Seasoned to the Use

Carol Sanger
Santa Clara Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr
Part of the Entertainment, Arts, and Sports Law Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol87/iss6/14
SEASONED TO THE USE

Carol Sanger*


"A brutal murder creates a crisis."1


"A woman’s attachment to her daughter becomes a consuming passion."2

Two recent novels, Presumed Innocent and The Good Mother, have more in common than critical success,3 longevity on best-seller lists, and big-name movie adaptations.4 Both books are about law: Presumed Innocent is a tale of murder in the big city; The Good Mother is the story of a custody fight over a little girl. Central characters in both books are lawyers. Turow is a lawyer, and Miller thanks lawyers. While the books could be classified in other ways—Presumed Innocent as mystery, The Good Mother as women’s fiction—each meets a suggested genre specification of a legal novel: “the presence . . . of an important, perhaps decisive, legal trial.”5 The murder trial in Pre-

* Associate Professor, Santa Clara Law School. B.A. 1970, Wellesley College; J.D. 1976, University of Michigan. — Ed. For their comments on this essay I thank Ed Baker, Howard Erlanger, Martha Minow, and Fran Olsen. I also thank Margaret Hanson and Lois Ogilby for their research assistance and Darleen Darnall for her editing.

3. “Every once in a while, a first novelist rockets into the literary atmosphere with a novel so accomplished that it shatters the common assumption that for a writer to have mastery, he or she must serve a long, auspicious apprenticeship. The novel arrives, all its parts gleaming, ticking, and we are filled with awe . . . . This is the case with Sue Miller’s ‘Good Mother’ . . . .” Wolfe, N.Y. Times, Apr. 27, 1986, § 7 (Book Review), at 1, col. 1.
7. Chase, Toward a Legal Theory of Popular Culture, 1986 WIS. L. REV. 527, 564-65. Chase observes that while trials may be too narrow an indicia of the genre, they are probably the symbol or image most associated with law and lawyers. In addition to their function in providing an agreed code or frame of reference between author and readers, trials are, in fiction anyway, natural dramatic devices containing “[t]he elements of tension, of confrontation, [and] of resolution . . . .” Leventhal, Law and Literature: A Preface, 32 RUTGERS L. REV. 603, 606 (1979). See generally J. BREEN, NOVEL VERDICTS: A GUIDE TO COURTROOM FICTION (1984) (annotating over 400 trial novels).
sumed Innocent answers the plot’s spiraling question of whodunit, or at least who didn’t. In The Good Mother the custody trial isolates and resolves legal issues of parenting pulled from an intense personal thicket.

In addition to genre, the books share themes essential to the story line of each but not apparent from reviews, press releases, or jacket blurbs. Both books are about women who enjoy nonmarital sex and are punished for it: one becomes a murder victim; the other loses custody of her child. Both women are characterized as bad mothers, a status connected to sexual activity and, especially in The Good Mother, responsible for their losses.

In this essay I argue that through the powerful coincidence of popularity, genre, and theme, Presumed Innocent and The Good Mother reinforce notions about the relation between good sex and bad mothering, and advance serious, nonfiction messages for women about law and sex. The point is not that all women who have intercourse with officemates are bound for glory, or that all single mothers with boyfriends lose custody of their children. Presumed Innocent and The Good Mother are novels, not star charts or manuals. They are, however, novels worth reading, and not just because they made noteworthy summertime reading lists.

Because fiction, including legal novels, has social influence, people read, as well as bargain, in the shadow of the law. The shadows cast by legal fiction may be especially strong because of the “strikingly legalistic” character of American culture, where “legal terms, images, and scenarios infuse . . . conversations and imaginations.” Thus, as litigants are sometimes influenced by knowledge of legal rules to order their relationships outside the legal process, readers, too, may be affected by the version of law presented in fiction. Looking at the treatment of women in popular legal fiction tells not so much how society views lawyers, the interesting though somewhat narcissistic inquiry


As examples of the ways in which readers incorporate fictional characters into their lives, Leslie Kurtz points to the epidemic of suicides which followed the publication of Goethe’s Young Werther, the devotion of Sherlock Holmes fans to the corporeal manifestations of the character’s life, the incorporation of fictional names into our vocabulary (Pollyanna, Simon Legree), and the perpetuation of fictional lives through use by other artists, sequels, and spinoffs. Kurtz, Independent Legal Lives of Fictional Characters, 1986 Wis. L. Rev. 429, 434-36. Tony Chase gives another and significant example of individual meandering between the real and the fictional: “a President who has difficulty distinguishing between real historical events and anecdotes drawn from a storehouse of movie nostalgia . . . ” Chase, supra note 5, at 534.


8. While fiction casts its own shadow, at the same time it sits in the shadow of the larger legal culture. It thus creates an image of law that affects us, even as it reflects or refracts the rules and practices of official law.
more traditionally undertaken by law people when dissecting literature, as it suggests perceptions about the power or influence of law for civilians. 

*Presumed Innocent* and *The Good Mother* suggest important connections between fictional and actual assumptions the legal process makes about the sexual conduct of women, particularly mothers. Both books use sex — the steamy, best-selling kind — to rivet and then divert attention from less sexual, though still sex-based, issues of justice raised in the novels. I focus here on the images of women as mothers, wives, and lovers — images integral to each story — and assess the accuracy of the fictional depictions as measured against real law. This review thus applies to popular fiction a technique of feminist literary criticism, making gender a "category of analysis" in order to bring into focus formerly unnoticed features of the literature. While I later suggest that the images of women in *Presumed Innocent* may fortify negative, wrong-headed attitudes, similar in kind though not intensity to reactions following exposure to pornography, this essay does not end with a proposed model ordinance banning subliminally sexist best sellers. Rather, it is in the nature of a "debriefing" or a discursive presentation of alternatives similar to empirical media studies designed to temper the effects on subjects of information received.

I locate the discussion on a patch of turf bordering, perhaps intersected by, two camps within legal studies: the law and literature movement and the newer school of law and popular culture. The location seems right, for *Presumed Innocent* and *The Good Mother* are good books, a term I use to distinguish them both from great books,

9. Yelin, *Women and Fiction Revisited: Feminist Criticism of the English Novel*, 12 Feminist Stud. 169, 170 (1986) (reviewing four books). Broad gender differences between *Presumed Innocent* and *The Good Mother* cannot have gone unnoticed, however. Turow and Miller have been praised for creating realistic worlds; those worlds reflect what each has best observed. *Presumed Innocent* is filled with tough guys who talk tough and do tough things. The word "fuck" is used a lot, compared to *The Good Mother* where it is used incorrectly by a child ("Fuck out!"). The characters in *Presumed Innocent* are dicks, coppers, and P.A.s (prosecuting attorneys); in *The Good Mother* they are cousins and piano students.

Such differences in language, setting, and detail may result in sex-based differences in the readerships of the two novels. In a discrete research sample (people I know), most men had read and recommended *Presumed Innocent* and almost no men had read *The Good Mother*. It has been suggested that even when men read women's fiction they may be hard pressed . . . to completely decipher its intended meaning [because the usually male] reader who, both by experience and by reading has never made acquaintance with . . . the lying-in room, the parlor, the nursery, the kitchen, the laundry, and so on . . . will necessarily lack the capacity to fully interpret the dialogue or action embedded therein.

Kolodny, *Dancing Through the Minefield: Some Observations of the Theory, Practice and Politics of a Feminist Literary Criticism*, 6 Feminist Stud. 1, 12-13 (1980). This may be so. But exposure to these rooms through "cross-gender reading" may prompt reflection, deciphering, or engagement with their contents and occupants.

the treasure in law and literature's chest, and from good trash, sometimes the stuff of popular culture. Part I develops the idea that there is profit in thinking about the good in fiction, in addition to the great or breezy. Part II reviews *Presumed Innocent* and *The Good Mother*, two good legal novels. Part III then discusses the perceived incom-

11. Terrance Rafferty explains trash and the urge to read it:
   As we scan the shelves for something to help us through the long flight, the solitary night, or the interminable Sunday at home, we're prey to strange desires: to give in to the brain death we feel creeping up on us; to try something new, even if we're pretty sure it won't be good for us; to read what we think everyone else is reading, to enjoy ourselves in what we imagine to be a communal, unself-conscious way.

   What we're looking for, in our manic state, isn't just fun but megafun — overdoses of junky entertainment.
   Rafferty, *Beg. The New Yorker*, June 20, 1988, at 90 (reviewing Robert Ludlum's *The Icarus Agenda* and Jackie Collins' *Rock Star*).

   Reading what everyone else is reading may, however, be more than just an exercise in megafun. For example, in her study of romance novels, Janice Radway suggests a different purpose or value for women in reading this particular genre of junky fiction: "the ability to reserve time for the self, even if it is to read a romance..." Radway, *Women Read the Romance: The Interaction of Text and Context*, 9 FEMINIST STUDIES 53, 72 (1983).

12. I considered a third novel, Louise Shivers' *Here To Get My Baby Out of Jail* — much praised, right theme, and, according to the cover of my 1983 paperback edition, "Now a Major Motion Picture!" The book tells a straightforward and somehow sweet story of a tobacco farmer's young wife who has an affair with the family's hired hand. The hand kills the husband, kidnaps the wife and her baby, is arrested, tried, and sentenced to death. The relation between sex and bad mothering is explicit: Baby, the baby, pulls a pot of boiling peas on herself while the hired hand and Roxy, the wife and narrator, are playing together. As in *The Good Mother*, the husband takes the child away from the negligent mother, though here only symbolically, out of the crib to sleep next to him.

   While close to the other books in quality and theme, I did not include it for two reasons. First, Roxy differs from the central women characters in *Presumed Innocent* and *The Good Mother*: she is married and they are single. The distinction may be small — all three are contented lovers and bad mothers; nevertheless, marital status is a characteristic worth isolating within this inquiry, as one might expect the legal system to regard the disapproved sexual behavior of single women with greater deference or leniency. But see infra notes 88-95 and accompanying text.

   Second, *Here To Get My Baby Out of Jail* is not really a legal novel. There is a trial, but it is brief and unsuspenseful. But although not an important dramatic device within the novel, the trial provides a view of women as witnesses and as jurors different from recent feminist "takes" on the subject and worth a detour.

   Roxy — narrator, wife of the victim, and lover of the defendant — is called to testify:
   The men on the jury kept their eyes right on me every minute... I'd never seen any of them before, but I guess they were from up around Raleigh or farther off in Tar Country. The way they sat, long-faced as preachers riding mules, I could tell they were trying hard not to give away their feelings in their faces. But I could tell the ones that were blaming me the most. I wondered if it would have been any different if there'd been any women in the jury box. Probably even worse, I thought. Would the air have been full of looks saying if you'd been decent none of this would have happened? I just didn't know and anyway, there were just the twelve men.


   Proponents of women's jury service long argued that women, considered to be more compassionate, understanding, maternal, and sensitive than men, would be better able to judge other women. Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN'S L.J. 59, 80 (1986). A fictional account of women's ability to judge one another using a gender-based code of justice, Susan Glaspell's *Jury of Her Peers*, is now much discussed. See, e.g., id. at 75-76; Schoff, *Women, Justice, and Judgment*, 4 LAW & INEQUALITY 137, 140 (1986). That vision of sisterhood aside, however, it appears that women jurors may judge women witnesses, as well as women attorneys and defendants, more harshly than they judge men. See *The First-Year Report of the New Jersey
compatibility of sexuality and motherhood, the cultural text relied on by Miller and Turow and deferred to in American law.

I. THE SETTING: LAW, LITERATURE, AND POPULAR CULTURE

While lawyers looking at lawyers in fiction is not new, the pursuit has become more “fashionable and respectable” in the last ten years.13 The law and literature movement, “a conscious scholarly concern with the interrelations of law and literature,” claims two central interests — the investigation of “the law-related content of literary work” and “the literary aspects of the law.”14 Most work therefore focuses on either traditional criticisms of literary works that deal with lawyers, courts, and legal doctrine, or on the interpretation of legal language using the techniques of literary criticism.15 In purpose and method, then, law and literature is serious business; “the effete and the anecdotal [sic] are not within the discipline.”16

The discipline is also marked by the quality of the texts and the readers.17 As explained in one of the earliest symposia, “Great writers

---


15. Page & Weisberg, Foreword: The Law and Southern Literature, 4 MISS. C. L. REV. 165, 165-66 (also suggesting a third area of concern: the study of values and human rights from literary perspectives). There is, of course, no finite list of what law and literature is about. Legal scholars use literature, literary criticism, and literary techniques — such as storytelling — to address a range of personal, pedagogical, institutional, and cultural concerns. See, e.g., Chase, supra note 5; Henderson, Legality and Empathy, 85 MICH. L. REV. 1574 (1987); see generally Legal Storytelling Symposium, 87 MICH. L. REV. (1989) (forthcoming).


17. In his thorough, curiously scientific study (see, e.g., Figure 9.2, “Translucent Goggles in Place,” at 185) of those who read for pleasure, or “ludic readers,” Victor Nell risks substituting “a populist fallacy for an elitist error” and maintains that the two classes of readers (highbrow
often speak as prophets of statutory and common law changes. To the extent that writers are in the vanguard of community conscience, lawyers, as legislators and policymakers, should be attentive to their work."^{18} The great writers include Melville, Shakespeare, Dickens, Kafka, and Faulkner. Lesser authors than the classical greats, when included in a law and literature forum, have provoked unease and required defense."^{19} Students of law and literature are necessarily serious. As James Boyd White explains, one cannot be the "ideal reader the first time through a book":

"Reading is a process in which the reader himself, through a process of assimilation and rejection, response and judgment, becomes more fully one set of the things that it is possible for him to be. Reading works by a perpetual interchange between the person that a text asks you to become and the other things you are."^{20}

Judged then by their literary merit and the intellectual rigor required of their readers, *Presumed Innocent* and *The Good Mother* fall outside the law and literature net. They are likely picked up as recommended, not required, reading. *Presumed Innocent* especially creates no "perpetual interchange" and makes no demands on the reader to become anything more than he was $4.95 ago.

But it is the very absence of demand, the quiet encouragement of the reader's existing values, which provokes this inquiry into the two books under review. Rather than measuring the "unconscious strivings" of the society, as great literary works may,"^{21} popular books may reflect whatever it is that ordinary readers feel most comfortable with. Readers of romance novels, for example, prefer books characterized by true love and happy endings because through such plots the readers can "affirm their adherence to traditional values."^{22} To the extent that traditional values may differ from higher strivings, popular works, particularly when laced with even the appearance of legal authority, may reinforce familiar values with subtlety and ease.

Indeed, such popular works may have particular force because of their broad and uncomplicated presentations. In his compelling review of Primo Levi's *The Drowned and The Saved*, Clive James illustrates that it is not necessarily the artistic work of highest quality

---


which influences public opinion the most. James observes that, of the several exceptionally affecting literary and cinematic works on Nazi death camps, it was the crude television miniseries “Holocaust” which had “direct, verifiable historic effect”:

Just before the miniseries was screened in West Germany, a statute of limitations on Nazi crimes was about to come into effect. After the miniseries was screened, the statute was rescinded. Public opinion had been decisive. . . . [I]t couldn’t be denied that a clumsy story had broken through barriers of unawareness that more sophisticated assaults had not penetrated. 23

In James’ example, insistence on memory, the goal of the more serious Holocaust literature, was achieved through the use of a popular medium, a simplified plot, and caricatured portrayals. 24 The miniseries influenced public opinion not because of the inevitable power of its subject, but because of the entertaining quality of the presentation. 25

Best-selling fiction — by definition broadly entertaining, heavy on “trance potential” 26 — also influences, though the influence may be as much to reinforce as to penetrate barriers of unawareness. The effect of racist images in early movies, for example, was to solidify prejudices already held by viewers. 27

Because popular books, like television miniseries, are sometimes clumsy, investigation of their significance has been taken up not by law and literature, but by popular culture. 28 Accusations about mandarin

23. James, Last Will and Testament (Book Review), THE NEW YORKER, May 23, 1988, at 86, 90-91. James accommodates his concern that crude works may diminish their subject matter because “if the wider public is to be reached the message has to be popularized.” Id. at 91.

24. The point is made in another way, from the consumer’s perspective, in Saul Bellows’ More Die of Heartbreak. The character of Uncle Benn has several times shown his nephew a favored and poignant Charles Addams cartoon about love and unhappiness and apologizes for doing so. The nephew responds, “Taking your situation into account, I can sympathize. Other people’s obsessions don’t turn me on. I can weather this one for a while — but if its satire or caricature you want, why not Daumier or Goya, one of the masters?” “You don’t always have a choice,” Uncle Benn replies. “And I haven’t got your culture. In the Midwest, minds are slower. I can see that Addams isn’t in a class with the greats, but he makes a contemporary statement. . . .” S. Bellows, More Die of Heartbreak 10 (1987).


26. Nell explains that readers choose books based on subjective judgments regarding their literary merit, difficulty, and most important, their “trance potential,” or “the perceived capacity of the book to exercise dominion and superiority. . . . Though the term trance potential is new, the construct is not; it parallels the quality so avidly sought by nineteenth century publishers, the creation of a pleasant atmosphere for the reader.” V. Nell, supra note 17, at 146-47.

27. G. Jowett, Film: The Democratic Art 220-24 (1976) (describing the 1933 Payne Fund studies on the influence of film upon children); see also Drotner, Schoolgirls, Madcaps, and Air Aces: English Girls and Their Magazine Reading Between the Wars, 9 FEMINIST STUD. 33, 49 (1983) (exploring the impact of popular periodicals on girls who grew up to be “the quiescent mothers of the 1950s”).

28. Scholarly inquiries are not necessarily limited to one or another level of literary work.
texts and mandarin readers aside, the placement makes sense. There is, quite reasonably, little academic interest in interpreting the language of *Presumed Innocent*; it's the guts of the book, not Turow's syntax, that keeps it on bookstore shelves.

*Presumed Innocent* and *The Good Mother* may be just the ticket, however, for analyzing the relationship of lawyers and law to "public attitudes and visions constructed through institutions of mass culture." David Papke has suggested, for example, that a comparison of the lawyer-heroes in *Presumed Innocent* and Auchincloss' *Diary of a Yuppie* ("characters less inclined to seek justice in the courtroom than therapy on the couch") with earlier, more classically heroic fictional lawyers may indicate "a decline in the dominant culture's sense of lawyers as special social actors." Cataloging and deciphering images of law and lawyers in other popular media — television, rock music, fiction, movies — has begun. As Anthony Chase argues, the purpose of this foray into the terrain of popular culture is to "discover the genuine social impact of legal ideas . . . ."

A similar use of popular fiction to locate the cultural contours of law has been suggested in the context of the American West. In creating a bibliography of nonlegal books about the western United States, Charles Wilkinson explains,

[An] analysis of the making of . . . [western] law . . . can proceed in a rational, principled way only with a firm understanding of the West's

For example, in *Woman and the Demon: The Life of a Victorian Myth*, Nina Auerbach "mov[es] back and forth between 'serious' literature and popular culture, . . . forc[ing] us to confront the submerged analogies between [the] central paradigms of womanhood as they appear not only in 'classics' by Dickens, Thackeray, Mill, Elliot, and Freud but also in best-sellers such as *Trilby*, *She*, and *Dracula*." Margolis, Book Review, 9 SIGNS 493, 495 (1984) (reviewing Auerbach).

29. Anthony Chase urges Critical Legal Studies scholars to "unchain themselves from their law library carrels" and "abandon the study of 'mandarin materials,' " urging a shift in focus to "material which received is or can be shown to have social consequences within non-mandarin strata of society." Chase, *supra* note 5, at 545 & n.69. He argues that the study of popular representations about law is particularly valuable to CLS scholars who might then actually demonstrate that legal ideas have "broad and penetrating currency in popular social thought . . . ." *Id.* at 544.

30. Chase, *supra* note 5, at 535; see also Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1356 (1986) ("There are better places to learn about law than novels — except perhaps to learn about how laymen react to law and lawyers.").


32. *Id.* at 413.


subcultures, traditions, institutions, and natural systems. And too, one
must have a feel for the passion that westerners bring to these issues and
for other intangibles, such as what I call the texture of the ground.35
Laws which regulate and influence women are also grounded in nonle­
gal traditions, systems, passions. The following consideration of the
treatment of women in *Presumed Innocent* and *The Good Mother* is an
attempt to get a feel for the texture of a different, geographically un­
bounded, gender-bordered ground.

II. THE BOOKS: *PRESUMED INNOCENT* AND *THE GOOD MOTHER*

The plot of *Presumed Innocent* is classic detective stuff: beautiful
corpse, innocent defendant, a surfeit of suspects, and hairpin eviden­
tiary turns leading to the hero's eleventh-hour vindication. The book's
first half sets up the characters, motives, and conundrums. Carolyn
Polhemus, a deputy prosecuting attorney ("A smart, sexy gal. A hel­
luva lawyer" (p. 8).), is found naked and dead — bound, raped, bashed
on the head. The details of her murder are packed with clues, all of
which are interpreted logically and incorrectly by the investigators
and, I assume, by most readers. Early money is on the theory that
some rapist Carolyn had prosecuted decided to get even. "I figure,"
says Detective Lipranzer, "that the way the ropes are tied, that he put
himself between her legs and was trying to let his weight strangle her.
It's all slip-knotted. I mean . . . that he was sort of trying to fuck her
to death" (p. 22).

But other evidence troubles a rape theory. No signs of forced en­
try into Carolyn's apartment. No struggle before she was bound.
Most significantly, the sperm inside Carolyn are "blanks," detective­
talk for nonviable. While first taken to mean that the murderer was
sterile, the police pathologist soon identifies another substance in the
vagina of Carolyn Polhemus: "Contraceptive jelly. . . . Used with a
diaphragm" (p. 93). Here the plot thickens — the autopsy reveals no
diaphragm in the victim. This revelation leads the police to a new
theory: "This man who kills her is her lover. He comes over. Has
drinks. This lady has intercourse with man, Okay? Real nice. But
he's a angry guy. Picks up somethin, kills her, tries to make it look
like rape. Ties her up. Pulls out diaphragm. That's what I think" (p.
93). The theory leads within a few pages to the arrest of the narrator,
deputy prosecuting attorney Rusty Sabich, who was not only
Carolyn's colleague, but her lover until she threw him over for their
boss.

The novel's second half, Rusty's trial, particularly praised for its
"utter authenticity," and "verisimilitude,"36 jolts the reader into the


realities of a criminal prosecution by opening with authentic pleadings of the murder charge. *Voir dire*, bench conferences, direct and cross examinations, evidentiary rulings, admonishments to counsel, and instructions to the jury follow. Circumstantial evidence linking Rusty to Carolyn mounts up, but the case against Rusty falls apart following the testimony of the county pathologist. The pathologist’s own report shows that Carolyn, who lost favor as a rape victim because of the missing diaphragm, had obtained a tubal ligation years earlier. As defense counsel puts it to the pathologist, “Sir, is it not absurd to believe that Carolyn Polhemus used a spermicide on the night of April first?” (p. 336). Yes, but then how to explain the spermicide at all? Ah, the pathologist, either from negligence or ill-motive, mixed up specimens taken during different autopsies. The judge then dismisses the case for lack of evidence, and the novel is almost over.

While the book offers much else to discuss (the politics of big-time prosecutions and the ethical conduct of bench and bar are but two issues), I focus here on the depictions of the women characters. Apart from office staff and witnesses, there are two: Carolyn, Rusty’s lover, and Barbara, Rusty’s wife. Carolyn, as best I can tell, looked and dressed very much like a Barbie doll: “Torrents of blond hair, and almost no behind, and this very full bosom. And long red fingernails, too. . . .” Rusty, the narrator, is overcome by even the memory of Carolyn’s “jangling jewelry and her light perfume, her silk blouses, her red lipstick and painted nails, that large heaving bosom and her long legs, that splash of bright hair. . . .”

Carolyn not only looked sexy — “[e]ven in death, she retain[ed] her erotic bearing” (p. 28) — but she also had slept with half of northern Illinois. The list includes deputy prosecutor Sabich, chief prosecutor Horgan, and the judge presiding over Rusty’s trial. We are told that “every copper [who saw her] would roll his eyes and make like he was jerking off” (p. 30), and that a headline reading, “Lady P.A., Prosecutor of Perverts, Fucks Defendant and Lives Out Forbidden Fantasy” would not have been unreasonable (p. 28). Carolyn’s teen-

37. There is Rusty’s secretary, an eavesdropper who lies on the stand. Mac, a deputy administrator who “beams up from her wheelchair, everybody’s favorite smart-ass, brassy and irreverent,” (p. 53) also has a few lines. Sydney Pollack, director of the film version, observed to Turow, “You have three women in the story, and the only one who is not tainted is a paraplegic.” Shear, *supra* note 4, at 79. Finally, there is Mrs. Krapotnik, a tenant in Carolyn’s building who is asked to point out anyone in the courtroom she has seen entering the victim’s building. When she points to the judge and prosecutor, laughter breaks out in the courtroom at her preposterous identifications. Of course, we later learn that all these guys did in fact visit Carolyn.

38. P. 29. This description most closely resembles Malibu Barbie.

39. P. 33. The burlesque portrayal of a sex-crazed woman attorney with red fingernails and lipstick is particularly annoying because it appears in a novel praised by Wallace Stegner for “a cast of characters who are dismayingly credible.” S. Turow, *Presumed Innocent* (Farrar, Straus, Giroux hardback ed. 1987) (Stegner quote appears inside hardback edition). I might well be dismayed if I could but find such women attorneys. They do not show up at bar association or faculty meetings I attend.
age son asks Rusty, “Was she like your girlfriend, too?” In what appears an attempt at sensitivity, Rusty answers, “I’m afraid at one point she was my girlfriend, too. Late last year . . . Just a little while” (p. 70). Rusty then describes the kid “shak[ing] his head with real disgust. He’s waiting to meet somebody she didn’t gull,40 and there is nobody here who can make that claim” (p. 70).

“The kid” raises the issue of Carolyn as mother. We know from the outset she’s not a very good mother because no one even knows she has a child: at the funeral “[t]he only unfamiliar figure is a boy in his late teens who is seated beside the mayor, directly at the foot of the bier” (p. 16). Carolyn “took off” after her son’s birth and when he later tried to reestablish contact with her, she didn’t want much to do with him because, in his words, “there were a lot of times . . . I’d call . . . and I could tell somebody else was there” and “she was real busy. She had her career and all” (pp. 67-68). The son may not make the obvious and dismal connection between his mother’s sex life and her professional success, but readers are not spared: Carolyn was a woman who “fucked her way to the top” (p. 288).

Indeed, the one hint that a motherly heart might lurk beneath that heaving bosom is quickly axed. One of Carolyn’s claim-to-fame cases involved taking the testimony of a six-year-old boy whose mother had tortured him by placing his head in a vise. Rusty is overwhelmed by Carolyn’s gentle rapport with the boy:

Whatever wild, surging, libidinal rivers Carolyn undammed in me by her manner and appearance, there was something about the tender attention she showed this needy child that drew me over the brink, that gave my emotions a melting, yearning quality that I took to be far more significant than all my priapic heat. [p. 60]

Rusty rhetorically asks the psychiatrist on the case if Carolyn’s manner is not extraordinary. “But Mattingly took my comments instead as a clinical inquiry . . . ‘I’ve thought about that,’ he said. . . . ‘And I believe . . . that in some small way she must remind him of his mother’ ” (pp. 60-61).

The foil to Carolyn is Rusty’s wife. Barbara is, first and above all, a wonderful mother. Rusty describes the relationship between Barbara and their eight-year-old son: “they enjoy a special sympathy, communion, a dependence that goes deeper even than the unsounded depths of mother and child” (p. 209). She is also a good homemaker, “a willing captive within the walls of her own home, flawlessly keeping our house, tending our child, and toiling endlessly with her formulae and computer algorithms.”41 Barbara is also no slouch physically

40. Gull??
41. The notion of mothers as captives also appears in Molly Haskell’s description of “the woman’s film”:

The circumscribed world of the housewife corresponds to the state of woman in general, confronted by a range of options so limited she might as well inhabit a cell. The persistent
("... her bustline still peaked; the waist, notwithstanding pregnancy, still girlish ...") (p. 184)), or sexually ("... an imaginative, athletic lover; ... [Rusty] cannot complain about hang-ups or fetishes or what Barbara will not do" (p. 183)). And she stands by her man. Upon Rusty’s confession of his affair with Carolyn, Barbara’s angriest response is to call Carolyn a bimbo. And although Barbara is furious when Rusty is assigned to investigate the murder of his former lover — a fury revealed by her calling him an asshole — Rusty knows that “[s]ooner or later, ... I will see a woman of good humor, of blazing intelligence, full of quirky insight and sly wit, who is keenly interested in me” (p. 121).

Barbara’s only flaw, it turns out, is that she killed Carolyn. Barbara hit her on the head with an iron gardening implement, tied her up, and stuffed her with defrosted sperm collected from Barbara’s own diaphragm, which had been stored in the basement freezer. We learn all this months after the trial as Rusty discovers blood and blonde hair on the crowbar he is using to remove backyard fence posts. Barbara sees Rusty scrubbing the crowbar clean and tells him she’s taken a job at Wayne State. Rusty tells Barbara that he has always loved her, that he’ll never tell, and that he understands that Barbara did it “[f]or the good of us.” Despite the fact that Barbara is a murderer, Rusty warmly endorses her retaining custody of their son. “That’s one thing I don’t worry about” (p. 415). Barbara is “in better shape with him. It pulls her back. Barbara needs someone around who really cares about her. And Nat does. I always knew I couldn’t split them up — it would be the worst thing I could do to either of them.”

To sum up, of all the possible suspects in this complex political

---

irony is that she is dependent for her well-being and “fulfillment” on institutions — marriage, motherhood — that by translating the word “woman” into “wife” and “mother,” end her independent identity. She then feels bound to adhere to a morality which demands that she stifle her own “illicit” creative or sexual urges in support of a social code that tolerates considerably more deviation on the part of her husband.


42. I’m not sure where Barbara learned to tie the fancy slipknots. We are told that she read voraciously on arcane subjects, but my hunch is that she must have helped their son make a knot board in cub scouts.

43. Pp. 400. Professional ethical relativism has been included among the traits of all notable literary lawyers. Weisberg, *The Quest for Silence: Faulkner’s Lawyer in a Comparative Setting*, 4 Miss. C. L. Rev. 193, 201 (1984). Spousal immunity and common sense (“they’d never believe it was you, honey”) defenses aside, Rusty’s management of Barbara’s guilt seems ethical relativism on stilts.

44. P. 415. While parents who commit murder shouldn’t necessarily lose custody of their children, it is a factor to consider. See Chambers, *Accused In Wife’s Murder, He Keeps Kids*, Natl. L.J., June 27, 1988, at 13-14. Moreover, the usual standard for custody is the best interests of the child, not the parent. But see Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. Rev. 1, 31 (1987) (awarding the child to the parent most in need of the child might be justified because, if one parent is “very unhappy if not given custody, the child will suffer too”).
mystery, the killer turns out to be the victim's lover's wife, motivated by revenge and rejection. Carolyn is murdered, Barbara goes on tenure track, and Turow calls it a day. There is no sense of injustice at the end; rather, a troubled marriage is amicably ended. If anything, the ending suggests a restoration of justice, where justice represents the male writer's implicit celebration of traditional cultural norms.\(^45\) That Carolyn — a promiscuous, home-wrecking, successful woman lawyer — becomes an unsolved murder statistic does not rankle. If Rusty isn't mad at Barbara, why should we be? He and Carolyn did Barbara wrong.\(^46\) To the extent that murder may have been an overreaction on Barbara's part, she seems to fall within a tradition in which women, "vulnerable to impulsive criminal acts," have received more lenient and protective treatment from the criminal justice system.\(^47\)

What troubles about the ending is not so much its improbability — ringers confessing at the last moment are common within the mystery genre — but rather the drearily sexist nature of the improbability.\(^48\) In her otherwise enthusiastic review of Presumed Innocent, Anne Rice concludes that Barbara as murderer is "too bizarre to be believed in any appropriate context."\(^49\) While Rice is right in finding the ending unconvincing, I think she is wrong in finding that no appropriate foundation had been laid. In the character of Carolyn, Turow revitalizes the harder-than-we-thought-to-trash stereotype of the sexually active, had-it-coming rape victim.\(^50\) Rape has been the area of law that has most vigorously taken women's sexuality into account.\(^51\) Pervasive criminal justice practices such as stringent requirements of corroboration and proof of resistance, special cautionary instructions to juries, admission of evidence regarding the victim's prior sexual history, and

\(^{45}\) I thank Robert A. Ferguson for suggesting this.

\(^{46}\) Luckily Barbara doesn't know how wrong; apparently Rusty never revealed that Carolyn would taunt him by asking, in concert with their more daring sexual acts, "[D]oes Barbara do this for you?" P. 110. It seems that Rusty also never told Carolyn that Barbara did. P. 183.

\(^{47}\) Heilbrun & Heilbrun, The Treatment of Women Within the Criminal Justice System: An Inquiry Into the Social Impact of the Women's Rights Movement, 10 Psychology Women Q. 240, 241 (1986) (suggesting, with many qualifications, that since the 1970s women have received sentences more similar to those received by men for the same crimes).

\(^{48}\) The quality of improbabilities may lead back to the difference between great literature and good fiction. In his exploration of Shakespearean comedy, John Denvir explains, "The study of literature also reminds the lawyer that all interpretation is an active exercise; we must work out the meaning of The Tempest if it is to rise above its improbable plot." Denvir, William Shakespeare and the Jurisprudence of Comedy, 39 Stan. L. Rev. 825, 839 (1987). Presumed Innocent makes a different interpretive demand: to notice that the plot is improbable and works only if the reader accepts the jealous but justified wife as murderer.

\(^{49}\) Rice, supra note 3, at 29.

\(^{50}\) See, e.g., LaFree, Reskin & Visher, Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials, 32 Soc. Probs. 389, 397 (1985) (jurors less likely to believe defendant guilty when victim had reportedly engaged in sex outside of marriage).

\(^{51}\) See, e.g., Loh, The Impact of Common Law and Rape Reform Statutes on Prosecution: An Empirical Study, 55 Wash. L. Rev. 543, 582 (1980) (rape cases are the only ones in which the prosecutor interviews the victim before charging).
absolute spousal exemptions resulted in part from images of women as seductive and untrustworthy.\textsuperscript{52} And despite legislative reforms officially removing some prejudicial practices, many police officers, prosecutors, judges, and jurors continue to act on the basis of traditional assumptions.\textsuperscript{53} Turow takes literary advantage of the cultural baggage encasing rape. Carolyn's body and background are used here as a signal not to jurors deciding a case, but to readers engaged in a plot. Her image as a woman who deserved it — even \textit{wanted} it — is not diminished by our learning that it was only a mock-rape and — guess what? — another woman did it.

Because the story is pitched as intrigue of political, not domestic, dimensions, readers are distracted from considering Barbara as a contender for killer. Our sense of her comes only through the narrator's controlling, self-centered perspective.\textsuperscript{54} The portrayal of Barbara appears to be clever because at the novel's end she turns out to be something other than the pained but loyal wife we thought we had come to know. But the "other" is simply a less passive version of wife, one who is willing and quite able — using ordinary household items — to take on her fictional opposite, the vamp. Turow has, in turn, made Carolyn as vamp particularly threatening through the combination of her singleness, heaving bosom, and law degree. But although women attorneys may be less trusted, respected, paid, and rewarded than men attorneys,\textsuperscript{55} there is no evidence that they are particularly promiscuous. Nor are wives so spectacularly vengeful as Turow's Barbara; while extramarital affairs usually create marital crises,\textsuperscript{56} murder is rarely the resolution. In fact, women seldom kill, and when they do murder husbands or lovers it is usually in response to physical violence, not jealousy.\textsuperscript{57} Nevertheless, \textit{Presumed Innocent} works because it relies on exaggerated but hard-to-shake notions about good wives and vampy women. When these two duke it out, a singular brand of suburban justice is applied, and wives win.\textsuperscript{58}

\begin{itemize}
\item \textsuperscript{53} Id. at 334.
\item \textsuperscript{54} For a discussion of ways in which an author's point of view may influence readers' judgments about murder and justice, see Baughman, \textit{Literary Perspectives on Murder}, 6 A.L.S.A. Forum 210 (1982) (comparing \textit{In Cold Blood} and \textit{Looking for Mr. Goodbar}).
\item \textsuperscript{55} See, e.g., Hodgson & Pryor, \textit{Sex Discrimination in the Courtroom: Attorney Gender and Credibility}, 71 Women Law. J. 7 (1985) (women rated female attorneys significantly less intelligent, less friendly, less capable, less expert, and less experienced than male attorneys).
\item \textsuperscript{58} The recent movie \textit{Fatal Attraction} is a cinematic example of this phenomenon. A sexy career woman has a short but intense affair with a man even more happily married than Rusty Sabich. To protect her family from the woman's physical threats (the movie has been called the first feminist slasher film), the man's wife stabs the woman to death. The movie originally ended
\end{itemize}
Wives win in another way in *The Good Mother*, a second novel in which the law fails a sexually active single mother. Anna Dunlap, the narrator, and her attorney husband, Brian, divorce. By agreement their small daughter Molly lives with Anna, who has arranged for the first time in her life a spare but satisfying and self-sufficient existence. Anna gives piano lessons to untalented students, works part-time in a university rat lab, puts Molly in day care, and meets Leo. Anna is careful to integrate Leo slowly into her household. Leo and Anna sleep together at night, but “he got up faithfully each morning he slept over and was out of the house before [Molly] emerged from her room” (p. 122).

Things couldn’t be going better — except that once when drying off after a shower, Leo lets Molly touch his penis. Molly had asked if she could and, in the interests of modern parenting, he said yes, unfortunately getting an erection in the touching process. When Molly mentions this to her father while visiting him for the weekend, Brian refuses to return Molly to Anna and sues for custody. During the custody trial, rendered with Turow-like verisimilitude, Anna agrees never to permit Leo near Molly again. Despite her pledge, the judge awards custody to Brian and his new wife, Brenda. Anna then rearranges her life. She gives up her apartment, jobs, and Leo, and moves from Boston to Washington, D.C., to see as much of Molly as she is allowed. When Brian and Brenda move back to Boston, Anna follows them back. That is the story.

Like Turow’s book, *The Good Mother* has its share of stereotyped characters. Leo, rather like the Alan Bates character in the film, *An Unmarried Woman*, is too good to be true: a handsome, verbal, sexual, nonsmoking, successful, single artist. Molly is too cute. Brian wasn’t a good lover, which is all right in itself, but he need not have been made a minister’s son in apparent explanation. A hard question arises, however, with regard to the characterization of Anna. Is the portrayal of the mother stereotypical, or, as may be more accurate and troubling, only typical? What are the indicia of good motherhood these days?

At the trial Anna’s sexual conduct is taken as the primary measure of her ability to mother well, and she has made two mistakes. The with the woman committing suicide, but preview audiences were dissatisfied and the more retributive ending was substituted. *Fatal Attraction* thus voluntarily upheld the tradition long enforced within the movie industry that “[a]dultery and illicit sex, sometimes necessary plot material, must not be explicitly treated or justified, or presented attractively.” The Production Code of the Motion Picture Producers and Directors of America, Inc. — 1930-1934, *reproduced in G. JOWETT, supra* note 27, at 468 app. Here again, wives win — and it is “the other woman,” a professional woman, who loses.

59. Interestingly, Leo exhibits the top three qualities that readers of romance novels desire most in their heroes — intelligence, tenderness, and a sense of humor. Radway, *supra* note 22, at 81-83.
first, the shower encounter between Leo and Molly, approaches a near-perfect dilemma. What should a parent, reader, or court make of the event? Anna and her lawyer do not attempt to defend what happened or to instruct the court on psychological theories on sexual openness within the home. Their strategy is to concede Anna’s mistake in negligently supervising Molly but to isolate the episode as a single, reparable error in judgment. For although it was Leo who acted, Anna takes legal and personal responsibility for having let it happen. She was the bad mother.

Paralleling the arrest of Rusty in Presumed Innocent, The Good Mother’s first half slams shut with Leo’s surprise admission. But while the shower episode is used more dramatically in the plot, Anna’s second and more subtle mistake is just as damaging. One night Molly, half asleep, climbs into bed with Anna and Leo, who have just finished having intercourse but are not yet physically separated. Anna describes the harmony she feels in holding at once the two she loves: “I can remember feeling a sense of completion, as though I had finally found a way to have everything. We seemed fused, the three of us, all the boundaries between us dissolved; and I felt the medium for that” (p. 124). At the trial this moment becomes fatal evidence that “for the entire duration of her mother’s relationship with [Leo], the child was exposed to a high degree of sexual activity” (p. 269). Thus, despite the recommendation by the court-appointed psychiatrist that Molly should live with her mother, Anna loses.

Critics and publicists have concentrated on the tension between Anna as sexual woman and as mother, some recognizing the evocative connection between the names and dilemmas of Anna Dunlap and Anna Karenina. The paperback cover brags that the book is “A Searing Novel of Woman’s Life As Two Fierce Hungers — Erotic and Maternal — Compete and Collide.” Yet in several respects, the suggested tension between Anna’s sexual and maternal inclinations seems a false conflict. First, Anna herself is not in conflict. If she must choose between Leo and Molly, Anna’s choice is clear; she wants Molly. For this choice the character has been much criticized as evidence of an anti-feminist backlash: “Maternalism retains primacy, despite its truncated form, and the novel offers no hint that Anna will

---

60. Feminist reviewers have dealt with the episode in several ways, including avoidance. A review of The Good Mother in the Harvard Women’s Law Journal, for example, states that “Brian strongly disapproves of Anna’s sexual relationship with her new lover and fears its effects on Molly.” Book Review, 10 HARV. WOMEN’S L.J. 335, 338 (1987). The description is somewhat disingenuous; Brian disapproved of a seemingly sexual relationship between the lover and Molly.

61. Wolfe, supra note 3. Not much can be said about the name Rusty Sabich, except to note that, consistent with Turow’s general misogyny, his hero’s name could be read as “Say, bitch.” Such an interpretation would, of course, rival Alvy Singer’s interpretation in the movie Annie Hall of a quickly spoken “Did you eat?” as “Jew eat?”; and is a matter for Turow and his analyst.
seek adult erotic love ever again.”62 This prediction seems a bit drastic, although it plays into general dissatisfaction with the character of Anna as feminist wimp. But Anna likes her life domestic, understands the benefits of her dead-end job, and defends herself well against criticism from none other than Leo, who wants her to want more for herself. If one acknowledges Anna’s competence to make choices, and certainly there is general audience approval for her decision to leave Brian, to take up with Leo, and to stand up to her grandfather, one must also accept her decision to pine over, adjust to, and even rationalize the loss of Molly.

The second shaky aspect to the maternal-erotic conflict is that for Anna and Leo, no choice was necessary. They could have continued in heightened sexuality forever so long as they kept Molly out of it. As a psychologist colleague observed,

With the flood of adults now making known that they were sexually used by relatives as children, might there be even a hint of the need to lock doors to make certain that children would not walk in? Not to do so, of course, should not result in a loss of custody. But it is a blissful state that does not know the nearness of the law.63

Content with her life and ignorant of the law, Anna presumed an innocence about her child’s potential exposure to adult sexuality not shared by court or, it seems, by community. Self-identified New Left feminists have trouble with the three in bed: “How can we judge Anna, especially when we must have assented to, envied even, the depth of her awakening passion? . . . Yet can we assent fully to including a child of four in this moment of intimacy between her mother and her mother’s lover?”64

After the court awards custody to Brian, Anna’s lawyer explains that it was just the luck of the draw: Judge Sullivan was strict about sexual issues. But it is not just the fictitious Judge Sullivan who is strict about sexual issues. Real mothers have lost custody of real children because of sexual behavior less questionable than Anna’s. Maternal cohabitation — whether long-term, occasional, or monogamous — still results in adverse custody decisions.65 And, as in The Good

---

64. Rosenfelt & Stacey, supra note 62, at 357. The film version of the book has received similar criticism: “[The Good Mother] is about a woman without the good sense to carry her sleeping child out of her bed.” James, Lately, Seeing Isn’t Believing, N.Y. Times, Nov. 20, 1988, § H, at 18, col. 1.

The risks of losing custody are particularly great if the mother’s lover is a woman. See, e.g., Newsome v. Newsome, 256 S.E.2d 849 (1979) (though gay mother is found to be “a loving
Mother, the decisions are sometimes based on the trial judge’s disapproval of the mother’s conduct rather than his application of statutory standards. One critic described the movie version of The Good Mother as a pretentious film packed with “quirky issues and atypical characters.” Viewers and readers may find Anna to be a good, good enough, bad, or dreadful mother, but she is not atypical.

In their thoughtful review of The Good Mother and other “post-feminist texts,” Rosenfelt and Stacey conclude that because the novel contains “competing voices,” like the psychiatrist who suggests to Anna that the trial’s outcome is not all her fault, the book should not be read “as a didactic morality play, a warning to mothers to behave or pay the price.” Still, Anna loses Molly because Anna did not understand that she and a Massachusetts family court judge had different notions about child-rearing. The book rightly suggests, if not warns, that single mothers remain at risk if unaware of the legal rules and their application.

As important as awareness of the law’s content is a recognition of its reach. Anna did not understand that even nonsexual personal choices about the management of her life, child, and household could have legal consequences. For while the book emphasizes and is organized around Anna’s sexual awakening, a second, slower dawning is also underway. In starting her new unmarried life Anna makes decisions consonant with her new sense of self: “I had a sense, a drunken irresponsible sense, of being about to begin my life, of moving beyond the claims of my own family, of Brian, into a passionate experiment, a claim on myself” (p. 10). As an example, she accepts child support for Molly but nothing for herself. It turns out not to be enough: “More than once I’d thought of calling Brian, of telling him that I’d been foolish to think I could manage on what we’d agreed on, that I needed more money from him . . . . But each time I’d talk myself out of it. At the day-care center I knew mothers who managed school and

mother who cares for and is interested in the well-being of [her child],” custody is awarded to father and his parents); see also Hunter & Polikoff, Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy, 25 BUFFALO L. REV. 691 (1976). Homosexual fathers have also lost custody as a result of living with their partners. See, e.g., Comment, Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties, 19 HARV. C.R.-C.L. L. REV. 497 (1984).

66. See, e.g., In re Marriage of Wellman, 104 Cal. Rptr. 148 (1980) (overturning trial court’s sua sponte order forbidding custodial mother “overnight visitations” from members of the opposite sex). But see Court Limits Woman’s Right to Male Guests, N.Y. Times, Mar. 12, 1989, § 1, at 27 (Rhode Island Supreme Court upholds lower court order prohibiting divorced mother “taking good care’ of her three children’ from having an unrelated man stay overnight in her home). Carol Bruch has noted that “[i]n the moral disapprobation of postdivorce maternal cohabitation is reminiscent of earlier condemnation of maternal adultery.” Bruch, Forms of Exclusion in Child Custody Law, 7 ETHOLOGY & SOCIOBIOLOGY 339, 343 (1986); see also M. GROSSBERG, GOVERNING THE HEARTH 252 (1985).

67. James, supra note 64.

jobs and childcare entirely on their own . . . . It seemed shameful to me that I couldn’t do it . . .” (p. 88). Anna then takes two part-time jobs, necessitating Molly’s full-time enrollment in day care. Anna is taking care of herself, at one level a good thing. But at the trial to decide who gets Molly, Brian’s lawyer characterizes Anna’s life differently: “So you work forty hours a week away from your daughter, and then still have all the work and maintenance involved in the home to do also . . . As well as your social life, isn’t that the case?” (p. 265). Yes, says Anna.

This quick exchange between Brian’s lawyer and Anna regarding work hours underscores a third “false conflict” or, more accurately, false emphasis, in the novel. Centering the trial around Anna’s sex life obscures the harder, less sexy issues now arising in custody determinations. Anna’s case is more typical, and therefore instructive, not because of her relationship with Leo, but because of the nonsexual, economic aspects of her life. Statistics abound supporting the authenticity and prevalence of women like Anna, the newly marginalized woman following divorce: her standard of living has been greatly reduced; she has a job, not a career; her child is necessarily in day care; and her remarried husband is in superior economic and domestic circumstances. Single mothers are less wealthy, less rested, less married. Thus even if there had been no “sexual irregularities,” Anna might have had a hard time keeping custody of Molly. During the trial Anna saw an alternative picture of parents emerge: “Brian and Brenda, who’d done things the right away, who kept their pajamas on, whose life was ordered, productive” (p. 246). Such factors — the stability and status of job, residence, marriage — count in real life, especially in states where no preference is given to the parent who has been the child’s primary caretaker prior to the divorce, so that contesting parents appear before the court on equal equitable footing.

In The Good Mother sexual satisfaction, the thematic center of Anna’s new adulthood, is used to show the tension and complexity between personal and legal responsibilities. Miller makes her case well regarding Anna’s confusion of sexual headiness and actual power. But the emphasis on maternal sexual conduct may skew readers’ sense of other significant factors, such as comparative economic status, professional predictions about a child’s well-being, and judicial biases that are more frequently at work when courts are choosing parents.

III. THE POINT

The stories told in Presumed Innocent and The Good Mother suggest that community and law are slow to defend sexual women. Most readers are conditioned not to expect much for Carolyn, an airbrushed caricature of a professional woman. But even monogamous Anna, a mascara-free user of laundromats, is severely penalized as a result of a sexual relationship. In both novels sexual activity is used to temper sympathy for women who might otherwise get some reader support—a rape victim and a pretty good mother. The law appears particularly strict when the woman’s sexuality is perceived as interfering with her responsibilities as a mother. Anna, who has “consciously chosen to make motherhood her priority, and an unambitious competence her mode”71 in order to be a better, more available, less stressed mother, still loses her child, largely in consequence of becoming a sexual person. Sexy Carolyn’s bad mothering seems gratuitously tossed in, accepted societal shorthand for the proposition that Carolyn is no good, in case readers had somehow missed the point.

Why motherhood is regarded as inconsistent with sexuality is a confounding issue, largely outside the scope of this essay, if not a life’s work. The starting point seems to be that “[m]aternal sexuality is a topic that makes virtually everyone anxious.”72 Explanations—religious, economic, political, and psychoanalytical—are available, plausible, and likely interrelated.73 Elizabeth Janeway offers an excellent crash course on the psychological underpinnings of the two images of woman-as-sexual-being which Western society seems able to master: the good and chaste mother (the generic Mary) versus the bad and sexual insatiate (Eve).74

The essential incompatibility of the two images within American culture has remained historically adaptable but constant. I offer examples from three centuries. The goodness of wives and mothers in pre-colonial New England was reflected in their very title—Goodwife or Goody;75 in the penalty for adultery—death;76 in the status con-

73. For a streamlined review of the perceived necessity of sexual repression from Freudian, Weberian, and Marxist perspectives, see Grey, Eros, Civilization and the Burger Court, 43 Law & Contemp. Probs. 83, 91-94 (1980); see also J. D’Emilio & A. Freedman, Intimate Matters: A History of Sexuality in America (1988). A special issue on motherhood and sexuality in volume one, number two, of Hypatia contains a series of articles concerning philosophical, psychoanalytic, and political critiques of this subject. 1 Hypatia (1986).
76. L. Ulrich, supra note 75, at 94.
nected to maternal fertility;\(^77\) and in a perceived link between the behavior of witches and bad mothering.\(^78\) Nineteenth-century Victorian America transformed the Christian model of Mary into the ideal and nonsexual mother, while Eve became the tempting and nonmaternal prostitute.\(^79\) Sex was either procreative (at menstruation girls were instructed on the care of their maternal organs),\(^80\) pathological (mid-nineteenth century hysteria was perceived as an inherently sexual disease),\(^81\) or wicked.\(^82\)

If “nineteenth century American society provided but one socially respectable, nondeviant role for women — that of loving wife and mother,”\(^83\) the post-nineteenth amendment, post-Freudian twentieth century brought some changes. Single women could have careers\(^84\) and wives were permitted to enjoy sex within their marriages.\(^85\)

\(^77\) Id. at 159.

\(^78\) Id. at 158 (“If a witch was by definition a bad neighbor, she was also a bad mother. Instead of nursing babies, she gave suck to familiar spirits or to the Devil himself.”).

\(^79\) Cott, Passionlessness: An Interpretation of Victorian Sexual Ideology, 1790-1850, in A HERITAGE OF HER OWN 162 (N. Cott & E. Pleck eds. 1979) (tracing cultural development of women’s lack of sexual passion). A task of motherhood throughout the nineteenth century was the reduction of licentiousness through both example and the moral upbringing of children, particularly sons, considered more at risk by virtue of their having sexual desires. N. COTT, THE BONDS OF WOMANHOOD: “WOMAN’S SPHERE” IN NEW ENGLAND, 1780-1835, at 149-53 (1977); C. SMITH-ROSENBERG, DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA 119 (1985).

\(^80\) C. SMITH-ROSENBERG, supra note 79, at 187-88.

\(^81\) C. SMITH-ROSENBERG, supra note 79, at 206-07. Masturbation or sexual excess, even within marriage, were two medically diagnosed causes. Id.

\(^82\) Visual representations of these sexual alternatives are wonderfully organized in Bram Dijkstra’s study of turn-of-the-century art, a “veritable iconography of misogyny.” B. DIJKSTRA, IDOLS OF PERVERTS: FANTASIES OF FEMININE EVIL IN FIN-DE-SIÈCLE CULTURE (1986). Mothers were inducted into “The Cult of the Household Nun,” where images of wife as madonna, angel, and garden flower prevailed. Because marital sex was to be tolerated only for its procreative rewards, sexual pleasure (possibly obtained through “solitary vice”) was regarded as sexual excess resulting in physical listlessness and mental degeneration. Thus collapsing, floating women became a popular subject for late nineteenth-century painters who, supported by scientific theory, “had a veritable field day exploring the autoerotic ramifications of the representations of the sleeping woman.” Id. at 78. More prevalent than domestic garden angels or floating madonnas, however, was the portrayal of women as sexually powerful and vengeful. Dijkstra catalogues the truly scary images of the sexual woman: virgin whores, daughters of Dracula, Judiths and Salomes, Sirens, and worse. (For worse, see Dijkstra’s chapter in Gynanders and Genetics: Connoisseurs of Bestiality and Serpentine Delights; Leda, Circe, and the Cold Caresses of the Sphinx. Id. at 272-332.)

\(^83\) Id. at 159.


\(^85\) During the 1920s a new marital ideal emerged, the “companionate marriage,” in which marital harmony was measured by the sexual satisfaction of both partners. N. COTT, THE GROUNDING OF MODERN FEMINISM 175-211 (1987).

Not surprisingly, “[a] new cultural apparatus formed around the revelation that sexual expression was a source of vitality and personality (not a drain on energy as nineteenth-century moralists had warned) and that female sexual desire was there to be exploited and satisfied.” Id. at 150.
But, as Janeway points out,

Eve is still with us. Tricked out in polyester, her doll-sized simulacrum presents herself as the *Cosmopolitan* girl. Other diminished versions of Eve appear in popular novels, movies, and of course on television, Charlie's fallen angels. It would be pleasant to think that these superficial puppets could operate as a kind of killed vaccine which would immunize patriarchal society against the mythic terror of Eve and the revenge it invites, but I am afraid that is overly optimistic. Since Eve is the projection of masculine emotions onto the outside world, her influence is not easily affected.

. . . . [Her real status derives from her ability to attract males even though she must combine this with work for pay . . . .]

Tom Wolfe provides a final, literary example of the contemporary incompatibility of motherhood with a particular form of sexuality, the glamorous. In *The Bonfire of the Vanities*, a novel of late twentieth-century urban manners and criminal justice, he describes the only two categories of women apparent within fashionable society: the skinny and young (dates and second wives) and the skinny and forty (original wives). In one scene, Wolfe observes,

What was missing from [the dinner party] was that manner of woman who is neither very young nor very old, who has laid in a lining of subcutaneous fat, who glows with plumpness and a rosy face that speaks, without a word, of home and hearth and hot food ready at six and stories read aloud at night and conversations while seated at the edge of the bed, just before the Sandman comes. In short, no one ever invited . . . Mother.

The connection between bad mothers and good sex in *Presumed Innocent* and *The Good Mother* may reflect current fondness and rhetorical support for traditional family values expressed in media as varying as political campaigns, television programming, and romance

87. T. Wolfe, *The Bonfire of the Vanities* 333-34 (1987). But Wolfe too forgets the invitation. The only such mother he portrays is an assistant prosecuting attorney's wife who has just given birth to their first child. The sight of this new mother, dumpy in a bathrobe, causes the husband to fall more deeply in love with a pretty juror wearing brown lipstick. The curse of motherhood has come full circle; what horrifies the husband about his wife's appearance is that she was "[o]nly twenty-nine, and already she looked just like her mother." *Id.* at 29.
88. In the 1988 presidential election, for example, both George Bush and Michael Dukakis expressed strong commitment to the American family. But as Mintz and Kellogg point out, "The paradox of the modern American family is that while we attach far greater psychological and ideological significance to a happy family life than did our ancestors, our work lives, our emphasis on personal fulfillment, and our political behavior all conflict with strong, stable family bonds." *S. Mintz & S. Kellogg, Domestic Revolutions* xx (1988). Thus, at the same time that candidates in the 1988 campaigns surrounded themselves with relatives galore, Congress voted down a pro-family legislative package that would have helped low-income parents pay for child care and required employers to grant up to 10 weeks of unpaid parental leave. *Day Care and Parent Leave Bills Die*, N.Y. Times, Oct. 8, 1988, at 7, col. 4.
Recent legal scholarship has also articulated the benefits of marriage and traditional family life. Sex outside marriage, like women's work outside the home, threatens the family. Divorced, and therefore potentially sexually active women may be perceived as an assault on the suburbs and its underlying system of values more serious than the threat presented by earlier, less populated, and less per-

---

90. Women who regularly read romance novels list "bed-hopping" or promiscuity most frequently as something which should never be included in a romance. J. RADWAY, supra note 22, at 67, 74.

91. See, e.g., Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy — Balancing the Individual and Social Interests, 81 MICH. L. REV. 463, 472-84 (1983) (including among the benefits provided by "formal families" the well-being of children, the transmission of cultural values, and a mediating structure between individual and state).

92. Carolyn and Anna demonstrate that working outside the home, in either blue or white collar, interferes with family life. Carolyn, a lawyer, is too busy for her child. Anna, a lab technician, is too poor. She cannot afford to hire a substitute mother like the nanny Brian and Brenda have employed to care for Molly.

But work alone, without more, does not do mothers in. Compare Carolyn and Barbara, Anna and Brenda. Carolyn has chosen a high-pressure legal career as an alternative to motherhood. Turow is clear that her success is quite related to sexual relationships at work. Barbara, Rusty's wife, doesn't work. Anna works low-key jobs with no on-site sex. Brenda, the wife of Anna's former husband, is a lawyer and became involved with Brian at their firm.

And who gets custody? A chart, though not required in feminist essays, helps:

<table>
<thead>
<tr>
<th>Marital Status</th>
<th>Career Status</th>
<th>Sex on Job</th>
<th>Custody</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anna Single</td>
<td>Technician</td>
<td>Platonic</td>
<td>Loses Molly</td>
</tr>
<tr>
<td>Brenda Married</td>
<td>Lawyer</td>
<td>Fools around with Brian</td>
<td>Keeps Molly</td>
</tr>
<tr>
<td>Carolyn Single</td>
<td>Lawyer</td>
<td>Fools around with everyone</td>
<td>Abandons son</td>
</tr>
<tr>
<td>Barbara Married</td>
<td>Full-time Mother</td>
<td>n/a</td>
<td>Keeps son</td>
</tr>
</tbody>
</table>

It appears that having a job in combination with single marital status and sexual activity creates the fatal combination.

93. Kristin Luker makes similar observations in the context of abortion. In analyzing the participation of political activists in the abortion movement, Luker found that "because pro-life [anti-abortion] women are traditional women, their primary resource for marriage is the promise of a stable home, with everything it implies: children, regular sex, a 'haven in a heartless world.' The availability of casual, nonprocreative sex therefore "undercuts pro-life women in two ways: it limits their ability to get into a marriage in the first place, and it undermines the social value placed on their presence once within a marriage." K. LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 209 (1984). See generally id. at 192-215 (ch. 8, Morality and Motherhood in America).

If such views are held more widely, then Miller and Turow may be signalling readers not only by their characters' sexual activities but through their use of birth control as well. Anna, for example, has an abortion during her relationship with Leo. Miller describes the decision to abort, the abortion clinic, and the procedure with matter-of-fact detail in a scene I had always thought unnecessary. But while it may not serve the plot, Anna's abortion may contribute significantly to reader assessment of her as a character. If, as Luker describes, pro-life people generally oppose the use of artificial contraception because it demeans the procreative purpose of sex, and pro-choice people tend to view contraceptives as "something like taking care of one's teeth — a sensible routine, a good health habit," then Anna's failed use of birth control and subsequent abortion prompt different moral judgments about her depending on readers' broader views of the relationship between sex and motherhood. Id. at 178. Similarly, in Presumed Innocent, where the entire plot hinges on a birth control device, Carolyn is doubly locked into reproductive symbolism. We think she was using a diaphragm, only to learn later that she didn't need one; she'd already been sterilized.
manent categories of unmarried women, such as spinsters and "career girls." Comparing unmarried women in the novels of Charlotte Bronte and Barbara Pym, Ezell points out the abundance of single women in both Victorian times and the 1950s. She observes, "In all of Pym's novels, the spinsters find themselves in conflict with married women in the community. In spite of the respectability of the modern woman's financial independence, the motives behind the tensions are basically the same . . . jealousy, contempt, and envy." Divorced women in the 1980s may be replacing spinsters in this regard. Anna and Carolyn are feared because their single marital status carries a presumption not of innocence but of sexual availability. Their sexuality endangers existing marriages and causes them to be bad mothers to boot.

While both Presumed Innocent and The Good Mother connect sex to motherhood, the books differ greatly in their uses of the characters' sexuality. In Presumed Innocent the women are paper dolls. Perhaps as a preemptive strike against anticipated feminist criticism, Turow gives these cut-outs academic credentials — and from traditionally masculine disciplines — but this is faux feminism at its worst. Carolyn's J.D. only makes her an educated slut and Barbara's algorithms don't stem her murderous jealousy. Turow pretends women are important, just as Rusty's lawyer Stern does by including Barbara in courtroom conferences during the trial. But when Barbara expresses appreciation for this, Rusty corrects her naive sense of participation: "Stern again wants all the jurors to see at the outset that my wife is still on my side and that we, in this modern age, defer to the opinions of women" (p. 230). The women in Presumed Innocent are not asked for opinions; instead they are given straightforward tasks — to have intercourse, to commit murder — and neither Carolyn nor Barbara is very believable.

Turow uses Carolyn to tease not just

94. Ezell, "What Shall We Do With Our Old Maids?: Barbara Pym and the "Woman Question," 7 INTL. J. WOMEN'S STUD. 450, 461 (1984). In Crampton Hodnet, for example, residents of North Oxford discuss with whom Mr. Latimer, the new curate, might lodge:

"... Don't you remember Willie Bell?" [the vicar's wife] added, referring to a former curate who had lodged with a widow and eventually married her.
The vicar looked rather embarrassed. "I hardly think that this is the same sort of thing," he said hastily. "... There are no widows in Leamington Lodge. . . ."
"But there are two spinsters," whispered Anthea to Miss Morrow. "Surely that's just as dangerous?"


95. The notion seems to be that once a woman has "done it," she is ready to keep doing it. Similarly, in early colonial history, widows were considered especially vulnerable to sexual temptation. L. ULRICH, supra note 75, at 97.


97. Several friends have pointed out that the men in Presumed Innocent don't come off very well either. I'm not sure I agree. While most of the male characters are unscrupulous (the
Rusty and the rest of the office, but the reader as well. From the outset, the book, essentially a macho detective story, invites the reader to indulge for a couple hundred pages in a little sexist fun made more tolerably respectable by the legal context. Reading Presumed Innocent isn’t like sneaking into one’s neighborhood Pussy Cat Theatre; it’s on the checkstands, it’s recommended by colleagues as a “good read.”

The Good Mother, on the other hand, is not as much fun. Though there are many steamy scenes, nicely depicted from a woman’s perspective, they occur between descriptions of a piano recital, a family reunion, a child’s bath. This seems to me much of the point. Sex is part of Anna’s life, even one of her favorite parts. But in addition to being sexual, Anna also works, shops, and kids around. In The Good Mother sex is something women learn, think, and make decisions about. But it is not all they do. For many, The Good Mother may be not so much a good read as an instructive one.

Presumed Innocent, on the other hand, is glossy, fast-pitched sexism, used here to mean “the presentation of images of women as less than and inferior to men, existing to titillate and service men.” I suspect Turow’s book works on readers in much the same way as pornography, by increasing tolerance for what is observed. Mock jury experiments, for example, show that subjects who have watched films depicting aggressive sexual acts against women are less likely to perceive real harm when later evaluating rape evidence. When the victim has been portrayed as enjoying the aggression, as we glean Carolyn usually did, there is even less likelihood of the subject finding that the victim was harmed. Recognizing the methodological and predictive limitations of these studies, there is still little dispute that lawyers) or cruel (a bad cop), in the hero Rusty and his faithful sidekick Detective Lipranzer, Turow has created a male friendship marked by conduct resembling a personal code of honor. See Chase, An Obscure Scandal of Consciousness, supra note 33, at 123 (the Lipranzer-Rusty relationship “constitutes the romance at the heart of Turow’s book . . . a story of male bonding, the endless struggle of heterosexual American men against loneliness, anxiety, women, and death”). Certainly Rusty is less heroic than earlier fictional lawyers. Papke, supra note 7, at 413-26. Nevertheless, while not loyal in every thought, word, or deed, Rusty has some decent qualities; Carolyn had none. Moreover, whether or not one likes Rusty, he is believable to readers, unlike any of the women in the book.

98. Is there a connection between a “good read” and a “good fuck”?

99. In this regard Miller may differ from women novelists of a decade ago. See Snitow, The Front Line: Notes on Sex in Novels by Women, 1969-1979, 5 Signs 702, 718 (1980) (suggesting that in earlier fiction, “[a] sexual episode is pleasant, but after the first burst of excitement, too many things have to go right before sexual feelings can deepen”).


violent pornography, like other forms of violence, inures viewers of both sexes to the cruelty and reality of subsequent depictions of sexual violence. One simply gets used to it. As explained in testimony on the Minneapolis anti-pornography ordinance by a woman who engaged in increasingly violent levels of sexual activity at the request of her husband, “I could see how I was being seasoned to the use of pornography . . . .”

Presumed Innocent is less than pornography. Nevertheless, the book seasons us to an essentially sexual conception and use of women. Such representations, whether best sellers or other forms of popular fiction, invigorate sexist images by making them simple, commonplace, acceptable. As with pornography, the material takes hold because it offers “cues,” both sexist and legal, which provoke responses to “systems of belief” already within the reader. Sextist beliefs may be unconscious, but as Charles Lawrence carefully explains in the context of unconscious racism, it doesn’t matter: such beliefs are “part of the individual’s rational ordering of her perceptions of the world.”

The cleverness of Presumed Innocent is that it shores up sexist “barriers of unawareness” by plaiting acceptable cues — law, politics, police — with those that would otherwise be too locker room to buy into. Less than pornography, Presumed Innocent is also more than just a good read. It is influential fiction that uses law to obscure, legitimize, and sell its near absurd misogyny.

Less absurd is the book’s rueful grounding in real law. The rape-murder in Presumed Innocent and the custody determination in The Good Mother are only two areas of the law where cultural perceptions about women’s sexual behavior have influenced the content and application of legal rules. Self-defenses for men who kill unfaithful partners, construction of wills against designing women beneficiaries, nonintervention in domestic abuse cases, the criminalization of


105. [W]ere we to reduce sexism to what is most obviously sexually titillating, romantic fiction, written by and for women, would seem as suitable a target of feminist analysis, critique, and understanding as men’s pornography. Here too we find a persistent worship of the strong, the powerful, the phallic male. Its effects could indeed be seen as more insidious, because less explicit.

L. SEGAL, supra note 100, at 113. But see J. RADWAY, supra note 22, at 208, 212.


108. Comment, supra note 57.

109. See, e.g., In re Estate of Reddaway, 214 Or. 410, 329 P.2d 886 (1958); In re Dillios’ Will, 156 Me. 508, 167 A.2d 571 (1960).

110. See generally L. WALKER, THE BATTERED WOMAN (1979); Marcus, Conjugal Violence:
prostitution but not its customers,\textsuperscript{111} judicial reluctance to find or enforce cohabitation agreements as contracts,\textsuperscript{112} and the slow recognition of sexual harassment as legal injury\textsuperscript{113} are other examples of the law's patriarchy.\textsuperscript{114} In each of these areas women who are even perceived as engaging in sex for nonmarital purposes (fun or profit) have been, and to a dismayingly extent remain, unprotected by the legal system.\textsuperscript{115} American law has accepted two categories of women: good and bad. Membership in one or the other category is governed not just by the volume or circumstances of sexual intercourse engaged in, but by assumed and lesser indicia of sexual availability or motivation— a smile, fingernail polish, marital status. Once categorized, the determination shades, sometimes substitutes for, standards such as intent, involvement, and innocence traditionally used to measure the legal consequences of individual conduct. Realism is acclaimed in \textit{The Good Mother} and \textit{Presumed Innocent} not only because Miller and Turow write well, but because in their role as cartographers, each has taken accurate notes of the terrain on which women and law meet.


\textsuperscript{112} See Dalton, \textit{An Essay in the Deconstruction of Contract Doctrine}, 94 YALE L.J. 997, 1095-113 (1985) (pointing out that in cohabitation cases women are regarded either as loving "angels" whose services are given with no thought of personal gain or as immoral "whores" who lure men into promises with sexual bait).


\textsuperscript{114} Diane Polan observes that not only the rules but "the whole structure of law — its hierarchial organization; its combative adversarial format; and its undeviating bias in favor of rationality over all other values — defines it as a fundamentally patriarchal institution." Polan, \textit{Toward a Theory of Law and Patriarchy}, in \textit{The Politics of Law: A Progressive Critique} 294 (D. Kairys ed. 1982); see also Taub & Schneider, \textit{Perspectives on Women's Subordination and the Role of Law}, in \textit{The Politics of Law}, supra, at 117-24.

Grossberg proposes a nineteenth-century substitution of judicial patriarchy for household patriarchy:

By seizing the power to define the legal abilities of married women, and other family members, judges helped perpetuate, albeit in altered form, patriarchal authority within republican society.

\textsuperscript{. . . .} Judges recast the law to aid wives and mothers who successfully performed household responsibilities such as child rearing and to compensate them for the travails of courtship and marriage, while at the same time invoking their authority to check radical alterations in the subordinate legal status of women. Judicially inspired changes in domestic relations thus allowed for an expanded feminine presence in the legal order, but in a way that ensured that women's domestic powers would not be translated into extensive external political and economic authority.

M. GROSSBERG, \textit{ supra} note 66, at 300-01. See generally id. at 289-304 (ch. 8, \textit{A Judicial Patriarchy}). But see L. GORDON, \textit{ supra} note 110, at 19 (arguing that, as applied to Progressive era family welfare policies, the substituted patriarchic critique is "at best too simple").

\textsuperscript{115} Women who decline to engage in sex for marital purposes (husband wants to) have also been unprotected by the legal system through such laws as the spousal exception to rape. See generally Note, \textit{The Marital Rape Exception}, 52 N.Y.U. L. REV. 306 (1977).
Defending the point and method of minimalist writing, Frederick Barthelme explains that "here's this breeze coming in with this smell that isn't lilac, but it's something. . . . So I guess that's mostly what's going on with this new fiction — people rolling down the windows, trying to get a good whiff of what's out there." Neither *Presumed Innocent* nor *The Good Mother* is accused of minimalism; they do, however, provide a whiff of what's out there for women interacting with law. And what makes these fictional whiffs matter is that they catch and carry the scent of the real.

---