentiation. The ritualized catharsis of trial promotes resolution of social tensions and crimes defined by the law, thereby becoming the treatment for its own ailments. I show evidence of how, at the time of Alice's trial, the law created a biased symbolic reality that led to categories of guilt based on social circumstances, in addition to the categorical guilt inherent in symbolicity's negativity. Under the umbrella of ritualized judicial catharsis I examine the written record for evidence of physio-emotional catharsis, cognitive catharsis, procedural catharsis, and political catharsis.

CHAPTER 4. ANALYSIS: MATERNAL INFANTICIDE AND JUDICIAL CATHARSIS

There is one species of murder which deserves attention. It is that of bastard children

-William Bradford

On 17 April 1787, the day after Alice Clifton's indictment for murder and the day before her trial, Edward Pole commented about the pending case, saying that he "did not see how any person could bring in a verdict otherwise than guilty" (Appendix A 207). It is not clear whether he based his comment on the contents of the indictment or on some other combination of courthouse chatter and community gossip. Considering the timing of his statement and the nature of the preliminary evidence against Alice, his opinion, though procedurally prejudicial, was neither logically unreasonable nor totally unexpected. After all, an innocent infant's throat had been cut immediately after its unattended birth. Anyone hearing those bare facts would have had an emotional reaction and likely would develop a strong opinion about the killer's character. What was less expected, however, was that four days later, Pole's would be the first and most prominent signature on the jury's handwritten petition to the Pennsylvania Supreme Court requesting that "the Life of the said Alice may be saved" (Appendix B 210). He was one of the jurors who had just convicted Alice. His pretrial statement about her obvious guilt became an issue on appeal. The procedural question was whether Pole's failure to disclose that he had made the statement, which would have excluded him from the jury, was sufficiently prejudicial to the outcome to warrant a new trial. That question became the subject of a short oral argument, recorded by Burd in the trial report (Appendix A 207-8). Chief Justice McKean denied the defense's request for a new trial and confirmed the verdict. Pole's pretrial statement, juxtaposed with the post-trial petition, also implied a rhetorical-political question: How did the process and

content of the trial cause Pole and his fellow jurors to identify Alice as a murderer worthy of death and as a mother deserving of a pardon?

If one thinks of a trial as a bundle of circulating narratives, incomplete stories with varied beginnings and middles on distinct cathartic trajectories, all culminating in a single—though not necessarily unified—official resolution, then the conclusion to Alice’s trial story reflects both ambivalence in the judicial outcome and irresolution in the underlying social tensions. The legal drama of her trial exposed the dissonance between idealized institutional bias and individualized social reality. The state’s essentialist or stereotypical narrative of Alice—the unwed slave murdering her child to conceal her shame—confronted the particularized narrative of her life experience—a victim of racialized rape and criminal instigation. The trial amounted to a rhetorical journey that could not be undone. Every trial participant, regardless of role, became implicated in her story and what it represented in the community. Even if the result—a conviction and immediate pardon—had been intended to put all parties back into their former circumstances as if nothing had happened, the experience demonstrated that the past could not be undone and that the present was not necessarily what it seemed. By revealing Alice’s personal experience, the trial shed light on the unsavory realities at society’s margins. A curtain had been briefly drawn and the scene could not be unseen; the audience had gone on a journey together. The symbolic reality of early America was fundamentally unfair, and the particular facts and circumstances of Alice Clifton’s situation represented the insurgency implied by the biased symbol-system; it complicated the application of legal process to her crime. Her acute crisis and the chronic tensions in the community were now implicated in the same resolution.

In this chapter, I analyze *The Trial of Alice Clifton* as a legal drama and manifold cathartic ritual through Burke’s lenses of dramatism and catharsis. Dramatism tracks judicial

ritual from the law's symbolic inception to its cathartic redemption: if law then action; if action then drama; if drama then conflict; if conflict then guilt; if guilt then victimage. Drama is implicit in law as a subset of language, and catharsis is implicit in its drama. In the judicial context, catharsis operates on multiple levels and its purification can be considered from individual and civic or political points of view. Preexisting social tension and irresolution can be consolidated into the specific case at issue; that is, intimate and sociopolitical cathartic potentials are equally simultaneously available. Suffering and victimage are implicit in criminal crises, which are communicated in trials as narratives containing representations of pain in the physical body, as manifestations of power in the physical world, or as abstractions in the body-politic. The dramatistic paradigm of catharsis aligns artifacts, actors, and abstractions into ideas and images for unclean, clean, cleansing, cleanser, and cleansed. The process does not simply go from "unclean" to "cleansed," and each moment can be dwelt upon in formal isolation. Since any "cleanser" takes on some of the uncleanness, dramatic catharsis is cyclical in its "completion."

Indictment: Defining the Unclean

In order for there to be a sense of cleansing, there must first be a sense of the unclean. The indictment against Alice Clifton established ways in which she was unclean. It also served as the provisional narrative for the unfolding legal drama in which she would be judged. It introduced the factual complications in her life before the trial and identified the actions that constituted alleged violations of the law's symbol-system. The trial, through the dialectical development of the legal drama, would untangle the historical complications and judge her conduct. But in several respects, Alice was guilty before the jury ever rendered its verdict. Guilt layered upon her, from the categorical to the acute, affecting both the dramatistic scene and her specific acts. General, categorical guilt resulted from the inherent negativity of the symbol

system in general, but early America added layers of chronic guilt based on biased differentiations of persons because of their physical traits or circumstances, including slaves and unwed mothers. By focusing its scrutiny on the chronic guilt of Alice individually, the indictment identified the law's prejudicial social scene, bringing with it the associated social tension and irresolution for collateral, simultaneous cathartic resolution. Finally, the indictment articulated the specific elements of the infanticide statute, raising the prospect of acute guilt resulting from Alice's actions in violation of specific legal injunctions.

The trial pamphlet summarized the indictment, the original of which is contained in the unpublished "Transcript of the Record of Conviction of Alice Clifton for Murder" (Appendix A 178). The indictment not only set the evidentiary stage for a criminal case involving the malicious taking of a human life, but it also illuminated a social backdrop in which humans were arbitrarily differentiated by the law. Before referring to any specific acts that were alleged to be illegal, the indictment, issued upon the oath and affirmation of twenty white men, affirmed that Alice was the slave of John Bartholomew and that her baby was legally a bastard (178). By twenty-first century standards, neither of these legal distinctions has any logical relevance in determining whether the evidentiary standard of the essential elements of the underlying murder statute had been met. At the time, however, those categorical distinctions fell squarely within the foundational elements of the existing sociolegal structure, part of the codified symbolic reality in which those particular differentiations were relevant in determining how a defendant would be treated under the law and even in determining whether a crime had occurred. Slaves and unwed mothers were unclean even if they were not killers. And with "slave" and "bastard" as the backdrop at the beginning of the story, an end is implied.

The hierarchy of privilege permitted variations in the meaning and application of justice and influenced individual judgments. Slave status and marital status were threshold questions in determining legal status and eligibility for certain legal protections. For example, regardless of the father's race or the nature of the parents' relationship, a baby born to a slave mother would be a slave. Even under Pennsylvania's Act for the Gradual Abolition of Slavery, babies born to slaves after 1780 would remain slaves until they reached the age of twenty-eight. Slaves, of course, could not vote, own property, practice law, serve on juries, or be witnesses against free persons. Non-slave women could marry, thereby assuming the identity of their husbands, but they could not thereafter own property in their own name; married or not, they could not vote, practice law, or serve on juries. As late as 1872, the U.S. Supreme Court upheld states' right to exclude women from the practice of law under the rationale that the "natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life" (*Bradwell v. Illinois*, 1872). As late as 1875, the Supreme Court upheld states' right to deny the vote to women, holding that the "Constitution of the United States does not confer the right of suffrage on anyone. . . . Women were excluded from suffrage in nearly all the states by the express provision of their constitutions and laws" (*Minor v. Happersett*, 1875). However, these mindsets gradually changed. In 1972, the Supreme Court held that blacks could not be systematically excluded from juries—"whatever may be the law with regard to other exclusions from jury service, it is clear beyond all doubt that the exclusion of Negroes cannot pass constitutional muster" (*Peters v. Kiff*, 1972). Finally, in 1975, the Supreme Court held that women cannot not be systematically excluded from jury pools, noting that "when any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human experience, the range of which is unknown, and perhaps

unknowable” (*Taylor v. Louisiana*, 1975). Taken together, these latter cases fundamentally changed the notion of justice by redistributing the inherent bias of social identification, not just from the perspective of defendants but from that of judicial role-players as well. Justice for individual defendants in the courtroom became linked with social justice for all citizens in the community.

By nominally reducing legally permissible differentiation and expanding the scope of persons deemed competent to advocate and judge, these cases redefined the role of the state from that of preserving judicial stratification to ensuring vertical integration. Whereas in the eighteenth and nineteenth century the hierarchy guarded the gate to justice by promoting equitable treatment *within* a class, the twentieth-century hierarchy took steps toward equitable treatment *across* classes. Burke observed that in ancient Greece, the Sophists viewed justice as inherently class-dependent—as in a different justice for the rich and for the poor (*Grammar of Motives* 173). It was Plato who introduced the concept of an ideal or universal justice that transcended all other divisions of justice and regardless of social circumstances (173). At the time of Alice’s trial, the law maintained racial, gender-based, and other distinctions when applying justice. As with any institutionalized hierarchy, the symbolic differentiation of persons under early American law resulted in a malleable concept of justice that inclined toward self-affirmation.

Trial: Judicial Cleanser

Burke considers religious rhetoric as the analog for secular applications. A criminal trial operates like a religious rite and dramatic ritual that permits the state to persuade the community to reaffirm the social order by resolving the anxiety of an immediate criminal crisis while assuaging the chronic tension of the social differentiation from which the crisis arose (*Rhetoric*

of Religion 287). The law serves as the doctrine for shared beliefs, defining sins and punishments. The physical setting, ceremonial atmosphere, special dress, and ritualistic solemnity evoke a sense of religious awe for the authority of the state. Because of her status, Alice Clifton entered the trial ritual burdened by a cultural scene of slavery and illegitimacy even as she faced condemnation for the act of murder. Her case would proceed through the same biased sociolegal apparatus that had established the law and its hierarchy. But if justice was ever denied in eighteenth-century Pennsylvania, it was almost never delayed. Law and custom valued speedy trials: “[J]ustice shall neither be sold, denied or delayed” (Charter and Laws, 1682). In Alice’s case, she delivered her baby on 5 April and was delivered to the judges and jury on 18 April. The rapid pace benefited the prosecution because infanticide cases tended to follow a typical pattern. Attorney General William Bradford may have assumed that he needed only to insert a new identify into an established case plan. Although the lack of time to prepare must have challenged the defense, the short period between arrest and jury may have benefitted Alice indirectly in at least one way: she did not have to spend much time in jail. The Philadelphia jails were notoriously small and miserable. In her condition, having suffered injuries prior to an unattended childbirth, Alice would have found little comfort in her cell. At least it was springtime. In the summer, the Philadelphia jails were so unbearably stifling that prisoners were known to have been permitted to wander the streets with a keeper just to get some fresh air (Eastman 113).

On the morning of 18 April 1787, when the sheriff led Alice from the jail to the courtroom, she encountered the same conduct and countenances that had dominated her life and caused her current crisis: white male control. Her freedom had been legally restrained since her birth as a slave. Now she faced criminal judgment and the prospect of execution by a legal

system that had acknowledged her only as property. Pennsylvania law, before and after the Revolution, required juries to be comprised of “twelve men, and as near as may be peers, or equals, and of the neighborhood, and men without just exception” (Charter and Laws, 1682). It would be a long time before the law recognized the incongruity of requiring a jury of one’s peers only for male freeholders. Those who would decide Alice’s fate were all white men.

Even after the United States won its independence from England, the criminal justice system in Pennsylvania remained mostly unchanged from its provincial roots. The Revolution ended the proprietary government that Charles II had granted to William Penn in 1681, but the original laws and the weight of English precedent persisted long after (Hoffer and Hull 35). One obvious exception was the 1700 creation of a special court for certain trials involving blacks. Another involved interracial rape: “[I]f any negro or negroes . . . commit a rape or ravishment upon any white woman . . . they shall be tried as aforesaid [by six freeholders] and shall be punished by death” (Statutes at Large II, 1700). This act was repealed in 1780, but the irony from Alice’s perspective was still unmistakable: the black slave victim of a white rapist now faced death for attempting to conceal the product of the rape.

The bench, like the jury box, consisted of another group of white men. Justices of the Pennsylvania Supreme Court and unspecified members of the Pennsylvania Supreme Executive Council (SEC) were present. Because murder was a capital crime, Alice’s case would be heard in the first instance by the Supreme Court with the discretionary participation of the SEC. Because of this provision in Pennsylvania law, one of the most prominent figures of the Revolutionary period—Chief Justice Thomas McKean—came to preside over the murder trial of a slave girl. It is also possible, though not likely, that Benjamin Franklin, as President of the SEC, was present that day. If he had been, it seems unlikely that Burd, in his role of chief scribe, would have failed

to mention his name in the docket, record of conviction, or the pamphlet. On the other hand, his presence may have been one of the motivations for transcribing and publishing the report in the first place. Regardless, the Supreme Court's post-trial clemency petition was directed to Franklin, and he granted a stay of execution.

Alice likely never would have seen anything like the imposing ceremonial rituals and intense public attention of her trial. Then as now, rape and murder made good theater; infanticide cases caused a sensation when they went to trial both in England and America, inspiring ballads and broadsides (Hoffer and Hull 21). Transcripts of the most interesting cases were published, sometimes in special collections, and were widely read. These narratives could appeal to curiosity and emotion—whether prurient or sympathetic—but they could not recreate the spectacle of being in the courtroom. Court sessions were called to order in a rigid observance of ceremonial formality, leaving no doubt about the power and authority of the state. The colonies had cast off the king, but, with the exception of the judicial wigs, much of the pageantry of English courts remained: “[They] retained the robes and such other appliances, as probably in their opinion, contributed to make ‘ambition virtue’ [and despite] their professed republican principles, they followed and imitated at no great distance, the example of the judges of the English Court of King’s Bench.” The sheriff who escorted Alice would have entered “in all his pomp, together with tip-staves and attendants . . . as they proceeded to take their respective places”. (Eastman 286-7)

The Stories of Alice Clifton

Part of the appeal and pleasure of human drama, whether on stage or in the courtroom, comes from the opportunity to safely imagine the suffering of others and to resolve, intellectually if not morally, individual conflicts that tend to represent transcendent, apparently irresolvable

conflicts or tensions in the world outside the tragedy. Sympathetic meditation on a tragic enactment or reenactment becomes a concentrated dose of the preexisting conflicts and tensions; it produces physiological responses and engages moral logic. Tragic characters become the vicarious sacrifice into which the audience or community pours its suffering or guilt, providing an emotional release and temporary sense of healing. Dramatic climax and the pronouncement of a final judgment also contribute to a sense of logical or cognitive resolution to the problem in the plot and to the social context from which it sprang. Narrative trajectories selected by poets or advocates manipulate audience responses by guiding their meditations. Because cathartic processes are intrinsic to drama in general, narratives constituting individual dramas must establish their own senses of the unclean and project how the cathartic progression implied by the narrative will resolve the conflict, complication, or tension. It is most successful when it incorporates the generalized human fears or tensions existing prior to and outside the specific circumstances of the dramatic narrative.

Alice Clifton's legal drama began with the provisional narrative supplied by the headline implied in the indictment: unwed slave cuts bastard's throat. The criminal charge built upon the established dramatic scene of cultural assumptions and categorical guilt established by the legal differentiation of slave, unwed mother, and bastard child, before culminating in the allegation of a specific homicidal act. These categories were legal constructs with cultural consequences. One of the narrative problems with bias in the law is that it creates essentially punitive categories that require no proof and cannot be refuted. They are not allegations. They are absolutes. Since they are crimes of identity and not of conduct, there is no presumption of innocence when one is "charged" on their basis. The label attaches to the character in the drama before the play begins, and it remains throughout. Since the taint of bias occupies the character—

in this case, that of Alice Clifton—it does not necessarily need to occupy narrative space to be “present.” Even so, references and allusions throughout the trial reinforced her subaltern status. For example, Mr. and Mrs. Bartholomew were identified as Alice’s master and mistress; Alice’s original owner, Mr. Milne, was called upon to confirm her age, either because she did not know it or else she was not permitted to say (Appendix A 192). Establishing her status as a slave, though not technically relevant to the infanticide statute, opened the door to cultural assumptions, both prejudicial and sympathetic, without the need of evidence. For example, jurors might consider it particularly deceitful for a slave to have lied to her mistress and master, as Alice appeared to have done when she denied being pregnant and in labor (181-2, 206). At the same time, they might respond sympathetically to learning about her being “debauched” by John Shaffer, understanding that as a slave she could neither refuse nor consent (198). This assumption might explain why, when she was asked by the coroner’s inquest who the father was, no one ever followed up to ask about the nature of her relationship with Shaffer.

Focusing on the homicidal act, the key question of material fact, indeed the only question about which there was any reasonable doubt, was whether Alice’s baby was alive when she cut its throat. The related procedural question, on the other hand, was whether the prosecution or the defense had to prove the condition of the baby at the moment that Alice took a “certain razor” and made a “mortal wound” across the child’s throat, “of the length of four inches, and of the depth of one inch” (178). The distinction affected the narrative strategies on both sides and, in all probability, the outcome of the case. The indictment alleged that on 5 April 1787, the bastard baby was born alive. If the state met its burden by proving a living victim, then Alice would be found guilty of murder. Under the law in effect until seven months before Alice’s trial, however, Bradford would have only been required to show that Alice was the unwed mother and that she,

or someone at her direction, concealed the child's death, whether it was stillbirth, natural, or violent. Alice would have no way of proving that the child was born dead because her word alone was of no legal value and there were no other witnesses. Absent jury nullification, a guilty verdict would have been a foregone conclusion. But Pennsylvania Statutes at Large XII (1786): 280 revised the law such that concealment alone would no longer be sufficient to justify a murder conviction. Instead, the prosecution would have to present "probable presumptive proof" that the child was born alive. For the same reasons—principally the lack of witnesses or attendants at bastard births—the prosecution's burden had become nearly as challenging as the defendant's had been. In theory, Bradford would have to show that there was a live victim, not just an unobserved disposal of a lifeless infant.

The Prosecution

In a typical homicide trial, the prosecution could be expected to establish a dramatic scene in which the victim is identified, not only to confirm the crime but also to establish a motive or purpose for it in relation to the victim. But here, Bradford largely ignores the child as a victim. It has no identity other than as evidence. Any focus on the child as a person could raise questions about the identity of the father, and awareness of the father could raise questions about conception and instigation. Bradford's case against Alice tracked the stereotypical narrative for bastard concealment cases prior to the 1786 revision. Based on his prior experience with infanticide cases, including that of Elizabeth Wilson, Pennsylvania's most recent and most famous case, he knew that these cases tended to follow a predictable fact pattern. And if Bradford relied on his past experience to develop a working theory of Alice's case even before hearing the findings of the coroner's inquest, he would have been largely correct. First, Alice consistently denied being pregnant, even when she was in labor. Second, she did not prepare

clothes for the infant. Third, she chose to deliver alone even though she might have had help. Fourth, she concealed the body. An additional aggravating factor in Alice's case was the fact that she, by her own admission, cut the baby's throat. Taken together, Bradford asserted, these circumstantial elements constituted probable presumptive proof that the child was born alive. It would seem a strong case, benefiting from social assumptions about how unmarried women like Alice acted when they try to conceal the shame of their sinful conduct. It is a case with which his peers would have been familiar given the only recent change to the infanticide law.

To overcome the absence of witnesses who had observed the birth, or a medical expert asserting a live birth, Bradford attempted to show that Alice formed the intent to kill her baby long before it was born. With the incriminating power of clear intent weighing upon the jurors' minds, it would be both logical and appropriate for them to conclude that she had followed through with that intent by slicing her baby's throat with a razor. The relevance of Alice's violent cut depended first upon Bradford's establishing that the child was alive. He likely knew that the only medical experts who would testify would claim that the child was stillborn. But he also knew that ultimately all questions of fact—including whether the baby had ever been alive—would be decided by the jury; if they were convinced of Alice's intent, they would find it hard to believe that she would bother to cut the throat of a baby that was already dead, especially since doing so would create evidence of guilt that would not have existed otherwise. What Bradford could not have known before the trial was that McKean would give the jurors an opportunity to see the “mark of violence” for themselves when he had Dr. Foulke bring the tiny corpse to the courtroom to show everyone the ear-to-ear gash across its throat (199). When Foulke did so, the jury could see for themselves how much it looked like murder.

As noted above, Bradford and the Court began by showing that Alice repeatedly denied being pregnant, even when it must have been obvious by her changing physical appearance. She continued to deny her condition at the onset of labor and immediately after she had given birth. Mr. and Mrs. Bartholomew both testified that they suspected Alice was pregnant from her appearance and asked her about it, only to have her deny it. They also testified that Alice intentionally delivered in secret when she might have received help. The clear message was that if Alice had already decided that she was going to kill the child, she would also need to conceal all prenatal and postnatal evidence of its existence in order to avoid questions about its disappearance. The prosecution also demonstrated that Alice made no provision to clothe the baby after it was born (183). If she knew that she was going to kill the child, she would not need to dress it, feed it, or find a place to keep it. Denial of pregnancy, unattended birth, and the absence of clothing were classic elements in infanticide cases, and this theoretical outline would have been in Bradford's playbook—and in the judges' minds—before they ever heard any evidence. And Alice's conduct—denial of pregnancy, failure to prepare linens, delivery in secret, and concealment of the body—for the most part, predictably followed the stereotypical pattern of the infanticidal mother.

According to the prosecution's narrative, on the morning of the delivery, Alice made a fire for the family in the parlor and then went upstairs to lie down. When Mrs. Bartholomew asked what the matter was, Alice said that she was not feeling well but again denied being pregnant. When Mrs. Bartholomew returned later, she found that Alice was feeling better, walking around, and she asked Mrs. Bartholomew for some old clothes to put on. Suspecting that Alice had given birth, Mrs. Bartholomew searched the room, including the closet and fireplace, but did not find a baby. However, Mrs. Bartholomew's sister-in-law, also named Mary

Bartholomew, found the infant wrapped in Alice's petticoat and stuffed beneath a roll of linen inside a trunk in an adjacent room. Although it was obvious that Alice had gone to the other room to hide the baby, no one saw or heard anything when she did so. Miss Bartholomew took the bundle containing the baby to Alice, who then unwrapped it and laid the child beside her. Miss Bartholomew then asked Alice if she killed her baby, and she replied that she did by lying on it. They left Alice alone with her baby and notified the authorities.

When Sheriff Samuel Bullfinch arrived, others from the coroner's inquest were already present. He described the dramatic scene only as it related to Alice's act. For example, he went upstairs and found Alice sitting on the floor with her child leaning over her arm; he suggested that Alice did so in order to keep the baby's head close to its breast, thereby concealing the wound to its neck. Bullfinch heard Alice say that it was her first child and that she had overlain it. When the inquest discovered that the child's neck was cut, Alice said that she had done it with a razor out of fear that it might cry and that the family would hear it. Bullfinch told her that if the baby was already dead she would have no need to cut its throat. In his opinion, the baby appeared "plump and hearty," indicating that the child had come full term (190). Even though Dr. Jones insisted that the child must have been stillborn, he confirmed that the infant's windpipe and major vessels were all severed by the cut, a wound that the child, if alive, could not have survived.

The Defense

Legally and dramatically, the defense needed to address Alice's violent act as described in the indictment. She admitted cutting her baby's throat so the defense needed to bolster her claim that it was stillborn. But they also needed to expand the scope of the dramatic scene beyond the Bartholomews' upstairs bedroom. If possible, they needed to give the court and

jury fresh meat to sink their “claw-thoughts” into (Burke, “Othello” 169). In order to get their audience to identify with their client, the defense needed to introduce everyone to the baby’s father and to explain how he became the baby’s father.

Legal narratology brings historical, social, and legal contexts into the present moment in order to focus the mind and emotions on one specific issue. Because the individual sense of self is a product of multiple and complex social narratives, individuals and audiences are capable of identifying with both offenders and victims. The complexity and particularity of an alleged offender’s narrative enables compassion and judgment and, depending upon the circumstances, the simultaneous identification of offenders as victims. It was this kind of complexity and particularity that Sergeant and Todd tried to introduce into the trial narrative. If told, the particular circumstances of her life added elements to the dramatic scene that freed her from the essentialist narrative of the murdering unwed mother and an otherwise superficial defense theme of seduction and betrayal. They, with occasional help of questions from Council or Court, deployed two distinct, particularized narrative tracts—one addressing the legal question of proof of life and the other addressing the contextual questions regarding Alice’s life and the circumstances of her conception. Each ventilated different sources of tension and guilt and resolved factual questions about the circumstances of conception and the condition of the baby at the moment its throat was cut. These questions contemplated at least two cultural concerns: one, an infanticide crisis representative of a broader issue of social illegitimacy; and the other, a particularized crisis of racial and sexual abuse, representative of broader social injustice. Together, the message for the jury was that Alice could not be considered personally responsible for her pregnancy, but even if she was, she could not have caused the baby’s death because it

was born dead. Although this particular and complex narrative trajectory was not, in the end, enough to save Alice from conviction, it may have spared her from execution.

On the key question of a live birth, Alice repeatedly and consistently told multiple interrogators that the child was born dead or that she overlaid it. The difference was not material because Alice, alone and inexperienced, would not have known which. After observing no signs of life for about thirty minutes, Alice cut the baby's throat as directed by Shaffer. To establish the probability of stillbirth, the defense relied primarily on the expert opinions of two doctors, Jones and Foulke, who both affirmed that the child was either born dead or did not survive the birth. Between them, they referred to injuries or strains that Alice suffered prior to her delivery, which were corroborated by other witnesses and could have damaged the fetus and induced premature birth. They referred to the lack of fetal development, calculating it at about two to three months short of full term. They further referred to Alice's unnatural birthing position—on her back—which would have suffocated the child even if it had been alive as it left the womb. Additionally, they accounted for whatever blood may have been found at the scene by stating that some amount of blood is always released in the birthing process and that even a dead infant would bleed somewhat if cut.

Prior to seeing the child and talking to Alice, Dr. Foulke assumed that the child had been murdered. But when he personally observed the child and learned about the time of conception and the circumstances of her pregnancy and delivery, he believed himself to be “absolutely justifiable in declaring that the child must have been born dead” and about two-three months premature (194). Further, he said, even if the child had not already died in the womb, it could not have survived the circumstances of delivery. Specifically, Alice would unavoidably have smothered the child because of her birthing position and lack of assistance in extricating it. With

regard to timing, Alice told Foulke that she had first been “debauched” by Shaffer at about the end of September and that she soon discovered that she was pregnant. She told Foulke that about three weeks before her delivery she suffered a “considerable injury” when a log fell on her hip. Then, about two or three days before delivery, she fell down the stairs. Finally, on the morning of her delivery, the strain of her trying to lift a large log induced labor (198). Beyond the medical testimony, the defense showed that no one who was nearby at the time of the delivery ever heard an infant cry. Mrs. Bartholomew stated that they were all in the room immediately below the room in which Alice delivered her child. The door to Alice’s room was open, and she believed that if a baby had cried they would have heard it (185).

To counter the prosecution’s circumstantial case demonstrating Alice’s intent, the defense introduced a new narrative, one that challenged the social assumption of a protective white patriarchy. They introduced the story of how she became pregnant by a white man and how he instructed her to kill the child. When questioned, coroner John Leacock, Sherriff Samuel Bullfinch, and Nathaniel Norgrave all testified that Alice said that she had been directed by Shaffer to kill the child. According to Norgrave, Shaffer specifically told Alice to “pinch its throat” (200). Contextualized this way, the intent to kill was not Alice’s. She was not concealing her shame through premeditated murder; she was complying with the demands of her white abuser and respecting his place as her superior in the social order. This counter-narrative was a new and complicating source of tension in the trial. It added gender-racial coercion to the question of responsibility. If true, how free was she, a slave, to choose otherwise? Further, threat-induced compliance also would explain why Alice might cut the child’s throat even in the absence of signs of life.

Sergeant and Todd wove the law and evidence into a narrative in which Alice was a victim, a status that the law, as a practical matter, denied her. They focused on facts from Alice's life that reflected current sociolegal realities and appealed to themes of seduction, betrayal, and criminal instigation. As the accused mother of a bastard child in an infanticide case, Alice's age was not legally relevant. Nor were the circumstances of her conception, the father's identity, or the possibility that he may have persuaded her to destroy the baby. Yet the defense raised each of these issues. In doing so, they sought to fundamentally alter perceptions within the courtroom over the course of a few minutes, changing Alice from property to a person, from a killer to a girl who was herself but a child. They used transformative language to recreate her identity and introduce her story. In this way, they persuaded the other participants by aligning them behind a new identification of Alice.

The following sequence of questions illustrates that transformation. Referring to Alice, the Court (probably McKean) asked Leacock, the first witness, "Is the prisoner at the bar the same woman that you then saw?" (180) The question labeled rather than named Alice, affirming her essentialist role in the case: the [adult] woman who is the prisoner indicted for murder. To the next witness, Mrs. Bartholomew, the Court reinforced this perception by asking, "Are you the mistress of that woman?" (181) By identifying Mrs. Bartholomew as "the mistress," the question reminded the jurors that Alice was [just] a slave without ever using the word. This word choice depersonalized Alice; legally, slaves were property not people, and McKean consistently affirmed as much in his court decisions and opinions, before and after the Alice case. Mrs. Bartholomew responded in the affirmative but without looking up at Alice, so the Court further depersonalized Alice by ordering Mrs. Bartholomew to "[I]ook, and see if it is the same" (181) The impersonal pronoun *it* may have been unintentional, but using *it* was nonetheless

unmistakable and unthinkable if applied to a white woman. Bradford, for his part, was less demeaning in his characterizations of Alice, using traditional gender pronouns, while describing her as a “woman” and “mother.”

Sergeant and Todd began to reshape Alice’s identity by consistently referring to her as a girl. They asked no questions of the first witness, Leacock. But with the second witness, Mrs. Mary Bartholomew, they began a pattern of multi-purpose questions. First, Todd asked, “Pray, Madam, where was the girl, when you went up to see her about twelve o’clock?” (184) The time of day, Alice’s location, and its distance from where the family gathered were all relevant to the defense theory that if a baby had cried, the Bartholomews would have heard it. Even more important, however, was the subtle establishment of a perception of Alice as a girl, alone, struggling through a difficult childbirth in a strange bed. Sergeant immediately reinforced these points when he asked, “How far is that room from where the girl lay?” (184) Later, Bradford acknowledged Alice’s youth—somewhat inadvertently—and drew attention to it. He asked Foulke how he determined that the child was conceived in September, allowing the doctor to respond, “The girl told me so” (194). And while attempting to get Jones to concede that the child’s small size could be attributable to something other than a premature birth, the doctor conceded that Alice was both very small and very young. Bradford asked, “But is not the mother a very little woman?” and, “She is very young tho’?” (191) Although he phrased these statements as questions, they reveal his changing attitude about Alice’s agency, responsibility, and social stature: She *is* very young; she *is* very small.

From that point, both sides in the case appear to have approached Alice’s age and stature from the same point of reference. For example, Norgrave, a later prosecution witness who showed no particular sympathy for Alice, referred to her as a girl: “I went up stairs and found the

girl setting up, and the Jury were there” (199). Even the Court, after hearing evidence about the abuses endured by young Alice Clifton, softened its tone, uniting behind the shared perception introduced by the defense’s narrative. Thus, the same questioner who had curtly asked Mrs. Bartholomew at the beginning of the trial if she was the “mistress of that woman” and forced her to look at Alice to “see if it [was] the same,” asked Mr. Bartholomew at the end of the trial if it was at his house that “this unfortunate accident happened,” and if it was he who had raised “the girl” (201-2). For the moment, in everyone’s eyes, “the prisoner at the bar” was transformed from woman to girl, and the murder had become an unfortunate accident.

Just as Sergeant and Todd used semantic choices to personalize and re-identify Alice as a girl in the minds of the trial participants and public, they used narrative themes to shift focus away from what Alice did to her child in the moments after giving birth to what had happened to her in the months and years before. They rhetorically particularized and redirected the narrative away from the acts of cutting and concealing and toward the scene of abuse and instigation. Although the law was indifferent to the circumstances of Alice’s illegitimate conception (whether from fornication, adultery, or rape) and she alone bore legal responsibility, the defense team ensured that the jurors heard that she was repeatedly debauched and, when pregnancy ensued, the father, using a combination of threats and promises, persuaded her to kill the child when it was born. Since, according to the 1780 Act for the Gradual Abolition of Slavery, Alice was not permitted to tell her own story in court, Sergeant and Todd prepared witnesses to relate—occasionally over objection—what Alice had told them during and just after the coroner’s inquest; Alice’s story would be told through persons whom the law considered competent to speak against a white man.

The first witness was Leacock, the coroner. He described a surprisingly passive role for himself during the inquest at the Bartholomews' home following the discovery of the corpse. He appeared to have been crowded off into a corner, allowing others to interrogate Alice (178-80). In his own words, he related that Alice said that "she had done it by the order or express command of the father of the child" (179). Later, when the questioning of Leacock had shifted to another topic, Council returned to the father, asking Leacock, "Did she mention any arguments which the father used to induce her to commit such a crime?" (180). Leacock deferred to "Captain Bullfinch," a member of the coroner's inquest who had more clearly heard what Alice said (180). Bullfinch was a reluctant defense witness. He portrayed the crime scene as poignant but incriminating: "I found her sitting on the floor, with the child leaning over her arm; she kept its head close down on its breast" (189). He was quick to convey Alice's admission that she had cut her baby's throat but needed to be asked repeatedly by Sergeant, the Court, and even one of the jurors, before he revealed what Alice said about the father's identity and involvement.

Consider the following exchange, as edited in Appendix A to facilitate speaker identification:

Sergeant.—Do you recollect, whether she said any thing further?

Bullfinch.—Yes; she said she was told to do it.

Court.—Did she say by whom?

Bullfinch.—Yes.

Sergeant.—Did she mention any promises that had been made her?

Bullfinch.—She said some were made.

Sergeant.—What were they?

Bullfinch.—She said that he promised her, if she made away with the child, she should have her time purchased, and he would set her at liberty.

Sergeant.—Did she say she was to be provided for?

Bullfinch.—Yes: she was to have fine cloaths, and to live like a lady.

Jury.—Whose name did she mention as the father who had promised this?

Bullfinch.—John Shaffer, and said it was him who had desired her to cut the child's throat, or make away with it. (190-1)

From the defense team's perspective, introducing Shaffer does not change the fact that it was Alice who committed the act of cutting the throat, but it created a sympathetic scene of her as the victim of a murderous abuser. Alice's backstory somewhat shifts the case from the "if...then" substrate of the law as written and instead paints a disturbing picture of her life as lived. This complexity and particularity complicates both the legal decision-making and the cathartic trajectory.

Dr. Foulke provided a more complete recitation of Shaffer's inducements: "[S]he said that John Shaffer, the fat Shaffer, was the father of it, and he had persuaded her to kill it; if she did, he would purchase her freedom, and that he was to marry a fine woman, and that he would make her then as happy and as fine as his wife, and that if she did not do it, she should suffer immensely" (198). Despite this testimony demonstrating that it was Shaffer who had persuaded Alice to do away with the child by using a combination of threats and promises, Sergeant and Todd showed that Alice's cutting did not cause the infant's death. Both of the expert witness, Drs. Jones and Foulke, agreed that the child was stillborn. Bradford did not call an expert of his own with an opposing opinion. Dr. Jones, who examined the corpse the next day, testified that he had seen enough to be convinced that the child was born dead (191). And Dr. Foulke, who examined, recovered, and preserved the corpse after interviewing Alice, testified that he was

absolutely justified in his conclusion that the child was born dead, despite his initial impression to the contrary (194).

Judicial Catharsis: Cleansing and the Cleansed

Alice's trial was always about more than the simple question of fact regarding the condition of her baby. From the opening lines of *The Trial of Alice Clifton*, she was labeled as unclean, not just as a killer but also as an unwed mother and a slave in a culture that denigrated them both. Consistent with the complexity suggested in those first lines, the legal drama of her trial raised multiple issues related to but distinct from the indictment's narrow question of fact. Whether it occurs consciously or not, all criminal trials process ancillary and collateral irresolution and tension. Aristotle's concept of tragic catharsis developed as an analog of physical catharsis, the notion that the body, either acting upon itself or aided in some way, could expel, discharge, or otherwise process contaminants or toxins. According to the analogy, an audience's observing the contrivances of a poet, enacted on stage as imitations of real actions, generates genuine pity and fear, culminating in the catharsis or purging of those emotions. Further, this dramatic model of catharsis can be viewed from a civic perspective, encompassing conditions in the community. That is, a tragedy can purify civic pollutions as it portrays a specific, concentrated, and contrived case of conflict or crisis within the community. Likewise, a criminal trial is a purgative ritual, staged as a procession, cyclical in the recurring terms of its own symbol system but curative in the fact that it is irreversible and real. Any moment of the process can be analyzed in isolation, but ultimately the trial goes somewhere. It ends, and the end matters. *The Trial of Alice Clifton* is an example of criminal justice as cathartic ritual. Just as an audience requires finality in a work of art, the legal process requires a final resolution to a real problem: a verdict; the truth. Nothing is more final in a work of art than death and nothing was

more final in an eighteenth-century murder trial than a death sentence. Thus, if in no other way, the inevitability of a verdict offered the promise of catharsis, a sense of cleansing, renewal, and affirmation.

However, if there is to be cleansing, there must be persons to do the cleansing. In the case of the trial, judges, jurors, and advocates assume authoritative roles in the legal drama on behalf of the community. If there is to be a cleansing there must also be off-scouring of the cleansing. Like the judicial role-players, the off-scouring—or scapegoats—must be fitted for their purpose as victim-vessels—whether virtuous, flawed, or villainous—of the collective discharges of fear, pity, or other emotions. Alice Clifton began the trial as the only designated “unclean” person, but the specter of Shaffer came to represent a different unclean to be cleansed.

Shaffer represented rape, and the prospect of rape altered the legal and cathartic trajectories. He also represented the institutional bias brooding over Alice and her race. By creating the abstraction of rape, the law defined the acceptable social boundaries for an otherwise essential and instinctive biological function. Coerced copulation has long been considered a physical and emotional violation deserving severe punishment, and, as we have seen, Pennsylvania and the rest of early America treated it as a capital crime. Forcing a woman into a reproductive act warranted the destruction of the aggressor. But we have also seen that, for a variety of reasons, the law did not operate uniformly or consistently to protect women and punish their abusers. Cultural norms redefined male coercion into consent and subjugated the agency of slave women over their own bodies. The law then prevented slaves from being witnesses to their own victimization. Rape became the unnavigable intersection of law, culture, and biology.

Perhaps the most insidious outcome of racialized rape norms was that the slave victim became the unclean who could never be cleansed. Beyond the extra-legal cultural protections of

white rapists, they could also escape legal scrutiny: if the black victim became pregnant, even if the victim denounced him, conception would be construed as proof of consent rather evidence of rape; if she did not become pregnant, there was no rape because the victim could not be her own witness. Shaffer, as rapist, was the carrier of a legal cancer that he could give Alice without ever having it himself. Penetration and ejaculation were physiologically cathartic of his abusive sexual energy. His uncleanness transferred to Alice. At conception, the uncleanness transferred to the bastard fetus without ever leaving Alice. No matter what happened, she would be the unwed mother of a bastard baby. Like white patriarchy itself, the guilt of which burdened (primarily slave) women, bias created a stain that could not be cleansed. The cumulative effect of this institutional bias was a legal and cathartic conundrum. The trial was a cleansing without cleaning and treatment without healing, a scene that could never be eliminated, only reprocessed.

Because law, culture, and specific circumstances restricted Alice's capacity to be Shaffer's victim, childbirth became a purge, like a cleansing menstrual discharge, expelling the father's child from her womb. But cathartic off-scouring is never eliminated, only displaced or covered, and childbirth delivered Shaffer's child from her womb to her arms. The cathartic cycle required a new displacement or covering. Alice did both. Performing a burial that was not a burial, she displaced the child from her arms and put it in a coffin-like chest in another room. It did not remain buried. Miss Mary Barthomew uncovered the child and brought it back to Alice's arms. Later, Dr. Foulke removed the child, which Alice must have believed was for the last time. But, indicative of the unavoidable burden of her condition, the child was again brought back to her presence in the courtroom. The unquestioned institutional disregard for the infant corpse as a human victim and for the feelings of its mother, just feet away, demonstrated the hierarchical view of the bastard baby as a supernumerary off-scouring and of the mother is a subaltern. The

child was preserved as evidence not buried as a human baby. Finally, the scribe narrated the in-court episode, making Shaffer's off-scouring part of a written record that survives to this day.

But Alice was not just the unintended and unwed carrier of the father's guilt and bastard child; she was the mother. Ambivalence occupied the evolving scene and affected her actions. Ambivalence leads to dramatic conflict and implies victimage, which includes mortification and scapegoating. Alice demonstrated ambivalent cathartic motives in at least three ways. First, if what she said to Dr. Foulke was true, the child lay by her side for thirty minutes without breathing or moving. Her delayed decision to cut its throat was at once an act of obedience to Shaffer and an act of negation and rebellion. The child was apparently lifeless, so hers was probably a cut that could not kill. Second, Miss Mary Bartholemew said that she found the baby stuffed inside a linen chest in another room, the result of an act of displacement and covering by Alice. But Miss Mary also said that the child had first been wrapped in Alice's own petticoat, an act of nurturing and comforting. Finally, Dr. Foulke said that while he was speaking with Alice, she stroked the child. In Foulke's opinion, however, her attention seemed to lack maternal affection. Yet, when it was time for him to take the baby from her, Alice became sad.

Whatever Alice's feelings about her baby may have been, the introduction of its body as evidence in court was extraordinary, legally and cathartically. The discarded corpse was both inflammatory evidence of its own murder and demonstrable *katharma*—Burke's interpretation of the Athenian term for "that which is thrown away in cleansing." In one sense, it represented the physical purge of rape and resulting pregnancy from Alice's body, returning her to roughly the same physical condition she was in before she was raped. In another, it constituted the off-scouring or refuse resulting from the purgation of Shaffer's abusively procreative act. And in another, it represented an innocent but "worthless fellow," an expendable victim cast off to

advance the overall murder plot. Since a trial can be more like the Roman Circus than the Greek stage, the presence of an actual victim concentrated the power of collective anxiety more perfectly than dramatic tragedy; the sacrificial victim could be appropriated in multiple curative directions, justifying rage and retribution in one direction and sympathy and reconciliation in the other. In either sense, it contributed to the overall cathartic trajectory of the ritualistic slaughter of Alice's ethos and personage. Since Alice was the ultimate scapegoat, whether through guilt, victimage, or a combination of the two terminuses, the sacrifice of her child constituted a partial purge of the intensifying emotions associated with her circumstances and her class. Since, as a slave and accused killer she could not be loved, collective catharsis can only come through fear or pity, the intermediaries of love. The baby in the jar permitted the purgation of some of the anger that may have otherwise fallen on Alice, either by directing some of it toward the father or by recognizing its presence in the courtroom as an additional and undeserved source of suffering for Alice, permitting an acceptable sense of sympathy or pity for her, even as the accused killer. The variability gave different audience members an opportunity to meditate on the suffering of someone else in the context of the tensions and anxieties that they brought with them.

Catharsis is both verbal and nonverbal. The body participates directly in the production of catharsis within the structure of the enabling symbol system. Examples include laughter and tears, which bridge the gap between the physical self and the rational self (Burke, "Second View" 107). Tears are physiological secretions indicative of pity, which functions cathartically as a surrogate for love when love is either not acknowledged or not permitted. This kind of physio-emotional catharsis is inevitable in criminal crises and their representations in court. An example in *The Trial of Alice Clifton* involved Mrs. Mary Bartholomew. During her testimony, while being asked about her observations of Alice Clifton in the upstairs bedroom on the

morning of her delivery, the lifeless infant by her side, Mrs. Bartholomew appears to have become so emotional that she was unable to speak. Here is the exchange:

Council.—Where was the child found?

Mrs. Bartholomew.—My sister-in-law found it in a trunk in another room.

Council.—Did she bring the child to the mother?

Mrs. Bartholomew.—Yes; she brought it herself.

Council.—Well, what more?

Mrs. Bartholomew.—*I retired from the room.*

Council.—Did you see the child?

Mrs. Bartholomew.—I just cast my eye on it.

Court.—Did you see any wound upon it?

Mrs. Bartholomew.—No: I saw none.

Court.—Well, what further?

[Mr. Bartholomew said they were all so affected, that they could not bear to remain in the room. Mrs. Bartholomew was also much indisposed.] (182-83)

The last line is an interjection from the pamphlet's narrator, describing how Mrs. Bartholomew was temporarily unable to continue—presumably in tears—so her husband briefly spoke on her behalf. Building up to that point, Council and the Court had to prompt her into taking each narrative step in reconstructing the scene in the bedroom that morning. Eventually, she could go no further. Just as Mrs. Bartholomew was not able to remain in the room after she had seen Alice and her baby, she could not maintain the narrative's natural flow while talking about it in court. In the bedroom and in court, her cathartic discharge came at the same sequential and psychological moment. Perhaps, in confronting the immediate emotional intensity of life and

death before her, the symbolic and socially constructed barriers between her and Alice may have intensified or they may have checked her natural or instinctive responses. Either way, when first observing and then recounting, Mrs. Bartholomew withdrew from the scene and filled the gap with nonverbal secretions and gestures. She had known Alice most of her life but had only known her as a slave. Seeing her in those extremities may have dissolved the barriers between them, but in pulling away—a response that would be hard to imagine if her sister-in-law were in Alice’s place—Mrs. Bartholomew seems rather to indicate that her rational self acknowledged and obeyed the social convention, something that her emotional self could not resolve other than through tears and retreat. Regardless, it would be hard to argue that the sociolegal differentiations that separated them symbolically did not contribute to Mrs. Bartholomew’s physiological response.

Catharsis not only bridges gaps between the rational self and the physical self, but it also builds bridges to new spaces in the rational mind. People can be cleansed or gratified when they resolve an episode of uncertainty or indecision by taking a decision or by taking up a new course of action. Although Burke argues that this kind of cleansing does not directly require victimage (“Second View” 127), I am inclined to believe that it does. For example, to the extent that the cleansing involves immersion in the elements of a new symbol system or in a new way of thinking, it involves a dissociation, disposal, or moving beyond old information or other symbol systems, or a distancing from a former way of thinking. How could there be a cognitive cleansing without a cognitive unclean? Regardless, the investigative nature of the justice system’s role in fact-finding and decision-making lends itself to moments of discovery and decision, which, at a minimum, require the sacrifice of inaccurate, incomplete, or inchoate

notions. And the objectivity and critical thinking involved in these cathartic leaps can moderate the effects of individual or institutional bias.

An example of catharsis as cognitive consummation in *The Trial of Alice Clifton* (Appendix A) is the intellectual transformation of Dr. Foulke. The coroner called on Foulke to examine the corpse of Alice's child. Before he arrived at the scene, members of the coroner's inquest explained their preliminary findings, specifically, that the child's throat had been cut by the mother. Understandably, Foulke concluded that it was a simple case of murder. So obvious, in fact, was this conclusion, that he saw no need to examine the child himself: "The murder of the child was no longer with me a question, at least so far as the efforts of the mother had been able to effect it; and I left the Coroner and Jury to do their duty in an affair which appeared so clear and plain" (193-4). As a result, the coroner concluded, without specific input from Dr. Foulke, and without considering or pursuing the possibility that the child had been born dead, that the cause of death was intentional homicide. That conclusion would have remained unchallenged and unchanged had Dr. Foulke not decided to visit Alice. He did so not to determine the cause of death, but to evaluate her condition and talk with her about the seriousness of her situation. After the coroner and jury left, he went to the room where Alice and her child lay. He soon was "induced to doubt the validity of [his] first opinion" (194). The trial gave him the opportunity for professional clarification and catharsis, to displace his prior opinion, or rather, displace and cover the opinion that he had allowed the coroner to make. Meantime, he took the practical and cathartic interim step of writing down his impressions: "I went home, and made notes of it, from which I could explain my several reasons for concluding, that the child could not be born alive" (197). All linguistic consummations are cathartic, and this one in particular. Linguistic expression helped Dr. Foulke clarify muddled thinking and prepare

to defend his revised decision, one that would challenge his colleagues, all in an attempt to save the life of a defendant whom he now considered innocent. During the trial, over Bradford's objection, Dr. Foulke testified that his change in opinion was based in part on Alice's explanation about the time of conception, the time of delivery, and the circumstances of the premature delivery. He also described his medical observations regarding the size, development, and condition of the infant. His intellectual and professional catharsis removed doubt about the cause of death from his own mind and transferred it instead to the prosecution's case.

The formal structure of the trial ritual lends itself to cathartic elements that are procedural and hierarchical. They can be procedural in the sense that they are either required or permitted under the laws and rules in place, and they are hierarchical in the sense that their applicability and validity will be decided by the institutional hierarchy. For example, the jury's verdict is both a procedural requirement and a cathartic naming; it reflects the jury's journey from indecision to decision and the consummation of the officially sanctioned ritual. As such, on behalf of the sovereignty of the hierarchy, it is symbolic action by fiat: saying it makes it so. But the verdict is also subject to appeal and, in the case of a pardon, an amendment; these procedural steps provide additional opportunities for cathartic displacement, replacement, and covering. In the case of *The Trial of Alice Clifton*, one can see how the complexity and particularity of Alice's circumstances challenged existing sociolegal assumptions about unwed mothers, the agency of slave victims in racialized sexual abuse, and the procedural fairness of denying slaves victim status in crimes committed against them by whites.

Thomas McKean's record as jurist portrays a complex image of a courageous man committed to national independence and individual liberty while advocating and enforcing biblical and legal justifications for the race-based property status of slaves in America. His

performance in *The Trial of Alice Clifton* suggests a jurist who was out of step with the cultural flow and who appears to have resisted both the specific amendments to the bastard concealment statute and the paradigmatic shift signaled by the Act for the Gradual Abolition of Slavery in Pennsylvania. Beginning with his charge to the jury and ending with his final recommendation to the SEC, his rhetoric suggests that he was more committed to an outcome that would validate his world view and its current hierarchy than to a process that would uphold and reinforce the legal and attitudinal evolution of the new Republic.

The Trial of Alice Clifton concludes with instructions to the jury by McKean, introduced by the reporter as follows: “The Council and Attorney-general having finished their pleadings, his Honor the Chief Justice gave a charge to the jury.” Part summary and part instruction, McKean’s “charge,” by far the longest monologue in the report, guided the jury into their deliberations. Dramatistic analysis of the speech reveals McKean’s veiled advocacy on behalf of the prosecution, and a cathartic analysis reveals why he did so. Burke’s dramatistic pentad provides the theoretical framework where act, scene, agent, agency, and purpose are the grammar of symbolic interaction, and life events constitute the palette from which the rhetorical artist selects symbols to compose drama and reveal motive by enhancing, shading, defusing, and labeling events in order to achieve a rhetorical objective. Because the resolution of crime from both a legal and cathartic perspective is preoccupied with motive, the pentad can reveal the “how” and “why” behind cathartic judicial rituals.

The narrative argumentation deployed in trials functions similar to dramatic tragedy; it is plot-driven and performative. But legal drama differs from poetic drama in that neither the facts nor the outcome of the action is scripted or fixed; judicial role-players as poets, not poets per se, ultimately decide what the facts are, where the locus of action resides, and what is the

appropriate mixture of “pity and fear and other such emotions” required—as expressions and responses—to purge individual and civic tensions to resolve the crisis and restore [momentary] emotional equilibrium. The narrative trajectory reveals what the advocate perceives as the source of the excess tension or the places in which the advocate wants to create excess of tension in others. The advocate propels the narrative toward the point at which a desired symbolic action, such as a verdict, is required to purge the emotional toxin. McKean’s judicial charge and post-trial petition rhetorically displaced or covered alternatives to his essentialist view of Alice by directing fear toward her act of maternal infanticide as an unwed women. He disallowed the possibility of factual innocence (i.e., stillbirth) and disregarded the possibility of shared or transferred responsibility (i.e., Shaffer abused Alice and instigated murder). In order to demonstrate McKean’s potential bias, I provide pentadic evidence of his motives at two key procedural stages: (1) In his charge to the jury, McKean intended to advocate for conviction, regardless of the facts or the law, and (2) in his request to the SEC, he intended to depersonalize Alice and resist the normalization of slaves in general, reaffirm her guilt, and reassert the authority of the existing social order.

In his charge (Appendix A 204-7), McKean fashioned a drama that attributed murderous action to Alice. He advocated guilt by focusing on conduct rather than context in the way he labeled actions, selected certain evidence while suppressing other evidence, and by the way he stressed the value of that evidence over its narrative context. The law assigned to McKean the persona of judge, with the judicially-imposed purpose of acting as an impartial legal guide, a dispassionate instructor who commissions the jury as they begin their deliberations. The law required the jury to accept as valid the contents of the state’s charging instrument—the indictment—while simultaneously rejecting it as unproved, at least initially. That is, even though

the authorized prosecuting official had alleged evidence of both a crime and a criminal actor, the jury was to presume that the actor was innocent and that the crime was not yet proved. As a practical matter, any admonition to the jury regarding their proper presumptive posture served mainly to caution them to be critical of evidence presented to them. Without such an admonition, the trial would begin with disproportionate momentum in favor of guilt, and the burden would, in effect, be reversed. McKean did not instruct the jury to begin with a presumption of innocence.

As noted in Chapter 2, the trial pamphlet's summary of the indictment against Alice identified her as the slave of John Bartholomew, and narrated how she was charged with:

the murder of her female child, on the 5th instant, which was born a bastard; and that she, with a certain razor, of the value of one schilling, did, in, upon, and across the throat of the said child, feloniously, willfully, and of malice afore-thought, did penetrate, and cut, with the razor aforesaid, one mortal wound, of the length of four inches, and of the depth of one inch; of which said wound, the said female child then and there instantly did die.

(178)

In terms of Burke's pentad, the indictment provided McKean with working definitions for the act (murder), actor (Alice Clifton), agency (a slit across the infant's throat with a razor worth one schilling), scene (after the live birth of her bastard baby), and purpose (to kill, willfully and with malice aforethought). McKean's initial comments exemplified every element of the pentad's questioning force, providing a context for everything that followed; along with his concluding paragraph, it demonstrates his rhetorical intent and his advocacy for the act of murder. The first section of McKean's charge consisted of four complete thoughts, or four independent clauses—regardless of the original reporter's somewhat arbitrary punctuation—each with a subject and a

verb. That is, each phrase would have meaning if isolated from the surrounding clauses. I number them in the quote below:

[1] Murder, Gentlemen, is the highest and most heinous crime against the law of nature, [2] and it is greatly aggravated when the parent destroys its own offspring; [3] but it is denied that the child was murdered by its mother, because it was already dead: [4] yet you find so far as her efforts could effect [sic] its destruction, she exerted them unpityingly, and void of maternal affection. (204)

Here, McKean featured the act (murder), and the actor (the parent). He also introduced an element of scene (the child is claimed to have already been dead). Mentioning an exculpatory element of scene so soon gives the impression of impartiality, but in reality it highlighted the intentional act by immediately undermining the defense's theory. Clauses 1, 2, and 4 are judicial advocacy in that they assume that a crime was committed, that the [unwed] mother committed it, and that she did so unmercifully. In essence, McKean began by telling the jury where he wanted their deliberations to conclude: "Murder, Gentlemen." Then, he imposed a hierarchical judgment about the crime ("heinous") and the character of its perpetrator ("void of maternal affection") even before explaining to the jury what they were to decide, how they were to decide, and what they were permitted to consider when they deliberated. Not until clause 3 could the jury begin to see that the case may not be about whether Alice committed a murderous act, but rather about whether her act was inflicted upon a living infant. Yet, McKean used dramatic force to focus the jurors' imaginations and emotions on the violence rather than the question of life, strongly suggesting that there was a murder and that Alice committed it unpityingly.

McKean sandwiched his spare, impartial contextual scene between vivid emotional appeals. Clause 3 employs a passive construction, void of intensifiers. Clauses 1, 2, and 4 are all

active voice and rich with intensifiers (“highest,” “most heinous,” “greatly aggravated,” “unpityingly,” and “void of maternal affection”). Clause 3 contains no conclusions, while the others contain numerous opinions, stated as facts, the language of which closely matches the intensifiers already mentioned. These opinionated descriptions carried the weight of settled fact when the presiding judge presented them. Although the entire speech was spoken to the jury, in the first paragraph McKean employed the stylistic technique of direct address on two occasions—addressing the jury as “gentlemen” and “you”—both of which were in advocacy phrases. Direct address served to heighten or reinforce the engagement between rhetor and audience. Conflating McKean’s first paragraph to its core message to the jury, as revealed in direct address, the message is clear: “Murder, Gentlemen, is [what] . . . you find.”

McKean began the final section of his charge to the jury by misstating the law, effectively reversing the legal burden regarding the issue at the heart of the case. The misstatement deflected the legislative reality and became a form of judicial advocacy disguised as benign instruction: “[I]t is incumbent, as I observed before, upon her to prove it was born dead” (206). In reality, what he had observed before was that, under the newly amended law, evidence of Alice’s concealment of the dead baby should no longer be sufficient to find her guilty “unless there is a probable presumption offered, that the child was born alive” (204). Under the September 1786 amendment, the state had the duty to prove the child was alive, but McKean told the jury that Alice had to prove it was dead as if he were citing the original 21 James I statute. McKean’s misstatement altered the deliberative scene by reconstructing the social and political context, and it may have determined the trial’s outcome. The only material issue about which there was any doubt was whether Alice’s baby was born alive. By making it incumbent upon her to prove that her baby was born dead, McKean required the jury to resolve

all doubt on that issue in favor of a live birth. By cutting its throat, she necessarily caused its death. By being rendered mute as a slave, she was prevented from stating otherwise.

McKean made no reference to the multiple witnesses who heard Alice assert that Shaffer created her desperate predicament by raping her or that he had directed her to kill his child. In McKean's view, Alice alone was responsible for the child's life and death, "the highest and most heinous crime against the law of nature," greatly aggravated in this case because "*the parent destroy[ed] its own offspring*" in a manner that was "unpitying and void of *maternal affection*" (204; emphasis added). The child had only one parent and it was only the maternal affections that were lacking in the conspiracy to kill it.

McKean also failed to mention Alice's own recitation of events, as told to Dr. Foulke, in which she described her exhausted state after a painful delivery and how she "laid still half an hour," the baby beside her, during which time it neither breathed nor cried (199). This portion of Alice's story was corroborated by the Bartholomew family, none of whom heard a baby cry. When Alice finally picked the baby up, she "lifted its right eye-lid, but which fell down instantly." Then, "suspecting it might be dead, and recollecting the promised reward offered by Shaffer, and her promise to him, and fearing that it might cry and alarm the family, she took up a razor laying by accident in the window by the bed-side, and cut its throat through" (198). Nor did McKean refer to the testimony of the first two persons to see the baby after it was born, neither of whom saw any blood or marks of violence on the child. When Miss Mary Bartholomew found Alice's baby wrapped in a petticoat in an adjoining room, she brought it to Alice, who unwrapped the petticoat and laid the child on the bed beside her. The baby was clearly dead but neither Miss Mary Bartholomew nor Mrs. Mary Bartholomew saw a wound across the baby's neck or blood on the baby or blood on the petticoat. They did not see a bloody razor or any

material on which a bloody razor or a bloody baby had been wiped. They then left Alice alone for at least ten minutes. Yet McKean mentioned none of this, or the possibility that it was during the time that she was alone with her [lifeless] baby that Alice cut its throat.

McKean featured the prosecution's evidence of Alice's guilt by mentioning that she "made not the least provision of cloaths for the infant" (206). He again employed an intensifier—"least"—to demonstrate Alice's intent. But he failed to mention the evidence suggesting why she may have been unprepared with clothes even if she did not intend to kill the child. For example, according to the doctors, the child was at least two months premature, and injuries to Alice apparently induced a miscarriage. Even an openly expectant mother may not have infant clothing ready two months in advance. Further, despite the sudden onset of labor, Alice asked Mrs. Bartholomew for extra clothing. Although she asked for herself, it would be reasonable for the jury to conclude that she was actually asking for something to replace what she would use to wrap the baby. Regardless, by making the case about Alice's evidence of intent, McKean made the case for guilt despite residual doubt about whether there was life to begin with. Only later did McKean reconnect to the threshold question of whether the child was born alive. But he never clarified that the prosecutor's evidence did not really answer that question. Instead, he lectured the jury on the different levels of circumstantial proof, including the standard applicable in this case, a "probable presumption" that the child was born alive. Notably, he provided hypothetical examples of the other kinds of proof, but not for probable presumption, perhaps suggesting to the jury that no example was necessary because Alice's case was the stereotypical example. Then, he immediately and erroneously told the jury that it was Alice's duty to prove that the child was born dead anyway. He did mention that both doctors said that Alice's baby was stillborn, but he

concluded by telling the jury that they, the jury, “are not bound to give [their] verdict upon the opinion or judgment of any man however eminent” (207).

By forcing the criminal crisis into a simple question of murder, proven through evidence of intent and concealment rather of a living victim, McKean coopted the cathartic moment to resolve tensions in favor of the state. His narrative trajectory shielded Shaffer and, by extension, the rest of his privileged class. McKean avoided speaking to Alice’s specific circumstances, which kept the collective gaze away from the general social condition of anyone similarly situated. He kept the case rooted in the essentialist narrative that matched the indictment. For McKean, civic catharsis came from scapegoating a misplaced fear. He reaffirmed the superiority of the state and leveraged the jury’s obedience to the law and the authority of the state to persuade them to convict based on a general fear of unwed murdering mothers.

A criminal conviction, whether it results in incarceration or execution, is a form of ostracism and cathartic victimage. The defendant represents what is feared and must be purged from the body politic. The trial of Alice Clifton was not the first time that McKean participated from the bench in a purging of perceived civic pollutions in deference to the hierarchy. In 1778, for example, McKean presided over two highly publicized trials that resulted in political executions and in which he affirmed the cause of the Revolution by strictly interpreting the treason statute. Abraham Carlisle and John Roberts were elderly Quakers charged with conduct in support of the British occupation of Philadelphia. Carlisle was a carpenter accused of accepting a commission from General Howe to tend the gates of the northern British readout. Roberts was a wealthy miller accused of enlisting—or attempting to enlist—volunteers to serve in the British army. Carlisle and Roberts were among many tried for treason in the fall of 1778,

but they were the only two who were hanged, even though they may have been the least likely targets for execution (Coleman 230).

Jonathan Sergeant, then attorney general and later Alice's lead defense lawyer, prosecuted the cases. Even though both cases raised doubts about the evidence against the defendants—in Carlisle's case, about whether there was ever a commission, and in Roberts's case, about whether he had actually enlisted anyone—McKean, in his jury instructions and decisions, took a strict stance on the treason statute and a liberal view about the evidence needed to prove it (Rowe, *Thomas McKean* 116-19). McKean's position in these cases seems out of step with his position in other treason cases that fall. Of the forty-five bills of indictment presented in September, twenty-three resulted in indictments and trial; only Carlisle and Roberts were convicted. Rowe notes that in other cases, McKean conceded defense demands for irrefutable proof, but not in the cases of Carlisle and Roberts (120). The SEC may have pressured McKean behind the scenes, or his personal animus against Quakers may have contributed to the disparate treatment.⁹ Regardless, based on statistics alone, Carlisle and Roberts appear to have been scapegoats, ritualistically ostracized and executed to symbolically purge fears of treason in their midst. One McKean biographer suggests that the executions raised more concerns about the use of capital punishment than they did about treason, suggesting a secondary terminus for the scapegoating (Coleman 230). There was widespread opposition to the convictions of Carlisle and Roberts and numerous appeals for clemency were made to the SEC, including from McKean himself and the jurymen (230). The SEC denied the appeals and the sentences were carried out.

On the morning of 4 November 1778, both men were led to the Philadelphia Commons, ropes around their necks, their coffins placed before them. McKean proclaimed Roberts's sentence before he was launched into eternity. Treason is inherently political, and Rowe suggests

that the SEC deliberately publicized McKean's dramatic sentencing of Roberts (118). Three days later, McKean's words were published in their entirety in the *Pennsylvania Packet* and widely distributed. In the sentencing, McKean betrayed personal ambivalence about the performance of his duty. Whether it was sincere—consistent with his initial recommendations for pardons—or a political attempt to be seen as merciful while exacting justice, the outcome was the same: his brief verbal discharge of sympathy was immediately and permanently displaced by strong condemnation and an execution. Specifically, he began by expressing how “sorry I am that it falls to my lot to pronounce the dreadful sentence but I must discharge my duty to my country” (*Pennsylvania Packet*, quoted by Coleman 230). McKean focused on the scene of treason rather than a treasonous act by Roberts. He spoke of treason generally as a “crime of the most dangerous and fatal consequences to society” (Rowe, *Thomas McKean* 118). And even though there was no evidence that Roberts ever actually enlisted anyone, McKean connected him to those endeavoring “the total destruction of the lives, liberties and property of all his fellow citizens,” and aiding those responsible for “murdering thousands” (118). The obvious irony was that Carlisle and Roberts were charged with treason against the rebellion, which was itself an act of treason, one for which McKean was personally liable as a signer of the *Declaration of Independence*.¹⁰ McKean biographers have cited his role reversal in these cases—advocating strict legal interpretations on scant evidence followed by requests for mercy—as evidence of his willingness to temper justice with mercy” and of his view that the court's role in society was to ensure that “[r]etribution must be tempered with mercy and tolerance . . . reason and charity” (119). My view is that he compromised judicial impartiality in favor of political ideology and then expected executive clemency to salvage his public popularity. McKean equated the

Republic with the rule of law. To him, what Carlisle and Roberts represented was more important than what they had done; the cause was great than the case.

Considering this prior evidence of judicial advocacy, McKean's potential political motivations cannot be ignored in Alice Clifton's case. He may not have been alone in his propensity to follow "colorful and grim pronouncements with pardons," (120) but his equation of political power with the rule of law warrants scrutiny. In Alice's case, it likely altered the outcome. In his view, even if there were valid questions about whether Alice's child, the result of rape by a white man, was born dead, she still represented something to be feared in the changing social landscape. She should still be the sacrificial scapegoat; the SEC could then decide whether to stay the hand of the executioner.

Alice's jury deliberated for three hours before returning a verdict. The defense moved for a new trial alleging that juror Edward Pole made prejudicial pre-trial statements. McKean denied the motion and sentenced Alice to hang. Perhaps McKean believed that the evidence against Alice was so unassailable that, even in light of juror prejudice, a conviction in a second trial was a foregone conclusion and not worth the time or expense. Or, perhaps he believed that the revelations about Shaffer and the stillborn child would only become more dispositive in a retrial, giving him less flexibility in his instructions to the jury. Regardless, the conviction and death sentence, now beyond further appeal and rehearing, consummated the cathartic ritual, manifesting the awful power of the court. It represented a unified commitment, however temporary, to an authorized version of events. But, as Burke cautions, the emotional power of purgative catharsis can blind society to its underlying injustice; the community emerges reborn but with a false consciousness of order. Resulting power in the hierarchy of authority can occlude factual inequalities and social injustice, which remain unaltered (Burke, *Rhetoric of*

Religion 141). The ritual gives the perception of unity while the privileged retain constructive hegemony (108). The temporary diversion of collective attention does not equate to persistent change in collective attitudes, and unresolved differentiation places additional demands on the law, both as an institution and as symbolic transcendence.

In returning a verdict of guilty, the jury accommodated McKean's instructions, which inclined toward guilt and the need for purgation by alienation or ostracism. However, on the same day that McKean announced the sentence, they tendered a handwritten petition to McKean, signed by all of the jurors, Edward Pole first among them, requesting that the Supreme Court seek a pardon for Alice from the SEC:

The Petition of the Subscribers, Humbly Sheweth, That your Petitioners were the Jurors who passed upon the Trial of Alice Clifton for the Murder of her infant Child upon whose Verdict the said Alice has been found guilty. That from all Circumstances of the Case and particularly from its appearing to your Petitioners to be more than probable that the said Alice being of tender Age ignorant and unexperienced was seduced to the Perpetration of the said Crime by the Persuasions and Instigation of the Father of the Child your Petitioners are desirous that the Life of the said Alice may be saved. And your Petitioners therefore pray that your Honors may be pleased to recommend the said Alice to the honorable the Supreme Executive Council for a Pardon. (Appendix B 210)

In addition to satisfying the legal function of initiating clemency proceedings with the Supreme Court and the SEC, the jurors' petition served a cathartic role, collectively and procedurally. It amended McKean's instructions, displaced their own prior verdict, personalized Alice, included the child's father, and kept the process—and Alice—alive. Where McKean had emphasized Alice's unmarried status—making her child a bastard—the jurors simply referred to her by name

and to her child as an infant. Where McKean had spent considerable time discussing various interpretations of the now-amended concealment statute, the jurors clarified that it was a murder trial all along. Where McKean emphasized Alice's act of un pitying violence, void of maternal affection, the jurors considered all the circumstances—scene—of the case. Where McKean made no reference to a father, the jurors included the father and attributed considerable responsibility to him. In narrative terms, their petition made it clear that their verdict was neither the whole story nor the end of the story, nor should it be the end of Alice's life.

McKean, for his part, acknowledged the petition of the jury and forwarded it to the SEC, adding a petition of his own, directed to Benjamin Franklin:

Sir, In consideration of the tender years of the mother named Alice Clifton, being only sixteen years of age, and of her situation in life, being a Mute Slave, illiterate and ignorant; and out of respect to the Petition of the Jury, who convicted her, We beg leave to recommend her, to Your Excellency and the Supreme Executive Council, as an object of Mercy. (Appendix B 211)

Although both of the brief petitions requested the same outcome, their content revealed important differences in their narratology and cathartic motives. In three key ways, McKean's version displaced that of the jurors and reasserted the social hierarchy that he tried to protect. First, he depersonalized Alice by again labeling her as a slave. And he called her a mute, a characterization that is factually inaccurate but may have been intended to reinforce her status as property and not a legally competent witness. Second, he removed the (white) father from the narrative—and from responsibility—thereby muting the role of the abusive social order. And third, he defended the propriety and ability of the hierarchy to rectify the situation without institutional changes. By this, I refer to his request to Franklin to make Alice an object of mercy

rather than the recipient of a pardon, as the jurors had requested. Again, the practical result may be the same, but a pardon empowers the pardoned; mercy empowers the grantor of mercy.

McKean may have been troubled by the outcomes in the Carlisle and Roberts, for which he was referred to as a bloodthirsty judge, or by the recent Elizabeth Wilson case. Wilson's post-conviction narrative haunted the community with the possibility that it was not she who had killed her twin daughters and that she had been wrongfully hanged. For example, a journal entry written ten years after the fact by a Philadelphia resident demonstrates the persistence of the Wilson myth:

Read a narrative of Elizabeth Wilson, who was executed at Chester, Jany. '86, charged with the murder of her twin infants. A reprieve arrived 20 minutes after her execution, by her brother from Philadelphia. She persisted to the last in her account of the murder being by the father of the children, which was generally believed to be the truth. I recollect having heard the sad tale at the time of the transaction. (Drinker 303)

McKean may have been trying to keep Alice's case from being similarly mythologized. Regardless, clemency would allow Alice to live and her case to die. Unlike Wilson, however, Alice was granted a stay of execution almost immediately (208). Other than resuming her role as the Bartholomews' household slave, it is not known what she did with the life she was spared, including whether she had other children or whether she survived the Yellow Fever epidemics that claimed both her prosecutor—Bradford—and one of her defenders—Sergeant. Although her trial and its outcome reflected a slowly waning social order, her story illuminated the virtue of the emerging new one. She challenged the system's categorization of persons and its differentiated justice. As Susan Sage Heinzelman has said about a more contemporary infanticide case:

[Her] narrative of motherhood . . . was articulated in the details of her lived experience within its cultural context. Both the individual and collective representation of disempowerment and its consequences can be simultaneously witnessed, and even the murdering mother . . . has a story to tell that demands an audience. (95)

Alice's narrative of motherhood could not be understood outside its cultural context. Her disempowerment was not merely circumstantial, it was institutional. Although she had a story to tell, the system conspired to keep it quiet until witnesses within the ruling class were permitted to repeat it.

A sign of the changing social narrative came when William Bradford sought an indictment against Shaffer for rape, a step that he likely never would have taken had Alice's narrative not emerged in her murder trial. Although he obtained an indictment, he apparently knew that a conviction of a white man for raping a black woman would not be possible. Later, in an allusion to the Shaffer case in his *Enquiry*, Bradford wrote: "[W]hy do the laws consider the violation of a female slave of so little moment as to secure the offender from punishment by excluding the only witness who can prove it?" (44). Where Bradford detected the early beginnings of a change in the civic dialogue about racialized justice, McKean resisted erosion of the essentialist narrative of benevolent and beneficial racism. Before and after the Alice Clifton trial, McKean consistently demonstrated commitment to the American legal innovation that black slaves were property.

For example, in the 1785 case of "Phillip Dalby (of Virginia) and his Mulatto Boy Francis Belt," the Pennsylvania Abolitionist Society sued for the emancipation of a slave belonging to an out-of-state visitor. George Washington let McKean know that he was upset by the possibility of the case succeeding; he feared that visitors to Pennsylvania could lose their

slaves to emancipation if they accompanied their masters (Rowe, *Thomas McKean* 231). At common law, a bastard's legal status was determined by that of the father, and even if they could not gain anything through inheritance, they did not lose their natural right to freedom just because of their relationship with their progenitors (231). But, according to McKean, that part of the common law did not apply to children born to slave mothers in America. Ironically, William Bradford represented Belt (232). In his charge to the jury, McKean traced slavery's biblical underpinnings and distinguished it from the English form of villeinage, which, he explained, had never been recognized in America, where slavery was an inheritance. He said that American-style slavery was not only authorized by the civil law but that it was consistent with the precepts of nature. His charge left the jury with little choice but to return a verdict for Dalby, the father of the slave (231-2). The Belt case not only demonstrated McKean's control over the court and the jury but his racism as well. And in the 1786 case of *Respublica v. Negro Betsy*, McKean not only endorsed slavery as an institution, but he also expressed reservations about the ability of any free black person to function in white society (232).

McKean may have considered himself in an impossible position politically, fearing both an acquittal and an execution. He had to choose one or the other cathartic terminus. Or perhaps both. Burke asserts that the nature of the negative determines the nature of the elements to be displaced through victimization, and that purifying symbols can function in more than one direction (*Language* 18; "On Catharsis" 361). The negative of Alice's legal disability checked the negative of her criminal liability, and protection of the hierarchy called for the displacement of both the pity and the guilt that would be attached to her situation. An outright acquittal could be viewed by people without full knowledge of the facts as a miscarriage of justice. Finding her guilty would satisfy the public and foreclose the question of liability, thus averting further airing

of intractable political issues such as the role of the white father and the implications of Alice's culturally-imposed sociolegal restrictions. But executing her could be viewed as excessive punishment given her circumstances, calling attention to the reasons for them and resurrecting McKean's earlier label of a blood-thirsty judge. A post-conviction pardon would satisfy the demands of justice and mercy and would be less disruptive to the social status quo. According to Burke, the symbol system sets the conditions for catharsis by determining which traits will be projected onto the scapegoat, and there is nothing inherently absurd about competing moral injunctions (*Language* 18; *Rhetoric of Motives* 253). Instead of choosing between principles, the step goes beyond principles, like the leap from morality to religion or the secular equivalent (253). Considering his privileged status within the existing symbol system, McKean could advocate for a conviction and a pardon, projecting onto Alice both justice and mercy, thereby laying claim to both qualities, for himself and for the elite within the hierarchy. Finally, given his reasoning in the *Betsy* case, McKean may have viewed Alice's execution as an unnecessary destruction of John Bartholomew's property. McKean's apparent compromise is indicative of early American ambivalence: committed to advancing the notion of liberty and post-Revolutionary social reforms while preserving discriminatory legal institutions beneath them.

CHAPTER 5. CONCLUSIONS: INSTITUTIONAL BIAS AND THE POLITICAL SCAPEGOAT

Sometime after 18 January 1777, Thomas McKean became one of fifty-six men to personally sign his name to America's founding document, affirming the equality of all men and their unalienable rights to life and liberty. On 1 March 1780, the legislature of the state in which McKean served as chief justice and would later serve as governor, enacted a law affirming that all men are the work of the same almighty hand and that the undeserved bondage of their black brethren should be replaced by universal civilization and all its blessings. In the 1786 case of *Respublica v. Negro Betsy*, McKean would eventually rule that if the slave named Betsy "were discharged from her Master, she would be incapable to take care of herself, and . . . she cannot suffer so much by living with a good master, as being with poor and ignorant parents . . . [and she] would be little benefitted to her master, who hitherto has derived no advantage from her services" (Dallas, *Reports of Cases* 471-472). In the spring of 1787, delegates began arriving in Philadelphia for the congress that would come to be known as the Constitutional Convention. On 18 April 1787, Alice Clifton appeared before McKean and the Pennsylvania Supreme Court as an unwed slave accused of murdering her infant. In a case at America's sociolegal crossroads, McKean, as judge, advocated a political compromise. His jury instructions focused more on the elements of the old concealment law—justifying bias against unwed mothers—than the content of the new law. His recommendation for post-conviction mercy emphasized stereotypes that justified racial hegemony. Together, they reflected deference for the hierarchical privilege that had won the Revolution at the expense of the ideal that had inspired it. But once created, the ideal persisted, even if resisted.

The Failure of the Ideal

The *Declaration of Independence* created the ideal of universal liberty and justice. In Burke's dramatisitic view of human relations, the symbol-using animals are forever guilty of failing to live up to the ideals of their own symbolic reality, and, in the case of the founding concept of unalienable rights, custom and law had long since institutionalized gaps in the lofty aspirations of the immerging national identity. Pennsylvania's Act for the Gradual Abolition of Slavery made it among the first to slowly undo legal human bondage and close the racial loophole in the *Declaration*. And the revised concealment statute moderated one aspect of differentiated due process, specifically by providing more procedural protections for unwed women in infanticide cases. Yet, those symbolic acts did not immediately change strongly held beliefs, and McKean represented those who retained their views on biological superiority and intra-class justice, as manifest in his subsequent use of the court as a political tool. Bringing politics into the courtroom concentrates issues of social policy onto individual defendants for partisan objectives. The political agenda influences legal decisions, and either the scapegoat must be fitted for both legal and civic redemption or else the respective burdens must be molded to fit the scapegoat's back. The essentially cathartic nature of criminal trials facilitates the discovery of political motives within the resolution of specific crises. The ritualistic apparatus of judicial catharsis negotiates the inherent conflict between humans' desire for a sense of order and their quest for the perfection implicit in the negative of symbolicity; perfection resides in the best version of themselves as embodied in universal justice.

Judicial Catharsis

Judicial catharsis—which I have described as the official apparatus for channeling the manifold cathartic pathways that converge upon a criminal crisis—processes variable layers and

trajectories of conflict and tension, individual and political. It is the procedural and ritualistic dramatism of the law. From the law's grammar that defines and judges human action, through its poetics that express collective ideals, to its rhetoric that invites identification with a social order that has power over redemptive rituals, judicial catharsis provides the serial victimage necessary to feed the insatiable appetite of symbolicity's categorical guilt. Although Burke does not mention a self-contained field of judicial catharsis, it can be inferred from, among other references, the way he gives aesthetic catharsis a civic and politic application ("On Catharsis" 337), from the way he discusses how criminals, real and imagined, can serve as scapegoats in a community through moral indignation and condemnation (*Grammar of Motives* 406-7), and from his recognition that purely formalistic and fragmented expressions are cathartic ("Second View" 116). Burke shows how catharsis purges or purifies tensions associated with all social interactions and conflicts by directing and expanding human thought. For example, adding new terms to the vocabulary of motives of a racially intolerant person can reduce the level of intolerance (*Grammar of Motives* 305). And human thought can be directed toward the "purification of war," not in the expectation that war will be eliminated but rather that the conditions for peace might increase (305). I extend the analogy of war to the arena of criminal justice. The criminal trial is linguistic battle in the "purification of crime," not in the expectation that crime or injustice will be eliminated from society but that through it the conditions for peace and universal justice might increase. By directing the mind toward a specific instance of crime, the incident itself can be refined, redefined, and resolved in a way that can give meaning to the unthinkable and reaffirm society's sense of order.

Justice is inherently cathartic, though in different ways to different persons, even in response to the same event. The inherent variability of trials permits participants to introduce

civic themes and complex individual particularity aligned with a specific legal context. Audiences may bring individual or collective dis-ease with them and purposefully or incidentally seek cleansing, retribution, validation, or distraction. Like a carnival attraction, a trial exposes participants to the sense of fear without risk of actual harm. But a trial begins in real crisis. The allegation constitutes a disease in the body politic, an unresolved disturbance that must be revealed, labeled, and dispatched. The trial operates similar to a drama, but its cooperative and aesthetic dialectic is ultimately practical. It is true symbolic action, making language both cause and treatment. Language creates both community and conflict. It enables crime and its catharsis, an incomplete and transient purification through judgement, linguistically placing the crisis beyond—or behind—the community. For example, an infanticide trial does not purge infanticide from the community, nor does it cure the specific crisis by restoring the loss of life or virtue. But the inevitability of conflict and the insufficiency of the catharsis do not equate to futility in the judicial process. Humanity in community means constant crisis and catharsis. The community defines the crime, which in turn fractures the community. The trial compels cooperation, the completion of which restores a sense of community. It generates pain and gratification, both of which are recognizable in contrast with each other. Its rhetoric is compensatory, not curative—a perpetual cleansing of what can never be made clean.

For trial participants and audiences, judicial catharsis represents cleansing through substitution and transcendence, like combatants whose causes transcend their battle. Similarly, the battlefield itself, in which rival combatants join in battle, transcends the divisions of opposing camps (*Rhetoric of Motives* 11). The courtroom, too, is a theoretically neutral battlefield; it should provide equal protection and due process to all contestants. Just as the terrain and conditions of a battlefield may tend to favor one army over another, institutional bias provides

the hierarchically privileged with the permanent high ground. Bias politicizes the law and its resolution. Policy reflects approved attitudes. Bias reflects privileged circumstances. Criminal law reflects the proscriptions and injunctions that disguise bias as order. Institutional bias complicates and politicizes judicial catharsis by defining crime more in terms of policy than security and by creating an underlying circumstantial guilt that cannot be directly discharged through criminal adjudication. Although the criminal-justice process accommodates all cathartic pathways, the rhetorical means for one may not serve another, and resolving one may complicate another. Institutional bias makes a criminal case a political crisis. In Alice's case, the justice system required a criminal scapegoat and the privileged hierarchy required a political scapegoat. To serve as both, the respective burdens had to be shaped to match the scapegoat's back. From McKean's perspective, the legal solution required a conviction to reaffirm the rule of law, and the political solution required mercy to reaffirm hierarchal privilege. In the end, the trial created the perception of judicial and merciful catharsis from the same process using the same actors.

But judicial catharsis through judgment is not the same thing as justice. That is, one can properly claim that criminal proceedings necessarily produce cathartic responses without endorsing the morality or legality of specific judgments. Purging is not productive if what is purged was healthy and if what remains is not. Purification is not improvement if it only serves to refine the toxicity of a poison. So, one must not confuse the emotional inevitability of a process with ethical morality in an outcome. Yet, one also must not permit the possibility of judicial failings or abuses to detract from a trial's cathartic potential to eventually achieve more ethical outcomes. Judicial catharsis rests on an underlying framework in which accused persons stand for, or stand in for, the generalized fears or conflicts or divisions embodied in the crimes of which they are accused. And it relies on the underlying assumption that labeling and punishing

them in the name of the law somehow remediates past events that are unconnected in time or space. Whatever fixing or healing takes place can only do so symbolically. In that sense, the community “treats” criminals for its own benefit. That is not to say that catharsis in the judiciary is objectively therapeutic. Any cleansing or healing reinforces the hierarchy, transferring residual pollutions to either a new cathartic cycle or back to the miasmatic swamp of social tension, irresolution, and anxiety. Trial rituals function as catharsis because the emotions necessary for its effects are intrinsic to the human condition. Legal dramas, played out as narrative structures, manipulate these emotions, which in turn seek vehicles for purification. Participants and audiences find them in real scapegoats, whose stories cure by introducing more concentrated doses of intrinsic tension and irresolution and then completing the stories with the finality of official judgment, encasing purification with institutional order. In Alice’s case, McKean presided over the resolution of a criminal case to protect the rights articulated in the law. But he also interjected himself to reinforce the rights of hierarchical privilege. The recognition and preservation of rights requires a hierarchical order that is capable of translating the inherent negativity of symbolicity into a positive ideal of orderly society.

Purification Through a Scapegoat

To promote the rule of law and the social order, McKean needed a scapegoat who had been perfected to match terms of the perceived pollutions in both. He could not completely control the outcome of the trial, but he could influence the perception of perfection implicit in the negative by controlling the terms. The principles of perfection are implicit in the nature of every symbol system (*Language* 17). They moralize actions into punishable transgressions and imply the corresponding negative traits of compensatory victimage required of a scapegoat. In the case of Pennsylvania’s revised infanticide statute, before any negative traits could be

projected onto Alice, the prosecution should have been required to prove that her child was born alive. If not, murder could not be projected onto her; she would not be an adequate scapegoat for those circumstances. McKean needed to perfect her as a scapegoat by redefining the terms in a way that matched the political attitudes of the ruling class about slaves and unwed mothers. Politically motivated appropriation of the principle of perfection is dangerous because it “derives sustenance” from unrelated parts of the system’s symbolicity (18). For example, in Alice’s case, McKean spent considerable time in his charge to the jury discussing the lapsed version of the bastard concealment statute. Even if all of his statements about it were accurate, they were irrelevant—legally. But politically they were still relevant; they reflected his preferred policy, and he privileged that policy above the law. If the circumstances of the scapegoat did not match the law, he believed that policy permitted him to match the law with the circumstances. He altered the drama implicit in the law so that the victimage aligned with the drama.

McKean also perfected Alice as scapegoat in his terms for recommending mercy. He implied the virtue of the political hierarchy by defining a perfect, and perfectly dependent, subaltern in a slave economy. In his recommendation, Alice’s slave status was relevant only to a policy of privilege, not to the law that she was accused of violating. To justify preserving differentiation, he had to enlist the essentialist negativity of Alice’s class and reinforce the virtue and authority of the ruling class. Thus, Alice was deemed worthy of mercy from the ruling class because she was a mute, ignorant, slave, and not because she was a victim of the ruling class or because she may have been factually innocent.

McKean’s reference to Alice’s being mute is a curious interjection. “Mute” generally means physically unable to speak or intentionally refraining from speech. In the legal context of the time, it also represented the prohibition of slaves bearing witness against free persons. But

such hegemonic restrictions on speech, beyond being inherently unjust, have consequences outside the courtroom. Burke observes that wherever injustice prevails, any restriction against voicing a complaint against certain protected persons becomes a generalized fear against voicing complaints at all (*Language* 470). Even if she was ignorant of the specifics of the law, Alice would have known from experience that she could not complain about the abuse she suffered or the directions she had been given.

McKean's superfluous reference to Alice's muteness also reinforced a racially differentiated society in general. Burke asserts that, according to Aristotle, a man without a community is not a man, and that, according to Cicero, humans become civilized only when they form communities through speech and communication (*Rhetoric of Motives* 21). Humans communicate with and identify with each other through language, and communication is the source of cooperation (21). By defining Alice as mute, while requesting her mercy, McKean reinforces racial division and the exclusion of slaves from the community of speaking persons, that is, persons with a voice in the community. Unlike the preamble to the Act for the Gradual Abolition of Slavery, McKean considered blacks an inferior race, primarily intellectually. By using his words to mute Alice, he excluded her from full fellowship in the community of persons. Both the jury and McKean referred to Alice being ignorant. In the jury's petition, however, her ignorance was connected to her being inexperienced in the context of being seduced to the commission of the crime by the father. In McKean's recommendation, the only context for Alice's ignorance was illiteracy. By keeping Alice and all slaves mute and ignorant, the ruling class could keep them from full integration into the community, a self-fulfilling prophecy of inherent inferiority. Further, ignorance would keep blacks dependent upon the ruling class in the administration of justice or the granting of mercy. McKean's labeling reflected the

pride intrinsic to privilege and its associated hierarchical motives (*Language* 18-19). McKean feared the erosion of social boundaries more than he feared infanticide. His controlling sacrificial principle became political, and Alice embodied a political scapegoat, relieving the criminal anxiety by artificially inserting racial anxiety. Alice became a surrogate for the stereotypes that justified legal differentiations—like slave and unwed mother—or that justified resistance to their removal.

Human Bias and Resistance

McKean's personal and public records show that he was a loyal patriot and jurist. He was also a human struggling with his humanity, and his decisions and politics at times lagged behind the evolving law of his home state and the vision articulated in his new country's founding declaration. He was personally invested—as very few others—in the political past, present, and future of the United States and Pennsylvania. Alice Clifton's case presented him with an apparently straight-forward criminal case in an unusually complex political context. As law transforms self-interest into the public good, the power of the law can induce the belief that those in certain ranks have the right to speak for society. The powerful tend to identify self-interests with ultimate social principles and the inertia of hierarchical power tends to legitimate privilege by masking underlying inequalities. The rituals of the law can give the perception of unifying the community across classes while in reality the privileged retain constructive hegemony. Ritual-induced unity is more of a temporary diversion of collective attention than a persistent change in collective attitude, but the promise of perfection remains unchanged.

At the end of *Language as Symbolic Action*, Burke offers some “afterthoughts” regarding the negative. He presents them as “self-contained glimpses [without] protracted exposition” (469). One glimpse, which he attributes to “another correspondent,” describes a moment when as

a boy he witnessed an event that, for him, came the closest to representing the complete negative as anything he had ever seen. It was a coroner's jury that had been called upon to inspect the body of a child killed by its mother. Burke quotes the correspondent: "Is not a child killed by its own mother at birth as near to complete negation as any event can be, yet to hold any affirmation at all?" (471). By citing the glimpse—though without explicitly endorsing it—Burke suggests that maternal infanticide is the irredeemable negation, an extraordinary cancellation that is at once homicidal and suicidal, the killing of a completely innocent part of oneself before it becomes its own self. To constitute negation, infanticide must be volitional; the mother must recognize the child as a part of herself and choose to destroy it. But in the case of someone like Alice Clifton, how can one know what the infant meant to her? Setting aside the question of stillbirth, did she recognize it as part of herself? Dr. Foulke observed in Alice both a sense of detachment and of sadness as he took her baby away. Her ambivalence was understandable. Because of codified racial and gender bias, the child was Shaffer's seed, and, had it lived, would have been Bartholomew's property for twenty-eight years. Her baby was the product of a system, not a courtship. She was a sexual and reproductive vehicle. In that sense, she had been a scapegoat her whole life, not just during the four days covering her trial, conviction, appeal, sentencing, and clemency pleadings. Her situation was as political as it was criminal, and the judicial catharsis of her trial accounted for both termanistic trajectories.

Bias in the law makes every case political, even if the facts or circumstances are not adjusted to match the scapegoat. It compels trial participants to assume political roles in deference to the rule of law, basing legal judgments in part on their acceptance or rejection of an underlying or unstated policy. For example, by McKean's own admission, in cases involving the original concealment, courts frequently "required some circumstantial evidence [beyond

concealment] or they acquitted the prisoner Therefore the Legislature have altered the law in this respect” (Appendix A 205-6). His rationale was that the terms of the law were deemed too severe to address the unstated policy of controlling unwed pregnancy and infanticide. Yet, he suggests in his instructions and his examples that the legislature’s purpose in the newly revised law was to require some circumstantial evidence of a homicidal act when in reality their explicit purpose was to require the state to produce some evidence of a live birth. McKean’s distinction demonstrated his political motivation and was critical to the outcome of Alice’s case. There was, of course, abundant evidence of a violent act, including an admission and a throat that had been cut, but there was considerable doubt about whether there was a live victim, especially given the consistent opinions of the only experts. However, McKean turned that doubt into a burden for Alice instead of for the prosecution: “it is incumbent, as I observed before, upon her to prove it was born dead” (206). During the trial, Alice’s defenders sought to depoliticize—or counter-politicize—the case narrative by introducing the legally excludable but relevant complex particularity of her circumstances. Although the jury had little recourse but to convict based on the law and evidence as framed by McKean, they performed an act of procedural and political catharsis by crafting a clemency petition that implicated the father and the system that protected him. McKean’s subsequent recommendation for mercy resisted the dissolution of the protective language of the law.

Nonetheless, resistance like McKean’s could only delay movement toward ultimate justice on a case-by-case basis; such resistance could not stop it altogether. Once linguistically launched into human consciousness, the gravitational pull of its perfection is as constant as its illusiveness. The symbol-using animal cannot be motivated solely by nonlinguistic motives, and the principle of perfection implicit in symbols means that language always drives toward the

ultimate of itself, and the ultimate manifestation of language is justice (*Language* 17, 440).

Burke defines ultimate justice as the “kind of completion whereby laws are so universalized that they also apply to the lawgiver” (440). One avenue to the universalization of the law is to eliminate the pride intrinsic to privilege whereby it excludes itself from the application of the law. Another is to universalize the class of lawgivers. The perfection implied by unalienable and universal liberty contemplates both. To dismiss the notion of perfect justice as mere language because it exists only as ink on parchment is to admit that it is at least language (see 440).

Grounding it in language is to ground it in human nature. Attempting to achieve in practice what was conceived in principle inevitably leads to moral strain. The motivations and the strains are alike linguistically based, as is the cathartic coping mechanism. Even though the ruling class will tend to equate itself with the rule of law, which necessarily subordinates the law to the hierarchy, the transcendent ideals of language as ultimate lawgiver goad the hierarchy toward its perfection.

Implications

The inclusion of *The Trial of Alice Clifton* into the anthology of early American criminal narratives will enable further analysis of the text and its context from multiple perspectives of early Americanism, including historical, social, legal, and literary. The theoretical lens of this critical introduction demonstrates the potential for a more deliberately dramatic critique of other legal texts and of the law in general, including recognition of law’s implicit role in judicial catharsis. A dramatic view of the law reveals not only its inherent symbolic action in defining social reality, but also its essentially cathartic apparatus for easing social tensions, resolving conflict, and judging conduct. Judicial catharsis is both dialectical and therapeutic; it seeks truth and healing. Truth is discovered—if not created—through the dialectical use of language (*Grammar of Motives* 403). Law is a linguistic enterprise. Particularly in the trial setting, truth is

discovered or decided or created out of narrative converse, concluding in a verdict, or “truth speaking” by the “finders of fact.” Judicial catharsis is implicit in the process and in the product, in narrative representations of past events (whether essentialist or particularized), in the naming or labeling of relevant facts as true or untrue, and in the labeling of certain persons as guilty or not guilty. The process pleases through representation and actualization; the outcome eases through judgment and resolution. Through cooperative identification and symbolic action, humans cathartically process their psychological and sociological tensions. Judicial catharsis is not just a mental configuration; it is intimately and intensely experiential. Its cooperative completion, through narrative engagement and authoritative judgment, ultimately—though not universally—tends to soothe.

Unlike dramatic tragedy, which achieves cathartic transcendence through substitution—of the imitated for the real and of the symbolic for the physical—judicial catharsis blurs or eliminates the element of substitution. In the “purification of crime,” a trial is both a substitution for physical conflict and itself an actual linguistic conflict. It places the battle in a controlled and authoritative arena. The trial is contained and constrained but not vicarious; it is not an armed duel, but it is more like a duel than it is like a play about a duel. Where dramatic tragedy conveys a sense of order through staging and plot development, the trial takes actual physical control over persons and issues and then places them in a ritualistic progression that culminates in judgment. A tragedy’s influence passes with the conclusion of the drama; a trial’s judgment redefines the past, projects into the future, and becomes itself a historical fact.

The heart of judicial catharsis is victimage, and guilt is the engine that drives law’s never-ending dialectic of order and disorder. The trial responds directly to a specific instance of crime—one that it can resolve—and it responds indirectly to irresolution outside the trial—

conditions that are either symbolically or literally unresolvable. In paving a path to the resolution of the immediate issue, the trial eases the emotions of unresolvable entanglements in the community. State-sanctioned punishment of criminal defendants symbolically satisfies specific debts, but it also pays down the categorical debt of symbolicity that is owed by all. Guilt is congenital as to language, chronic as to symbolic differentiation (including bias), and acute as to individual acts of deviance. The judicial catharsis of legal drama contemplates all three. Public sacrifice of a scapegoat redeems and heals the community by cutting off the diseased member, however defined. Because individual identities are socially constructed, people are capable of identifying with the defendant as a criminal, with the victim as a victim and with the criminal as a victim. Whether convicting or acquitting, punishing or pardoning, acting upon the defendant purifies the group. Regardless of a trial's outcome or outcomes, in the purification of crime, a defendant can be all things to all people. Pollution comes from the combination of crime and bias. Purification comes from the combination of narration, judgment, and punishment. Redemption brings the transitory sense of rebirth or renewal following the cathartic division and casting off, both case-specific and transcendent.

NOTES

¹ Although some of Philadelphia's most prominent citizens participated in the trial—including Chief Justice Thomas McKean and Attorney General William Bradford—and although Benjamin Franklin, as President of the Supreme Executive Council, approved the pardon, none of these men is known to have ever mentioned the trial or Alice Clifton by name in their personal writings or publicly available correspondence.

² An image of the pamphlet is available online, *Early American Imprints, Series I: Evans, 1639 – 1800*. The contents were digitized in the same database just prior to the submission of this dissertation.

³ Section 7 of Pennsylvania's Act for the Gradual Abolition of Slavery (1780) provided that if a slave were executed by the state pursuant to a conviction for a capital offence, the slave's owner would be reimbursed in cash by the state at a value established by the jury.

⁴ Most of pages 15 and 16 is occupied by excerpts of the trial of James M'Glochin, which may have been inserted for comic relief. For example, when Constable John Goss testified, he demonstrated how the defendant turned his "back-side" so as to hide some stolen property, to which the Court (probably McKean) replied, "You need not turn your's upon us." Then, Council asked Goss about a prior reference he made to seeing the defendant shake hands with "a great rogue . . . from Ireland named O'Neil: "[I]s it not usual for Irishmen to shake hands, or to kiss, when they meet?" Goss responded, "No: the Irishmen don't kiss, that's the French outlandish way."

⁵ Although a few early law reports, or digests, reported jury trial proceedings, they were primarily, and eventually exclusively, for reporting decisions of appellate courts for use by legal

professionals, and did not appear in the United States until 1789. See Erwin C. Surrency, “Law Reports in the United States,” *American Journal of Legal History*, 25 (1981), pp. 48-66.

⁶ Friedman points out that as early as 1671 Maryland passed a law ensuring that baptism was no longer an escape from bondage.

⁷ Nearly one hundred years later, the U.S. Supreme Court would still uphold states’ rights to exclude women from practicing law, ruling that the “natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.” *Bradwell v. Illinois*, 83 U.S. 130 (1872).

⁸ I neutralize Burke’s original “man” here and throughout; it is clear to me that he, consistent with common usage at the time of his writings, employed the term in its general sense, not as a sexist marker.

⁹ For example, Rowe cites a 1775 statement by McKean in which he describes the position of the Quakers with regard to war preparations and financing as “bear[ing] an Aspect unfriendly to the Liberties of America and maintain[ing] Principles destructive to all Society and Government” (70).

¹⁰ “Treason doth never prosper, what’s the reason? Why, if it prosper, none dare call it treason” (Sir John Harington, *Epigrams, Book IV, Epistle 5*).

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APPENDIX A. THE TRIAL OF ALICE CLIFTON

[The layout of the text has been altered to improve readability and facilitate speaker identification while preserving much of the original appearance. With the exception of replacing the long *f* with the standard *s*, spelling and punctuation are original.]

The TRIAL of ALICE CLIFTON, for the Murder of her Bastard-Child,

At the Court of Oyer and Terminer and General Gaol Delivery, held at Philadelphia, on Wednesday the 18th day of April, 1787.

ALICE CLIFTON, late of the county of Philadelphia, slave of John Bartholomew, was indicted for the murder of her female child, on the 5th instant, which was born a bastard; and that she, with a certain razor, of the value of one shilling, did, in , upon, and across the throat of the said child, feloniously, willfully, and of malice afore-thought, did penetrate, and cut, with the razor aforesaid, one mortal wound, of the length of four inches, and of the depth of one inch; of which said mortal wound, the said female child then and there instantly did die.

The Attorney-general managed the trial on behalf of the state, and Messrs. Sergeant and Todd were employed for the prisoner. The following witnesses appeared, and deposed.

John Leacock, Coroner, Sworn.

Court.—Well, Mr. Leacock, what do you know of this affair?

Leacock.—I know very little more, than that while the inquest were examining the child, I discovered that its throat had been cut.

Court.—Did you say any thing to her, or ask her any questions?

Leacock.—She was asked, how she come to kill her child? and answered, that it was in order to keep it from crying. I was informed by Mr. Bartholomew, that the body was discovered, under some cloaths, in a chest.

Court.—Did she say, that she was the mother?

Leacock.—I did not ask her.

Court.—You say, that she said she cut the child's throat to prevent its crying, when you discovered that it had been cut?

Leacock.—It was not me who found it out; it was one of the jury, while they were examining it.

Council.—Did she say she cut its throat to prevent its crying, or for fear it should cry?

Leacock.—I am not positive, but believe it was to keep it from crying: she said too, that she had done it by the order or express command of the father of the child. She was then asked, who the father was? and she mentioned his name.

Court.—Who did she say was the father?

Leacock.—She mentioned his name.

Court.—What name did she mention?

Leacock.—She said it was John Shaffer.

Court.—What else happened?

Leacock.—That is all I know.

Court.—What child was it, male or female?

Leacock.—It was a female child.

Court.—Did it appear to be a likely child?

Leacock.—Yes.

Court.—Was the hair and nails grown, and did it look as if it had come to its full time?

Leacock.—The hair and nails were grown, but I did not examine it particularly, as I made no question but it had gone the full time.

Court.—Is the prisoner at the bar the same woman that you then saw?

Leacock.—Yes.

Court.—Did you ask her if it was born alive?

Leacock.—Yes: she was asked several times, but always said it was born dead.

Court.—And was she not then asked, if it was born dead, what was her reason for cutting its throat, and she answered it was to prevent its crying?

Leacock.—I believe that question was asked, and she might have answered so; but I could not hear, as there were a great number of people in the room, so that I was crowded up in a corner, as the room was but small.

Attorney-general.—If the room was so small you could hear the better, I should think.

Council.—Did she say whether the child cried or not?

Leacock.—No: she said it was born dead.

Council.—Was the child cold or warm, when you was there?

Leacock.—I did not feel it.

Council.—Did she say she cut its throat for fear it would cry?

Leacock.—Yes, I think she did.

Council.—Did she mention any arguments which the father had used to induce her to commit such a crime?

Leacock.—I know nothing further: Captain Bullfinch was there, and he heard what she said on that subject.

Council.—Did you take any examination in writing, at the time?

Leacock.—No.

Council.—Well but you should on such important occasion.

Leacock.—I did not know it was necessary.

Mrs. Mary Bartholomew Sworn.

Court.—Are you the mistress of that woman?

Mrs. Bartholomew.—Yes, Sir.

Court.—Look, and see if it is the same.

Mrs. Bartholomew.—She is, Sir.

Court.—When did you discover her to be with child?

Mrs. Bartholomew.—About five or six months ago.

Court.—Did you charge her with it?

Mrs. Bartholomew.—Yes, Sir.

Court.—Did she own it?

Mrs. Bartholomew.—No: she said she was not.

Court.—Did you charge her more than once?

Mrs. Bartholomew.—Yes; but she constantly denied it.

Court.—What happened the morning that she was delivered?

Mrs. Bartholomew.—I don't know, for I did not see her till twelve o'clock, when I went up to her, and she complained of being unwell.

Court.—Had she not been up that morning?

Mrs. Bartholomew.—Yes: she got up and made the fire in the parlour, and afterward she went and laid down.

Court.—What did you say to her, when you went up?

Mrs. Bartholomew.—I asked her what was the matter? and she said she was poorly. I told her that I suspected she was with child, but she denied it.

Court.—Well, what further?

Mrs. Bartholomew.—I then left her, Sir: I thought she was in that situation, and seemed to suspect she was in labour.

Court.—Was she laying in the bed, or on the bed?

Mrs. Bartholomew.—She was lying under the clothes; in about an hour I went up again.

Court.—What did you discover then?

Mrs. Bartholomew.—She seemed much the same: I asked her the same question, and she told me again, that she was not with child: I went down directly, and in about a quarter of an hour I went up again, and she asked me for some old cloaths to put on: she told me that she felt better.

Court.—Where was she when you came up?

Mrs. Bartholomew.—She was walking about the room: I told her I suspected she had a child, but she denied it still; but I searched about in the closet, and in the chimney.

Council.—Did she appear disturbed while you was searching?

Mrs. Bartholomew.—No: she said nothing.

Council.—Where was the child found?

Mrs. Bartholomew.—My sister-in-law found it in a trunk in another room.

Council.—Did she bring the child to the mother?

Mrs. Bartholomew.—Yes; she brought it herself.

Council.—Well, what more?

Mrs. Bartholomew.—I retired from the room.

Council.—Did you see the child?

Mrs. Bartholomew.—I just cast my eye on it.

Court.—Did you see any wound upon it?

Mrs. Bartholomew.—No: I saw none.

Court.—Well, what further?

[Mr. Bartholomew said they were all so affected, that they could not bear to remain in the room. Mrs. Bartholomew was also much indisposed.]

Court.—Did you discover any blood about the cloaths?

Mrs. Bartholomew.—No.

Council.—When you said she asked you for cloaths, did you understand cloaths for herself, or for the child?

Mrs. Bartholomew.—For herself.

Sergeant, being council for the prisoner.—When she asked you for old cloaths, did she not let you know that she had a child?

Mrs. Bartholomew.—No, Sir.

Sergeant.—Had she sufficient cloaths always before?

Mrs. Bartholomew.—Yes, Sir.

Sergeant.—Pray, did you know of her having received any hurt, previous to her delivery?

Mrs. Bartholomew.—Yes; about a month.

Sergeant.—You'll please, Madam, to relate the circumstances to the Court and Jury.

Mrs. Bartholomew.—About a month or so before, she fell down the cellar-stairs, with a log of wood in her arms.

Sergeant.—Was she much bruised by the accident?

Mrs. Bartholomew.—Yes, Sir, a good deal on her hip.

Sergeant.—Do you know of any other hurt she received?

Mrs. Bartholomew.—She was hurt a few days before.

Court.—Did she complain much of the bruise?

Mrs. Bartholomew.—Yes, Sir, she complained for a week or two after.

Court.—Did she keep her bed?

Mrs. Bartholomew.—No, Sir.

Todd, being also council for the prisoner.—Pray, Madam, where was the girl, when you went up to see her, about twelve o'clock?—Was she in the garret or second story?

Mrs. Bartholomew.—She was lying on a bed, in a room on the second story.

Todd.—Is that the usual room where she sleeps?

Mrs. Bartholomew.—No, Sir.

Todd.—Who sleeps in that room?

Mrs. Bartholomew.—My brother, and the boys of the shop.

Sergeant.—Where was you about the time she was delivered?

Mrs. Bartholomew.—We were eating dinner in the parlour.

Sergeant.—How far is that room from where the girl lay?

Mrs. Bartholomew.—The room was exactly overhead; we were in the room under her.

Todd.—Is the ceiling of the room high or low?

Mrs. Bartholomew.—It is middling.

Todd.—Is it not one of those old-fashioned houses, where the ceilings are built much lower than is common now?

Mrs. Bartholomew.—Yes, Sir.

Todd.—Were the doors open?

Mrs. Bartholomew.—Yes: the room-door was open.

Sergeant.—Did you hear the child cry?

Mrs. Bartholomew.—No: I heard no noise at all.

Sergeant.—Don't you think you could have heard the child, had it cried?

Mrs. Bartholomew.—I believe I could.

Sergeant.—Was she ever in bed in that room before?

Mrs. Bartholomew.—No.

Attorney-general.—Where was the room in which the child was found?

Mrs. Bartholomew.—It was opposite to this, and on the same floor.

Attorney-general.—Did you hear her when she carried it there, and put it into the chest?

Mrs. Bartholomew.—No.

Sergeant.—Did she appear very ill, when you first saw her?

Mrs. Bartholomew.—Yes; she was very poorly.

Todd.—This is the room, you say, where the boys usually lodged?

Mrs. Bartholomew.—Yes.

Sergeant.—Did you know whether their razors were lying about?

Mrs. Bartholomew.—Yes; they were in the window: there were two razors laying there.

Sergeant.—How came she to go into that room?

Mrs. Bartholomew.—After she had made a fire in the morning, I suppose she found herself unwell, and went in there to lay down: I know no other reason.

Attorney-general.—You say it is about five or six months ago that you first suspected her to be with child: pray, from what symptoms was it that you suspected?

Mrs. Bartholomew.—From her appearance.

Attorney-general.—Was there no particular symptom, or something in her conduct, which led you to suspect?

Mrs. Bartholomew.—Nothing but her being a little sick, and from appearance.

Attorney-general.—What, sick at her stomach?

Mrs. Bartholomew.—Yes.

Attorney-general.—Did you employ a Doctor for her, when she fell down stairs?

Mrs. Bartholomew.—No: she was not confined.

Attorney-general.—She went about as usual, and did middling well?

Mrs. Bartholomew.—She kept up and went about all the time, but still complained.

Attorney-general.—And how has she been since she was delivered, pretty hearty?

Mrs. Bartholomew.—I don't know; she went from our house shortly after.

Attorney-general.—At the time you first suspected her being with child, you said you founded your opinion upon her appearance; do you mean by that, that you discovered it by her bulk?

Mrs. Bartholomew.—Yes.

Sergeant.—Her bulk, Madam, was not the first cause of your suspicion, but her sickness, and afterward her bulk?

Mrs. Bartholomew.—Yes, Sir.

Sergeant.—Can you set the time, when you first observed this?

Mrs. Bartholomew.—Not exactly.

Attorney-general.—When you perceived her sickness, did you not also observe her increase of bulk?

Mrs. Bartholomew.—No; not then.

Miss Mary Bartholomew Sworn.

Court.—You found the child?

Miss Bartholomew.—Yes, Sir.

Court.—Where?

Miss Bartholomew.—In a trunk in the room opposite to where she was: it was wrapped up in a petticoat belonging to her.

Court.—How did the child get in the trunk?

Miss Bartholomew.—I suppose she must have carried it there herself: when I was searching about in the trunk, I asked her what was in the petticoat? when I laid my hand upon it; but she said nothing.

Court.—Was the petticoat at the top of the trunk?

Miss Bartholomew.—No; it was under a large roll of linen.

Court.—Did she say any thing, when you asked her what was in the petticoat?

Miss Bartholomew.—No.

Court.—Whether did she desire you to open the petticoat or not?

Miss Bartholomew.—No: she opened it herself, and laid it upon the bed aside of her: I asked her if she had killed the child? and she said, Yes: I asked her how? and she said she had laid on it, but could not help it.

Council.—Did you discover any marks of violence upon the body?

Miss Bartholomew.—No.

Council.—You saw the child?

Miss Bartholomew.—Yes: she opened the petticoat, and laid the child with it on the bed, and sat by its side.

Council.—Did nothing further happen?

Miss Bartholomew.—The Jury was sent for, and came in, and I retired from the room.

Attorney-general.—Did it appear a fine, plump child?

Miss Bartholomew.—I am not a judge: I can't say any thing of it.

Todd.—Can you recollect the time the child was brought out of the trunk?

Miss Bartholomew.—It was about two o'clock.

Todd.—After you discovered the child, was not she left alone with it?

Miss Bartholomew.—Yes: I went down to speak to my sister.

Todd.—What length of time was you absent?

Miss Bartholomew.—I believe about ten minutes.

Court.—When you put your hand upon it in the trunk, did it feel warm?

Council.—If your Honor pleases, she says it was wrapt up in a petticoat.

Court.—Well, did you feel it warm through the petticoat?

Miss Bartholomew.—Yes, Sir, I believe it was.

Court.—She took the child in the petticoat into the other room?

Miss Bartholomew.—I believe she did.

Court.—How long did you stay with her?

Miss Bartholomew.—About ten minutes.

Todd.—And then went down for ten minutes?

Miss Bartholomew.—Yes.

Todd.—Did you see blood about the child?

Miss Bartholomew.—(After some hesitation) No: none.

Todd.—I mean about the throat?

Miss Bartholomew.—I did not examine.

Todd.—Did you think it was dead, when it lay on the bed?

Miss Bartholomew.—Yes.

Court.—Had it hair and nails perfect?

Miss Bartholomew.—I can't say: I believe it had nails.

Sergeant.—Pray, Ma'am, do you know any thing of a hurt she received?

Miss Bartholomew.—Yes: she received a hurt in fetching up a log of wood about two months before.

Council.—Was it one or two?

Miss Bartholomew.—I can't tell exactly.

Attorney-general.—She went about tho' as usual?

Miss Bartholomew.—Yes; but still complained.

Attorney-general.—How long?

Miss Bartholomew.—For a few days.

Samuel Bullfinch Sworn.

Bullfinch.—When I went up into the room, I found her sitting on the floor, with the child leaning over her arm; she kept its head close down on its breast. The Inquest asked her, if she had used no violence to the child? and she said, No. It was the first time she had ever had a child, and she believed she had overlaid it. At this time there appeared no marks of violence, or they were not discovered. Mr. *Naglee*, or *Norgrove* (we don't know which he named) was the first,

who, on examining the child, discovered that the throat was cut. He asked her, how the throat came to be cut? and she said she did it herself with a razor. She was asked, where the razor was? and I understood that one Bryan O'Connor, and some other, had been there, and taken it away. However, the razor was produced, and she was asked, if that was the razor? She said, Yes. We asked her, how she came to cut its throat? and she said, for fear it should cry, and the family would hear it. I observed to her, that if the child was born dead, as she said it was, that there were no occasion to cut its throat.

Sergeant.—Did the child appear bloody?

Bullfinch.—No; it appeared as if it had been washed.

Sergeant.—Did she say the child was born dead?

Bullfinch.—Yes: she persisted in it, that it was born dead; that is, that she overlaid it.

Sergeant.—Had it the appearance of having come to maturity?

Bullfinch.—Why, I thought it appeared plump and hearty.

Sergeant.—Do you recollect, whether she said any thing further?

Bullfinch.—Yes; she said she was told to do it.

Court.—Did she say by whom?

Bullfinch.—Yes.

Sergeant.—Did she mention any promises that had been made her?

Bullfinch.—She said some were made.

Sergeant.—What were they?

Bullfinch.—She said that he promised her, if she made away with the child, she should have her time purchased, and he would set her at liberty.

Sergeant.—Did she say she was to be provided for?

Bullfinch.—Yes: she was to have fine cloaths, and to live like a lady.

Jury.—Whose name did she mention as the father who had promised this?

Bullfinch.—John Shaffer, and said it was him who had desired her to cut the child's throat, or make away with it.

Doctor Jones Sworn.

Jones.—What I have to declare in the present case, is merely matter of opinion founded on observation, and what my profession teaches me to decide. I saw the mother a few minutes after the Inquest had been held, and she informed me it was born dead.

Attorney-general.—You are not to relate what she said afterward, as that cannot be received as evidence.

Jones.—Well then, Sir, from the size and appearance of the child, I saw enough to convince me that it was not born alive: it is true its throat was cut, and it had been taken away from the mother, and preserved in spirits by Dr. Foulke.

Attorney-general.—Doctor, pray when did you see the child first?

Jones.—The day after the Inquest.

Attorney-general.—If that is the case, it can have little to do with the subject.

Jones.—Why, Sir, an opinion is as well to be formed from the size of the child then, as at the first minute—And I am convinced it was not a full grown child; for it was too small, and there was little hair on its head, not near so much as when an infant has come to its full time of birth.

Attorney-general.—But is not the mother a very little woman?

Jones.—No: she is not very little; she is about the middling size.

Attorney-general.—She is very young tho'?

(Her age, Mr. Milne who brought her up, said, was seventeen, wanting two months.)

Attorney-general.—Is this a subject on which you can form an opinion perfectly satisfactory to yourself?

Jones.—Yes, Sir; and of which I have no doubt.

Attorney-general.—Was the windpipe cut through from side to side?

Jones.—Yes, it was, and the other large vessels were separated; and it must have killed the child, had it been alive at the time; but I am of opinion it was dead, and born dead from the accident which had happened to its mother, and from the size and appearance of the child.

Attorney-general.—Can you, from appearances or such circumstances, determine whether the child was born dead or alive?

Jones.—Yes: I can determine for myself, and am perfectly satisfied of the conclusion. This child had not the appearance of a full grown child; it was of too small a size, and had not the usual quantity of hair on its head, and the inferior limbs were much too small, if compared with the nobler.

Attorney-general.—How long may the infant remain in the womb after it is dead?

Jones.—I have known instances of their being retained a long time.

Attorney-general.—Could it be a month?

Jones.—Yes; more than a month or six weeks either.

Sergeant.—Suppose, Doctor, a child to be born dead, would it bleed on cutting its throat?

Jones.—Yes; and many persons do bleed after they are dead, on opening a small vein only.

Attorney-general.—But, Doctor, not after having lain so long as a month or six weeks in the womb?

Jones.—No; I don't say that: much depends on the habit of body, and there are various constitutions. This child does not appear to be within two months at least of its full time.

Court.—But did you never see a seven months child make a good man?

Jones.—I don't say so: there are certainly such, but they are to be found very seldom.

Sergeant.—Can you judge better from the comparative size of the limbs than from the length of the infant?

Court.—Did the child appear to have fallen away much, when you saw it?

Jones.—No.

Court.—What was the cause of its premature birth?

Jones.—The mother told me, that she had received a very severe fall in lifting a log.

Attorney-general.—You must not repeat what she told you.

Jones.—Well but, Sir, it was confirmed to me by the testimony of her master; and soon after she said she was seized with the pains of labour.

Attorney-general.—Did this conversation happen on the same day she was delivered?

Jones.—It did?

Attorney-general.—But we have nothing of this second hurt in testimony.

Jones.—If you have not, I suppose you will; for I understood she had received two falls, and the Jury will be satisfied in this point, when they come to hear her master; and I understood she had a fall, or severe strain, the very morning of her delivery.

Doctor Foulke affirmed.

Foulke.—I was called upon by the Coroner and the Inquest, to examine the dead body of a child supposed to have been murdered. Before I got there, several persons on the inquest had examined and found the throat cut. The murder of the child was no longer with me a question, at

least so far as the efforts of the mother had been able to effect it; and I left the Coroner and Jury to do their duty in an affair which appeared so clear and plain. But after they had left the room, I returned to examine the mother, and to explain to her, her dangerous situation; but I was induced to doubt the validity of my first opinion, when she informed me with respect to the time of conception, the time of delivery, the circumstances which prematurely brought on the birth of the child, and from the appearance of the child afterward; from all of which considerations I believe myself absolutely justifiable in declaring that the child must have been born dead: the delicacy necessary to be observed, will make me say as little as is possible on this occasion. With regard to the time of conception, it must have been about the latter end of the month of September.

Attorney-general.—How do you know that?

Foulke.—The girl told me so.

Attorney-general.—But you are not to repeat what she told you.

Foulke.—Then, from the appearance of the child, I believe it to be only a six or seven months conception, which brings it to about that time. I keep the child for the purpose of examining it fully, and of shewing it to Doctor Jones: the Honorable Court, and the Jury may see it also if the Court pleases; and by referring to it, they will be able to judge for themselves in some degree from its size.

Attorney-general.—Does it not lessen by being kept in spirits?

Foulke.—It does not grow bigger.

Attorney-general.—But does it not lessen?

Foulke.—Yes, something.

Attorney-general.—Does it much or little?

Foulke.—But little: when Doctor Jones saw it, it had not lessened, for I was obliged to extract it with forceps from the jar in which I put it.

Sergeant.—From all the circumstances you have mentioned, do you say you are justifiable in concluding that it was born dead?

Foulke.—I do.

Sergeant.—Pray, when was you called in?

Foulke.—About two hours after the child was born.

Attorney-general.—But you then was not of opinion, that it was born dead?

Foulke.—When I went, and saw, and heard that she had cut the child's throat, I formed my opinion on that circumstance only, and I believe the Inquest did the same without enquiring whether it was likely to have been born dead or not.

Court.—You say from its size, that it was not a full grown child; are not some children smaller than others?

Foulke.—Clearly, Sir, this is not a child that ought to be produced by its mother, after nine months gestation.

Court.—Do not children live who are born at seven months?

Foulke.—Children have lived who were born at six months; but such examples are very rare, and seldom happen, and cannot affect the present question: they are like monsters—I don't mean that they are deformed, but they are not perfect, and are extraordinary things, rarely to be met with, not one in a hundred.—I have compared this child with several others which I have preserved, (as I have them of almost every period of conception) and I find that it is not the child by two or three months, which ought to be released after nine months gestation.

Sergeant.—Do you believe a dead child might bleed on having its throat cut?

Foulke.—I do: the blood of children is much finer and more fluid than that of men. Such are the dispositions of nature, in accommodating the cause to the effect; the blood of infants circulate through innumerable subtile canals, which a more gross fluid would obstruct: but it is not only the throat of a child that would bleed on being cut after it was dead, but also of a man, or indeed of any animal.

Attorney-general.—Did you discover any blood about the child, when you first saw it?

Foulke.—I did a little, not more than is customary; for it is well known that more or less is always discharged by the mother on these occasions—This is a subject that delicacy and respect makes it difficult to speak of—but the Honorable Court will excuse me.

Court.—It is necessary to be explicit, and relate things as they are, so that you stand in need of no excuse.

Sergeant.—Did she say the child was born dead?

Foulke.—Yes.

Attorney-general.—You are not to say any thing she said, after the Inquest had sat.

Foulke.—I believe the gentlemen have related that they heard her say so. The reason why I did not, was, the woman was then in such a situation of body and mind, that humanity and every generous feeling for an unhappy creature forbid to add to her pain and care, and therefore made it expedient to leave the room: but afterward when the poignancy of her distress might be alleviated, I called and attended to her narration, which I am not, you say, to relate.

Sergeant.—Did she appear very feeble?

Foulke.—She was setting up, but then it was necessary she should, as the room was much crowded, and the people pressing about her. When I had heard her relate the particulars of her

situation, I went home, and made notes of it, from which I could explain my several reasons for concluding, that the child could not be born alive.

[Mr. Bullfinch was called, and asked if she said it was born dead? He answered, Yes; and that she had lifted up the lid of its eye, but it fell down again—This she said before it was discovered that the throat was cut.]

Sergeant.—Did you observe, Doctor, that the limbs of the child were not proportioned?

Foulke.—Yes: the hands, arms, legs, and other inferior limbs, were too small when compared with the others. There are too, many circumstances of evidence, which would confirm the justness of the conclusion drawn by Doctor Jones and myself, with respect to the child's having been born dead: there are also other matters which I could mention, but from the delicacy and tenderness with which it is requisite to speak on this subject.

Court.—Our great object is information, and nothing should prevent our obtaining the fullest.

Foulke.—Well, then, as this woman was delivered alone of a feeble and imperfect child, and as she informs me, she lay upon her back at the time of its birth, then had the child been alive, but come in the common or ordinary way into the world. You know that it is necessary that its eyes, its nose and mouth, in short its face, must have been towards the posterior parts of the mother, and in this situation of release—it is more than probable that the child might have been smothered in the birth; nay, it is a certainty, that it must have been smothered from the want of assistance to extricate it, and from its long continuance in that situation.

Court.—Did she seem to be affected for the loss of her child?

Foulke.—She seemed to me to have lost herself much; she stroaked it, and looked at it, but I thought not with that maternal tenderness, which she should have discovered on such an

occasion: she shed no tears for her loss; not that I esteem the shedding tears an essential to constitute tenderness. She began to appear sorry, when I was about to take the infant from her.

Court.—Did she say why she cut its throat?

Foulke.—Yes: she said that John Shaffer, the fat Shaffer, was the father of it, and he had persuaded her to kill it; if she did, he would purchase her freedom, and that he was to marry a fine woman, and that he would make her then as happy and as fine as his wife, and that if she did not do it, she should suffer immensely—but if she did, she had nothing to fear, for there was no heaven or hell, no God or devil that he knew better than any body else, as he possessed more learning than any other man, and had traveled in Europe; and to encourage her, he said that it was no harm, and he had persuaded a milk-girl to do the like once before. I examined her to know the time of her conception, and she told me that it was sometime after her master went to live in Church-alley. She remembered it was sometime in the latter end of September, when she first was debauched by him on their lot, and that she soon discovered her situation; that she went on as women usually do, until about three weeks before her delivery, when she was helping in with a cord of wood, she received a considerable injury by the fall of a log upon her hip; that two or three days before she was delivered, she unfortunately met with a fall down stairs, when her master saw her; that she found herself indisposed in the morning, and strained herself in getting up a large backlog, which immediately hastened on the labour-pains, and an abortion came on about two o'clock; that she was in great agony until then, and she after that laid quiet half an hour, when she took it up in her arms, and lifted its right eye-lid, but which fell down instantly: she therefore suspecting that it might be dead, and recollecting the promised reward offered by Shaffer, and her promise to him, and fearing that it might cry and alarm the family, she took up a razor laying by accident in the window by the bed-side, and cut its throat through, and cut even

the very bone; but the blood that discharged, was very small, and there must have been some mistake about its being washed—for when I saw it, it was as is usual with children after their birth; but perhaps the rags, or things it had been wrapped up in, might have absorbed some, and given the appearance of wiping or washing. She said she laid still half an hour after the birth; if so, there can be no doubt but it was dead, and she declared that it neither breathed nor cried.

Court.—You say you have the child yet; how is it preserved?

Foulke.—In a glass jar, and I'll send it, if you please, to the Jury.

Court.—Can't it be brought to Court?

Foulke.—Yes, Sir.

Todd.—If your Honors please, it can be sent to the jury-room.

Court.—If we please to see, why may we not?

Todd.—Well, Sir, I will send it.

Accordingly the child was brought into Court, in a large glass jar, and Doctor Foulke had sent with it a pair of forceps to extract it, if it should be deemed necessary.

Nathanial Norgrave Sworn.

Norgrave.—I went up stairs and found the girl setting up, and the Jury were there; I was on the Inquest also. When I saw the child was dead, I asked her if she knew who was the father? She answered, Yes. And asked her what his name was? She told me John Shaffer. I told her that she should be careful in what she said, and not charge any body unless she was certain of them.

Council.—Did you ask her how she was delivered?

Norgrave.—Yes; and she said she was delivered upon her back. I asked her if she heard the child cry? and she said No. I asked her if she had told her master, that she was with child? and she told me No. I said she ought, and not have concealed it. I left her a little while, when I

returned, and examined the child, but could discover no marks of violence upon it, until I happened to lift up its head, and then I perceived its throat was cut from here to here, [making a motion with his hand across his throat.] I then told her, that she had murdered the child, and deserved to be punished. I asked her how she did it? and she confessed she did it with a razor. I asked her where it was? and was informed that one O'Bryan, or O'Conner, or some such name, had taken it away; but the razor was got, and I looked at it and saw it had been wiped, but still there was some little blood left on the point. I asked her how she came to destroy the child in that cruel manner? and she said that she was directed by the father, and told to pinch its throat, which would effectually destroy it. She told me, that he was concerned with her in Church-alley. I asked her when she had seen him last? She said she had not seen him lately. I asked her if she had seen him since he was concerned with her in the alley? and she said she had several times, but not lately; she believed he was not in town. I asked her particularly what Shaffer it was? and she told me the one that married Chavalier's daughter.

Sergeant.—Did you ask her if the child was born dead?

Norgrave.—No: she said it was dead, and I asked her why she cut its throat when it was dead? It seemed as if nature had helped the birth for it came very plain.

Sergeant.—What do you mean by its coming very plain, that it was come to its full time?

Norgrave.—I believe it was very near about that.

Sergeant.—Did she say she was delivered on her back?

Norgrave.—Yes; but I know it could not be so, and I told Doctor Jones, that it could not be born in that way without help.

Attorney-general.—And what did Doctor Jones say?

Norgrave.—He could not say much, because he knows it so very well.

Sergeant.—Do you know any thing of these matters?

Norgrave.—Yes, a little: I served my time to it.

Sergeant.—Very well, then you can tell me; do not children cry, when they are born into this world?

Norgrave.—Yes; they generally do.

Attorney-general.—What time do you suppose this child to have been conceived? Was it come to its full time?

Norgrave.—I believe that it was a child of about seven months or so.

Sergeant.—When the girl said the child was born dead, was it before or after you found its throat to be cut?

Norgrave.—I did not say that she said it was born dead.

Sergeant.—We understood it so.

Norgrave.—But I did not say so.

Attorney-general.—Are not women generally worse, and more feeble, after a miscarriage than after a natural birth?

Norgrave.—Yes; they commonly are.

Mr. Bartholomew Sworn.

Court.—Where do you live?

Mr. Bartholomew.—At the corner of Market and Second-street.

Court.—Was it in your house this unfortunate accident happened?

Mr. Bartholomew.—Yes.

Court.—How long have you lived there?

Mr. Bartholomew.—It is near nine months.

Court.—Did you bring up the girl?

Mr. Bartholomew.—No, Sir: I have had her about three years; she was brought up by Mr. Milne, my wife's father.

Court.—Did you not live in Church-alley?

Mr. Bartholomew.—Yes: I moved in there about eight or nine months ago.

Court.—How long did you live there?

Mr. Bartholomew.—Three months.

Sergeant.—Do you know any thing of any hurt the girl received before this accident?

Mr. Bartholomew.—Yes; somewhere about a month before she was delivered, it could not be a week under or over, she fell down with a stick of wood in my hearing, and when I went to see what was the matter, she was sitting crying, and complained she was hurt much. Again, about three nights before this happened.

Court.—What, before the other accident, or before her delivery?

Mr. Bartholomew.—Before her delivery, Sir. We had moving narrow steps to go into the cellar, and I went myself, and held the candle to light her down to bring up a stick of wood; and in lifting or getting up the stick, she fell down, and the stick fell upon her: she cried, and sat several minutes before she got up. She said no more afterward, nor I heard no more about it.

Court.—Did you see the child?

Mr. Bartholomew.—Yes: I saw it, but did not examine it.

Court.—Did you ever enquire of her, if she was not with child?

Mr. Bartholomew.—Yes: I have charged her often with it.

Attorney-general.—Did you discover she was with child from her bulk?

Mr. Bartholomew.—Yes.

Attorney-general.—When did you discover it by her bulk?

Mr. Bartholomew.—Before we left Church-alley.

Attorney-general.—And how long have you lived where you now reside?

Mr. Bartholomew.—Near nine months.

Attorney-general.—How long did you live in Church-alley?

Mr. Bartholomew.—Three months.

Sergeant.—What, Sir, is it nine month since you left Church-alley?

Mr. Bartholomew.—No: it is about seven months. I had both houses at once—the one at Market-street I occupied for a store—the one in Church-alley was my dwelling house.

Court.—And how long is it since you moved into the shop?

Mr. Bartholomew.—About nine months.

Sergeant.—The Court mean to ask you, how long since you moved your family into the shop?

Mr. Bartholomew.—It is somewhere about six or seven months.

Attorney-general.—Can't you tell exactly?

Mr. Bartholomew.—It is somewhere thereabouts—but I could tell exactly, if I had my receipt-book here; because I paid my rent in Church-alley to the day I removed.

Attorney-general.—Can't you get that receipt?

Mr. Bartholomew.—Yes; if I go home.

Attorney-general.—You had better go and fetch it.

Whereupon Mr. Bartholomew went to fetch it; but before he returned, the Council had gone through much of their pleadings, and he was only examined touching the time; when it appeared he had went into Church-alley the 2d of August, and left it the beginning of November.

The Council and Attorney-general having finished their pleadings, his Honor the Chief Justice gave a charge to the Jury.

Chief Justice.—Murder, Gentlemen, is the highest and most heinous crime against the law of nature, and it is greatly aggravated when the parent destroys its own offspring; but it is denied that the child was murdered by its mother, because it was already dead: yet you find so far as her efforts could effect its destruction, she exerted them un pitying, and void of maternal affection.

This case, which has been ably discussed, was heretofore described by the laws in this manner—That whenever a single or unmarried woman was delivered of a child, and attempted to conceal it, the bare concealment was made conclusive evidence against the mother, that she murdered it, unless she could make it appear by one evidence at least, that the child so concealed was born dead: so that when this probable proof was in evidence, it was incumbent on the prisoner to prove positively that the child was born dead, or did not die through her means or procurement; otherwise she was adjudged guilty, and suffered the penalty affixed to murder. This act of James—was recognized by the Assembly of the State; and had the prisoner been tried under that, there could not be the least doubt but your verdict would determine her guilty. But now, by a late act of Assembly, passed last September, a further kind of proof is required, and the bare concealment is not sufficient, unless there is a probable presumption offered, that the child was born alive. You have heard this kind of proof already explained—That there are two kinds of evidence. The first is positive proof, where the witness can swear to the commission of the fact: this sometimes is attainable, yet but seldom in cases like the present. The second division is circumstantial proof—This you have heard divided into three kinds. First, Violent presumption, which is the stronger kind, and such as amounts to nearly full conviction, or of

which the mind can entertain no doubt. As in a case, where you see a man greatly confused, endeavoring to make his escape out of a house, with his naked sword bloody in his hand, and a body lying on the floor newly slain—This I say amounts to a violent presumption that the man endeavoring to escape, is the slayer. Second, There is probable presumption, which is not so conclusive, or satisfactory as the former. And thirdly, There is slight presumption, but which, in capital cases, is seldom allowed, if by itself, any weight in criminating the prisoner, or much regarded by the Court or Jury. Beside the case I have mentioned, you have heard others adduced by the Council; but among the rest there is this kind of evidence—the confession of the party upon being apprehended, and this, when other circumstances are strong in its support, amounts to as full a conviction; I say it is so strong that no doubt can be had of the criminality, or hesitation left upon the mind, than would had you heard a witness come forward, and have sworn that he saw the perpetration. The evidence, I say, would be strong and conclusive in the instance which was mentioned by the Council, where a man should be robbed of twenty guineas, and that exact sum be found upon a man with two pistols, the one loaded the other discharged—This, I say, would leave no doubt on your minds with respect to the criminal. But this is not the circumstantial proof required in this case. The law would not require this kind, because it is not to be had; for people determined upon the commission of the crime of infanticide, always are silent and alone for the purpose of concealment, as they would hardly be so callous or fool-hardened, as to commit it in public—Therefore positive proof can rarely be come at in such cases. The concealment of the child, as I have already remarked, was deemed sufficient evidence of its being murdered, though the Courts and Juries in England and here, for this many years, have always required some circumstantial evidence beside, or they acquitted the prisoners; and this law has long been deemed to favour of severity. Therefore the Legislature have altered the

law in this respect, so as to make it correspond with the already established practice of their Courts of Justice, and have required the second degree of circumstantial evidence to convict the prisoner. It was observed by the Attorney-general, that her persisting in the denial of her being with child, even when she was in labour, and her having made not the least provision of cloaths for the infant, and as she chose to be delivered alone, when she might have had the assistance of her mistress and other women who were by—These, with the further circumstance of her cutting its throat, (and as you are informed by one of the witnesses, from ear to ear) with her endeavour to conceal it, by placing it wrapped up under a large roll of linen in a trunk—I say, if when you take and weigh all the circumstances together, you are of opinion, that it amounts to a probable presumption that the child was born alive, you can be at no loss to decide that she was guilty in the manner and form in which she stands indicted; and as it is incumbent, as I observed before, upon her to prove it was born dead, you will examine what testimony relates to this particular. There is her own relation of the story; she several times said it was born dead, but then added also that she had overlaid it, and on the Inquest's finding the throat cut, she owned having done that, but it was to prevent its crying. Again, there is the deposition of the Doctors, who, as professional men, and as gentlemen eminent in their profession, declared, that they are convinced the child was born dead from the circumstances of its appearance, and from a consideration of the hurts which the mother had received, the one about a month before, another three days before, and a strain the very morning of the day she was delivered, as well as the circumstance of her being delivered on her back. I say, if you are satisfied that the child was killed by any of these accidents, then you must acquit, as the cutting of the infant's throat, already dead, cannot be accounted murder in the mother. It is for you, gentlemen, to weigh and consider the matter of fact; but I would observe to you, that when you are sworn to give a true verdict from the

evidence which shall be laid before you, you are not bound to give that verdict upon the opinion or judgment of any man however eminent.

The Jury, after an absence of about three hours, returned, and brought in their verdict guilty.

On the morning of Saturday, when she was brought up to receive sentence of death, a motion was made by Mr. Todd, and supported by Mr. Sergeant, that the Court would be pleased to grant a new trial, as an affidavit was produced, in which Mr. Edward Pole, one of the Jurors, had said the day preceding the trial, that he did not see how any person could bring in a verdict otherwise than guilty, (or words of like import.) This it was contended, would have been good cause of challenge, had it been known at the time; and if cause of challenge then, it should be allowed of weight now. Some law-cases were adduced, where in new trials had been granted for similar reasons. The Attorney-general contended it ought not to be allowed for three reasons: the first was, that no new trial was ever permitted in capital cases like the present: 2d. That a person's giving his opinion, was not cause of challenge; so that if not cause of challenge, no pretense could be set up for a new trial: and 3d. If it had been cause of challenge *then*, it was *now* too late. This was replied to by Mr. Sergeant, and the point conceded, that tho' no new trial had yet been had in capital cases, yet the Court had *power* to grant one, if it saw good cause. To the second point he replied, it was cause of challenge, and no doubt could be received into the breast of the Court and Jury, but what if it had been known in time, they would have challenged him; if not for cause, they would without cause, (as every person has a right to challenge twenty of the 48 Jurors peremptorily, and as many more as he can shew cause for.) Of the third point he observed, that as the Court had the *power* to allow a new trial, it could not be too late.

The Court gave it as their opinion, that the expressions used by Mr. Edward Pole were not sufficient cause for the court to grant a new trial, and the girl then received sentence of DEATH; but since has been respited by the Honorable Supreme Executive Council.

APPENDIX B. THE PETITION AND RECOMMENDATION

[Transcription of the handwritten clemency file of the Supreme Executive Council]

1787 April 21st

Petition of Jury and recommendation of the Judges in favor of Alice Clifton

Read in Council May 2nd 1787 and a reprieve granted until the end of the next Session of
the General Assembly

[Petition of the Jury]

To the Honorable Thomas McKean Doctor of Laws Chief Justice and his Associate Justices of the Supreme Court.

The Petition of the Subscribers, Humbly Sheweth,

That your Petitioners were the Jurors who passed upon the Trial of Alice Clifton for the Murder of her infant Child upon whose Verdict the said Alice has been found guilty. That from all the Circumstances of the Case and particularly from its appearing to your Petitioners to be more than probable that the said Alice being of tender Age ignorant and unexperienced was seduced to the Perpetration of the said Crime by the Persuasions and Instigation of the Father of the Child your Petitioners are desirous that the Life of the said Alice may be saved. And your Petitioners therefore pray that your Honors may be pleased to recommend the said Alice to the honorable the Supreme Executive Council for a Pardon.

And your Petitioners will pray etc.

Edward Pole

John Richards

Joseph Keyser

Christian Fiss

John Singer

William Shannon

Zachariah Andreas

James Pickering

Peter Beck

George Ozeas

George Keely

Henry Faunce

[Recommendation of the Judges]

Philadelphia April 21st 1787—

Sir,

In consideration of the tender years of the mother named Alice Clifton, being only sixteen years of age, and of her situation in life, being a Mute Slave, illiterate and ignorant; and out of respect to the Petition of the Jury, who convicted her, We beg leave to recommend her, to Your Excellency and the Supreme Executive Council, as an object of Mercy.

Your most obedient humble

Tho McKean

William Atlee

His Excellency

Benjamin Franklin Esquire

President of Pennsylvania

P.S. Judge Rush concurs in the above Recommendation, tho' absent at the time of signing.