Feminists have long identified the justice system as one of the formal social institutions through which male dominance is both discursively asserted and physically instantiated. Nowhere is this truer than in legal cases that exist at the intersection of male power, violence, and the governance of sexuality. Each of these books sheds light on a different aspect of the complex relationship between law, social ordering and gender – in the case of Tyson’s book, the ways in which the legal doctrine of provocation both creates and maintains women’s subordination to male violence, and in the case of Shuy’s book, the ways in which legal actors consciously (and sometimes unconsciously) manipulate discourse in order to secure a legal advantage in cases involving allegations of sexual misconduct.

Danielle Tyson focuses her book on a traditionally sanctioned legal defence to homicide in common law jurisdictions, that of provocation. This defence allowed a person who killed someone (almost always an intimate partner or someone having a sexual relationship with that intimate partner) to reduce the degree of his culpability from murder to manslaughter if his actions were the product of what the law deemed to be ‘provocation’ by the deceased. As Tyson demonstrates, it is entirely appropriate to
use the masculine pronoun here, because provocation at common law was a doctrine by and for men.

Provocation was defined as behaviour by the deceased that would cause any reasonable man to lose control of his ability to resist engaging in violence; thus, his act of murder could be partially excused under the law and considered instead manslaughter, for which the penalties are far less severe than for murder. Although the legal rule as formally stated was not limited to excusing male violence against women, in practice it was virtually always invoked to justify the murder of women. One circumstance in which the provocation defence was frequently raised was when a man believed that his wife or female partner was sexually unfaithful to him. Even bare suspicion of this fact seemed to the law to be a situation in which any man would be so overcome with rage and horror that it would be unreasonable to expect him to refrain from murder. Nor was sexual infidelity – real or imagined – the only circumstance in which a man might invoke the defence of provocation. If a woman attempted to leave her husband, the legal rule defining provocation could be used to argue that any reasonable man would kill a woman who dared to assert her independence by leaving him. Taunting or nagging by a wife, particularly if she cast aspersions on her husband’s sexual potency, was the triggering event in other cases of provocation discussed by Tyson. She links the expansive use of provocation in these cases to other ways in which the law served as a tool to regulate women’s behaviour, such as the crime of being a ‘common scold,’ a crime that the law defined exclusively as a crime of women’s speech. Provocation, then, can be seen as an example of the law’s insistence that women were the exclusive sexual property of men, denied agency in their own sexuality and even in their speech.

In contrast to the leniency that the provocation defence traditionally provided for men who killed their female partners, the law has been reluctant to show similar consideration for women who kill their abusive male partners. Tyson details various attempts to provide legal defences on behalf of women victims of domestic violence who kill their batterers. Attempts to use self-defence in such cases frequently fail because the legal definition of self-defence limits the use of that defence to situations in which the actor reasonably fears imminent death or serious bodily harm. Since domestic violence victims seldom can prove that the harm that they fear is going to occur right away, they cannot show that they fear imminent harm and therefore are not entitled to rely on self-defence. Similarly, attempts to use so-called ‘battered women’s syndrome’ testimony to show the reasonableness of a battered woman’s use of force based on her subjective experience has also had limited success. Tyson notes that ‘battered women’s syndrome’
testimony has had some positive impact systemically by bringing into open court women’s narratives of abuse and the lack of options they face in responding to male violence. However, ‘battered women’s syndrome’ has not shared an equivalent legal acceptance to that of the provocation defence. Criticised by many feminists for constructing women’s agency as a pathological psychological condition and rejected as contrary to self-defence standards by many judges, ‘battered women’s syndrome’ has been of limited utility in mitigating culpability for victims of abuse who kill their abusers.

What links these two legal issues, in Tyson’s view, is that the reception in law of the provocation defence and of battered women’s syndrome are each the product of the discursive construction of masculinity and femininity through which gender is defined, produced, and enacted. Men who explode into murderous rages are in fact acting well within the understood construct of masculinity, whereas the actions of women who inspire these rages — whether by exercising sexual agency or by otherwise expressing resistance to male domination — are acting outside the bounds of appropriate ‘feminine’ behaviour. Both in trial testimony and in the words of the judges who sum up the cases and sentence the defendants, the narrative in provocation cases is a victim-blaming narrative in which the murdered women deserve what they are ‘asking for’ by their gender-transgressive behaviour, and the men who kill them inspire the law’s sympathy and consideration for their ‘reasonable’ masculine outbursts of violence.

At least, that is how the common law provocation defence traditionally worked. Tyson goes on to describe the current legal rollback of the defence of provocation, in which many jurisdictions have abolished the defence entirely, while others have restricted its application. Tyson tells the reader the story of how state after state in Australia came to severely curtail or completely abandon the provocation defence, a fate that has also befallen the defence throughout the common law world. Interestingly, the downfall of the provocation defence — a defence that Tyson shows is squarely grounded on narrative constructions of gender — has itself been accomplished largely through deployment of narrative. In almost every instance, the precipitating cause for a re-examination of the law of provocation has been a high-profile case in which a man who killed his partner received a very light sentence due to a successful use of the provocation defence to murder. These highly publicised cases have served as a vehicle to galvanise public outrage and thus have spurred lawmakers to a re-evaluation of the legal doctrine that allows defendants to literally ‘get away with murder’.

One might think, then, that the provocation defence now is nothing more than a relic of the murky, unenlightened legal past, like coverture,
slavery, and other once-potent legal doctrines that have been discarded as the social order moved beyond a point where their enforcement made sense. Not so fast, Tyson warns us. Despite the fact that the defence has been legally abrogated in much of the common law world, Tyson sees echoes of it in the words of sentencing judges, who still often express empathetic understanding for men who kill their partners, and in the deliberations of jurors who continue to find compelling the gender narratives on which the provocation defence rested, notwithstanding the formal abolition of the doctrine. Since sentencing and jury verdicts are aspects of the justice system in which discretion is a hallmark, the survival of judicial and jury narratives consistent with the provocation defence suggests that provocation, however discredited it may be in legal doctrine, may still live on in legal practice.

Tyson's last chapters consider the challenge of the recontextualisation of narratives of masculinity by masculinity theorists and the overall question of whether narratives of gender can ever be effectively displaced. Her critique of masculinity theorists for ignoring the work of feminist theorists is demonstrated in her critique of the examination by masculinity theorists of the rape prosecution of the boxer Mike Tyson. While only very tangentially related to the theme of the book – on the provocation defence – Danielle Tyson again probes the way in which discursive constructions of gender serve to legitimise and normalise male violence against women. This leads into her last chapter – a brief and hopeful chapter arguing that re-examining narratives that have been oppressive may be the key to using narratives as a progressive force for feminist change rather than part of the social fabric of subordination. This has ever been the challenge of progressive narrative theorists – having recognised the power of narrative in the maintenance of hegemonic structures of oppression, how do counter-narratives gain sufficient traction to supplant those narratives with progressive narratives? Do narratives simply follow the leading edge of social change, or do they provide the fuel for social change, or is the relationship between the power of narrative and social change more complex than either of those possibilities? Tyson's narrative of the rise and fall (and possible covert survival) of the provocation defence raises this larger question for the reader.

Roger Shuy takes a very different approach in his analysis of legal cases of sexual misconduct. Shuy, one of the world's leading scholars on language in society, has in recent years written extensively on the intersection of linguistics and the law. This book follows the format of a number of his earlier works in the field, in which he examines a particular area of legal practice through the lens of specific legal cases in which he was involved as a linguistics expert. He begins the book by first briefly canvassing the
American legal rules governing the resolution of sexual misconduct allegations, focusing on physical sexual offences rather than forms of sexual harassment such as the creation of a hostile work environment. The rules defining criminal and civil sexual offences are, of course, specific to particular jurisdictions, even within a single national legal system. Nevertheless, his selection of some representative statutes provides the reader with a basis for understanding the 11 cases he presents to illustrate some of the issues that occur in which linguistic analysis could be useful for the appropriate resolution of the cases.

Shuy notes that cases of sexual misconduct frequently feature language as evidence, but that lawyers seldom recognise the utility of systematic linguistic analysis of that evidence. Shuy suggests that linguistic analysis should begin with the largest linguistic units at issue – what is the nature of overall speech event in question, what schemas did the speakers make use of, what were their agendas in engaging in communication? From there, smaller units of language could be examined – how did speakers respond to the turns of the other with respect to conversational norms such as the cooperative principle and the recency principle? If ambiguity occurred, what response to clarify, if any, took place? Who introduced topics and what responsive uptake, if any, occurred? Finally, the smallest units of language could be analysed – what lexical choices were made by the speakers, what grammatical structures were deployed? While not all of these features are significant in every case, a systematic linguistic analysis means that significant language issues are not missed by lawyers often too anxious to find a ‘smoking gun’ word or phrase that indicates lying or enhances credibility.

At the heart of the book are the individual case analyses that Shuy conducts as a retained linguistics expert, some of which involve sexual misconduct allegations occurring in the workplace, some of which involve allegations of sexual abuse of children and adolescents, and some of which involve sexual misconduct between adults outside the workplace. In all but two of these cases, a tape-recorded conversation figured as critical evidence. In one of the remaining cases, the diary of the accused – a US senator – contained his reconstructions of conversations he had had with women accusing him of sexual misconduct. In the other, a police interrogation that was not recorded resulted in a written summarised statement used by the prosecution. Shuy includes verbatim portions of the language at issue in his discussion of the cases, and shows how a linguistic analysis can help clarify what was said, what may have been meant by each party in the saying and how ambiguity in the interchanges could make two very different readings equally plausible for the parties to the conversation.
In reading the case studies, the reader should note that in every case, Shuy was retained by the accused to assist in defending the allegations. Shuy points out that linguistic evidence would as often be useful to prosecutors as to defendants, but that, for whatever reason, prosecutors seldom seek to use expert evidence from linguists in their cases. (It is interesting to note that, outside the United States, linguists have in fact frequently been retained by prosecutors. In the United Kingdom, for example, forensic linguists are at least as often retained by the Crown as by the defendants. Why this might be is a matter outside the scope of this review.) Shuy strongly believes that an expert’s analysis of the evidence in a case should not be affected by the fact that the expert has been retained by one party to the litigation. In fact, in many cases, after analysis of the evidence in question, he has had to tell the would-be retaining lawyer that his testimony will not be helpful to that side of the case.

The reader may be somewhat disappointed that Shuy does not disclose the ultimate outcomes in the cases he discusses. There are, he reminds us, many reasons why the resolution of a particular case may be entirely unrelated to the strength or weakness of some of the evidence in that case. Parties settle cases and juries decide cases on the basis of many, many factors other than the language evidence in the case. In any event, Shuy is presenting these case analyses as examples of how linguistic evidence could bear on the resolution of the disputed facts, not necessarily that the linguistic evidence was actually dispositive in the case at hand. He incorporates into his case studies the actual language in question so that readers can judge for themselves whether they find his analysis persuasive. Still, the reader can be forgiven for wanting to know the final result in the cases. Part of what makes the case studies compelling is that they are real-life cases, not merely hypothetical examples, and the reader’s awareness of that fact makes it difficult to suspend curiosity regarding the ultimate resolution in the cases.

In many ways, the most useful parts of the book are found in the concluding two chapters, in which Shuy discusses systemic problems that police and prosecutors have in developing and using language evidence. Often it is the manner of gathering, transcribing and interpreting language evidence that is at the heart of the dispute in cases of sexual misconduct. Typically, there is no third witness to events other than the accused and the accuser, and in many cases, no physical evidence to corroborate or disprove either party’s version of the events. Under those circumstances, how language evidence is collected can determine how reliable that evidence turns out to be. Shuy makes a series of recommendations for the appropriate collection and interpretation of language evidence – suggestions about
proper recording and transcription techniques, as well as cautionary warnings about the use of surreptitiously recorded ‘confrontation calls’ in which the accused is telephoned by the accuser in the hope that he will respond to her accusations with admissions of guilt. Unfortunately, all too often the accuser is inadequately coached and frames her accusations in vague, inexplicit and ambiguous language, so that the responses of the accused are as likely to be simply expressions of confusion or sympathy at her unhappiness as to be expressions acknowledging guilt of the offence.

Shuy concludes the book with a summative set of frameworks for linguistic analysis of language evidence in legal disputes. He illustrates his frameworks liberally with examples from the cases analysed earlier, but the frameworks themselves have obvious utility in analysing discourse in many contexts beyond the legal resolution of sexual misconduct cases. Shuy’s discussion of the sexual misconduct cases serves as a reminder that, while such cases are often referred to reductively as ‘he said, she said’ cases, the reality is that interpretation of conversational interactions is more complex than the ‘he said, she said’ slogan would suggest, and at the same time, that language in these cases is susceptible to linguistic analysis that can provide a helpful means of arriving at just outcomes.