"Ever so many generations hence": Rereading The People vs Abbot (1838)

Anne Lee Kaufman

The University of Montana

Follow this and additional works at: https://scholarworks.umt.edu/etd

Let us know how access to this document benefits you.

Recommended Citation
Kaufman, Anne Lee, ""Ever so many generations hence": Rereading The People vs Abbot (1838)" (1994). Graduate Student Theses, Dissertations, & Professional Papers. 8607. https://scholarworks.umt.edu/etd/8607

This Thesis is brought to you for free and open access by the Graduate School at ScholarWorks at University of Montana. It has been accepted for inclusion in Graduate Student Theses, Dissertations, & Professional Papers by an authorized administrator of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.
Permission is granted by the author to reproduce this material in its entirety, provided that this material is used for scholarly purposes and is properly cited in published works and reports.

** Please check “Yes” or “No” and provide signature **

Yes, I grant permission after January 1945 only  
No, I do not grant permission

Author’s Signature  Anne L. Kaufman  
Date: May 17, 1994  

Further reproduction prohibited without the author’s explicit consent.
"Ever So Many Generations Hence":
Rereading
The People vs Abbot (1838)

by
Anne Lee Kaufman
B.A. cum laude 1992
Smith College, Northampton, Massachusetts

Presented in partial fulfillment of the requirements
for the degree of
Master of Arts
University of Montana
1994

Approved by

Chair, Board of Examiners

Dean, Graduate School

Date
"Ever so Many Generations Hence": Rereading *People vs. Abbot* (1837)

Director: Nancy Cook

In this paper I hope to open a discussion of how the language the legal system uses to discuss women's sexuality began to evolve. How has it happened, for example, that the language used in a particular rape case, *People v. Abbot*, 19 Wend 192 (1838) can appear in a discussion of the language of women's sexuality? While it may seem overly focused to consider one such case in depth, as historians have noted, legal (and cultural) attitudes toward women in the United States evolved at local and state levels as the new country began the process of defining itself. One case, then, can provide a small but effective picture of developing attitudes toward women (as well of the history of rape law).

The opinion written by Judge Esek Cowen for the court in *Abbot* takes pains to set forth the author's concept of appropriate female sexuality. The bulk of the opinion focuses on this matter, while the case itself turns on a point of law that makes 90% of the opinion irrelevant to the disposition of the case. It would be a mistake, however, to see Judge Cowen's discursiveness as a unique event: the law is shaped by *dicta* as much as by statute, and Cowen was neither the first nor the last judge to use a court opinion as an op-ed piece. It is Cowen's choice of language, and the frequency with which this case is cited in subsequent rape cases, that makes *Abbot* an interesting and useful moment to consider in the discourse on female sexuality.

On first reading, Cowen's opinion seemed both anachronistic and appalling. Closer inspection and the research involved in building a context around this case, reveal a longstanding tradition of resistance to the attitudes Cowen espouses. Certain nineteenth century women writers, such as Elizabeth Stoddard, used their fiction to initiate such a pattern of resistance, while others, such as Susan Warner, lined up in Esek Cowen's camp. The *Abbot* case thus becomes useful not only as interpretive possibility inherent in its text, but as a starting point from which to begin a wider-ranging investigation of the development of rape law, of the language men and women use to talk about women's sexuality, and of the culture we inhabit.
ACKNOWLEDGEMENTS

It will become clear from my notes and citations that I had an enormous amount of assistance from friends and family as I wrote this paper. Their contributions are responsible for the good things about this essay: all errors are mine. The encouragement and support I have received from Nancy Cook and Ken Lockridge has sustained me, especially during the times when I thought I would never complete this project. Brooke Masters has listened to endless monologues on the subject of People v. Abbot. Daniel Kaufman and Linda Kaufman struggled through some very rough drafts. The staff of the Special Collections Department at the Harvard Law School Library was friendly, helpful, and indefatigable in their efforts on my behalf, especially David DeLorenza and David Ferris. This paper would have been inconceivable if James D. Folts, head archivist at the New York State Archives, had not discovered the bill of exceptions for People v. Abbot in a series of partly arranged, completely unindexed writs of error. And though I had a germ of an idea, without the (as usual) unstinting and generous guidance of my father, Andrew L. Kaufman, this paper could not have been written. Many thanks to my husband, Rob Scott, for sharing the computer— for reading and re-reading drafts, offering helpful suggestions, playing ball with the dog, and otherwise continuing to support everything I do.

iii
It avails not, time nor place—distance avails not,
I am with you, you men and women of a generation,
or ever so many generations hence,
Just as you feel when you look on the river and sky, so I felt,
Just as any one of you is one of a living crowd, I was one of a crowd. . . .

"Crossing Brooklyn Ferry"
Walt Whitman
INTRODUCTION

Last spring I read several chapters of my father's biography of Justice Benjamin Cardozo\textsuperscript{1}. I came to a section that treats Cardozo's participation in the case People v. Carey, 223 N.Y. 519. Cardozo's comments on this case, in an unpublished memo, lit a bulb over my head, just like in the comic strips--his words resonated with some of my own work on the representation of desire and sexuality in the works of some nineteenth-century American women writers. Although it may seem problematic to modern scholars, nineteenth-century rape opinions do expound upon women's sexuality at great length. Rape was not yet entirely (or at all) separable from sexual intercourse in the cultural vocabulary, and issues of consent complicated the issue as well. I began to search for a rape case more contemporary with the works of fiction with which I was already engaged. In People v. Abbot (19 Wend. 192), a case dealing with rape charges brought by Philena Morehouse against the preacher who held her indentures, Orson Abbot, I found everything I could have hoped for and more. The case was tried before the local Court of General Sessions, and was heard, on appeal, by the Supreme Court of Judicature of the state of New York in 1838\textsuperscript{2}. The opinion issued by Judge Esek Cowen for the Supreme Court of Judicature serves as a window into a particular nineteenth-century perspective on female sexuality. Cowen's language, as I will show, offers a wealth of interpretive possibility, and can be regarded as the
starting point for a fruitful inquiry into the development of the language men and women use to talk about women's sexuality.

It may seem unusual to come at legal research from a literature background, but this background gives me a different perspective on the issues of language and textual analysis, and allows me to bring a different critical perspective to bear on the material.

In nineteenth-century women's writing, discussions of women's sexuality appear within the context of narrative and plot, and are seldom approached directly. The elaborate encoding of sexual desire contrasts starkly with the blunt dichotomies presented in nineteenth-century rape case opinions. In this paper I hope to open a discussion of how the language the legal system uses to discuss women's sexuality began to evolve, contrasting it with the language women writers used to treat the same subject. It seems odd and jarring that the language used in a rape case can appear in a discussion of the language of women's sexuality. This combination is a moral and philosophical conflation with its roots in the evolving republican ideology of post-revolutionary America.

While it may seem overly focused to consider one such case in depth, as Joan Hoff Wilson has noted, legal (and cultural) attitudes toward women "did not emerge full-blown
with only sporadic Supreme Court decisions. They evolved structurally substantively at local and state levels after 1787. One case, then, can provide a small but effective picture of developing attitudes toward women (as well of the history of rape law).

Judge Cowen's opinion takes pains to set forth his concept of appropriate female sexuality. The bulk of the opinion focuses on this matter, while the case itself turns on a procedural issue that makes ninety percent of the opinion irrelevant to the disposition of the case. It would be a mistake, however, to see Cowen's discursiveness as a unique event: the law is shaped by dicta as much as by statute, and Cowen was neither the first nor the last judge to use a court opinion as an op-ed piece. It is Cowen's choice of language, and the frequency with which this case is cited in subsequent rape cases, that makes Abbot an interesting and useful moment to consider in the discourse on female sexuality.

*       *       *

Given the fact that Lyons and Sodus, the towns in which the attacks alleged in People v. Abbot occurred, are only 15-25 miles from Seneca Falls, New York, I had hoped to be able to investigate the influence that the events leading up
to the Seneca Falls convention in 1848 may have had on Judge Cowen and his attitudes toward women, but so far I have been unable to find primary sources with which to begin this discussion. And contemporary transportation issues may well make direct influence a moot point. It seems very neat that Lyons and Sodus are so close to Seneca Falls, but by 1830s standards 20 miles is not close. Although the Erie Canal, a significant advance in transportation, was completed in 1825, and the federal government actively encouraged the growth of the railroads and westward expansion, the state of the roads in western New York State at that time meant that it was close to a full day's trip from Lyons to Seneca Falls. In 1816, President James Madison and Congressman John C. Calhoun battled over a bill that would have provided federal funds for local roads: Madison vetoed Calhoun's bill, "adamantly insisting that it was unconstitutional." And the telegraph did not become a significant factor in communication until the middle of the nineteenth century.

This essay is a step in my ongoing effort to build a context for understanding the culture we live in today. I hope that this brief take on a complex subject will provide an interesting opening to a fascinating discourse. And where better to find nineteenth-century men writing about women's sexuality than in rape case opinions?
A broad study of rape opinions, placed next to an equally comprehensive study of women's writing on sexuality, will begin to offer a set of ideas about the way women's and men's language about women and their sexuality has evolved along such different paths in the past 150 years. It is, however, a huge task, and one that I do not propose to undertake in this space. The work of this essay, then, will be to rebuild the context around a rape case I see as particularly problematic: The People v. Orson Abbot. This case resulted in a conviction at the local level and was reversed on the procedural issue that the Court of General Sessions had no jurisdiction to try a rape case.

I also hope to give a brief overview of women writing fiction that dealt with issues of on women's sexuality at roughly the same time in order to frame the investigation of two such different discourses10.

1 Biography of Justice Benjamin N. Cardozo, by Andrew L. Kaufman, forthcoming from Harvard University Press.
2 Under statehood, until the judicial reorganization of 1847, the Supreme Court of Judicature was the State's highest court of law possessing original jurisdiction. The Constitution of 1822 changed the organization of the Supreme Court. The number of justices was reduced from five to three. The Governor now appointed the justices, with Senate approval. The state was divided into eight judicial circuits, each presided over by an appointive circuit judge. These circuit judges presided over civil trials in the circuit courts and criminal trials in the courts of oyer and terminer. From Juely & Constantly Kept, a publication of the New York State Archives, p. 5.
There are opinions in 19th century rape cases which do not exhibit the forceful and colorful language of Judge Cowen, in *People v. Abbot* (1837). One in particular is Judge Strong's opinion in *People v. Jackson* (1857), which exhibits a sensibility (perhaps informed by the debate leading up to the Seneca Falls convention in 1848) that is both openminded and humane.

Quite simply, the case was tried before a court that did not have jurisdiction.

Shephard's Citations lists over sixty cases and several law review articles which cite Abbot: each of the law review articles cites the case in reference to the admissibility of character evidence.

Thanks to Brooke Masters for providing this information, including a citation to *Liberty & Union*, by David Herbert Donald, Lexington, MA and Toronto: D.C. Heath & Company, 1978, pages 4 and 6.

---


9 It certainly seems possible that looking at texts of sermons would also be useful to this endeavor--but I am not going to do that for this paper.

10 T. Walter Herbert's *Dearest Beloved: The Hawthornes and the Making of the Middle-Class Family* (Berkeley: University of California Press, 1993) will be useful as part of this discussion, too--certainly Nathaniel Hawthorne was the published writer, but Sophia's experiences with negotiating sexuality and desire and other aspects of adult life bear mentioning in this context.
America in the 1830s was still very much a country in the process of defining itself. The years 1750-1820 saw political discourse engaging the middle class, as the American and French Revolutions brought the philosophies of Locke and Rousseau into everyday conversation. Both countries struggled to develop workable new political ideologies. Under pressure from these new ideologies, which stressed the rights of the individual, men found themselves having to rationalize gender issues for the first time.

Kenneth A. Lockridge states that

in general and most particularly in colonial contexts, patriarchy was under constant pressure from many directions—from the state, financially, culturally, and in specific cases because of the peculiar vulnerabilities of colonial situations. From this perspective, it was not patriarchy's strengths but rather its very vulnerability which was vital in maintaining larger patriarchal urges to political and ideological control right up through the age of the democratic revolutions.\textsuperscript{11}

The contradictions inherent in Locke and Rousseau's theories were apparent first at the philosophic level; later they surfaced at the family level as well. And the contradictions were not new. One hundred years before the Abbot case, Mary Astell was already asking, "If absolute Sovereignty be not necessary in a State, how comes it to be so in a Family? Or if in a Family, why not in a State? . . . . if all Men are born Free, how is it that all Women are born Slaves?"\textsuperscript{12}
Many historians of the early republic have discussed various implications of this dilemma, including Susan Moller Okin:

> Just as the freedom, individuality, and rationality of men was beginning to be recognized as the foundation for their political and legal equality, a change was taking place in the sphere of family life that had catastrophic implications for the future of women's rights and freedoms. But the development of the affective or sentimental family and the idealizing of it that occurred had serious consequences for women. (72)

These consequences are apparent in historical documents, as states which had granted women the right to vote began disenfranchising female citizens, and in literature, where Susanna Rowson, followed by Susan Warner, Lydia Maria Child, E.D.E.N. Southworth, and a host of others began to branch out from their literary predecessors (Richardson, Austen, Brontë, the Shelleys) to explore the possibilities (or lack thereof) for young women in a society dominated by the the ideal of the Republican Mother. This paragon, whose domestic life involved creating an oasis to which her busy husband might return for sanctuary, and raising her daughters to do the same, and whose political responsibilities involved nothing more or less than raising good republican sons, became the embodiment of all feminine virtue.

Significantly, there was no sphere for a public challenge of these contradictions. As Okin says, "anyone who
wished to register objection to the subordinate position of
women had now to take considerable care not to be branded as
an enemy of that newly hallowed institution—the sentimental
family" (Okin, 88). And Linda Kerber notes that "to accept an
openly acknowledged role for women in the public sector was
to invite extraordinary hostility and ridicule. Although
neither political party took a consistent position on the
matter, hostility to women's political participation seems
to have been particularly acute in Federalist circles" 13.
This left women, especially middle- and upper-class women,
in a paradoxical bind. Having worked for the Revolution,
often in traditionally male roles, they now, in many cases,
found themselves less free than they had been before the
war, as "the Republican Mother . . . . was a citizen but not
really a constituent" (Women of the Republic, 283). The new
republic was built on a gendered notion of power and
entitlement.

What does all this suggest about the political climate
of the 1830s in America? The evolving sentimental family
idealized a certain role for women, but left very little
room for negotiation. Working-class women, single women, and
of course women fighting for social reforms such as the
Married Woman's Property Act (finally passed in 1848, the
same year as the convention at Seneca Falls) and
enfranchisement were all beyond the pale of appropriate
behavior. For example, when Fanny Wright lectured in the United States on "equality for women, emancipation for slaves . . . . free public education for everyone, regardless of sex, race, or economic status . . . . she was denounced as a 'red harlot,' a 'fallen and degraded fair one'" (Gurko, 33). Not only did the development of the idealized sentimental family have serious consequences for women, it also added another facet to the growing dual characterization of women: women outside of the sentimental family were dubious characters sexually, morally, and politically.

A perfect example of this notion, as Christine Stansell suggests, is the Bedlow-Sawyer rape case of 1793: "an especially valuable source of information about how men could act out and explain to themselves their hostilities toward women". Bedlow was charged with the rape of Lanah Sawyer, a seventeen-year-old seamstress, and his attorneys used the trial to "shift the focus . . . . from the duplicity of the seducer to the weak-mindedness of the seduced" (Stansell, 24). The strategy was successful. Bedlow was acquitted, although the jury's decision was not universally popular. Stansell notes that "the intersection of class and gender . . . . signified a sexual wantonness that weakened women's credibility" (Stansell, 26), an effect clearly visible in the Abbot case as well.
Marybeth Hamilton's essay, "'The Life of a Citizen in the Hands of a Woman,'" discusses the fate of working-class women who brought complaints for rape before the Court of General Sessions in New York City in the period 1790-1820 generally, and the Bedlow-Sawyer case specifically. While there are important differences in the two cases (Henry Bedlow was tried in New York City in 1793, and People v. Abbot was brought in the western part of the state thirty-seven years later) many of Hamilton's conclusions do much to explicate and inform a reading of Philena Morehouse's experience.

Hamilton explores the ways class inflects a discussion of women's sexuality: "the women of New York's laboring class...were made the repositories of all the most venal qualities the city's upper-class women had shed in their ascent to ladyhood--their insatiable passions and grasping, greedy brand of treachery" (Hamilton, 233). This was in no way an implicit action, as

in the rowdy male preserves of saloons and bawdy houses (terrain frequented by both gentlemen and laborers), jokes, songs, and tales depicted poor women as greedy whores and lusty, manipulative molls, creatures whose violent passions led them readily to vengefulness and deceit. In such a cynical milieu, the way lay open for some men to dismiss any refusal as simple apparent refusal, and to see force as a legitimate weapon in, and indeed inseparable from, sexual conquest. (Hamilton, 233)
The extent to which women outside the specific Republican Wife/Mother role were forced into a sexually unscrupulous vocabulary seems to become particularly crucial at this moment:

the Bedlow-Sawyer case was thus transformed into a dispute between a citizen and an outsider—potent rhetoric in a society where the misogyny informing all classes lay as well at the heart of the republican political theory on which that society had been founded. (Hamilton, 246)

Through the shifting and evolving post-revolutionary system of language, a violent crime becomes a battle over citizenship. Abigail Adams, in an oft-quoted letter, points out the misogyny at the heart of republican political theory ("Remember, all men would be tyrants if they could."). That lurking misogyny rapidly informed post-revolutionary women's roles, as the Republican Mother became a confining symbol of patriotism and morality. Enlightenment philosophers were read and reread, interpreted and reinterpreted, as the first legislators carefully located women outside the boundaries of the new nation.

Changing language and vocabulary are not incidental to a discussion of a rape opinion, for, as Laurel Thatcher Ulrich notes, "eighteenth-century literature became obsessed with rape and seduction at the very time legal standards for prosecuting such crimes were changing." 16 Also, as Joan Hoff Wilson points out, "one of the greatest societal
setbacks for women was a direct result of legal modernization induced by new private and public laws which appeared in the United States in the first three decades of the nineteenth century". (10)

It is important to consider how the particularities of a rural community inflect rape trials as well. In *A Midwife's Tale* Ulrich describes a rape case roughly contemporary to the Bedlow-Sawyer case. Rebecca Foster, the wife of the minister Isaac Foster, accused several men of raping her, as her neighbor, the midwife Martha Ballard, recorded in her diary in October 1789: "Mrs Foster has sworn a Rape on a number of men among whom is Judge North. Shocking indeed" (Ulrich, 102). The similarities between the rape(s) alleged by Mrs Foster and those alleged by Philena Morehouse in *People v. Abbot* include the nature of life in rural communities, the regard in which ministers may be held in their communities, and the resonances of class difference. Ulrich notes of Rebecca Foster that "except for a few cryptic documents in the records of the Supreme Judicial Court and a tantalizing set of entries in Martha's diary, her story is lost" (104). Ulrich goes on to say that Martha Ballard and Rebecca Foster's "reticence is hardly surprising, given the rarity of the accusation and the severity of the penalty" (118). This statement is largely true of Philena Morehouse's story as well, but in her case,
as I will show, the young woman has been completely erased by the force of Judge Cowen's opinion. (As Foster's story has not been completely lost, appearing as it does in Ulrich's book, so too it is possible to reconstruct a framework for Philena Morehouse's story: that being the work of this essay.) While Rebecca Foster was the wife of the local minister, her husband's place in the community was tenuous enough once his contract had been cancelled. In the Abbot case, it is the accused rapist who is the minister, possibly lending his defense some weight and dignity. Rebecca Foster, like Philena Morehouse, found her character under assault, both overtly and implicitly, as Martha Ballard writes, "I also testifed that said North said to me Last weak [sic] that he really believed Mrs[,] Foster was treated as she complains but he never had the least reason to suspect her virtue or modesty" (Ulrich, 116). Ballard also notes that "on trial Mrs Foster apeard very Calm sedate & unmovd notwithstanding the strong atempts there were made to throw aspersions on her Carrectir" (Ulrich, 117). Unfortunately Martha Ballard was nowhere near the Court of Oyer and Terminer the day Philena Morehouse testified.


17 "Since rape was a capital crime, justices and grand juries frequently reduced the charge in order to get a conviction. Only ten men were tried for rape in Massachusetts in the entire eighteenth century, none after 1780. Between 1780 and 1797 there were sixteen indictments and ten convictions for attempted rape, still a small number considering that the population of the state approached 400,000" (Ulrich, 118). While this may have been the case in Massachusetts, rape was not a capital crime in New York in 1837, and these justifications would not apply. It was clearly a serious accusation, taken seriously, but by then, as will become obvious, there were other reasons for women's reticence.
18 Foster's contract was cancelled in October 1788; he was formally dismissed in December 1788. See Ulrich, p. 113.
Based on Philena Morehouse's sworn testimony, the following story emerges:

On a rainy Saturday evening in April, 1835, Philena Morehouse, a thirteen-year-old indentured servant, was in charge of the Abbot children's bedtime. Mrs. Abbot had taken her youngest boy and gone to visit her mother earlier in the day, expecting to return that evening. But it rained, and since she had "poor shoes," Mrs. Abbot was unable to return home. As darkness fell, the two older boys, aged nine and seven, were in their trundle bed, which stood in its usual position next to their father and mother's bed, in the corner of the small room where the family also did its cooking. The boys' four-year-old sister was in Philena's bed, across the room. Around seven or eight o'clock, with the children already sound asleep, Philena Morehouse and the children's father, Orson Abbot, went to their beds by the light of the fire.

The children were still asleep about a half an hour later when their father asked Philena to come to his bed. When she did not respond, Orson Abbot, clad only in his shirt, crossed the room, moved his sleeping daughter to the "back side" of the bed, and pulled up Philena's shift. She tried to keep her legs together, but he pulled them apart and climbed on top of her. What followed was the first of a
series of rapes and assaults that continued over the next two years.

"When he got in the bed," Philena later testified, "I told him I did not want to do so." Her refusal had little effect, as Abbot "said, 'yes,--it won't do you no hurt.' I did not hollow [sic] because I was afraid he would whip me." Although Philena was new to the Abbot household she had already formed certain impressions of the inhabitants, particularly Orson Abbot. When Abbot asked her to come to his bed Philena was not surprised, having thought from observing him on the drive home from her previous residence, and seeing him about in the community, that his face was "kinder mean," and that "he was just such a man" to make sexual demands on her.

Philena Morehouse was not a sheltered innocent. She had been bound to two families prior to her indenture to the Abbots, and had resided in the local poorhouse as well (a place to which she had no desire to return). She was experienced enough in the ways of her world to make a judgment about Orson Abbot, and possessed survival skills that prevented her from crying out when Abbot forced himself on her.

The rain continued for the next three or four days, and Mrs. Abbot remained at her mother's. Abbot "did the same thing [to Philena] every night while [Mrs. Abbot] was away."
Eventually Mrs. Abbot returned, but her presence in the home was not enough to protect Philena, as Abbot waylaid the girl on a nearby farm in Lyons. Philena resisted, and tried to get away, but Abbot took hold of her and pushed her down. "When he took hold of me," Philena later testified, "I tried to get away from him and told him I did not want to. He said I must—that it would be no hurt to me."

Abbot continued to rely on the notion that bound girls were by their very status sexually available (he later told Philena that "all bound girls did just so"), and that they are thus impervious to physical or social harm. Philena did not give in without a struggle, and "continued to resist and try to get away." She was no match for Abbot, however. He pushed her down, and held her while he took down his pantaloons, and, as Philena later recalled, "he had connexion with me and entered my person this time—I resisted only a part of the time—along at first & towards the last. It was against my will."

Abbot was assured and confident of his rights, as at first he did not even bother to warn Philena to keep quiet: "nothing was said about my not saying anything about it, or anything else." There was no need for Philena to keep quiet, Abbot probably reasoned, for her tale could surely do him no harm. After all, he was a married man and a preacher, and
she an indentured servant. Philena noted during the trial that it was not until a month or so after the first alleged rape in the field that Abbot mentioned the necessity of keeping silent about his actions: "After we got up he said I must never tell any body of it, and that if I would not, he would make me some nice presents. I said I guessed I would not." It is interesting to speculate about what it was that caused Abbot, all of a sudden, to try to ensure Philena's silence, and about Philena's reasons, at that time, for agreeing to do so, but there is no way to know for sure. Perhaps his wife had become suspicious. Mrs. Abbot would later be instrumental in Philena's departure from the Abbot home, under circumstances that suggest she was aware of a (seemingly) sexual relationship between her husband and the servant. The "nice presents" Abbot promises Philena may well have been items that would otherwise have belonged to his wife, but the specifics ("sugar candy & raisins," for example) are items that Philena could have had no good reason for possessing. For a bound girl, any belongings were a luxury; luxury belongings themselves were out of the question.

At this point, too, twentieth century attitudes collide emphatically with nineteenth century expectations. While it may be abundantly clear to a modern reader that Philena's agreement to keep silent at this point is a result of her
economic position and her utter powerlessness in the social structure she inhabits, a nineteenth-century judge might well have heard this testimony and found all his prejudices about young working class women confirmed.

Abbot repeatedly waylaid Philena, in the same field and in the woods surrounding Lyons. He "coaxed me & promised me sugar candy & raisins," she reported, "and told me it would do me no hurt," a line of reasoning that is difficult for a modern reader to follow at first. Later on in Philena's testimony, however, her account of Abbot's words renders his meaning more explicitly: "he said it would never be any hurt to me—that all other bound girls did just so." The "hurt" Orson Abbot means is thus revealed to be damage to Philena Morehouse's reputation, rather than any physical consequence of the rape.

This prolonged sexual assault continued for the duration of Philena's stay in the Abbot home. And she was, apparently, offered an opportunity to leave, although it was probably not a meaningful choice if the alternative to the Abbot home was the poorhouse. Lyman Dunning, "one of the Superintendents of the poor of Wayne County," heard complaints against the Abbots in the course of his daily work, as he later testified:

After Philena was bound to Abbot complaints of her ill treatment that she was set to digging potatoes in the spring & not well
clothed, came to my ears, and I called at Abbot's to inquire into the truth of them. Mrs. Abbot denied the validity of the complaints, apparently saying "they were not true, and that if there was anything else, she told the girl to answer for herself." Dunning then apparently informed Philena that she could leave the Abbots' home if she so chose, but that she would have to go back to the poorhouse while legal action was taken to "prosecute the indentures." Philena responded (not entirely surprisingly) that she would rather live with the Abbots than return to the poorhouse. That hardly seems a ringing endorsement, but counsel for the defense clearly intended the anecdote to imply consent to sexual intercourse.

Philena did eventually leave the Abbots, although she was not forced to return immediately to the poor house. Several versions of her departure from the Abbots' appear in the record of testimony. The disputed points seem to be myriad: whether the sometime hired man John Lyon was hired well in advance to take Philena elsewhere, or on the spur of the moment, after Philena was thought to be stealing Mrs. Abbot's belongings; whether Philena asked Lyon if she might accompany him on a sleigh ride, having no intention of seeking shelter elsewhere; whether the Shakers refused to take
Philena in, or whether she changed her mind about where she wanted to go. What seems clear from the record is that Mrs. Abbot finally decided, on a Sunday in February, 1837, that Philena Morehouse should not continue to live under her roof. Philena's testimony outlines her perception of the manner in which she left the Abbot household:

I left Abbots on Sunday. I was sent away from there by Mrs. Abbot. Mr. Abbot did not say I must go away. Mr. John Lyon took me away. Mrs Abbot employed Lyon to take me away. Mr. Abbot was gone to meeting when Mrs. Abbot employed Lyon to take me away. It was arranged between Mrs. Abbot and Lyon that I should be taken to the Shakers.

The plot thickens. Mrs. Abbot was obviously no fool. Whether she arranged for Philena's departure to protect the girl, or her marriage, or out of revenge against a young woman who was distracting her husband from his marriage vows, it is clear that she thought she had good reason to wish Philena gone.

Lyons' version presents Philena's departure somewhat differently. According to his testimony, John Lyon arrived at the Abbot home on his way to the nearby Shaker community. He offered to take Philena with him for a sleigh ride if Mrs. Abbot would make sure she was dressed warmly. He and Mrs. Abbot had had some previous conversation about getting Philena out of the household, ostensibly because Mrs. Abbot considered Philena to be dishonest. Philena, preparing to
leave, threw a little bundle tied up in a handkerchief into John Lyon's cutter and went upstairs to put on her warm clothes. Mrs. Abbot retrieved the bundle and opened it onto the bed, displaying "two pair of silk gloves, a couple of finger rings, a piece of Calico half a yard or a yard, a piece of silk braid, and some thread, some garden seeds." According to Lyon, Mrs. Abbot had previously noticed that these items were missing, but whether she suspected Philena of stealing them or her husband of giving trinkets to the bound girl is unclear. Philena would not confess to stealing the things, even after Lyon threatened her with jail. And the catalogue of items, as reported by John Lyon, is particularly damning: what reason could there be for Philena Morehouse, indentured servant, to possess silk gloves? The fact remains that, to make sure of the bound girl's departure, Mrs. Abbot completed the transaction in her husband's absence.

After she left the Abbott household, Philena stayed with the William Pullen family, and Mrs. Pullen was the first person she told about Orson Abbot raping her. Mrs. Pullen may have encouraged Philena to take Abbot to court, for in April 1837, Philena Morehouse brought charges against Orson Abbot before James Edwards, a local judge or magistrate. Edwards sent Philena's case to Theron Strong, the district attorney for Wayne County.
On April 24, 1837, Orson Abbot was indicted at a Grand Jury hearing before the local Court of Oyer and Terminer (a court which had jurisdiction in criminal proceedings) with Daniel Moseley, a local circuit judge, presiding. Abbot's indictment is signed in the name of Theron R. Strong, District Attorney.

Theron Rudd Strong (1802-1873) was the District Attorney for Wayne County, New York, and acted on Philena Morehouse's behalf. He was a member of a family with a long history of distinguished legal work. He was born in Salisbury, Connecticut on November 7, 1802, and began his law practice in Palmyra, New York, in 1826. Strong became District Attorney in 1831, and went on to be elected Justice of the Supreme Court of New York in 1851, after serving in Congress and as a member of the State Assembly. His ancestor Elder John Strong, or John the Puritan, was one of the first settlers of Northampton, Massachusetts, and the Long Island branch of the Strong family also produced a number of notable historical figures. Theron Strong's cousin Justice Selah Brewster Strong (1787-1872), in fact, wrote the opinion for the court in People v. Jackson (1857), a case I will discuss at some length later.

The indictment against Abbot was filed three days after the hearing. Moseley was Circuit Judge of the Seventh Circuit of the State of New York, and serving with him at
the hearing were four judges of the County Courts of common
pleas and General Sessions; William Sisson, Theodore
Partridge, Daniel Poppins, and Marvin Rich. These four men,
at least, would have been local residents and familiar with
the community. The charge was presented to them (the Grand
Jury) as follows:

that Orson Abbot late of the town of Sodus
in the County of Wayne...on the first
day of April in the year of our lord one
thousand eight hundred and thirty five
with force and arms...in and upon one
Philena Morehouse in the peace of God and
of the said People [of New York] then and
there being, forcibly, violently and
feloniously did make an assault, and her
the said Philena Morehouse, then and there
forcibly, violently and against her will
feloniously did ravish and carnally know
against the peace of the people of the
State of New York and their dignity.26

And the jurors also presented the charge that "the said
Orson Abbot" had committed the same offense on numerous
occasions in the next two years27. Orson Abbot was further
alleged to have "beat[en], wound[ed], and ill treat[ed] with
intent" Philena Morehouse on October 1, 1835 and October 1,
1836, "to the great damage of the said Philena and against
the Peace of the People of the State of New York and their
dignity". It is striking that the charge is presented as
not only an attempt to right alleged wrongs on behalf of an
individual, but also on behalf of "the People of the State
of New York and their dignity" (italics mine). The
allegation of an assault against an intangible ideal is not merely rhetorical in nature, and is quite different from rape cases which are presented as an assault against a man's property. In the Bedlow-Sawyer case, as well, the prosecuting attorney "stressed the violation not of a woman's will, but of her honor; rape thus was hateful as a perversion of each man's duty to protect chaste and helpless females" (Hamilton, 229). The "chaste and helpless female" was, however, not likely to be present in the courtroom when the prosecutrix was an indentured servant. As we have seen, class position inflected the reputations of all bound girls, though to what extent this was a definition utilized by unscrupulous employers (as a method of persuasion) is unclear. The inclusion of the offense against "the People of the State of New York and their dignity," then, serves to counterbalance the negative effect of the prosecutrix's class status.

The record continues with an exact copy of the indictment, as it must have been read in court that day, and concludes:

And afterwards. . . .on the twenty seventh day of April in the year one thousand eight hundred and thirty seven at the Court of Oyer and Terminer and Jail delivery aforesaid, held at the Court house in the town of Lyons in the County aforesaid before the Circuit Judge and the other judges aforesaid comes the said Orson Abbot in his own proper person, and having heard the said indictment

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
read, the said Orson Abbot says that he is not guilty of the premises in the said indictment alleged against him as in and by the said indictment is above set forth, and thereupon he puts himself upon the country and Theron R. Strong Esquire District Attorney who presents for the people in this behalf doth do likewise.

So, in other words, Orson Abbot pleaded not guilty, and "afterwards the said Indictment for certain reasons was sent by the said Court of Oyer and Terminer and Jail Delivery to, and received by the Court of General Sessions of the peace held at the court house" in Lyons, New York, "to be tried according to law, and the directions of the statute provided."28

This, in fact, is the action on which the Supreme Court of Judicature decision turns. Before 1847, the question of jurisdiction on the New York State court system seems to have been quite difficult to follow. District Attorney Theron Strong could have prosecuted Orson Abbot for rape before the court of Oyer and Terminer, or he could have prosecuted Abbot on the assault and battery charges before the Court of General Sessions. The rules of jurisdiction did not allow Strong to prosecute Abbot for rape before the Court of General Sessions, and this error proved enough to reverse Abbot's conviction. Whatever the "certain reasons" were that prompted the district attorney to send the case to the Court of General Sessions, they weren't good enough. The trial began, in the wrong court, on May 25, 1837.
The details of the alleged assaults appear in the record of Philena Morehouse's testimony, as it was set down by the clerk of the Courts of Common Pleas and General Sessions, Cullen Foster. The pattern of the assaults affords modern readers a fairly detailed picture of Philena's daily existence, as Abbot seems to have laid in wait for her on every path and behind every bush in the Lyons/Sodus area, as well as lurking in the haymow. Marybeth Hamilton notes that "women were attacked. . . .not on extraordinary excursions into the city's unfamiliar nether reaches, but in the most mundane of settings, in the same locations in which they lived and worked, and as they went about their everyday chores and pleasures."(231) As we have seen, Philena Morehouse was first attacked in a place that was at once familiar and unfamiliar--her own bed, "about a week after she went to live with [Abbot]." Even that is problematic, however, for it was not her own bed, but rather the bed set aside for her use by the Abbot family, and belonging, as did everything in the home, to Orson Abbot.29

Philena Morehouse's testimony, as recorded by the clerk, exhibits little surprise or outrage at the events that had allegedly occurred. As presented in the bill of exceptions, (a record, admittedly, allowing for little emotional expression) she was able to provide a matter-of-fact account of events. The clerk of courts did, however,
manage to record some of the flavor of the testimony of other witnesses; when the Van Maters, Philena's former employers, testify, their dislike of Philena is apparent in every word as they faithfully report every nasty bit of gossip about their former servant. Philena seems, from the records, to have had no hesitation about admitting her lack of resistance or outcry during Abbot's attacks. This admission may have resonated quite differently when she testified in the local court than it read, as part of the bill of exceptions, in the Supreme Court of Judicature hearing. This may have been an occasion when Abbot's reputation within the community worked against him in a court made up of members of that community. The jury's knowledge of Orson Abbot the person may have outweighed problematic testimony on Philena's part.

There seems to have been little conversation between Philena and Abbot until the third night, when "the defendant said he wanted I should do every thing he wanted me to do, and always obey him. This was after he got out of my bed. He said nothing further."

Reading further into the bill of exceptions, the fact that a jury convicted Abbot becomes more surprising, given the prevailing cultural values. Again, it may be that Abbot's reputation at the local level weighed heavily enough with the jury to overshadow some of the most
surprising aspects of Philena's testimony. The record of her testimony regarding the first rape continues (italics mine):

It hurt when he put some thing into me. I was not bloody. There was no blood on my clothes or on the sheets. I did not scream nor cry. I am sure he entered my body. I was not lame the next day.

It seems extraordinary that this revelation was not enough to prove that Philena had been sexually active and was therefore unrapeable. There are no indications that anyone in the courtroom made an effort to continue this line of investigation until the close of testimony. Her testimony continues with details of the incidents outside the home.

There also seems to have been a series of questions related to Philena's disclosure of the rape(s). The record of her testimony suggests that she maintained a positive front within the community, but is not clear as to her reasons for choosing Mrs. Pullen as her confidante. Philena also has her own reasons for not telling people about the rapes, as she states again and again:

I told John Lyon that Mr. Abbott always used me well because I did not want to tell him. I have never said I liked to live at Abbots. I don't recollect telling Mercy Foster so. I told old Mrs. Hughson [Mrs. Abbott's mother] I liked to live at Abbots, but I did not like to live there.

Since John Lyon seems to have been Mrs. Abbott's ally in the accusations of theft, it would have been quite odd had
Philena chosen him as her confidante. While Philena also seems to have been caught fibbing to Mrs. Abbot's mother, neither of these dissimulations appeared to the court as serious offenses against truth and veracity. At the local level, the jury seems to have been remarkably alert to the nuances of Philena's situation, overlooking ostensible gray areas in her testimony and focusing on Abbot's actions rather than Philena's. The issue of who Philena told about the rape(s) and when she told them is a problematic one as far as the attorneys were concerned, however, as the record suggests that related questions were put on a number of occasions during the trial. Philena admits that

two or three of my brothers and my father came [to Abbotts] while I lived there--one of my brothers was there about a month after the first time he had connexion with me. I did not tell them about it, nor did I tell any body else till after I left there. Lyman Dunning one of the Superintendents of the poor who bound me to Abbott called there while I was there and asked me, if I was dissatisfied. I told him I was not, I dare not tell him I was dissatisfied. Mrs. Abbott was by while he asked me.

Certainly it seems unlikely that Philena would have felt comfortable confiding in an authority figure while her employer (and the wife of the alleged rapist) was standing right there. It is not as clear why she felt unable to confide in her brothers or her father, but as the family seems to have been separated for some time, the relationship
may not have been in any way traditionally familial. (From the records available, there seems to have been no time when all members of the family lived together in their own home.) Later questions suggest that Abbott's lawyer tried to determine whether Philena had been put up to bringing the charge by any of her relatives. Philena testifies that she was brought to court by her uncle, Mr. Cephas Fields, but assured the court that he had not told her what to testify, nor had anyone else.

Philena concludes this section of her testimony by noting that Orson Abbot "told me he thought I would be sorry if I went to the Shakers." This could be read as a veiled threat, or, possibly, as a sign that Abbot knew Philena well enough to know where she would certainly not fit in. It certainly suggests that Philena had discussed the possibility of leaving with Orson Abbot. There seems to have been no follow-up to the statement.

And then, amid all the recorded answers, Philena apparently responds to a question: "I knew William Cooper while I lived at Van Mater's. He lived at Van Maters & was hired man there a month while I lived there." This response seems oddly out of place, and, equally oddly, unaccompanied by further investigation. A series of questions, not recorded by the clerk of courts, seem to have been put with the express design of casting doubt on Philena Morehouse as
a credible witness, and, more broadly, establishing whether she is in fact entitled to the protection of the court in this matter. There seems to have been a parade of witnesses eager to cast doubt on Philena's reputation, including several of her former employers. Strong's objection to a direct question (ostensibly referring to Cooper) later provides Abbot's lawyer basis for the appeal.

The trial concluded with a parade of witnesses, including Philena's former employers and neighbors, all offering character testimony, both good and bad. David Van Mater testified that while Philena lived with him and his family, "she was not a girl of truth. . . . The general speech of people, while she was at my house. . . . was, that she was an impudent girl about chastity."31

One of the last witnesses called was James Edwards, the magistrate before whom Philena first brought rape charges against Abbot. Here at last is a follow-up to Philena's testimony about the absence of blood on the sheets. Abbot's attorney bluntly asks James Edwards "Did Philena testify before you on her Examination that she had had connexion with any other persons before she went to live at Abbotts?" Theron Strong immediately objected, and the court did not allow the question. The defense counsel "excepted to the decision excluding the said question," thereby preserving the point for appeal.
The jury proceeded to find Orson Abbot guilty of assault and battery. Following the seals of Judges Sisson, Partridge, Poppins and Rich, there is a note reading, "I hereby certify that there is so much doubt as to render it expedient to take the Judgment of the Supreme Court on the within Bill of Exceptions," signed by William Sisson.

In the account of the trial before the Supreme Court of Judicature, the court reporter, John L. Wendell, fills in a few more of the blanks from the local trial and provides an additional account of Philena Morehouse's cross-examination:

On the trial at the sessions the prosecutrix, on whom the rape was charged to have been committed, and who testified as a witness in support of the prosecution, on her cross-examination was asked whether she had ever had carnal connection with any person other than the defendant previous to her connection with him. The district attorney objected to the question, and the court decided that it should not be put, and overruled the same. The counsel for the defendant asked the magistrate before whom the complaint was made whether the prosecutrix testified before him, on her examination, that she had connection with any person before she had connection with the defendant: this question was also objected to and overruled (People v. Abbot, 192).

This line of questioning should be all too familiar to anyone acquainted with the modern issues of admissibility of evidence in rape trials. The counsel for the defense employed familiar strategy, that of balancing the alleged rapist's 'fine' reputation in the community against the word
of a woman of 'doubtful' reputation, as we learn from Wendell's introductory notes to the case as it was presented on appeal:

The defendant was a married man and a preacher of the gospel; his counsel inquired of a female witness (Mercy Foster) who had resided in his house a portion of the time during which the prosecutrix alleged that the defendant had intercourse with her, whether she had ever observed any immodest intercourse or any improper familiarity between the defendant and the prosecutrix. This question was also overruled (People v. Abbot, 192).

Here, too, Orson Abbot's attorney attempted to cast doubt on Philena Morehouse's character; more specifically, the question put to Mercy Foster (and subsequently overruled by Daniel Moseley) is designed to produce the impression that whatever it was that happened to Philena Morehouse, she brought it on herself by "improper familiarity":

The defendant having adduced some evidence slightly impeaching the character of the prosecutrix for truth and veracity, offered to prove that her character in that respect was bad six or seven years previous to the trial: to the introduction of which testimony the district attorney objected, and the same was excluded by the court. The defendant excepted to these several decisions, and the question submitted to this court arose upon these exceptions (People v. Abbot, 192).

The case, then, went on appeal to the Supreme Court of Judicature in 1837. Now it would be Esek Cowen's turn.
25 3 Parker C. R. 391 (Sup. Ct. 1857)
26 see Supreme Court of Judicature Writs of Error (Utica) (Series J0031,
New York State Archives).
27 June 1, 1835; August 1, 1835; October 1, 1835; December 1, 1835;
February 1, 1836; April 1, 1836; June 1, 1836; August 1, 1836;
October 1, 1836; December 1, 1836; and on February 1, 1837, see Supreme
Court of Judicature Writs of Error (Utica) (Series J0031, New York State
Archives).
28 see Supreme Court of Judicature Writs of Error (Utica) (Series J0031,
New York State Archives).
29 I am grateful to Nancy Cook for this insight.
30 Philena Morehouse seems to have been suspected of having a sexual
relationship with William Cooper. Details of the accusation are scarce,
mostly contained in innuendo and in the way certain questions are
framed.
31 see Supreme Court of Judicature Writs of Error (Utica) (Series J0031,
New York State Archives).
Judge Esek Cowen (1787-1844) was a well-known and well-respected member of the legal profession in New York. The inventory of his law library shows a collection containing approximately 2800 volumes, which made it the most extensive and valuable law library in the country at the time was advertised for sale. His form book, begun in 1806 when Cowen was nineteen, is an excellent example of the way a good nineteenth-century lawyer built up his knowledge of forms and statutes and effective statements of legal points. It even contains several entries on proper methods of figuring costs to be awarded. Cowen is described as an "eminent jurist" and "his opinions, it was said, were 'not excelled by those of any judge in England or America,' in their 'depth and breadth of research and their strength of reasoning'" (Chester, 1103). The death of "the excellent and learned Esek Cowen" in 1844 caused "the judiciary, the bar, and the State" to suffer "an almost irreparable loss." Proctor continues his paean to Cowen:

His vast legal knowledge, his intimate acquaintance with precedent, his wonderfully retentive memory, his unceasing industry, his love of research, gave him the reputation of being one of the most erudite judges in the nation.... It caused him to trace every principle of law to its fountain head--to describe every variation and restriction in its course, modifying or neutralizing its force and meaning...In many respects, he was to the American bar what Mansfield was to the English. (Proctor, 385-6)
Cowen worked with his friend, Nicholas Hill, one of the most famous "special pleaders" of the day, to produce an important reference text, Cowen & Hill's Notes to Phillips on Evidence. (Cowen's son Sidney seems to have continued both his father's friendship with Hill and the working relationship, and worked on later editions of the Notes.) Esek Cowen's opinions were famous, as L. B. Proctor notes: "His legal opinions are the trophies—the imperishable monuments of his great judicial powers; they have been criticised for their length, their prolixity, and their discursiveness, but those faults, if indeed they can be considered faults, are the result of his great profundity" (385-6). Were it not for Cowen's discursiveness, People v. Abbot would be simply another entry in Wendell's Reports.

Judge Cowen's opinion for the court in People v. Abbot is rich with cultural history. The breadth of its author's education is readily apparent in a wealth of literary and religious allusion; contemporary attitudes toward women, especially as regarding their place in society, are equally apparent. Even accounting for connotations which may have evolved considerably over 150 years, a late twentieth-century reader will be struck by the force of the language.
Judge Cowen employs against this plaintiff in particular, and women seeking the protection of the court in general.\(^{39}\)

The familiar line of questioning utilized by Abbot's lawyers as they attempted to use evidence of bad character to discredit Philena Morehouse's story caught Judge Cowen's attention. While his colleague in the court of Oyer and Terminus had overruled several of the questions aimed at Philena Morehouse's reputation, and while these questions ultimately had no bearing on his decision, Esek Cowen felt compelled to discuss their relevance. Given his views on the subject, it is clear that Judge Cowen would have allowed the questions:

The question to the prosecutrix herself, whether she had not had previous criminal connection with other men, was, I think, proper, assuming, as we do at present, that the defendant could be considered on trial either on the charge of rape, or for an assault and battery with intent to commit that crime. (People v. Abbot, 192-3)

Note that the judge has transformed the original question, "had she had connection with any person before she had connection with the defendant," to "whether she had not had criminal connection with other men" (italics mine). While the two may have been nearly synonymous in Wayne County, New York, in 1837, the resonance of the phrase "criminal connection" is quite different from an unadorned "connection", seeming far more calculated and deliberate, a
real threat to the fabric of society. "Criminal connection" also has quite a different set of connotations than does the phrase "carnal connection," again regardless of whether the two may have been nearly identical in meaning to a nineteenth-century audience.

As language has changed dramatically over the last hundred years, so too was it in flux during the post-revolutionary era, as Cynthia Jordan reads

the after-effects of the American Revolution on language and on attitudes toward language; to suggest, in particular, the complex links between language and authority, and language and power, that came to exist in the minds of the men who first shaped this country and that led them so often to 'unfix' the traditional meanings of the words they used in response to their 'new circumstances' .

What Jordan names 'unfixing' is the startled reaction of the men who based their Revolution on Enlightenment philosophies, upon discovering that those very philosophies empowered several interested groups whom the leaders of the Revolution had not intended to empower. As one can see from documents such as the Essex Result, a good deal of energy was hastily devoted to excluding women, and men without property, and to layering gendered and class-based language and entitlements over the Revolutionary ideal. Cowen, perhaps in response to the shifting meanings around him, chooses strong, biblically-linked, unambiguous language to
express his reading of the proper rape victim, but employs the unstable language to his benefit as well. Cowen continues:

In such a case the material issue is on the willingness or reluctance of the prosecutrix—an act of the mind...The prosecutrix is usually, as here, the sole witness to the principal facts, and the accused is put to rely for his defence on circumstantial evidence. (People v. Abbot, 194)

To a late twentieth century reader, the weight of this comment is to render implicit the contention that a thirteen-year-old female servant could not possibly be a trustworthy witness. Implicit as well is the fear that any woman could bring an unfounded charge of rape, and the man so charged would be powerless to defend himself. Cowen also describes "the willingness or reluctance of the prosecutrix" as "an act of the mind," although determining willingness or reluctance is based on a physical act:

Any fact tending to the inference that there was not the utmost reluctance and the utmost resistance is always received. That there was not an immediate disclosure, that there was no outcry, though aid was at hand and that known to the prosecutrix, that there are no indications of violence to the person, are put as among the circumstances of defence; not as conclusive but as throwing distrust upon the assumption that there was a real absence of assent. (People v. Abbot, 194)
Judge Cowen's slippery linguistic feat has rendered equivalent "utmost resistance" with "a real absence of assent."\textsuperscript{44} In her testimony, Philena's response to the issue of her failure to cry out was that she was afraid Abbot would whip her. Cowen would have seen this response, as it is contained in the bill of exceptions, the set of documents sent by the Court of General Sessions to the Supreme Court of Judicature. And aid, in the form of the three small Abbot children asleep in the same room, seems at best a temporary relief. There may have been a family living in another part of the Abbots' house; it is unclear whether they were home at the time. That Philena Morehouse was without economic assets and dependent for room and board on the alleged rapist (that she was a bound girl with all that implies) and that she was only thirteen years old at the time of the first alleged assault has, apparently, no bearing upon the case. Certainly, as Marybeth Hamilton (among others) has shown, in an urban setting girls as young as six years old were the target of forced sexual activity\textsuperscript{45}: a thirteen-year-old is at quite an advanced age, given those conditions. Sir Matthew Hale, the distinguished British jurist, set ten years as the age at which a female person could consent to sexual intercourse. Indenture papers, however, usually served to bind a young man or woman to an adult household until at least the age of eighteen, implying
attainment of majority at that age and not before, at least for certain purposes. Judge Cowen again:

the connection must be absolutely against the will; and are we to be told that previous prostitution shall not make one among those circumstances which raise a doubt of assent? that the triers should be advised to make no distinction between the virgin and a tenant of the stew? between one who would prefer death to pollution, and another who, incited by lust and lucre, daily offers her person to the other sex? (People v. Abbot, 194)

Sexual intercourse (or rape) becomes "prostitution"; "connection" becomes "criminal connection". The transformation of the language itself seems designed to place the worst possible light on any expression of female sexuality outside marriage (again, it is awkward for modern readers to realize that it was appropriate, in the eyes of nineteenth-century jurists, to discuss female sexuality in relation to rape). Judge Cowen seemingly anticipated this interpretation:

Shall I be answered that an isolated instance of criminal connection does not make a common prostitute? I answer, yes; it only makes a prostitute. . . .but no court can overrule the law of human nature\(^46\), which declares that one who has already started on the road of prostitution, would be less reluctant to pursue her way, than another who yet remains at her home of innocence, and looks upon such a career with horror. (People v. Abbot, 196)\(^47\)

Cowen's condemnation has thus translated one hypothetical instance of premarital or extramarital "connection" into the
beginning of a career in prostitution. Philena Morehouse had no "home of innocence"; she had been an indentured servant in other people's homes from the age of ten or eleven (and before that, apparently, had lived at the poorhouse with her father and brothers). This absence of a traditional upbringing (read innocence) was enough to brand Philena Morehouse sexually available, and from there it was but a short step to regarding her as a "common prostitute".

And why not? Sexually available women were a temptation to respectably married men. Rape was no longer a capital crime in New York State, so a charge of rape did not mean, as it had in the early republic, that "the life of a citizen [rested] in the hands of a woman" (Hamilton, 246). It was instead a potential threat to the unity of the republican family. Women who appeared, in nineteenth century terms, to choose to be sexually active outside of marriage had to be "inspired by lust and lucre".

As Philena Morehouse surely discovered during her time in the various courts, her appearance and past conduct were desperately important:

Why? Because in the practised vendor of bad coin or bad bills we more readily infer a guilty knowledge than in the novice. (People v. Abbot, 194)

This is by no means a minor point. Issues of disclosure continue to be very important, for as Cowen noted, knowledge
of human nature might well suggest that a witness who has previously perjured him or herself might well do so again; a person who has stolen might well do so again. The question of how much a jury is entitled to know is a question Cowen emphasizes repeatedly:

And will you not more readily infer assent in the practised Messalina, in loose attire, than in the reserved and virtuous Lucretia? Both knowledge and assent are affections of the mind, and the mode of proving both, rests on the same principle in the philosophy of evidence. (People v. Abbot, 194)

The choice of Messalina as metaphor for the sexually active woman is particularly telling. The ravenous, consuming wife of Claudius, set in opposition to Lucretia, wife of Tarquin, is another symbolically loaded emblem of the demon woman versus the epitome of chastity and purity, and one which was certainly familiar to Cowen's contemporaries. Any classically-educated nineteenth-century man would have been familiar with Tacitus' Annales, and would not have needed to spend any time unpacking this allusion. (The rhetorical question cited above appears in most citations of the case, as Cowen's language resonates in contemporary discussions of the admissibility of character evidence in rape trials.) Again, slippery language results in a familiar equation: knowledge = assent. There seems to have been no language for forced sexual intercourse within marriage or when the woman in question was not a middle- or
upper-class member of society of unsullied reputation AND a virgin:

Why is this? Because there is not so much probability that a common prostitute or the prisoner's concubine would withhold her assent, as one less depraved; and may I not ask, does not the same probable distinction arise between one who has already submitted herself to the lewd embraces of another, and the coy and modest female, severely chaste and instinctively shuddering at the thought of impurity? Shall I be answered that both are equally under the protection of the law? (People v. Abbot, 194)

Although Cowen goes on to admit that both are indeed equally under the protection of the law, he does so grudgingly and conditionally. The familiar virgin/whore dichotomy is explicitly at work in Cowen's universe: "shall the triers make no distinction between a virgin and a tenant of the stew?" The fact of Philena Morehouse's status as a "bound girl" further complicates the dichotomy with issues of class status, but these are twentieth century issues and almost certainly would not have entered into Cowen's conscious interpretation of the situation.

If a woman's family was not in good standing in the community, as in the Foster case, her marital status seems not to have been enough to validate her claim. Mrs Foster's allegations thus led inevitably to attacks on her virtue and "Carrectir". Rape opinions from Abbot (in 1837) to Carey (in 1909) to the present show that post-revolutionary
America defined a standard of behavior and morality, which holds today, to be applied whenever a woman sought the protection of the court.

As I have said before, *Abbot* is a fascinating case precisely because of the absolute irrelevance of the most influential part of the opinion, the sections cited above which have had considerable impact on issues of evidence in rape law. After reading Judge Cowen's opinion I have been able to consider questions about nineteenth-century men's attitudes toward women's sexuality (in an arena where the discussion, sparked as it was by charges of rape, should not have had anything to do with sexuality), and issues of class in sexual assault. In the final analysis, however, none of these things mattered:

there is another reason why judgment against the defendant must be withheld; or if rendered, why he must be discharged from it. The court below had no jurisdiction of this indictment. ... The imprisonment may be for life, on conviction of a rape. ... To warrant a trial at the sessions, the district attorney should have entered a *nolle prosequi* on the numerous counts for rape. The issue tried here was general on all the counts, the jury and witnesses were sworn, and the verdict rendered on that issue. The whole was *coram non judice*, and void. Not a witness could be indicted for perjury; nor could any effectual judgment be rendered, or execution issued.

Here is Cowen's decision, in one paragraph. There has been a procedural error; regardless of anything else that occurred,
the trial took place before the wrong court and must be considered void. Having ruled, however, Cowen continues:

I know not to what extent the evidence was intended to be placed before us. There is vastly more in the bill of exceptions than was necessary to raise the points of law proposed by counsel. I will only say, that if the district attorney should think he cannot make more of this case than what we are able to see, he had better not try this man again upon the present indictment. I should very much doubt on the evidence, whether he has been guilty even of a simple assault and battery. Upon that matter, however, we cannot advise finally, for want of knowing what there may be left out of the case. It is our proper province merely to pronounce on the questions of law (People v. Abbot, 200).

If it is the "proper province [of the Supreme Court of Judicature] merely to pronounce on the questions of law," why does Cowen comment at all? He must have known that his opinions were held in very high regard. If there were some reason to lash out at the Wayne County district attorney, surely there was a more appropriate forum. The vehemence of these closing remarks reinforce my feeling that there is much more at stake for Cowen than the fate of a teenage bound girl and her employer (or saving the state of New York the cost of bringing the case again in the proper, lower-level court).

One possible reading of this section of the opinion is that Esek Cowen, whose form book shows the detailed and methodical way he prepared to become a lawyer himself, did
not suffer fools gladly, and considered a procedural error the mark of a fool. Someone as committed to preparation as Cowen may well have perceived Strong's error as a sign that he was an incompetent lawyer. In any case, Cowen chose a very public and lasting forum in which to deliver his lecture.

His language suggests that Cowen also perceives a real threat in 'unworthy' women seeking the protection of the court; that for him the "Female Monster," to borrow Susan Gubar's term, is a sexually active woman, motivated by desire (or economic necessity) and under the control of no man. Cowen concludes the opinion with a set of directions for the Wayne County district attorney, and the implicit comment that the whole issue would be better off dropped:

There must be a re-trial, if we may be allowed to so speak in a case where there has, as yet, been no trial at all; and if the counts for rape be not abandoned, the cause must be tried by the oyer and terminer.

(People v. Abbot, 200)

This must have been a crushing blow to Philena Morehouse. Regardless of the truth of the matter, her status in the community was such that, regardless of Abbot's conviction at the local level, bringing an ultimately inconclusive charge of rape against her employer would probably ruin her reputation in the community forever more. As someone who depended on her
employability for survival, Philena Morehouse probably suffered economic hardship (again) as a result of Cowen's decision. I don't know yet what happened to her or to the case after this. Orson Abbot's conviction was at least temporarily reversed; the district attorney was shown to have made important procedural errors, and in summarizing his position one of the most learned and well-respected jurists of the era delivered himself of the opinion that "I should very much doubt on the evidence, whether [Abbot] has been guilty even of a simple assault and battery". L. B. Proctor said of Cowen's opinions that

the lawyer, the student, the scholar, those who love the learning of the bar, those who admire judicious and philosophic arguments, and possess the industry to seek for them, will find in the opinions of Judge Cowen, legal Golcondas glowing with richest gems of erudition. (Proctor, 385-6)

Judge Cowen's opinion in the Abbot case glows with the intensity and weight of early nineteenth century American literature, history, and culture. His perception of the issues implicit and explicit in a rape case, and his gendered reading of the purview of the court itself provide brief but telling glimpses of the structure upon which late twentieth-century law and culture rest. Indeed, it is the very "length, prolixity, and discursiveness" which annoyed
some of his colleagues that render Cowen's opinions invaluable to a modern-day reader.

32 Records differ on the date of Cowen's birth, some sources giving 1784 and others 1787. The History of the Bench and Bar of New York states that he "ranked among the foremost lawyers and judges of New York state. Early obtaining marked recognition as a practitioner, he was appointed in 1823 reporter to the Supreme Court, retaining the position until 1828. During the period of his service he produced seven volumes of reports. In 1828 he was appointed judge of the 4th circuit in place of Reuben H. Walworth, who was made chancellor. In 1836 he became associate justice of the Supreme Court, filling the position with distinguished ability until 1844. He was author of "Civil Jurisdiction of Justices of the Peace," and, in connection with Nicholas Hill, of "Notes to Phillips' Evidence," a standard book of reference on that branch of the law" (McAdam, p. 288).  
33 Catalogue of the Law Library of Judge Esek Cowen, in the Special Collections Department of the Harvard Law School Library.  
34 Also in the Special Collections Department of the Harvard Law School Library.  
37 L. B. Proctor, Lives of Eminent Lawyers and Statesmen of the State of New York, with notes of cases tried by them, speeches, anecdotes, and incidents in their lives, New York: S. S. Peloubet & Company 1882, p. 626. There was, at the time, a group of lawyers who made their living arguing cases for other lawyers in front of the state Supreme Court, thus saving vast amounts of travel time and inconvenience—Hill was one of the best of these.  
38 Case reports from state court systems are collected in volumes of reports. In New York State, the volumes bore the names of the court reporters, hence Wendell's Reports, or Barbour's Reports, for example.  
39 Fruitful investigations of the history of rape law are by no means unique to cases originating in the state of New York: see, for example, Constance B. Backhouse, "The Sayer Street Outrage": Gang Rape and Male Law in 19th Century Toronto," and James A. Vaught and Margaret Henning, "Admissibility of a Rape Victim's Prior Sexual Conduct in Texas: A Contemporary Review and Analysis."  
41 The Essex Result, 1778, is the response of a convention of delegates from towns including Salem, Danvers, Waltham, and Ipswich to the
proposed Massachusetts Constitution. The document contains objections from issues of property ("11. That in a free government, a law affecting the person and property of it's [sic] members, is not valid, unless it has the consent of a majority of the members, which majority should include those, who hold a major part of property in the state." (81)) to gender ("Women what age soever they are of, are also considered as not having a sufficient acquired discretion; not from a deficiency in their mental powers, but from the natural tenderness and delicacy of their minds, their retired mode of life, and various domestic duties." (81)).


Cowen was following an already well-established pattern here. As Stephen P. Pistonio points out, "In 1285, the Statute of Westminster proclaimed that any man guilty of raping a married woman or virgin would be considered guilty of a felony and put to death" (italics mine): the judgment about which women were entitled to protection from violent crime was already in place. (Stephen P. Pistonio, "Susan Brownmiller and the History of Rape," Women's Studies, Volume 14, no. 3, 1988, p. 271).

See, for example, Marybeth Hamilton, p. 246 or Jackson, p. 397.

Cowen's opinion, though dictum, has been extremely influential in rape law. In People v. Carey, 223 N. Y. 519, 119 N.E. 83, for example, the court opined that "Rape is not committed unless the woman oppose the man to the utmost limit of her power. A feigned or passive or perfunctory resistance is not enough. It must be genuine and active and proportioned to the outrage." (519) While there is room for interpretive possibility in the phrase "utmost limit of her power," the court makes its position clear in the following sentences. Regardless of the circumstances, in order to seek the protection of the court a woman must be able to prove that she exerted active resistance against her attacker. Carey is an interesting case in that some members of the court wished to follow Cowen on another matter, as noted: "Some of the members of the court desire to place their concurrence upon the additional ground that error was committed in rejecting testimony tending to prove that the complainant was unchaste. They think that the exclusion of such testimony may work a denial of justice."

46 Hamilton, 235.

47 The catalogue of Cowen's law library includes Thomas Hobbes' Leviathan, explaining, perhaps, this grim view of human nature.

48 New York Revised Statutes.
And economic motivation, in women, may have been more cause for distrust than lust: in post-revolutionary society men were the only ones who were supposed to be concerned with money and economic growth. The Messalina image was a part of the language of female sexuality well before Esek Cowen came on the scene. William Byrd (1674-1744), for example, quotes long anecdotes related to issues of female sexuality in his commonplace book, including the following:

Messalina, who obliged 25 men in 20 hours, and Cleopatra, who in one night stood the attack of 105 young Fellows would have made sad Disciples to that Philosopher [Solon]. The first of these illustrious Ladies when she had past thro' the whole number askt if there were no more, for tho she was tired she was not satisfyd. (Lockridge, 11)

In Commonwealth vs. Edward J. Manning (328 N.E. 2d 496), a case heard on appeal before the Supreme Judicial Court of Massachusetts in December, 1974, the defendant had been convicted of "rape, sodomy, unnatural and lascivious acts, and assault and battery." (496) Manning's lawyers had attempted, during the original trial, to introduce evidence showing the complainant's "poor reputation for chastity." (496). The Appeals Court held that the trial judge should not have excluded this evidence, and reversed the conviction; the Supreme Judicial Court upheld this decision. Justice Braucher, however, dissented,

I think the exceptions should be overruled on the indictments for sodomy, unnatural and lascivious acts, and assault and battery, for the reasons given by the Appeals Court: 'The excluded testimony...bore only on the issue of consent, not on veracity. Wigmore, Evidence, @ 924b...The convictions on the other indictments are therefore not affected by the error.' In view of the extended discussion of the point by the court, some elaboration of these reasons is appropriate. The 'established law' on which the court's opinion rests is part of a legal tradition, established by men, that the complaining woman in a rape case is fair game for character assassination in open court. Its logical underpinnings are shaky in the extreme. See, for example, People v. Abbott [sic]....'And will you not more readily infer assent in the practised Messalina, in loose attire, than in the reserved and virtuous Lucretia?'...The trouble is that the court reasons logically, using an illogical rule as its major premise. (Manning, 496 ff).

As we can see, the Abbot /Jackson 'debate' over the character of the rape victim is still being played out, over 100 years later.
Few references to Abbot mention this seeming disjunction. An exception is Charles P. Nemeth's essay, "Character Evidence in rape trials in nineteenth century New York: Chastity and the admissibility of specific acts," Women's Rights Law Reporter, Spring 1980, vol. 6, no. 3. Nemeth notes that "further inspection of this opinion leaves the reader with the impression that Justice Cowen distrusted loose women," (219, n. 22) and that Cowen "seemed insulted that a woman whose reputation for chastity was less than sanctimonious would dare beckon his court for a remedy," (219, n. 23) but does not interrogate the issue further. Nemeth, too, contrasts the opinion in Abbot with Justice Selah Strong's opinion in Jackson, but concludes simply that "the Jackson decision was a methodical and scholarly effort to apply the rules and decisions of the day." (220) It seems to me that this conclusion, while acceptable on a superficial level, merely skims the surface of rich interpretive possibility.

"I don't want to prosecute;" a way of dismissing an indictment. For example, if District Attorney Theron Strong wanted to try Orson Abbot for assault before the Court of General Sessions, he should have said that he did not want to prosecute Abbot for rape.

"Heard before the wrong court."
As influential as Judge Cowen's opinion has been, there is another thread besides *Abbot* at work in the history of evidence rules in rape law. The New York Supreme Court, in May, 1857, heard the case *People v. Joseph Jackson*. Joseph Jackson and John Dixon were charged with the rape of Catharine Sullivan, the assault allegedly taking place in late August, 1856. Jackson and Dixon were convicted in the Kings County Court of Oyer and Terminer. According to the record, it was July, 1856, when Catharine Sullivan left Liverpool for New York on the ship City of Brooklyn. While on board ship, Catharine Sullivan was alleged to have had an affair with a fellow passenger, Dr. Mason, an allegation Sullivan denied. The counsel for the defense offered to prove that this affair had taken place as evidence of Sullivan's "general bad character for chastity," but the Court of Oyer and Termer refured to allow his evidence. The court reporter's note is reproduced here:

> On the trial of an indictment for rape it is not competent, on the part of the defence, to prove acts of illicit sexual intercourse between the prosecutrix and persons other than the defendant, although the prosecutrix had previously been asked, on her cross-examination, in relation to such illicit acts, and had denied them (a). (This case overrules *The People v. Abbot*, 19 Wend. 192.)

Again, the point of law on which *Abbot* was decided had nothing to do with the admissibility of evidence on the
previous actions or character of the prosecutrix. Cowen's opinion, however, had such force that the resonance of the case was precisely on that issue. As I have previously noted, the portion of the opinion that is *obiter dictum* continues on for pages, while the procedural issue is mentioned in two or three paragraphs at the very end of the opinion. And Justice Selah B. Strong (cousin of Theron Strong, the district attorney in the Abbot case) does not necessarily disagree with Judge Cowen on the issue of the complainant's character:

> It is certainly right that the testimony of the female preferring the complaint should be subjected to the strictest scrutiny compatible with the due administration of justice; she is a necessary and generally the sole witness of the transaction. *(People v. Jackson, 397)*

Like Cowen, Selah Strong exhibits a great deal of concern for the defendant, taking pains to note that in rape cases men are at the mercy of women:

> Experience has shown that the charge is frequently unfounded and instituted from impure motives. It is hard to meet the testimony of a cunning and unprincipled woman in reference to what is alleged to have taken place in the presence only of herself and of the accused, whose mouth of course is closed. It is therefore deemed essential that the charge should be supported by attending considerations or circumstances, such as that the witness is of good fame; that she presently disclosed the offence and made exertions for the detection and prosecution of the offender; that she exhibited marks and signs of the injury, and that the alleged
outrage was perpetrated in a private or secluded place. (People v. Jackson, 397)

Strong's list of conditions is a reminder that the logistical and emotional difficulty of bringing charges against a rapist has quite a long history. According to Stephen Pistonio, in medieval society there were

six steps a woman was compelled to follow if she wanted to bring her assailant to justice: she must create a public outcry over the crime as soon as possible, exhibit her torn garments and bleeding to men of good standing in the neighboring towns, explain the crime to local law officials, make a formal accusation at the first county court to be held, repeat her accusation before the coroners so that it could be taken down verbatim for the public records and finally prosecute the offender in the royal circuit court as the earliest opportunity. (Pistonio, 271)

The medieval conditions are repeated in almost identical fashion in Strong's opinion, although he does not require that the alleged victim exhibit her bleeding before the court.

Strong, however, introduces an exception into the question of resistance when he suggests that threats and intimidation are legitimate reasons to appear to comply with a rapist:

It is absolutely necessary to the constitution of the offence that the outraged female should have resisted to the extent of her power until the crime was consummated, unless such resistance was prevented by threats and intimidation. As the complainants more frequently pervert the truth and are harder to be met in reference to this
particular than as to any other allegation, courts have very properly allowed to the defendants considerable latitude in proving contradictory circumstances. (People v. Jackson, 397)

By including the phrase "to the extent of her power" as well as broaching the issue of potential "threats and intimidation," Strong makes explicit his recognition of the nature of the crime of rape. Unlike Cowen, Selah Strong seems prepared to treat rape as a violent crime, and one in which issues of power and control play important roles.

And there is another important difference in the way Strong and Cowen view women:

In any case, a single aberration from virtue, in one whose general character for chastity is otherwise unimpeachable, would raise so slight an inference, if any, of non-resistance to a brutal outrage from a person, or indeed to any one except him to whom she had previously yielded, that it would not justify a departure from the ordinary rules of evidence. (People v. Jackson, 398)

For Cowen, as we have seen, one instance of unsanctioned-by-marriage sexual activity was enough to place a woman in the "tenant of the stew" category. Given the burgeoning popularity of the religious revival movement at the time, such linguistic equations may well have seemed natural to him.\textsuperscript{56} Something in the equation had changed, however, by the time Justice Strong wrote the Jackson
opinion. In that opinion, Justice Strong responds to Judge Cowen:

It is true that Judge Cowen, in the case of *The People v. Abbot* (19 Wend. 192), disapproves of the rule, strongly sustained as it is by numerous judicial decisions and the opinions of many elementary writers; but the point was not necessarily raised in that case, as the conviction was reversed on the ground that the Court of General Sessions, before which the trial for a rape had been conducted, had no jurisdiction of the case, and what was said by the learned judge as to the rejection of the evidence was a mere *obiter dictum*. (Jackson, 400)

Strong denied the motion for a new trial and instructed the Court of Oyer and Terminer to "sentence the defendant conformably to his conviction" (Jackson, 400). The decision favorable to women, however, can be read as being perhaps class-based, and is not cited as much as *Abbot*. I originally read the tone of Strong's opinion as suggesting that not all members of the bar regarded Judge Cowen's work in the same favorable light. I think it is possible, however to read Strong's opinion with deeper insight. Not only was Cowen's opinion highly critical of District Attorney Theron Strong, one of Selah Strong's many cousins, the bulk of the opinion, that which Strong labels "mere *obiter dictum,*" had already become part of an evolving body of thought on evidence. Could Strong have been objecting to the molding of precedent by *dicta*? There was, in *Jackson*, a set of complex circumstances quite different enough from those in *Abbot*.
Strong may well have felt that blindly applying Cowen's words—no matter how learned and well-respected their author, and regardless of whether he agreed with Cowen—might have been inappropriate.

Yet it is certainly possible to locate examples of less culturally-bound (or more humane and equality-minded) early to mid-nineteenth century lawyers and judges, as I have shown via the Jackson case. Linda Kerber has shown that Daniel Davis, solicitor general, and James Sullivan, the attorney general, who argued for the state in Martin v. Massachusetts (1805), seem also to have been early feminists. Sullivan's arguments for the state in this case (which dealt with the seizure of a Tory loyalist couple's property, the property rights of the wife's heirs, and the wife's citizenship) were congruent with the unusually consistent liberalism he displayed throughout his career. Believing that society was composed of equal individuals, he spun out the implications of that belief in a wide range of issues as they presented themselves—banking and the economy, religious freedom, an end to slavery, and even gender relations.57

Davis and Sullivan undercut the concept of coverture, saying that "the politicized woman did have 'a will of her own' for which she was responsible and for which she could be punished" (Women of the Republic, 134). The "Federalist judges" (Women of the Republic, 135) did not buy this
argument, and ruled, in effect, that Anna Martin could not be viewed as a fully vested citizen, as one of her son's lawyers, Theophilus Parsons, had argued (asking "'whether the statute was intended to include persons who have, by law, no wills of their own'"58).

55 People v. Jackson, 392.
56 The influx of revival meetings in western New York State may not have had a direct effect on every inhabitant, but the young Elizabeth Cady was assigned "novels by Sir Walter Scott, James Fenimore Cooper, and Charles Dickens, the rational philosophy of George Combe, and works about phrenology" (Griffith, 21) by her brother-in-law in an effort to offset distress brought on by attending revival meetings. I hope that further research will allow me to expand on this point. Also, "organizations for abolition, temperance, and Christian benevolence flourished in upstate New York" (Griffith, 21): this may well be what brought Orson Abbot to Sodus.
58 Women of the Republic, 134. And see Kerber, "The Paradox of Women's Citizenship in the Early Republic: The Case of Martin vs. Massachusetts," and "'She Can Have No Will Different From His': Revolutionary Loyalties of Married Women," pages 115-136 in Women of the Republic, for a full discussion of the import of this fascinating case and others which attempted to define women's status in the new republic.
Abbot was a prosecution for assault and battery, and rape. The woman in question was thirteen at the time the alleged attacks began. She had no economic assets or well-placed family connections to make her an important member of the community. She was a servant, and a servant who had, in the past, been unable to maintain her indenture obligations to more than one family. Under the circumstances, there seems to have been little opportunity for Philena Morehouse's voice to be heard in Judge Cowen's court. Even the various court reporters' versions of her testimony are inflected by the choices they necessarily had to make, not being tape recorders but human beings. Cynthia Jordan remarks that

the texts left to us by the Revolutionary generation both describe and employ a language burdened with the multiple task of breaking with past definitions, interpreting the present in the interest of the public good, and remaining flexible enough to accommodate future reinterpretations.(510)

While the first two tasks seem immediately applicable to Judge Cowen's opinion in the Abbot case, his linguistic choices strongly suggest a desire to resist rather than accommodate "future reinterpretations,"59 and thus preserve a cultural moment without the possibility of future misreading.

Cowen's opinion can be read as representing the philosophy of one man, to be sure, but the language he uses
suggests that the modes and habits of thought that were familiar to him, and which informed every word of the Abbot opinion, were almost universally familiar to his contemporaries as well. As Daniel A. Cohen notes in his discussion of the influence of nineteenth-century trial reports on the fiction of the time, "editors and lawyers not only used sentimental language themselves but seemed to assume that their mature neighbors were attuned to fictive discourse as well." 60

Boundaries between fiction and non-fiction were occasionally blurred in the nineteenth century, as they occasionally are today, and the narrative of Cowen's opinion might well have been deliberately constructed to resemble other familiar contemporary texts. And this was by no means a new phenomenon. The blurred boundaries are apparent in late eighteenth-century fiction as well. Cathy N. Davidson points out that "in the changing world of the turn of the eighteenth century, many new readers wanted to read about characters like themselves, characters with whom they could identify and about whom they could fantasize." 61 Susanna Rowson's Charlotte Temple, 62 for example, an extremely popular novel of seduction and the subsequent—almost immediate—dreadful ramifications thereof, seems to have had roots in an actual unhappy seduction. Rowson's language
shows her as being squarely in the tradition that produced Esek Cowen.

For me, then, several big questions remain. What influences led Judge Cowen and Judge Strong to have such different opinions of women and women's sexuality? Were their views all that different, or is it simply that they had different views of the importance of character evidence in sexual assault cases—is it possible that Strong had an equally firm dichotomy in mind but different courtroom values? What role did other historical events, including the Seneca Falls Convention, have on the men who wrote these opinions?

As I noted earlier, the boundaries between fact and fiction were occasionally blurred. As the publishing industry grew, and as more Americans learned to read, the items available for their literary consumption began to enter into the cultural vocabulary. It is important, then, not to discount the influence of Samuel Richardson's Clarissa: The History of a Young Lady on literate nineteenth-century America. Richardson's novel was as important an influence on white American women writers as Charlotte Brontë or the Romantics. The novel, published in 1748, quickly became an important literary success. As Linda Kerber points out, Richardson's novel "offers sexual adventure, but blames the heroine for it."
Both *Pamela* and *Clarissa* were widely available and widely read by men and women. It is not surprising that aspects of the plots of these very popular novels would become part of that culture's frame of reference. Clarissa's rape, occurring as it did while she was unconscious, provides an almost infinitely expandable arena for a discussion of consent. And Lovelace's attitude draws on historical and Biblical precedent when he suggests that he may be able to gain retroactive consent by persuading Clarissa to marry him. And, as Frances Ferguson points out, "the rape becomes the vehicle for the contrast between what could be said in public and proved and what is said in private and believed." Implicit in Ferguson's comment is a (perceived) difference between what is said in public and what is said in private; this apparent disjunct ure in communication is visible in every prosecution for rape. The vengeful or duplicitous woman who brings false charges of rape springs from this split: her assumed embodiment in every victim of rape may be an admission that men and women speak differently about rape.

Women writers began to attempt a parallel discourse around the middle of the nineteenth century and continue today: this alternative way of regarding women as sexual beings was often heavily influenced by Gothic traditions and thus rendered many books easily dismissible by critics as
trashy or sentimental novels. What distinguishes these alternative texts—both novels and the *Jackson* tradition of rape case opinions—is that they allow the possibility of a more humane reading of women's sexual experiences.

Elizabeth Stoddard's novel *The Morgesons* (1862)\(^6\) is, like Selah Strong's opinion in *People v. Jackson*, one example of such an attempt at a parallel discourse. The novel, which met with little financial success, uses some of the best-known women's novels of the day (including Susan Warner's *The Wide, Wide World*,\(^6\) which was the best-selling novel in the United States until the publication of *Uncle Tom's Cabin* in 1862) as a starting point for its exploration of the possibilities realistically available for a nineteenth-century New England woman aware of her capacity for sexual desire. Cassandra Morgeson, the protagonist, struggles to create a place for herself in society without denying the desire that is integral to her sense of self.

This effort leaves Cassandra scarred, both literally and figuratively. But her scars are not entirely a source of shame to Cassandra, and she describes them, accurately, as wounds received in battle, even to a prospective suitor so bold as to inquire:

> I heard a low voice at my ear, and felt a slight touch from the tip of a finger on my cheek. "How came those scars?" I brushed my cheek with my handkerchief, and answered, "I got them in battle." (*Morgesons*, 173)

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
This somewhat cryptic exchange turns out to be crucial to Cassandra's ultimate choice of partner. Her growing attraction to this man, Desmond Somers, is characterized by her efforts to have him see her clearly, and to correct his misreading of her past, initiated by their differing definitions of "battle." Cassandra doesn't realize at first that Desmond understands her to mean a battle to preserve her chastity from a would-be ravisher. Once this becomes clear to her, she takes pains to have him understand that it was, in fact, a battle between her own desire and cultural restriction; a battle that resulted in the accidental death of her married cousin and lover Charles Morgeson.

Stoddard does not allow her heroine to draw a veil of misunderstanding (and hence respectability) over her scars. Rather it is Cassandra's struggle to maintain some kind of honesty about her sexual desire that occupies the bulk of the novel. Stoddard draws heavily on the Gothic imagery of flowers and horses in representing Cassandra's desire, but also uses Cassandra's relationship with the sea in a particularly powerful set of images, most notably in an exchange between Cassandra and her mother, with Cousin Charles looking on:

Cousin Charles' hawk eyes caught the look, and he heard me too, when I tapped her shoulder till she turned round and smiled. I whispered, "Mother, your eyes are as blue as the sea yonder, and I love you." She glanced
toward it; it was murmuring softly, creeping along the shore, licking the rocks and sand as if recognizing a master. And I saw and felt its steady, resistless heaving, insidious and terrible. (*Morgesons*, 63)

Stoddard links the sea and Cassandra's awakening sexuality. She introduces issues of power and control in her description of the sea "licking the rocks and sand as if recognizing a master," and hints at the danger inherent, for Cassandra, in any expression of sexuality, with the use of the words "resistless," "insidious," and "terrible."

Stoddard's sensually-charged language is even more striking when read against Esek Cowen's allusion-laden jeremiad. It seems almost impossible that Elizabeth Stoddard and Esek Cowen were both writing about women in the northeastern United States within a thirty year time period.

Cassandra's struggle with sexual expression and cultural boundaries, I would argue, is Stoddard's effort to add her distinctive voice to the ongoing discussion of appropriate roles for women. Some women felt confined by domestic roles, as did nearly all Stoddard's female characters. Some women did not shy from experiencing and expressing sexual desire, as some of her personal letters suggest about Stoddard herself. In Stoddard's view, the Republican Wife or Mother was an unrealistic, and possibly unhealthy construct. *The Morgesons* is Stoddard's response to the attitudes embodied in Judge Cowen's opinion.
The influence Abbot and Judge Cowen have had on a discourse of female sexuality is evident, as I have shown, in contemporary prosecutions for rape. Even today, despite efforts in some states to reform evidence laws regarding rape cases, a woman's entire sexual history may well be part of a discussion of her right to the court's protection. And men and women still seem to speak different languages when they discuss these issues. On a first reading, Cowen's opinion leaped out at me, trained as I am to read through a lens of feminist criticism, as anachronistic and appalling. While Esek Cowen's dictum has had a far-reaching influence on rape law, closer inspection reveals a long-standing resistance to his reading of sexually active women, a resistance by men and women, in media that included legal opinions and fiction. The lengthy and discursive opinion in People v. Abbot, then, offers a rare opportunity for interpretation and contextualization, and an opportunity to reexamine assumptions; it provides an avenue into a larger understanding of the events and influences shaping rape law, views of women as sexual beings, and the culture we inhabit.

And as far as reinterpretations are concerned, I must confess to a feeling of some dismay upon reading that Philena Morehouse had been caught attempting to make off with some of Mrs. Abbot's belongings on the day she was removed from the Abbot household. In an all-too-predictable way I found myself both doubting her testimony and constructing a complicated set of possibilities to justify her alleged actions that Sunday.
62 The first American edition of Rowson's novel appeared in 1794; the first British edition three years earlier.
63 As I searched for primary sources to fill in some of the missing background in this case, it was brought to my attention that the Wayne Sentinel, the weekly newspaper that would have covered the Abbot trial, is available on microfilm from two libraries in Utah: Brigham Young University and the Historian's Office of the Mormon Church. Palmyra, New York, (the county seat for Wayne County) turns out to be the site of the annual Mormon celebration of Joseph Smith's revelation. I hope to investigate this source as I continue my research.
64 See Frances Ferguson, "Rape and the Rise of the Novel," in Misogyny, Misandry, and Misanthropy, edited by R. Howard Bloch and Frances Ferguson, Berkeley: University of California Press, 1989, (especially p. 102 and following) for an exploration of this theme, among others.
65 The "bad" mother continues to be easily identifiable by her sexual activity--see Sue Miller, The Good Mother, for example.
Works Cited


Catalogue of the law library, formerly owned by the late Hon. Esek Cowen, an Associate judge, of the Supreme Court, of the state of New York, 1844, in the Special Collections Department, Harvard Law School Library.


Cowen, Esek, *Entries of Legal Forms, etc. 1806-15*.


Kaufman, Andrew L., biography of Justice Benjamin N. Cardozo, forthcoming from Harvard University Press.


People v. Abbot (1837) 19 Wend. 192.

People v. Carey (1918) 223 N.Y. 519, 119 N.E. 83.

People v. Jackson (1857) 3 Parker C. R. 391.


Proctor, L. B., Lives of Eminent Lawyers and Statesmen of the State of New York, with notes of cases tried by them, speeches, anecdotes, and incidents in their lives, New York: S. S. Peloubet & Company 1882.


Supreme Court of Judicature Writs of Error (Utica) (Series J0031), writ of certiorari and bill of exceptions. Courtesy of the New York State Archives.

Tacitus, Annales


