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Jeremy D. Weinstein

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Note

Adultery, Law, and the State: A History

If your subject is law, the roads are plain to anthropology It is perfectly proper to regard and study the law simply as a great anthropological document.*

Our legal system is to a large extent the product of the reaction of authority to the seeking of private vengeance by wronged parties. To ensure social control, the state must assert a monopoly of force, prohibiting its use by any other than itself.¹ This monopoly of force is achieved through law. Law, by making the use of force a monopoly of the community, pacifies the community.² A monopolization of violence is achieved by the gradual institutionalization of vengeance through law. "Institutionalization of vengeance" refers to the process by which violent revenge comes to be exercised lawfully only by the state or under its authority; in other words, violent revenge becomes part of the law by being exercised only at the behest of the state.

Traditionally, such legal theorists as Maine and Holmes have seen the state's institutionalization of the personal desire for vengeance as an important ingredient in the development of the law.³ The husband whose wife is murdered might want to kill the killer. The state exercises the husband's vengeance by itself killing the killer and prohibiting the husband from doing so. Thus, the state institutionalizes vengeance, makes it part of the system, by co-opting it. Maine's discussion of the Roman law of theft is a classic example of this co-optation.⁴

This Note argues that the state can institutionalize vengeance by permission as well as by co-optation. Such permission may be deliber-

* O.W. HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 210, 212 (1920).

1. H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 21 (1945).

2. *Id.* "[T]he societies of man have from the outset wrestled with the problem of maintaining internal peace and harmony." E. HOEBEL, *THE LAW OF PRIMITIVE MAN* 329 (1954).

3. O.W. HOLMES, *THE COMMON LAW* 2 (1881) ("It is commonly known that the early forms of legal procedure were grounded in vengeance."); G. SAWER, *LAW IN SOCIETY* 40 (1965) ("Putting aside reciprocity, religion, and sorcery, the constant sanctioning force in primitive society is that of self-help, gradually contained and institutionalized by social action."); W. SEAGLE, *QUEST FOR LAW* 229 (1941) ("Indeed, public punishment is still only a thinly disguised system of state vengeance . . .").

4. See *infra* section I.B.

ately granted, or the state may tolerate private revenge because other deficiencies in the law make it necessary. If someone slept with another man's wife, the betrayed husband might want to kill him. But the state rarely punished adultery with death, and so did not effectively co-opt the cuckold's vengeance. In some circumstances, although the state would not kill the interloper, it would allow the husband to kill him. This is institutionalization of vengeance by permission.

In the case of adultery, permissive remedies have existed side-by-side with co-optive remedies provided by the state. To illustrate institutionalization of vengeance by both permission and co-optation, this Note presents the history of how the law has dealt with the seeking of revenge against an interloper by one who has discovered his wife in adultery.

In Section I, this Note presents a theoretical model of how the process of legal development has institutionalized vengeance. It discusses the Roman law of theft, which is the traditional model of legal development through co-optation of vengeance. The remainder of the Note presents adultery as a counter-example to show the institutionalization of vengeance by the state through both co-optation and permission.

Section II presents the history of the earliest remedies available in English law to the cuckolded husband, commenting upon their relative co-optive or permissive elements and goals. It first discusses remedies existing at the time of Caesar's invasion of Britain in 44 B.C., then focuses on the earliest known English laws, the sixth-century King Aethelberht's Code of Dooms, and ends with the codes of native English law that existed shortly after the Norman Conquest. Section III sets forth the history of the development of the cuckold's remedies at early common law. Section IV presents the development of the modern common-law actions, which completely replaced the earlier common-law actions.

The Note then explores the product of a law that has institutionalized vengeance through both co-optation and permission by considering the two branches of remedial action available to the cuckold. First, Section V discusses "modern" civil, equitable, and criminal remedies, which are today in a sort of twilight existence, still in the textbooks, but rarely used since the 1930s. These are presented as the available co-optive remedies. Finally, the permissive remedies are discussed under the rubric of the "unwritten law." Here the husband is permitted to kill the marital interloper. The Note discusses the now-repealed Georgia and Texas statutes that justified the homicide by a husband of one he found in adultery with his wife. The notorious sympathy of juries for such defendants is also discussed.

I. A Theoretical Outline of Legal Development Through the Institutionalization of Vengeance

A. A Model of Development

This section sets forth a theoretical model of how law has institutionalized vengeance to facilitate the reader's understanding of how English law developed.⁵ This model extends beyond the development of the common law in England—in fact, it refers to societies still in the process of development. England is simply one of many societies whose development comports with this model.

In barbarian times, wrongful acts such as homicide and adultery were considered private wrongs against the victim and his kinship group.⁶ A kinship group is a very extended family—a sub-unit of a tribe.⁷ The remedy for a private wrong at this early time was for the victim or a member of his kinship group to extract “blood-vengeance” by killing a member of the wrongdoer's kinship group.⁸ A series of mutual retributions became a feud between kinship groups, called the blood-feud, or *vendetta*. The blood-feud was and still is extremely widespread in primitive societies. However, because *vendetta* was a fight between kinship groups, no revenge was taken for a wrong committed within a kinship group, even for homicide.⁹

This system of collective responsibility acted as a reasonable deterrent to wrongful conduct because a potential wrongdoer knew that his

5. For a discussion of the legal theory in the introduction and in this section, see A.S. DIAMOND, *THE EVOLUTION OF LAW AND ORDER* (1951); O.W. HOLMES, *supra* note 3, Lectures I-II; H. MAINE, *ANCIENT LAW* ch. X (F. Pollock ed. 1884); W. SEAGLE, *supra* note 3; see also Pound, *Individual Interests in the Domestic Relations*, 14 *MICH. L. REV.* 177, 177-81 (1916). See generally E. ROSS, *SOCIAL CONTROL* chs. V, VIII-IX (1910) for an interesting combination of crude psychological theories, Nietzsche, racism, and progressivism that produces an optimistic theory. For an introduction to, and bibliography of, historical and anthropological approaches to jurisprudence, see R. DIAS, *A BIBLIOGRAPHY OF JURISPRUDENCE* ch. 18 (3d ed. 1979); D. LLOYD, *INTRODUCTION TO JURISPRUDENCE* ch. 9 (4th ed. 1979); S. ROBERTS, *ORDER AND DISPUTE: AN INTRODUCTION TO LEGAL ANTHROPOLOGY* (1979). The best general discussion of primitive law is E. HOEBEL, *supra* note 2. Hoebel traces “the trend of the law” by presenting a string of contemporary societies at various stages of legal development. *Id.* ch. 12.

6. “In modern society murder is the major crime against the individual, but primitive peoples treated it as a private, amendable wrong. Obviously they had no conception of ‘crime.’” W. SEAGLE, *supra* note 3, at 29.

7. See R. LOWIE, *PRIMITIVE SOCIETY* chs. VI-VII (1920).

8. “Authority to enforce a norm resides (for private wrongs) with the wronged individual and his immediate kinsmen—but only for the duration of time necessary to follow through the procedural steps that lead to redress or punishment of the culprit.” E. HOEBEL, *supra* note 2, at 276.

9. W. SEAGLE, *supra* note 3, at 38. See *id.* chs. III-IV for a discussion of the blood feud. For a fictional account of the blood feud in the United States, see MARK TWAIN, *ADVENTURES OF HUCKLEBERRY FINN* ch. XVIII (W. Blair & V. Fischer ed. 1985) (The Grangerford-Shepherdson Feud).

act might bring retribution not only against himself, but against his relations as well.¹⁰ As the blood-feud developed into a sophisticated social institution, one act of retaliation became sufficient. Furthermore, the kin of the wronged man became socially obligated to extract blood-vengeance.¹¹

In some societies, the potential arbitrariness of the blood-feud was checked by the development of a regulated fight or public humiliation of the wrongdoer. In cases of wrongs less than homicide, such as theft or adultery, these alternatives would satisfy the victim and his kin.¹² The kin were angry and demanded satisfaction, and the offender feared being handed over by his group to avoid feud or disorder. A peaceful solution was reached when the offender voluntarily submitted himself to a throwing of spears, a hacking with knives, or some other regulated fight.¹³

Composition, the most flourishing institution of primitive and later archaic law, can be seen in embryo in this public humiliation. Composition was a voluntary offering by the wrongdoer and his kinship group made in the hope of averting a blood-feud, and it was also a form of humiliation for the offender and his kin. The humiliation appeased the wronged kinship group's thirst for revenge. Acceptance was optional for the kin of the wronged party, who retained the right to insist on violent revenge.¹⁴

This primitive institution of composition must be distinguished from modern notions of damages. "In damages the idea of compensation for the actual loss is dominant, but in composition the motive is rather the awarding of an amount which shall be sufficiently large to induce the relatives to keep the peace."¹⁵ The state often came to facilitate composition by providing sophisticated tables of tariffs for each particular wrong.¹⁶ These tables avoided the difficulties involved in settling upon an amount and thus preserved domestic order.

Composition became possible with the accumulation of surplus wealth.¹⁷ It spread because the kinship group was willing to accept restitution and the wrongdoer feared violent retribution.¹⁸ Eventually the state became strong enough to—and desired to—make the system of

10. W. SEAGLE, *supra* note 3, at 44.

11. "[W]hen the community qua community acknowledges the exercise of force by a wronged person or his kinship group as correct and proper in a given situation, and so restrains the wrongdoer from striking back, then law prevails and order triumphs over violence." E. HOEBEL, *supra* note 2, at 276.

12. W. SEAGLE, *supra* note 3, at 41.

13. A.S. DIAMOND, *supra* note 5, at 22.

14. W. SEAGLE, *supra* note 3, at 41.

15. *Id.* at 42; see H. MAINE, *supra* note 5, at 365.

16. W. SEAGLE, *supra* note 3, at 41.

17. *Id.* at 42.

18. *Id.* at 41.

composition compulsory. By enforcing composition, the state tried to end the internal disorder caused by blood-feuding.¹⁹ However, as surplus wealth increased, composition became a mere fine for rich transgressors and therefore became an undesirable system.²⁰

The system of composition eventually was completely suppressed by the expansion of the "king's peace,"²¹ which was the king's assertion that a violent act, a breach of the peace, was a wrong to him.²² The growth of strong government gave the king a special interest in preserving peace and preventing homicides and personal injuries, apart from the interests of his individual subjects. What was formerly a private wrong exclusively against an individual came to be seen as a public wrong against the domestic order and therefore against the state.²³

As the concept of the "king's peace" expanded, the king increasingly insisted upon an exclusive right to punish wrongs.²⁴ A system of private settlement between the respective kin of the perpetrator and the victim such as composition could not coexist with the king's exclusive right and therefore was suppressed.²⁵ The homicides and more serious personal injuries ceased to be emendable by composition and were prosecuted as crimes, usually with the death penalty.²⁶ Moreover, the range of breaches of the peace in which the king displayed a special interest gradually expanded into offenses less serious than homicide and treason. This gradual assertion of jurisdiction, after overcoming resistance, converted what we would call "torts" into what we would call "crimes." By insisting on its exclusive right to punish wrongs, the state asserted a monopoly of violence.

Revenge was the original goal of the displaced system of composition,²⁷ and the state achieved popular acceptance of its monopoly of violence by institutionalizing revenge. It could do this either by co-optation, that is, inflicting the vengeance of the wronged party or his kin upon the disturber of public order, or by permission, that is, allowing the wronged party to take revenge himself, under the tacit authority of the state.

With respect to adultery in England, the state failed to co-opt the

19. "[S]uppression of the feud becomes ever more determined with the consolidation of political power." *Id.* at 68.

20. *Id.* at 42, 68-69.

21. *See id.* ch. VII.

22. *Id.* at 70-73.

23. G. SAWER, *supra* note 3, at 64; *see also* O.W. HOLMES, *supra* note 3, at 39; E. ROSS, *supra* note 5, at 39-40; W. SEAGLE, *supra* note 3, at 228-30.

24. "The really significant shift . . . in the development of primitive law is [that] . . . [p]rivilege-rights and responsibility for the maintenance of the legal norms are transferred from the individual and his kinship group to the agents of the body politic as a social entity." E. HOEBEL, *supra* note 2, at 329.

25. W. SEAGLE, *supra* note 3, at 73-75.

26. G. SAWER, *supra* note 3, at 64.

27. W. SEAGLE, *supra* note 3, at 39-42.

vengeance of the wronged husband completely, and institutionalized his violence by a partial and ineffective co-optation that coexisted with permission for the private exercise of violence in limited circumstances. In contrast to this ineffective co-optation of vengeance for adultery in England, the ancient Roman law was openly designed to effectively co-opt the victim's vengeance. The following section explores the Roman law of theft as an example of explicit state co-optation.

B. The Roman Law of Theft: An Example of Co-optation of Revenge by the State

Sir Henry Maine, the great pioneer of historical jurisprudence,²⁸ was a leading exponent of the theory that the state co-opted vengeance in the development of its criminal law.²⁹ To illustrate this theory, Maine used the dual classification of thieves in the Roman law of theft as his primary example.³⁰

Maine stated that "the earliest administrators of justice simulated the probable acts of parties engaged in a private quarrel [and] took as their guide the measure of vengeance likely to be exacted by an aggrieved person under the circumstances of the case."³¹ That is, the state co-opted the victim's vengeance by inflicting it itself. He wrote:

The Laws of the Twelve Tables seem to have divided Thefts into Manifest and Non-Manifest, and to have allotted extraordinarily different penalties to the offense according as it fell under one head or the other. The Manifest Thief was he who was caught within the house in which he had been pilfering, or who was taken while making off to a place of safety with the stolen goods; the Twelve Tables condemned him to be put to death if he were already a slave, and, if he was a freeman, they

28. See M.E. DUFF, *MAINE: A BRIEF MEMOIR OF HIS LIFE* (1892); G. FEAVER, *FROM STATUS TO CONTRACT* (1969); P. STEIN, *LEGAL EVOLUTION: THE STORY OF AN IDEA* 86-115 (1980); see also C. CRAWLEY, *TRINITY HALL* 86-87, 113, 146-52, plate 10 (1976) (Maine as Master of Trinity Hall).

29. This theory was further developed by Holmes. O.W. HOLMES, *supra* note 3, Lectures I-II.

30. H. MAINE, *supra* note 5, at 365. Holmes used the common-law rules of deodand and animals. O.W. HOLMES, *supra* note 3, at 20-38. For the distinction between the Manifest and Non-Manifest Thief, see W. BUCKLAND, *A MANUAL OF ROMAN PRIVATE LAW* 319-20 (1925); W. BUCKLAND, *A TEXTBOOK OF ROMAN LAW* 581-82 (P. Stein 3d ed. 1963); H. JOLOWICZ & B. NICHOLAS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 167-70, 274-75 (3d ed. 1972); A. PRICHARD, *LEAGE'S ROMAN PRIVATE LAW* 404-06 (3d ed. 1961). For a translated formula, see *id.* at 478-79. The Roman law of theft has been described as

one of the least commendable parts of the mature Roman law . . . because many archaic features were allowed to survive . . . The archaic survivals are of great interest to the student of anthropology and primitive law, but are strangely out of place in a system as sophisticated as the classical Roman law . . .

B. NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 211 (1962).

31. H. MAINE, *supra* note 5, at 365-66.

made him the bondsman of the owner of the property. The Non-Manifest Thief was he who was detected under any other circumstances than those described; and the old code simply directed that an offender of this sort should refund double the value of what he had stolen. . . . The ancient lawgiver [of the Twelve Tables] doubtless considered that the injured proprietor, if left to himself, would inflict a very different punishment when his blood was hot from that with which he would be satisfied when the Thief was detected after a considerable interval; and to this calculation the legal scale of penalties was adjusted.³²

Justinian, in his *Digest of Roman Law*, preserved and further refined the distinction between the Manifest and Non-Manifest Thief,³³ but by his time—the early sixth century A.D.—it was essentially academic.³⁴ A telling archaicism in Justinian's *Digest* is a citation to Pomponius: “[I]f you saw me committing a theft in your house, but hid yourself for fear that I might kill you, even though you watched me, it is not a case of manifest theft.”³⁵ This further supports the thesis that the punishment was a substitute for vengeance. The thief on whom the homeowner would not take vengeance was not classified as a Manifest Thief. The Manifest Thief was one “caught in the very act,”³⁶ in a circumstance in which the owner of the house, had he caught the thief, would have killed him. However, if the homeowner showed that he did not want to take revenge because he lacked the fortitude to do so, the state would not do it for him.

Maine commented that “the men of primitive times were . . . completely . . . persuaded that the impulses of the injured person were the proper measure of the vengeance he was entitled to exact, and . . . literally . . . imitated the probable rise and fall of his passions in fixing their scale of punishment.”³⁷ The Roman law of theft thus is an excellent example of the institutionalization of vengeance through co-optation.

The following section presents the early history of the English law of adultery. The Anglo-American law of adultery will serve as an example of the institutionalization of vengeance through both co-optation and permission.

II. Early English Law

A. Before 600 A.D.: A Pre-History and Background

This section describes how and why adultery became a wrong, and

32. *Id.* at 366-67.

33. DIG. 46.2.2-9, translated in THE DIGEST OF JUSTINIAN 103-05 (C. Kolbert ed. 1979).

34. “[Its] surviv[al] all through the classical period suggests that the *actio furti manifesti* was not often brought.” B. NICHOLAS, *supra* note 30, at 212.

35. DIG. 46.2.7 (Ulpian).

36. *Id.* 46.2.3 (Ulpian).

37. H. MAINE, *supra* note 5, at 368.

how it was remedied by the early English law. It explains the social institution of bride-price marriage, which is important for an understanding of the cultural background of early English law. This section also sets the stage for the consideration of the earliest written compilations of English law.

1. *Adultery and Blood-Feud*

Adultery was not a serious wrong before society became monogamous.³⁸ When Caesar invaded Britain in 55 B.C., his impression was that the Britons were not monogamous, but rather shared common wives within a kinship group.³⁹ If, in fact, they were not then monogamous, the Britons became monogamous during the invasions of Germanic tribes, who were certainly monogamous,⁴⁰ from the European Continent in the fourth and fifth centuries.⁴¹ Once monogamy took hold in Britain, whether it was before or after Caesar's invasion, society recognized adultery as a serious wrong⁴² that invaded a husband's "rights" over his wife.⁴³

Adultery, considered a private wrong, was remedied by the self-help of the husband and his kinship group—that is, by *vendetta*.⁴⁴ Failure of

38. See J. ZANE, *THE STORY OF LAW* 45 (1927).

39. All the Britons dye themselves with woad, . . . wear their hair long, and have every part of their body shaved except their head and upper lip. Ten and even twelve of them have wives in common to them, and particularly brothers among brothers and parents among their children; but if there be any issue by these wives, they are reputed to be the children of those by whom respectively each was first espoused when a virgin.

JULIUS CAESAR, *COMMENTARIES* bk. V, ch. XIV, reprinted in A. KOCOUREK & J. WIGMORE, *SOURCES OF ANCIENT AND PRIMITIVE LAW* 89 (1915). But the Britons may in fact have been monogamous. Caesar's observations may be inaccurate because he visited England only for a short time while it was in a state of war against him.

40. See TACITUS, *GERMANICA XVIII-XIX* (H. Mattingly & S. Hardford trans. 1981) (published as *THE AGRICOLA AND THE GERMANICA*).

41. 1 R. HODGKIN, *A HISTORY OF THE ANGLO-SAXONS* chs. III-VI (3d ed. 1952). "Having once obtained a glimpse of this glorious land, the hungry, half-naked Teuton was unable to appease the desire of possessing it." 1 J. ST. JOHN, *HISTORY OF THE FOUR CONQUESTS OF ENGLAND* 61 (1862). For a unique history of these invasions, see D. HAIGH, *THE CONQUEST OF BRITAIN BY THE SAXONS* (1861).

42. Adultery was wrong because it bastardized a family's lifeline, destroyed family unity, and was a serious blow to a man's pride. Murray, *Ancient Laws on Adultery—A Synopsis*, 1 J. FAM. L. 89, 89 (1961).

43. R. HUEBNER, *A HISTORY OF GERMANIC PRIVATE LAW* 617 (F. Philbrick trans. 1918). These "rights" of a Germanic tribesman over his wife were at times savage. Huebner cites "from the Flemish *coûtume* of Ardenberg the rule that a husband may cut open his wife and warm his feet in her blood, provided only [that] he sew her up again and that she remain alive." *Id.* at 617 n.1 (citing 1 H. BRUNNER, *DEUTSCHE RECHTSEGESCHICHTE* 101 (2d ed. 1906)). Analogous rights probably existed among the Germanic tribes that invaded England.

44. "[H]omicide, adultery with a wife, and the stealing of a wife (including the capture or elopement of a bride) commonly rouse fierce passions, and might lead to the murder of the

the kin to fulfill their solemn duty to take vengeance resulted in dishonor.⁴⁵ Among the Anglo-Saxon tribes, no feuding occurred within the kinship group, and so adultery by another within one's kinship group might have gone unremedied.⁴⁶

2. *Bride-Price Marriage*

To place the further development of English law in its cultural context,⁴⁷ the institution of bride-price marriage must be understood.⁴⁸ Bride-price, or bride-wealth, marriage was the most significant institution in the life of the barbarian. It began as a gift to the bride's father or next of kin to secure his consent to the marriage. So highly did the woman's father and suitor value her that the bride-wealth gradually grew into a great mass of property.⁴⁹

It is a misconception to regard bride-price marriage as a sale of the woman.⁵⁰ Bride-price marriage was too fundamental and too much colored by every aspect of life to be analogized to a modern commercial transaction. The Code of Aethelberht used the word "buy," but in context its meaning is much different from our own use of the word⁵¹ because of all that bride-price marriage embraced in the minds of these peoples.⁵² In early medieval England, although bride-wealth changed

offender or his friends by an aggrieved person or his friends, or to fights between the two kinship or local groups." A.S. DIAMOND, *supra* note 5, at 22.

45. See, e.g., THE ICELANDIC LAXDAELIC SAGA 197 (M. Magnusson & H. Polsson trans. 1969); Heatt, *Introduction to BEOWULF AND OTHER OLD ENGLISH POEMS* at xviii-xxii (C. Heatt trans. 2d ed. 1983).

46. F. SEEBOHM, *TRIBAL CUSTOM IN ANGLO-SAXON ENGLAND* 56-72 (1911) (discussing *Beowulf*). Perhaps this is the root of Caesar's observation. See *supra* note 39.

47. "[L]aw divorced from its cultural matrix is meaningless." E. HOEBEL, *supra* note 2, at 39.

48. The failure of some writers to understand the institution of bride-price marriage has led to misinterpretations of the early law as it concerned women. E.g., Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 655-58 (1930); Murray, *supra* note 42, *passim*.

49. The need to accumulate the requisite bride-wealth motivated the suitor's industry. It helped knit together his family, on whom he depended to provide the cattle. The price he paid made him value all the more highly the wife who was so difficult to acquire. As for the bride, the wealth her marriage brought to her family increased her self-respect. Furthermore, the bride-wealth was her security against ill-treatment, for if she left her husband for good cause he would not be entitled to return of the property, and he would therefore probably have been unable to acquire another wife. The receipt by her relations of shares of the bride-wealth put them under a duty to protect her against ill-treatment, by force if necessary, and in the event of calamity to support her and her children. A.S. DIAMOND, *supra* note 5, at 99-100.

50. *Id.* at 101.

51. "[W]e must neither blindly nor willfully force upon primitive data that are only relatively comparable the specific content of meaning associated with our terminology." E. HOEBEL, *supra* note 2, at 20.

52. See A.S. DIAMOND, *supra* note 5, at 99-100; 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 364-65 (2d ed. 1898); cf. R. LOWIE, *supra* note 7, at 201-03 (it is wrong to judge a society by the apparent status of its women).

hands before a marriage, women were not "owned" as chattels. A guardian of a marriageable or married woman, however, had certain expectations raised by the institution of bride-price marriage that could be foiled by an adulterous liaison.⁵³

Composition, another flourishing institution of early society, emerged in England prior to the middle of the sixth century.⁵⁴ In the sixth century, a code was promulgated to provide a fixed scale of sums to be paid as composition, to serve as a viable alternative to the blood-feud. This code was known as Aethelberht's Doms.

B. Aethelberht's Doms

Aethelberht was the King of Kent, in southeastern England, from 560 or 565 A.D. until his death in 616.⁵⁵ He promulgated a set of secular laws⁵⁶ referred to as the Code of Doms.⁵⁷ It is the oldest surviving literary document in any Teutonic tongue, and with it the "grand traditions of English law and English literature both commence."⁵⁸ Traditionally, it is thought to have been promulgated after Augustine converted Aethelberht to Christianity in the first few years of the seventh century,⁵⁹ but it might perhaps come from any year after 565, the date of Aethelberht's accession.⁶⁰

Aethelberht's legislation has been classified with the "Early Codes," "the laws of the barbarian peoples of Western Europe."⁶¹ These Early Codes were promulgated chiefly to diffuse dangerous resentments arising from private injuries, and thereby to preserve the peace. The main private wrongs were homicide, serious personal injury, wrongful sexual in-

53. For bride-wealth marriage in Anglo-Saxon law, see Young, *The Anglo-Saxon Family Law*, in *ESSAYS IN ANGLO-SAXON LAW* 163-78 (1905).

54. For the development of composition in England and the general process by which Anglo-Saxon legal procedure evolved to both permit and co-opt vengeance, see Laughlin, *The Anglo-Saxon Legal Procedure*, in *ESSAYS IN ANGLO-SAXON LAW* 262-305 (1905).

55. H. RICHARDSON & G. SAYLES, *LAW AND LEGISLATION FROM AETHELBERHT TO MAGNA CARTA* 1-27, 157 & n.3 (1966). Bede says 560 A.D., and the Anglo-Saxon Chronicle 565 A.D.

56. A.S. DIAMOND, *PRIMITIVE LAW PAST AND PRESENT* 59 (1971).

57. H. RICHARDSON & G. SAYLES, *supra* note 55, at 1-10. The text of Aethelberht's Code may be found in F. ATTENBOROUGH, *THE LAWS OF THE EARLIEST ENGLISH KINGS* 4-17 (1922). See generally A.S. DIAMOND, *supra* note 56, ch. 5; H. RICHARDSON & G. SAYLES, *supra* note 55; Simpson, *The Laws of Ethelbert*, in *ON THE LAWS AND CUSTOMS OF ENGLAND* 3-17 (1981). The Doms codified pre-existing law and added fresh legislation, although the proportion of each is uncertain. Each clause of the Doms is a conditional sentence setting forth the judgment to be given for each wrong described. Thus, the form is typical of that taken by many laws.

58. A.S. DIAMOND, *supra* note 56, at 57; see A.S. DIAMOND, *supra* note 5, at 137.

59. Simpson, *supra* note 57, at 4.

60. H. RICHARDSON & G. SAYLES, *supra* note 55, at 1-11 (arguing based on the pagan character of the document).

61. A.S. DIAMOND, *supra* note 56, at 55.

tercourse, and theft.⁶² The predominant purpose of the Dooms was to provide a fixed scale of composition, which could serve as a viable alternative to the blood-feud.⁶³ They set out a very detailed scheme of payment of *bót*, or compensation,⁶⁴ for all varieties of wrongdoing, starting at the top with pulling hair,⁶⁵ through to serious wounding,⁶⁶ and ending up with broken toenails.⁶⁷ Two factors determined the amount of composition: the seriousness of the wrong and the social class of the wronged party.⁶⁸ The more serious the wrong and the higher the status of the wronged party, the greater the composition. The rigidity of the penalties was the very key to the success of the Dooms: the possibility of negotiations might have led to haggling and thence to feuding.

One could have been entitled to composition under the Dooms in two ways. First, one directly injured would have been entitled to *bót* for the wrong done to him. Second, one could have been wronged by injury to another under one's *mund*, or protection. The sum paid in compensation for violating a *mund* was called *mundbyrd*, which was paid in addition to any *bót* that might have been due to the kinship group of the party directly injured.⁶⁹

Any illicit sex, including adultery, was a serious wrong under the Dooms. It wronged the woman's husband or kin who had expectations relating to the bride-price, and it wronged one under whose *mund* the woman lived. Several provisions of Aethelberht's Code set out the pecuniary payments to be made to a wronged party by one who had sex with a woman under the wronged party's *mund*.⁷⁰

The Dooms further provided for payment by the interloper to the

62. *Id.* at 61.

63. Lively debate over whether the purpose behind this alternative was religious or secular has centered on whether the Dooms were promulgated by a pagan or a Christian king. Richardson and Sayles argue for a pagan king. H. RICHARDSON & G. SAYLES, *supra* note 55, at 2-10. Simpson, in contrast, argues that the Dooms are Christian in nature. Simpson, *supra* note 57, at 14.

64. The sanctions all were pecuniary, denominated in Kentish golden shillings and silver sceattas. Twenty sceattas make up a shilling. In Aethelberht's day, the Kentish golden shilling was probably the price of a cow. A.S. DIAMOND, *supra* note 56, at 56 n.6. Although it was primitive, seventh-century southeastern England had a money economy. H. RICHARDSON & G. SAYLES, *supra* note 55, at 11, 157-69.

65. AETHELBERHT'S DOOMS cap. 33 [hereinafter AETH.] (50 sceattas).

66. *Id.* cap. 63 (30 shillings).

67. *Id.* cap. 72 (30 sceattas for a big toenail, 10 sceattas for each of the others).

68. Not only the sanctions, but the very order of the Dooms' clauses show "an extreme consciousness of distinctions between social classes—a characteristic which it might not seem fanciful to describe as English." A.S. DIAMOND, *supra* note 56, at 58.

69. *Id.* at 58-59, 68.

70. AETH., *supra* note 65, caps. 10-11, 14-16. For example, the Dooms provided that "if a man lies with a maiden belonging to the King, he shall pay 50 shillings compensation." *Id.* cap. 10. This is a large amount, equivalent to fifty cows, *see supra* note 64; and equivalent to the *bót* due for striking off another's foot, AETH., *supra* note 65, cap. 69, or half of a freeman's

husband, who had had to pay a bride-price for his wife, as composition for adultery. The provision read: "If a freeman lies with [another] freeman's wife, he shall pay [the husband] his *wergeld*⁷¹ and procure a second wife with his own money, and bring her to the other man's home."⁷² The marital interloper thus had to take the wife, pay a huge fine of 100 shillings,⁷³ and produce the capital to pay a bride-price. Because Aethelberht's Code was an alternative to *vendetta*, the wronged husband could either accept this composition, or he could try to kill the interloper.⁷⁴

In Aethelberht's Kent, bride-price marriage was still the prevailing custom.⁷⁵ The most interesting, and most misunderstood,⁷⁶ provisions of Aethelberht's Code are those that applied against one who took a woman without paying the bride-price.⁷⁷ These provisions are important because they are the probable antecedents of the common-law actions for abduction.⁷⁸ Thus, "[i]f a man forcibly carries off a maiden [he shall pay] 50 shillings to her owner (*þ am agande*), and afterwards buy from the owner his consent."⁷⁹ The "owner" is the woman's kinsman entitled to the bride-price.⁸⁰

The wrongful taking of a woman without paying the bride-price was a serious wrong to her kinsmen, even if she had in fact consented and eloped.⁸¹ A large penalty in addition to the bride-price had to be paid.⁸² If she was returned, fifty shillings was paid, thirty-five as *bót* to the injured party, and fifteen to the king as a *wíte* to buy back the peace broken

wergeld. *Id.* cap. 21. *Wergeld* is defined *infra* at note 71. The *mundbyrd* is the same as that for killing a man on the king's premises. AETH., *supra* note 65, cap. 5.

The importance of status in setting compensation is well illustrated here: compensation halves with each drop in status of the woman (25 shillings for a slave, 12 shillings for one "of the third class." *Id.* cap. 11), and with each drop in status of the one whose *mund* is violated (12 shillings for a nobleman's servingmaid, *id.* cap. 14; 6 shillings for a commoner's servingmaid, *id.* cap. 16).

71. *Wergeld* is a value set on a freeman's life. It literally means "man's price." 1 F. POLLOCK & F. MAITLAND, *supra* note 52, at 47.

72. AETH., *supra* note 65, cap. 31 (author's translation).

73. A freeman's *wergeld*. *Id.* cap. 21.

74. See Simpson, *supra* note 57, at 14.

75. See AETH., *supra* note 65, cap. 77 (enjoining dishonesty in that custom).

76. E.g., Murray, *supra* note 42, at 98.

77. AETH., *supra* note 65, caps. 82-84.

78. See *infra* section III.

79. AETH., *supra* note 65, cap. 82.

80. The relationship described by the *Dooms* was not ownership of the woman but rather enjoyment of certain rights, including receipt of the bride-price, arising from a status relationship between the woman and her kinsmen. It was a profitable protective wardship rather than ownership of a chattel. See *supra* notes 50-53 and accompanying text.

81. 2 F. POLLOCK & F. MAITLAND, *supra* note 52, at 490.

82. "There is no talk of giving her back, but a *bót* must be paid and the *mund* must be purchased." *Id.* at 365 n.5.

by the interloper.⁸³ If another man was betrothed to the woman, and so had already paid the bride-price, twenty shillings were due, and the betrothed had his own remedy.⁸⁴

Although it condemned adultery, Aethelberht's Code was concerned with power, not with religion. Providing a viable alternative to the blood feud by setting a precise scale of penalties was a step in the process of legal development that eventually led to the state's monopolization of violence. In early seventh-century Kent, the state's effort to institutionalize vengeance was limited to providing a viable alternative to exacting that vengeance. As the legal system stood at this stage, vengeance could be exacted (permission) or it could be "bought off" at prices set by the state (co-optation). Thus, with Aethelberht's Code we have reached the stage at which a husband, having discovered a man in adultery with his wife, could either kill the man, or receive compensation assessed to his presumed satisfaction by the Dooms.

C. Subsequent Development of Native English Law

Several codes promulgated by English kings after Aethelberht also were concerned primarily with providing a detailed tariff for various enumerated offenses. These later native English Codes present a picture of the deterioration of domestic order and royal authority in Britain resulting from continual foreign invasion. Although Aethelberht's Code of the late sixth century did not mention *vendetta*,⁸⁵ the term was mentioned in the codes of the ninth and tenth centuries in the form of concessions, allowing its exercise while feebly attempting to regulate it.⁸⁶ With the spread of Christianity in England in the eighth and ninth centuries, adultery became a sin as well as a wrong against the husband. It was not until the tenth century, however, that this concept noticeably affected the written laws.

1. Alfred's Code

Alfred, King of Wessex in the latter part of the ninth century, promulgated a series of laws between the years 871 and 893 A.D.⁸⁷ In this Code, Alfred collected earlier laws and added a few of his own.⁸⁸ The Code set a tariff typical of the Anglo-Saxon codes. It also provided penalties for adultery: "If anyone lies with the wife of a man whose *wer-*

83. AETH., *supra* note 65, cap. 84; see 2 F. POLLOCK & F. MAITLAND, *supra* note 52, at 451.

84. AETH., *supra* note 65, cap. 83.

85. See *supra* notes 8-11 and accompanying text.

86. E.g., ALFRED cap. 42; II EDMUND. For the text of Edmund's Code, see A. ROBERTSON, *THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I*, at 6-15 (1925).

87. F. ATTENBOROUGH, *supra* note 57, at 35. For the text of Alfred's Code, see *id.* at 62-93.

88. ALFRED Intro. 49, § 9.

geld is 1200 shillings, he shall pay 120 shillings compensation to the husband; to a husband whose *wergeld* is 600 shillings, he shall pay 100 shillings compensation; to a commoner he shall pay 40 shillings compensation."⁸⁹ The penalties thus were closely tied to status. Payment may have been uncommon; the tone of the document, which was an attempt to suppress blood-feuding, suggests that *vendetta* was prevalent.

A further clause presented the earliest English example of explicit legal permission to the cuckold to exercise his vengeance. It provided:

A man may fight, without becoming liable to *vendetta* (*órwige*) if he finds another with his wedded wife, behind closed doors or under the same blanket; or [if he finds another man] with his legitimate daughter (or with his legitimate married sister); or with his mother, if she has been legally married to his father.⁹⁰

This apparently regressive provision⁹¹ reduced to writing a time-honored practice. It was very similar to the Texas statute that will be discussed in Section VI of this Note.⁹² Both provided that a man who discovered an adulterer *in flagrante delicto* with his wife legally could execute him without fear of retribution. It institutionalized the vengeance of the cuckold by explicitly permitting it.

2. *The Central Codes*

The codes of law typified by those promulgated in England from 900 to 1100 A.D. have been termed the "Central Codes."⁹³ At this time, barbarism was at its close and civilization was beginning.⁹⁴ The chief "Central" English Codes are those of Edward,⁹⁵ Aethelstan,⁹⁶ Edgar,⁹⁷ Aethelred,⁹⁸ and Cnut,⁹⁹ "all of poor quality, largely drawing on earlier English material, and showing little progress."¹⁰⁰ They do, however, show the impact of Christianity: adultery was now a sin and was explicitly prohibited. Bride-price marriage technically had become optional,¹⁰¹

89. *Id.* cap. 10.

90. *Id.* cap. 42, § 7 (author's translation). Literally, *órwige* means "without war." It evidently denoted a man who, having committed homicide under the circumstances specified, was protected from vengeance at the hands of his victim's relatives. F. ATTENBOROUGH, *supra* note 57, at 198 n.42.

91. Murray, *supra* note 42, at 98-99 (stressing similarity to ancient laws).

92. TEX. PENAL CODE art. 1220 (Vernon 1925) (repealed 1973). In Texas, the grounds for justified homicide were limited to adultery with wives.

93. A.S. DIAMOND, *supra* note 56, at 70.

94. A.S. DIAMOND, *supra* note 5, at 167.

95. F. ATTENBOROUGH, *supra* note 57, at 114-17.

96. *Id.* at 126-43.

97. A. ROBERTSON, *supra* note 86, at 16-19, 24-29.

98. *Id.* at 52-71.

99. *Id.* at 174-219.

100. A.S. DIAMOND, *supra* note 56, at 70.

101. II CNUY cap. 74 ("And no woman or maiden shall ever be forced to marry a man whom she dislikes, nor shall she be given for money, except the suitor desires of his own free

although it did not completely disappear until the end of the twelfth century.¹⁰²

Adultery, along with other illicit unions¹⁰³ and prostitution,¹⁰⁴ was prohibited by the Central Codes. The penalties for sexual misconduct were more severe and covered a greater range than before because it now was seen as a public wrong: sexual misconduct had become a "crime." The laws of Cnut strictly enforced monogamy, by mutilation if necessary,¹⁰⁵ and adultery was considered a wrong against monogamy. With these codes, not only was the husband interested in retribution against the marital interloper, but so was the state as an enforcer of morality. The legacy of these codes remained strong into the early twelfth century, as will be seen in the next section.

D. The Norman Invasion

1. *The Native Law of the Late Eleventh Century*

Around the time of the Norman invasion in 1066, a husband could kill an interloper if he found him in bed with his wife. This is illustrated by two compilations of laws that appeared soon after the Norman invasion.

Between the years 1090 and 1135 A.D., a compilation of earlier laws known as the *Leis Willelme* appeared.¹⁰⁶ This compilation echoed Alfred's Code¹⁰⁷ by allowing a father who found his daughter in adultery in either his own house or that of his son-in-law to slay the adulterer.¹⁰⁸ Presumably, this permission also extended to a husband who found his wife in similar circumstances.¹⁰⁹

Another compilation known as the *Leges Henrici Primi* stated the laws claimed by its author to be in force at the time of its writing, sometime between the years 1114 and 1118. It drew heavily on the laws of the Anglo-Saxon kings, most notably those of Cnut.¹¹⁰ The *Leges Henrici*

will to give something." Unquestionably, the Church was behind this. See A.S. DIAMOND, *supra* note 5, at 186-87.

102. A.S. DIAMOND, *supra* note 5, at 248.

103. I EDMUND cap. 4 (with nuns); V AETHELRED cap. 10 (illicit unions); VI AETHELRED cap. 11 (same); I CNU T cap. 6, § 3 (same); V AETHELRED cap. 25 (violations of marriage); VI AETHELRED cap. 28, § 2 (same); VIII AETHELRED cap. 4 (illicit intercourse); I CNU T cap. 24 (illicit unions); II CNU T caps. 6, 50, 53-55 (adultery).

104. VI AETHELRED cap. 7; II CNU T cap. 4a.

105. II CNU T cap. 53.

106. A. ROBERTSON, *supra* note 86, at 227 (dates), 252-75 (text).

107. ALFRED cap. 42, § 7.

108. LEIS WILLELME cap. 35.

109. The source of the law, Alfred's Code, permitted the husband to slay the interloper. See *supra* text accompanying notes 89-92.

110. Downer, *Leges Henrici Primi*, in ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER 175, 176-78 (M. Forkosch ed. 1966). Most scholars have accepted the *Leges* as a serious contribution, however mangled, to the law of the early twelfth century. *Id.* at 186.

Primi also echoed Alfred's Code, allowing a man to fight another man found with his wife behind closed doors or under one covering.¹¹¹

Much of the *Leges Henrici Primi* was devoted to controlling blood-feuds, which were still relatively prevalent, by placating relatives and trying to achieve royal justice.¹¹² By the end of the eleventh century, the state was interested in co-opting vengeance, including that which the husband would desire against the marital interloper. In the *Leges Henrici Primi*, the king asserted jurisdiction over the disposition of the marital interloper: "If a married man commits adultery, the king or lord shall have the man, and the bishop the woman, for the purpose of exacting a penalty."¹¹³ Presumably, the king only got the man if the cuckold did not get him first.

Before the reign of Henry I in the early twelfth century, wrongs were identified both by the damage or loss inflicted and by the affront to honor that the deed entailed.¹¹⁴ Adultery was a very great wrong when reckoned by either element, so great in fact that it was the only wrong for which composition had not become obligatory.¹¹⁵

2. Norman Reforms

When Duke William of Normandy conquered England in 1066, the Normans brought with them "a taste for strong government and a flair for administration. . . . The common law emerged in the twelfth century from the efficient and rapid expansion of institutions which existed in an undeveloped stage before 1066."¹¹⁶

Norman judicial policy favored a system of precisely measured vengeance exercised at the behest of the state. William I made two main "reforms" in the criminal law. He introduced the appeal of felony with its concomitant, trial by battle, and he substituted mutilation for death

111. LEGES HENRICI PRIMI 82, 8 [hereinafter L.H.P.]. Legitimate daughters, sisters, and lawfully wedded mothers were also included in the provision. A convenient edition is LEGES HENRICI PRIMI (L. Downer ed. 1962). The cited provision can be found in *id.* at 258-59.

112. See L.H.P., *supra* note 111, at 88, 11-20a (L. Downer ed. at 272-77).

113. *Id.* at 11, 5 (L. Downer ed. at 110-11); see *id.* at 21, 1 (L. Downer ed. at 124-25).

114. Beckerman, *Adding Insult to Iniuria: Affronts to Honor and the Origins of Trespass*, in ON THE LAWS AND CUSTOMS OF ENGLAND, *supra* note 57, at 159-81, 165. Beckerman discusses how the latter element disappeared in the development of the concept of tortious liability in English law.

115. In general, into the early twelfth century, one could not take vengeance for a wrong prior to seeking legal redress One exception to this rule existed in the case of an adulterer taken *in flagrante delicto* by the woman's husband or immediate male relative, who might lawfully kill him, no doubt because of the special outrage accruing from sexual offenses.

Id. at 166; see *id.* at 168-69.

116. J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 11 (2d ed. 1979). See generally G. KEETON, THE NORMAN CONQUEST AND THE COMMON LAW (1966).

by hanging.¹¹⁷ This substitution of mutilation for death has been identified with the so-called *lex talionis*, the "eye for an eye" of the Bible.¹¹⁸ It was a system of precisely measured co-opted vengeance, exercised by the state. A typical example was the substitution of blinding and castration for death in cases of rape.¹¹⁹

The conquering Normans were very eager to establish their authority. It was they who finally crushed the *vendetta*, sternly suppressing anything like private vengeance or the prosecution of a feud,¹²⁰ with one exception. Although somewhat limited, vengeance was still permitted in one extreme situation. While there were signs that the outraged husband who found his wife in the act of adultery could no longer slay the interloper, he nonetheless could emasculate him.¹²¹

The Norman reforms effectively established royal justice as an act taken by the state, for the purposes of the state. Wrongs against the king's subjects came to be seen primarily as wrongs against the king. Although in early Norman times injured individuals employed judicial proceedings as a means of taking private vengeance, "by the end of the twelfth century the *jurisperiti* who were making the law of the King's courts actively believed that royal justice ought not to be used as a means of private retribution, an instrument of revenge for wounded honor."¹²² Royal justice was to be used for kingly and not private ends. Delictual liability thus became restricted to actual economic loss and excluded the affront to wounded honor in most cases.¹²³

Hidden in the obscurities of the twelfth century was a critical juncture in the development of the common law. The state was attempting to supplant private vengeance and *vendetta* with action taken under its own authority—that is, by co-optation. The Normans, particularly keen on judicial vengeance, did this with nearly all offenses save adultery, which became an ecclesiastical offense: jurisdiction in cases of adultery was delegated to the Church courts. Thus, adultery became an offense punishable by the Church at a time when the state began to win acceptance for its exclusive right to mete out punishments by co-optation of private vengeance. Had adultery remained a wrong punishable by the state, the problem with which this Note is concerned might not have developed.

117. Beckerman, *supra* note 114, at 168.

118. *Exodus* 21:2-22:17; *Leviticus* 24:20.

119. J. BAKER, *supra* note 116, at 430 ("The punishment was castration and blinding, or fine and imprisonment, until 1285 when rape was made a capital felony."); 2 F. POLLOCK & F. MAITLAND, *supra* note 52, at 490; see, e.g., LEIS WILLELME cap. 18, § 2.

120. 2 F. POLLOCK & F. MAITLAND, *supra* note 52, at 484-85.

121. *Id.* at 484. "[I]n 1212, King John orders that A who has emasculated B is to have his land restored to him, if an inquest finds that B committed adultery with A's wife after being forbidden to visit her." *Id.* at 484 n.6 (citing 1 ROTULI CURIAE REGIS 126 (London 1835)).

122. Beckerman, *supra* note 114, at 172.

123. *Id.* at 178-81.

The state might have institutionalized the vengeance of the cuckold by exercising it through co-optation, but the Church did not administer a punishment sufficiently severe to co-opt the husband's vengeance.¹²⁴ The kin of the murder victim effectively had their vengeance co-opted by the king, who executed the murderer. This was institutionalization of revenge by co-optation. Although the death penalty was not given for adultery, Norman law explicitly or implicitly permitted the husband himself to act against the marital interloper, perhaps by killing him despite ecclesiastical jurisdiction over the adulterer. The state, having failed to provide an adequate remedy, did not punish the cuckold's vengeance, and thus institutionalized it through permission.

III. The Early Common Law: Emergence of the Husband's Remedies

Common-law remedies for a husband whose wife was taken away by another began to appear as early as the beginning of the thirteenth century. Theft of a wife, as opposed to mere adultery, was recognized as a wrong remediable by royal justice at least as early as 1203 A.D.¹²⁵

A royal writ for abduction became available in the early thirteenth century.¹²⁶ Its availability soon became restricted to situations in which the king's peace had been breached by an act of violence.¹²⁷ The wrong was to the husband, who had to allege damage to himself.¹²⁸ Thus, for

124. 2 F. POLLOCK & F. MAITLAND, *supra* note 52, at 367, 543-44 ("If the church had left the matter [of sexual morality] to laymen, it is probable that some of these crimes would have been sternly, if not savagely, punished." (footnote omitted)).

125. Curia Regis Roll no. 29 (Hil. 4 John (1203)) m. 9 (Lancaster), in 2 CURIA REGIS ROLLS 181-82 (1925). Bracton gives a case of felonious abduction of a wife in 1223. 3 H. BRACTON, NOTE BOOK 469, pl. 1597 (F. Maitland ed. 1887).

126. An action for the abduction of a damsel was brought in a fascinating and colorful case of 1220, complete with rescue from a nunnery and knights in shining armour. Trin. 4 Hen. III (1220), Hertford, pl. 202, in 1 SELECT PLEAS OF THE CROWN, 1200-1225 (1 Selden Soc.) 135-38 (F. Maitland ed. 1888) [hereinafter SELECT PLEAS].

127. The writs were written in the *ostensurus quare* formula and, after initial uncertainty, it was settled that chancery clerks would issue such writs only for those trespasses done "with force and arms and against the king's peace (*vi et armis et contra pacem Domini regis*)." J. BAKER, *supra* note 116, at 56-58.

128. Gyliot and Maud v. William, Y.B. 14 Edw. II (Eyre of London) (86 Selden Soc.) 125-27 (1321). The concept of a wrong to the husband's *mund*, or protection, done by the abduction, seems to survive, but the logic has been forgotten. Thus Bracton:

A person also suffers an injury, not only in his person, but also in respect of those who are under his authority, as in respect of his children or wife. A husband may also bring an action for an injury done to his wife, but not the converse, for it is worthy that a wife should be defended by her husband, but not a husband by his wife.

2 H. BRACTON, DE LEGIBUS 547 (T. Twiss ed. 1879). For a more literal translation, see 2 H. BRACTON, DE LEGIBUS 438 (S. Thorne trans., G. Woodbine ed. 1968). Bracton's reason seems curiously chivalrous.

the husband to obtain a royal writ, his allegations of adultery¹²⁹ had to be spiced up with allegations of other trespassory wrongs by the interloper, such as the taking of the husband's chattels¹³⁰ or damage to his property.¹³¹

In a colorful suit for the enormous sum of one hundred pounds, William of Somptang complained against Thomas, the village chaplain, that in April of 1261 Thomas broke into his house by pulling out the eaves and took Agnes, William's wife, by force, and begat a son on her, to William's disinheritance, and consumed and wasted his goods, and afterwards took Agnes away, and kept her against William's will and in breach of the king's peace. Thomas denied force and tort, and the jury found that, although Thomas did in fact lie with Agnes, he did not break into the house, but came in upon Agnes' invitation, and not against the peace. Since force had not been used, the only wrong was adultery, which was cognizable only in the church courts. Thomas was acquitted, and William was amerced for a false plaint.¹³²

In 1275, "ravishment," the taking away of a woman by force, was criminalized by statute.¹³³ The husband now had a writ of ravishment according to the form of this statute.¹³⁴ Ten years later, the Statute of Westminster II had a chapter concerning women,¹³⁵ and the writ of ravishment was governed by that statute.¹³⁶

These statutes made rape a felony. They also provided the cuckold

129. "Early actions for forcibly taking and abducting a wife with all her possessions almost certainly conceal elopements to which the wife in fact consented." J. BAKER, *supra* note 116, at 382.

130. Coke says that at common law the husband had "an action of *trespasse de uxore abducta cum bonis viri*," that is, for the abduction of a wife with goods (i.e. her clothes and jewelry). 2 E. COKE, *INSTITUTES* *434(4).

131. See, e.g., Assize Roll no. 911 m.16 (1260-61: Surrey), pl. 132, in H. RICHARDSON & G. SAYLES, *SELECT CASES OF PROCEDURE WITHOUT WRIT UNDER HENRY III* (60 Selden Soc.) 131-32.

132. *Id.*

133. Stat. Westm. I, 3 Edw., cap. 13, (1275), 1 *STATUTES AT LARGE* 45 (1763), *repealed*, 9 Geo. 4, ch. 31, sched. 1 (1828).

134. 2 E. COKE, *INSTITUTES* *434(4).

135. Stat. Westm. II, 13 Edw., cap. 34, (1285), 1 *STATUTES AT LARGE* 101 (1763), *repealed in part*, 9 Geo. 4, ch. 31, sched. 1 (1828), and 10 Geo. 4, ch. 34, sched. 1 (1829), *repealed with savings* by Administrations of Estates Act, 1925, ch. 23, sched. 56, sched. 2, pt. 1, *residue repealed* by Statute Law Revision Act, 1948, ch. 62, sched. 1, ch. 34. The statute reaffirmed that rape was a felony. It also provided that a wife who willingly left her husband and lived with another in adultery during her husband's lifetime would be debarred of dower unless the husband was willingly reconciled to her before his death. This was the law until recently. See 5 HALISBURY'S *STATUTES OF ENGLAND* 442-43 (2d ed. 1948); 3 C. VERNIER, *AMERICAN FAMILY LAW* § 202 (1935). The statute also made the abduction of a nun from her convent punishable by three years imprisonment.

136. E.g., Coram Rege Roll no. 162 (Mich. 1300) m. 40, London pl. 8 in 3 *SELECT CASES IN THE COURT OF KING'S BENCH UNDER ED. I* (58 Selden Soc.) 100 (G. Sayles ed. 1939) [hereinafter *SELECT CASES*].

with a remedy against the marital interloper. If the wife did not bring an appeal of felony¹³⁷ for the rape because she had consented, her husband or father could bring it.¹³⁸ Appeal of felony, the zenith of judicial institutionalization of vengeance, was tried by battle, and loss of the battle could result in the death of the "ravisher." However, trial by battle did not last very far into the fourteenth century.¹³⁹

If the husband could not recover his wife from the ravisher, either because she had divorced her husband or died, the husband could recover money damages.¹⁴⁰ The action would also subject the marital interloper to the brutal civil process of the time.¹⁴¹

A jurisdictional problem became apparent. If a wife simply went off with another man, it was a matter touching on the marriage, and all questions of marriage were for the ecclesiastical courts.¹⁴² The Statute of Westminster II secured royal jurisdiction by treating the abduction of a wife entirely in terms of the chattels taken with her, usually her clothing and jewelry.¹⁴³ If a wife simply left her husband for another man, there was no question for the royal courts. If she and her chattels were taken with what could be alleged to be force and arms against the king's peace, however, the king's courts had jurisdiction. In 1310,¹⁴⁴ for example, the

137. Proceedings by which the victim or his kin would bring the offender to justice and prove the accusation by battle. 2 F. POLLOCK & F. MAITLAND, *supra* note 52, at 605-06.

138. 2 E. COKE, INSTITUTES *433.

139. J. BAKER, *supra* note 116, at 413-14. For the procedure of trial by battle, see 3 W. BLACKSTONE, COMMENTARIES *338-41. For trial by battle generally, see H. LEA, SUPERSTITION AND FORCE pt. II (1866) (republished as H. LEA, THE DUEL AND THE OATH (1979)). A contemporary illustration of judicial combat may be found in 1 SELECT PLEAS, *supra* note 126, (1 Selden Soc.) frontis.

140. 2 E. COKE, INSTITUTES *434(5). Coke says this action was separate from the husband's action for taking away the wife as his servant, but there was no action for *servitium* before the Statute of Labourers. See *infra* section IV.A.

141. See F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 49-50 (1909).

142. See, e.g., N. ADAMS & C. DONAHUE, SELECT CASES FROM THE ECCLESIASTICAL COURTS OF THE PROVINCE OF CANTERBURY CA. 1200-1301 (95 Selden Soc.) Intro. 57, 81-88, 96, 99 (1981).

143. T. PLUCKNETT, THE LEGISLATION OF EDWARD I, at 121 (1949). A misinterpretation of these writs in the twentieth century was advanced by commentators arguing against the "Heart Balm" actions, see *infra* section V.A(2). The wife was considered in terms of the chattels taken with her in order to create an action of trespass, so that a question close to marital relations could be taken out of ecclesiastical courts for consideration in royal courts able to mete out royal sanctions. She was not legally a chattel. Although many would argue that wives were treated as chattels, it was not the statutes that accorded such treatment. Even if it is said that a husband's cause of action derived from a property interest in his relationship with his wife, it does not mean that his wife legally was property. See 1 T. STREET, FOUNDATIONS OF LEGAL LIABILITY 263 (1906) ("[S]he is sometimes treated as being in like case with chattels, so far as to admit of the use of the ordinary common-law remedies for the redress of wrongs done to the husband in respect of his conjugal rights."); see also G. CHAUCER, *The Wife of Bath's Tale*, in THE CANTERBURY TALES (c. 1388) (a woman certainly not "owned" by anyone).

144. Gyse v. Baudewyne, Y.B. 3 Edw. 2 (22 Selden Soc.) 4-5, 205-06 (1310).

defense to a writ of ravishment of wife¹⁴⁵ was that the plaintiff was in the process of divorcing her. Rather than allowing the case to turn on this question of ecclesiastical law and be sent to the Bishop, the royal court kept jurisdiction by forcing the defendant to plead the general issue—that is, to say he either did or did not ravish her.¹⁴⁶

Remedies could also sometimes be obtained at the local level. In some manorial courts, it appears that a crude injunction could lie for simple adultery. In one such case, a monk was put into the stocks by secular authority for his adulterous relationship with a married woman, and was told that he would return to the stocks if he did not stay away from her.¹⁴⁷ Several other cases¹⁴⁸ and examples of writs¹⁴⁹ for ravishment and abduction arose in the ensuing years of the fourteenth century. Attempts during this period to use royal remedies other than the writs of ravishment and abduction failed.¹⁵⁰

145. “[F]or that . . . they with force and arms ravished his wife with his goods to the value etc. and carried her off, etc.: *quare Isobel sa femme vi et armis etc. rapuerunt cum bonis et catallis ad valenciā etc. abduxerunt etc.*” *Id.* at 4.

146. *Id.* at 4-5, 205-06.

147. See, e.g., F. MAITLAND, SELECT PLEAS IN MANORIAL AND OTHER SEIGNURIAL COURTS, REIGNS OF HENRY III & EDWARD I (2 Selden Soc.) 98 (plea in the manorial court of the Abbott of Ramsey).

148. Coram Rege Roll no. 162 (Mich. 1300) m. 40, London pl. 58, in 3 SELECT CASES, *supra* note 136, (58 Selden Soc.) 100 (1939) (“with force and arms he ravished Matilda, Gilbert of Ashdown’s wife, at London, and abducted her with Gilbert’s goods and chattels and still keeps them from him, to his loss, against the peace, and against the form of the statute”); Coram Rege Roll no. 218 (Mich. 1314) m. 7d, London pl. 20, in 4 SELECT CASES, *supra* note 136, (74 Selden Soc.) 59-62 (1957) (a spurious and maliciously brought action); Coram Rege Roll no. 305 (Trinity 1336) m. 10d (crown), Lincolnshire pl. 45, in 5 SELECT CASES, *supra* note 136, (76 Selden Soc.) 90-91 (1958) (Count of Lincoln sued Hugh de Frenes for the ravishment and abduction of the Countess; acquitted at trial); Anon., Y.B. Trin. 1 Edw. 2 (17 Selden Soc.) 37 pl. 6 (1308) (writ of ravishment pending).

149. S. MILSOM, NOVAE NARRATIONES (80 Selden Soc.) 125 (1963) (writ B248: “wrongfully came and with force and arms abducted A’s wife and led her away and took and carried away his chattels found there, namely clothes, wrongfully and against the peace”); *id.* at 328 (writ C334: “wrongfully came with force and arms and seized the wife of John and led her away with John’s chattels, namely jewelry, and broke down his hedges, against the form of the statute provided by the King for such a case”); E. DE HAAS & G. HALL, EARLY REGISTERS OF WRITS (87 Selden Soc.) 181, 193 (1970) (writs R324, R365: *ostensurus quare*) *cf. id.* at 178 (writ R303: an early writ for causing loss of servants by violent trespass).

150. E.g., Coram Rege Roll, no. 140 (Easter 1294) m. 42 (Oxfordshire), in 3 SELECT CASES, *supra* note 136, (58 Selden Soc.) lxi-lxiii, 22-23 (1939) (a writ of conspiracy would not lie, because for abduction a common law writ was available). The king, of course, had his own remedy. It is treason “if a man do violate the King’s wife or the King’s eldest daughter unmarried, or the wife of the King’s eldest son and heir.” Treason Act, 25 Edw. 3 stat. 5, ch. 2 (1351), *reprinted in* 5 HALSBURY’S STATUTES OF ENGLAND 452-53 (2d ed. 1948) (said to be declaratory of the common law). Even more extreme was a statute of Henry VIII making it treason for the woman as well, even if it had happened before her marriage to the king, and misprision of treason for one who knew to fail to report it discreetly to the king. 33 Hen. 8 ch. 21 (1541), 2 STATUTES AT LARGE 319 (1763) (attaint of Queen Katherine Howard for High Treason), *repealed*, 1 Edw. 6 ch. 12 (1547), 2 STATUTES AT LARGE 392 (1763) (abrogating all

Hence, royal justice at this stage provided a remedy by a writ for attempted marriage by capture or other "ravishment" of one's wife, but the simple cuckold had no remedy. Royal justice could take cognizance only of violence in breach of the king's peace, and use of force was essential to the availability of the writ. Absent the element of violence, adultery was a matter for the ecclesiastical courts, from which there were very limited remedies,¹⁵¹ certainly none sufficient to satisfy an enraged husband. This failure of royal justice to co-opt vengeance for adultery while suppressing private blood-revenge led to the development of the "unwritten law," discussed in Section VI.

IV. The Modern Actions

A. The Development of the Action for Consortium

Aside from a few later statutory¹⁵² and case law¹⁵³ refinements, the royal writs of abduction and ravishment proved a dead end in the law. For reasons that are unclear, the actions were no longer being brought by the end of the fifteenth century. These writs originally were targeted at remedying marriage by capture. They were replaced with actions protecting against interference with relational interests.

The new actions for enticement and harboring were derived by analogy from the Statute of Labourers,¹⁵⁴ which had been enacted to remedy

treasons created since the Treason Act of 1351); see 1 W. BLACKSTONE, COMMENTARIES *222 ("A law of Henry the Eighth made it treason also for any woman who was not a virgin, to marry the King without informing him thereof: but this law was soon repealed, it trespassing too strongly as well on natural justice as female modesty."); 2 J. CAMPBELL, LIVES OF THE LORD CHANCELLORS 108 (4th ed. 1856) ("This law . . . so much frightened all the spinsters in Henry's court, that instead of trying to attract his notice . . . in the hope of wearing a crown, they shunned his approach as if he had been himself the executioner . . ."). But a failure to confirm or deny a rumored royal infidelity when ordered to do so by a Council of State resulted in a criminal prosecution in *The Countess of Shrewsbury's Case*, 2 Howell St. Tr. 769, 12 Co. Rep. 94, 77 Eng. Rep. 1369, Hobart 235, 80 Eng. Rep. 381 (Star Chamber 1612).

151. 2 F. POLLOCK & F. MAITLAND, *supra* note 52, at 543-44.

152. 6 Rich. 2 Stat. I, ch. 6 (1382), 1 STATUTES AT LARGE 360-61 (1763) (husband may sue ravisher even if wife consents), *repealed*, S.L.R. 1863; 3 Hen. 7 ch. 2 (1486), 2 STATUTES AT LARGE 69 (1763) (felony to carry off a propertied woman), *repealed*, 9 Geo. 4 ch. 31, sched. 1 (1828), 29 STATUTES AT LARGE 371 (1829), & 10 Geo. 4 ch. 34, sched. 1 (1829), 29 STATUTES AT LARGE 769 (1829); 4 & 5 Phil. & M. ch. 8 (1557), 2 STATUTES AT LARGE 515-16 (1763) (extended to the taking away of any woman), *repealed*, 9 Geo. 4 ch. 31, sched. 1 (1828), 29 STATUTES AT LARGE 371 (1829).

153. *E.g.*, 20 C. VINER, A GENERAL ABRIDGEMENT OF LAW AND EQUITY 450, L.2, no. 4 (London 1744) (citing Y.B. 43 Edw. 3 23 (1369)) (the action could be brought against a woman as well). A spurious and malicious appeal of rape was brought against an unpopular recorder of London, spiced up with lurid allegations befitting a satyr. *Athern v. Bigg*, Y.B. 1 Hen. 6 (50 Selden Soc.) 1-10 (1422).

154. 23 Edw. 3 (1349), 1 STATUTES AT LARGE 248-49 (1763); 25 Edw. 3, Stat. 1 (1350), 1 STATUTES AT LARGE 251 (1763), *repealed*, S.L.R. 1863.

the labor shortage caused by the Black Death.¹⁵⁵ It punished both the servants who left their employment without reasonable cause and those who enticed, retained, or harbored deserting servants. By 1530, a master was able to sue another who had enticed a servant away from his employ.¹⁵⁶ The action for wrongfully depriving a master of his servant was the action *per quod servitium amisit*.¹⁵⁷

Gradually, this action was extended to protect from wrongful taking any person in whom the plaintiff had a property interest. For example, it extended to protect a father from the taking of a child in which he had a property interest (an heir).¹⁵⁸ By 1619, the courts extended by analogy the action *per quod servitium amisit* to the loss of a wife's services.¹⁵⁹ The husband's action was analogous to the master's, but it was based on a loss of consortium rather than loss of services. Consortium is a bundle of rights arising out of the marital relationship, including rights to aid, comfort, society, services, and exclusive sexual relations.¹⁶⁰ The concept of consortium developed as the wife's status within the marital relationship changed.¹⁶¹

Significantly, the action for loss of consortium became recognized as an action on the case.¹⁶² The courts recognized that a harm to the wife was not a direct harm to the husband, but rather was a wrong that caused him consequential harm by impairing his right to marital consortium. A husband's right to marital consortium could be harmed by a defendant's negligent or intentional act.¹⁶³

Actions for interference with marital consortium are brought today.

155. 2 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 459-60 (3d ed. 1923). For a contemporary account of the labor shortage, see *Chronicon Henrici Knighton*, 2 ROLLS SERIES 58 (J. Lumby ed. 1895), translated in 4 ENGLISH HISTORICAL DOCUMENTS 1327-1485, at 89-91 (A. Myers ed. 1969).

156. J. BAKER, *supra* note 116, at 381.

157. See Jones, *Per Quod Servitium Amisit*, 74 LAW Q. REV. 39 (1958).

158. *Barham v. Dennis*, Cro. Eliz. 770, 78 Eng. Rep. 1001 (K.B. Trin. 42 Eliz. (1600)).

159. *Guy v. Livesey*, Cro. Jac. 501, 79 Eng. Rep. 428 (K.B. Mich. 16 Jac. I (1619)). In that case, the court said that

the action is not brought in respect of the harm done to the wife, but it is brought for the particular loss of the husband, for that he lost the company of his wife, which is only a damage and loss to himself, for which he shall have this action, as the master shall have for the loss of his servant's services.

Id. at 501, 79 Eng. Rep. at 428. Another early case is *Hyde v. Scysson*, Cro. Jac. 538, 79 Eng. Rep. 462 (K.B. Trin. 17 Jac. I (1620)) (husband's action for loss of his wife's "company and aid").

160. RESTATEMENT (SECOND) OF TORTS § 683 comment c (1977).

161. See Lippman, *supra* note 48, at 651.

162. See, e.g., *Duke of Norfolk v. Germaine*, 12 Howell St. Tr. 927, 927 (K.B. 1692); *MacFazden v. Olivant*, 6 East 387, 390-91, 102 Eng. Rep. 1335, 1336 (K.B. 1805). *Contra* *Ditcham v. Bond*, 2 M. & S. 436, 437, 105 Eng. Rep. 443, 443 (1814); *Woodward v. Walton*, 2 Bos. & Pul. (N.R.) 476, 483, 127 Eng. Rep. 715, 718 (C.P. 1807).

163. W. KEETON, *PROSSER AND KEETON ON THE LAW OF TORTS* §§ 124-125 (5th ed. 1984).

Most commonly, these are for negligence,¹⁶⁴ but actions for intentional interference were once fairly common and usually involved sexual misconduct. These actions are discussed in the next section, and the story of their decline will be told in the subsequent one.

B. Torts of Intentional Interference with Consortium

(1) *Criminal Conversation*

A cuckold may bring an action of criminal conversation—adultery—against a marital interloper.¹⁶⁵ The action for criminal conversation is an action for the loss of consortium inherent in the adultery.¹⁶⁶ The action was abolished in England over a century ago,¹⁶⁷ but, although moribund, it does exist in the United States today.¹⁶⁸

Although adultery was a concern of the Church courts¹⁶⁹ and not a crime at common law,¹⁷⁰ it became a concern of the common-law courts through the action for criminal conversation as the peculiarities of English divorce law emerged. By the end of the seventeenth century, there was but a single route to procuring a dissolution of marriage. Adultery was the only ground for dissolving a marriage,¹⁷¹ and so the first step toward dissolution was to prove the adultery by winning an action for criminal conversation, which conveniently appeared at about this time. Then the ecclesiastical courts had to grant a marital separation.¹⁷² Finally, a petition for dissolution of marriage had to be presented to the House of Lords for a vote. If the bill passed, the marriage was legally dissolved.¹⁷³ Practically, this procedure made divorce the privilege of the very rich because litigation and private lobbying were very expensive.¹⁷⁴

164. *Id.* § 125.

165. See RESTATEMENT (SECOND) OF TORTS § 685 (1977).

166. "The essential injury to the husband consists in the defilement of the marriage bed—in the invasion of his exclusive right to marital intercourse with his wife, and to beget his own children. This presumes the loss of the *consortium* with his wife . . ." *Bigaouette v. Paulet*, 134 Mass. 123, 125 (1881); see also *Tinker v. Colwell*, 193 U.S. 473, 481-90 (1904). "Where adultery is proved or admitted, loss of consortium is conclusively presumed." *Shedrick v. Lathrop*, 106 Vt. 311, 316, 172 A. 630, 632 (1934).

167. Stat. 20 & 21 Vict. ch. 85, sched. 59 (1857).

168. See *infra* section V.A(2).

169. 3 BLACKSTONE, COMMENTARIES *139; 4 *id.* *65; 2 R. BURN, THE ECCLESIASTICAL LAW 401-05 (9th ed. London 1842); R. GREY, A SYSTEM OF ENGLISH ECCLESIASTICAL LAW 351 (4th ed. London 1743).

170. *E.g.*, *Rigault v. Galizard*, 7 Mod. 78, 81-82, 87 Eng. Rep. 1106, 1108, Holt K.B. 597, 598, 90 Eng. Rep. 1230, 1231, 2 Salk. 552, 552, 91 Eng. Rep. 467, 468 (Mich. 1 Anne (1702)) (this case recognized a civil action). Adultery was made a capital crime by statute under the Commonwealth. See *infra* note 225 and accompanying text.

171. J. BAKER, *supra* note 116, at 407.

172. This separation was a divorce *a mensa et thoro*, from bed and board. *Id.*

173. *Id.* at 406-07; Holdsworth, *The Ecclesiastical Courts and Their Jurisdiction*, in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 55 (1908).

174. See Judge Maule's address to the prisoner, a convicted bigamist, in *Regina v. Hall*,

Out of this procedure, however, grew the notion that the action of criminal conversation could be brought for its own sake, to seek compensation from or to harm the marital interloper.¹⁷⁵

The action could be used to "punish" the marital interloper. Lord Mansfield said that "an action of criminal conversation has a mixture of penal prosecution,"¹⁷⁶ and requested damages could be enormous.¹⁷⁷ The consent of the wife,¹⁷⁸ or even that of the husband,¹⁷⁹ would not bar the action, but such facts were relevant for mitigation of damages. Because the action belonged to the husband for his loss, the wife's consent was immaterial.¹⁸⁰

The Times (London), Apr. 3, 1845, reprinted in L. BLOM-COOPER, *THE LAW AS LITERATURE* 285-87 (1961).

175. Blackstone wrote:

Adultery, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury (and surely there can be no greater,) the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary. But these are properly increased or diminished by circumstances; as the rank and fortune of the plaintiff and defendant; the relation or connection between them; the seduction or otherwise of the wife, founded on her previous behavior and character; and the husband's obligation by settlement or otherwise to provide for those children, which he cannot but suspect to be spurious.

3 W. BLACKSTONE, *COMMENTARIES* *140.

176. *Birt v. Barlow*, 1 Dougl. 171, 174, 99 Eng. Rep. 113, 114 (K.B. 1779). Compare *Weedon v. Trumbell*, 5 T.R. 357, 360, 101 Eng. Rep. 199, 201 (K.B. 1783) ("[I]t is a civil action, brought to recover satisfaction for a civil injury done to the husband, and not to punish the defendant for having broken the laws of morality and decency . . .") with *Chambers v. Caulfield*, 6 East 244, 249, 102 Eng. Rep. 1280, 1282 (1805) ("*Weedon v. Trumbell* is not founded on any former precedent in the law[;] all principles of morality and public policy are the other way.").

177. *E.g.*, *Duke of Norfolk v. Germaine*, 12 Howell St. Tr. 927, 948 (K.B. 1692) (£100,000 sought in action on the case for criminal conversation; approximately £5 was awarded, but the Duke got the divorce he wanted by private Act of Parliament eight years later.).

178. *Rogers v. Goddard*, 2 Shaw K.B. 255, 89 Eng. Rep. 925 (Hil. 34 & 35 Car. 2 (1684)); see *Davis v. Cochran*, 42 Ga. App. 215, 217, 155 S.E. 379, 380 (1930); see also *RESTATEMENT (SECOND) OF TORTS* § 685 comment e (1977).

179. *Coot v. Berty*, 12 Mod. 232, 232, 88 Eng. Rep. 1283, 1283-84 (K.B. Mich. 10 Wil. 3 (1699)) (plea that the "husband had bargained and sold her to the adulterer" held bad; "license by husband to wife to lie with another man, cannot be pleaded in bar to an action of trespass by husband; nor that she was a notorious lewd woman; but these matters may be given in mitigation of damages."). *Contra* *RESTATEMENT (SECOND) OF TORTS* §§ 687-688 (1977) (but condonation does not bar suit); cf. *Kenny, Wife-Selling in England*, 45 *LAW Q. REV.* 494 (1929).

180. Furthermore, by the law at the time of the origin of the action, if a raped woman conceived, it raised the conclusive presumption that she had consented. T. BLOUNT, *NOMOLEXIKON: A LAW DICTIONARY*, Rape (2d ed. London 1691) ("[f]or she cannot conceive unless she consent."). Although the wife had legally "consented," the husband still was grievously wronged and fortunately had a cause of action.

(2) *Enticement*

Enticement was a civil action by a husband against another who had unjustifiably persuaded his wife to leave him.¹⁸¹ The action appeared in England in the mid-eighteenth century with the case of *Winsmore v. Greenbank*.¹⁸² Unlike the old action for abduction, the action for enticement was directed at one who used charm, rather than physical force, to entice away the wife of another. Accordingly, enticement was considered an action on the case rather than an action of trespass because the husband's loss was considered an indirect consequence of the defendant's wrong rather than directly and immediately caused by it.¹⁸³ Distinctions are no longer made between trespass and case; the lines are now drawn between intentional and negligent acts,¹⁸⁴ and enticement is an intentional act. Like the other actions for interference with marriage, enticement was also based on loss of consortium.¹⁸⁵

(3) *Alienation of Affections*

In the United States, not only did enticement and harboring exist as separate torts, but an indigenous version of these torts developed in the mid-nineteenth century.¹⁸⁶ The action for alienation of affections renders liable one who purposefully alienates the affections of another's spouse.¹⁸⁷ The action for alienation of affections is also based on loss of consortium.¹⁸⁸ It usually subsumes the actions for criminal conversation and enticement,¹⁸⁹ which are theoretically separate torts, although they are often brought together.¹⁹⁰ An important element in an action for alienation of affections is the mental anguish caused by the loss of the

181. RESTATEMENT (SECOND) OF TORTS § 684 (1977); see *id.* §§ 686-688 (examples of justifications).

182. Willes 577, 125 Eng. Rep. 1330 (C.P. 1745); cf. S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 292 (2d ed. 1981) ("Before that date, so far as the legal records go, Englishmen had kept austere to kidnapping."). But see *supra* section III.

183. Harboring, the tort of persuading a spouse to remain away from the other spouse, was technically a separate tort, although it was usually subsumed in an action for enticement. See *Winchester v. Fleming*, [1958] 1 Q.B. 259, (H.L.); Payne, *Enticing and Harboring Spouses*, 21 MOD. L. REV. 296 (1958). No action lies for harboring the plaintiff's wife if defendant's motive is humanitarian, to secure her from the ill treatment of her husband. *Berthan v. Cartwright*, 2 Esp. 480, 170 Eng. Rep. 426 (1796); *Philip v. Squire*, Peake 114, 170 Eng. Rep. 99 (1791).

184. See RESTATEMENT (SECOND) OF TORTS § 684(1) (1977).

185. *Nelson v. Jacobsen*, 669 P.2d 1207 (Utah 1983).

186. See generally *Brown*, *The Action for Alienation of Affections*, 82 U. PA. L. REV. 472 (1934).

187. RESTATEMENT (SECOND) OF TORTS §§ 683, 686 (1977).

188. "The gist of both the action for alienation of affections and that for criminal conversation is the same, the loss of the consortium." *Valentine v. Pollak*, 95 Conn. 556, 561, 111 A. 869, 872 (1920).

189. RESTATEMENT (SECOND) OF TORTS §§ 683-685 (1977).

190. See, e.g., *Sebastian v. Kluttz*, 6 N.C. App. 201, 205-06, 170 S.E.2d 104, 106 (1969).

spouse's love. Actions for alienation of affections were formerly relatively common in America. In England, however, the comparable action of enticement was rarely brought.¹⁹¹

V. Co-optive Remedies Available Through the State

The state may institutionalize a cuckold's vengeance by co-optation or by permission. Effective co-optation would require the state to act in a way that would harm the marital interloper to such an extent that the husband would consider personal vengeance unnecessary. If the state fails to do this effectively, it will have to institutionalize by permission that vengeance which it does not co-opt. The common law never effectively co-opted the vengeance of the discovering cuckold. It provided remedies that co-opted it to some extent, but because the co-optation was not complete, legal permission had to coexist with legal co-optation.

Two courses of action, therefore, are open to the discovering cuckold. He may rely on the branch of the law that permits him to exercise his vengeance,¹⁹² or he may have his vengeance effectively co-opted by remedies available through the state's legal system, as discussed in this section.

Within the judicial system there are three options: the cuckold may sue for damages in one of the common-law consortium actions, he may go to equity and seek an injunction, or he may use the authority of the state to punish the adulterer by filing a criminal complaint. The availability of these remedies varies among jurisdictions.

A. Civil Actions at Common Law

(1) *Damages in Consortium Actions*

Earlier this century and to a limited extent today, the wronged husband might have tried to avenge himself on the marital interloper by putting him to the expense of defending a civil action and exposing him to the risk of paying large money damages. In a consortium action, the plaintiff is entitled to his actual economic loss, such as his share of his wife's inheritance,¹⁹³ and punitive damages.

There are many reported cases of large damage awards.¹⁹⁴ In assessing damages, the jury has virtually unlimited discretion and commonly will award large compensatory and punitive damages.¹⁹⁵ In a suit

191. "There seems to be no reported case between 1796 and 1904." *Place v. Searle*, [1932] 2 K.B. 497, 501. In that case, the court held that the action still existed. *Id.* at 512; see Note, 5 CAMBRIDGE L.J. 112 (1933).

192. See *infra* section VI.

193. *Winsmore v. Greenbank*, Willes 577, 125 Eng. Rep. 1330 (1745).

194. See 42 C.J.S. *Husband and Wife* §§ 696 n.84, 706 n.67 (1944 & Supp. 1985).

195. Brown, *supra* note 186, at 499-503.

The injury, though not precisely measureable, justifies substantial damages . . . In

against an archetypal homewrecker,¹⁹⁶ the jury typically will award large punitive damages to soothe the plaintiff's injured honor and mental anguish.¹⁹⁷ Damages have at times been large enough to ruin the defendant. Evidence of the defendant's wealth is admissible in determining the amount of punitive damages,¹⁹⁸ but the defendant's poverty will not protect him from an exorbitant award.¹⁹⁹ Ill treatment of the wife by her husband²⁰⁰ and low moral character of the husband or wife²⁰¹ will not bar a suit, but they are factors considered in mitigation of damages.

There are several drawbacks to this remedy: the length of time it might take to gain satisfaction, the public exposure and humiliation to which the plaintiff and his innocent family members are subject, and the doubts potentially cast on the legitimacy of the plaintiff's children. Furthermore, the damages may be inadequate compensation. Despite these limitations, actions for criminal conversation and alienation of affections became increasingly popular in the 1920s.²⁰² However, the very popularity of the actions for intentional interference with marriage eventually proved to be their downfall.

(2) *The Decline of the Actions*

The actions for deliberate interference with marriage, along with the actions for breach of promise to marry and seduction, became known as

view of the obvious vagueness of the basis for computing compensatory damage it clearly follows there is no definite line between compensatory and punitive damages . . . [T]o justify an award of punitive damages, malice in its strict sense, or at least a wanton disregard of the plaintiff's rights, must be shown.

Id. at 500-01.

196. *E.g.*, *Eclov v. Birdsong*, 166 F.2d 960 (D.C. Cir. 1948).

197. "The degradation which ensues, the distress and mental anguish which necessarily follow, are the real causes of recovery." *Botwinick v. Annenberg*, 204 A.D. 436, 439, 198 N.Y.S. 151, 153 (1923) (quoting *Yundt v. Hartrunft*, 41 Ill. 9, 12 (1866)).

198. *Brown*, *supra* note 186, at 502 ("This is obviously justifiable, since the adequate punishment of a wealthy person will obviously require much higher damages than if he were comparatively poor.").

199. *E.g.*, *Wilford v. Berkeley*, 1 Burr 609, 609, 97 Eng. Rep. 472, 472 (1758) (£500 against a part time Exchequer clerk who earned £50 a year not excessive, "for, the injury suffered by the husband, and the estimate of the damages to be assessed . . . depend entirely upon circumstances, which it was strictly and properly the province of the jury to be the judge of"); *Elliott v. Nicklin*, 5 Price 641, 146 Eng. Rep. 719 (Exch. 1818) (£1000 against an unemployed minor living at home not excessive).

200. *Winter v. Wroot*, 1 M. & Rob. 404, 174 Eng. Rep. 140 (1834).

201. *Calcroft v. Earl of Harbrough*, 4 C. & P. 499, 172 Eng. Rep. 798 (1831) (plaintiff's wife was an actress; £100 damages).

202. This was determined by a statistical assessment of the citations in 42 C.J.S. *Husband and Wife* §§ 692-696 (1944 & Supp. 1985). The verdicts in the 1920s ranged from five to twenty thousand dollars. Larger awards include: *Mohn v. Tingley*, 191 Cal. 470, 217 P. 733 (1923) (\$75,000 compensatory and \$25,000 punitive); *Overton v. Overton*, 121 Okla. 1, 246 P. 1095 (1926) (\$150,000 reduced to \$60,000); *Woodhouse v. Woodhouse*, 99 Vt. 91, 130 A. 758 (1925) (\$465,000 reduced to \$125,000).

“Heart Balm” actions.²⁰³ Probably as a backlash to the actions’ increasing popularity and jury awards, an anti-“Heart Balm” movement emerged in the 1930s and quickly swept the country.²⁰⁴

There were fears that these actions were brought to extort money out of innocent defendants who did not want publicity, and those willing to publicize their intimate disgraces were viewed with suspicion.²⁰⁵ However, there was no proof that the actions for consortium were being abused any more than other tort actions.²⁰⁶

England²⁰⁷ and many American states abolished these actions by statute,²⁰⁸ and state supreme courts continue to abolish them.²⁰⁹ Other states have tightly limited the available remedies.²¹⁰ However, the action retains its vitality in parts of the United States.²¹¹

203. For a detailed history of this subject, see *Fundermann v. Mickelson*, 304 N.W.2d 790, 791-94 (Iowa 1981); *Cannon v. Miller*, 322 S.E.2d 780, 788-804 (N.C. Ct. App. 1984), *vacated*, 313 N.C. 324, 327 S.E.2d 888 (1985); Note, *Heartbalm Statutes and Deceit Actions*, 83 MICH. L. REV. 1770 (1985).

204. The leading law review articles published as part of this national debate include Feinsinger, *Legislative Attack on “Heart Balm,”* 33 MICH. L. REV. 979 (1935); Feinsinger, *Current Legislation Affecting Breach of Promise to Marry, Alienation of Affections, and Related Actions*, 10 WISC. L. REV. 417 (1935); Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923); Kane, *Heart Balm and Public Policy*, 5 FORDHAM L. REV. 63 (1936); Lippman, *supra* note 48.

205. The action that incurred the most public distaste was the action for breach of promise to marry, which was often abused. See F. WELLMAN, *THE ART OF CROSS-EXAMINATION* 302-61 (4th ed. 1936).

206. See Kane, *supra* note 204, at 66.

207. Law Reform (Miscellaneous Provisions) Act 1970, sched. 5.

208. *E.g.*, ARIZ. REV. STAT. ANN. § 25-341 (Supp. 1985); CAL. CIV. CODE § 43.5 (West 1982); COLO. REV. STAT. § 13-20-202 (1973); CONN. GEN. STAT. ANN. § 52-572b (West Supp. 1984); DEL. CODE ANN. tit. 10, § 3924 (1974); D.C. CODE ANN. § 16-923 (1981); GA. CODE ANN. § 1-1-17 (1981); IND. CODE ANN. § 34-4-4-8 (Burns Supp. 1981) (criminal offense to file such an action); MICH. COMP. LAWS ANN. § 600.2901 (West 1968); MINN. STAT. ANN. § 553.02 (West Supp. 1985); NEV. REV. STAT. § 41.380 (1979); N.Y. CIV. RIGHTS LAW § 81 (McKinney 1976) (criminal offense to file such an action); OHIO REV. CODE ANN. § 2305.29 (Anderson 1981); OKLA. STAT. ANN. tit. 76, § 8.1 (West Supp. 1985); OR. REV. STAT. § 30.850 (1983); TEX. FAM. CODE ANN. § 4.05 (Vernon Supp. 1984); VA. CODE ANN. § 8.01-220 (1984); WIS. STAT. ANN. § 768.03 (West 1981) (criminal offense to file such an action); WYO. STAT. § 1-23-101 (1977) (same).

209. *E.g.*, *Fundermann v. Mickelson*, 304 N.W.2d 790, 794 (Iowa 1981); *Kline v. Ansell*, 287 Md. 585, 414 A.2d 929 (1980); *Fadgen v. Lenkner*, 469 Pa. 272, 365 A.2d 147 (1976).

210. *E.g.*, ARK. STAT. ANN. § 37-201 (Supp. 1985) (one year statute of limitations on alienation of affections and criminal conversation); ILL. ANN. STAT. ch. 40, paras. 1901-1907 (Smith-Hurd 1980) (no punitive damages for alienation of affections); KY. REV. STAT. ANN. § 413.140(1)(c) (Michie/Bobbs-Merrill 1970) (one year statute of limitations on alienation of affections and criminal conversation); MO. ANN. STAT. § 516.140 (Vernon 1952 & Supp. 1986) (two year statute of limitations on criminal conversation); R.I. GEN. LAWS § 9-1-14 (1985); S.C. CODE ANN. § 15-37-50 (Law. Co-op 1976) (limitation on recoverable costs); TENN. CODE ANN. § 28-3-104 (1980) (one year statute of limitations for alienation of affections).

211. *E.g.*, *Schoenecke v. Ronnigen*, 315 N.W.2d 612 (Minn. 1982) (\$122,000 alienation of affections verdict reduced to \$50,000); *Vacek v. Ames*, 221 Neb. 333, 377 N.W.2d 86 (1985)

It seems that spousal love has been removed from the definition of consortium. Actions for loss of consortium caused by physically incapacitating injury may still be brought, but jurisdictions that permit an action for deliberately causing the loss of the love of the other spouse are increasingly rare, "because spousal love is not property subject to theft."²¹²

B. Equity

In some jurisdictions, the cuckold may obtain equitable relief by way of injunction.²¹³ Such an injunction prohibits the marital interloper from seeing or communicating with the cuckold's wife. Most courts presented with the question have denied injunctive relief, because enforcement is both impractical and a severe invasion of personal liberty.²¹⁴

Some commentators have urged that the equitable remedy of injunction be made available.²¹⁵ While damages can only compensate for harm already done, an injunction might prevent the damage from arising at all. New Jersey has agreed with these commentators in theory, although not in practice,²¹⁶ but Georgia,²¹⁷ Alabama,²¹⁸ and especially Texas,²¹⁹ have granted injunctions.

The first reported case to present the question, and the centerpiece

(\$100,000 jury verdict for alienation of affections not excessive); *Creason v. Myers*, 217 Neb. 551, 558, 350 N.W.2d 526, 530 (1984); *Zarella v. Robinson*, 460 A.2d 415 (R.I. 1983); *Nelson v. Jacobsen*, 669 P.2d 1207 (Utah 1983).

212. *Fundermann v. Mickelson*, 304 N.W.2d 790, 794 (Iowa 1981).

213. See generally *Brown*, *supra* note 186, at 503-04; Moreland, *Injunctive Control of Family Relations*, 18 KY. L. REV. 207 (1930); Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 674-75 (1916); Schoonover, *Comment: Piracy on the Matrimonial Seas—The Law and the Marital Interloper*, 25 SW. L.J. 594, 607-08 (1971).

214. E.g., *Snedaker v. King*, 111 Ohio St. 225, 145 N.E. 15 (1924) (injunction dissolved by Ohio Supreme Court as "extreme"); see Recent Decision, 25 COLUM. L. REV. 373 (1925); Recent Case, 38 HARV. L. REV. 396 (1925); Recent Case, 74 U. PA. L. REV. 97 (1925); Recent Case Note, 34 YALE L.J. 327 (1925). More recent cases denying injunctive relief include *Lyon v. Izen*, 131 Ill. App. 2d 94, 268 N.E.2d 436 (1971); *White v. Thomson*, 324 Mass. 140, 85 N.E.2d 246 (1949).

215. Moreland, *supra* note 213, at 224 ("[T]he remedy at law is not adequate, and a property right on which to ground the injunction can be found if the court does not care to protect personal rights, as such."); Schoonover, *supra* note 213, at 609 ("[I]n extreme instances equitable relief should be available . . ."); cf. *Brown*, *supra* note 186, at 503-04 (1934) ("[W]here the plaintiff acts soon enough, he ought to be entitled to relief by having the defendant enjoined from acting in such a way as to deprive the plaintiff of *consortium* . . . because of the obvious inadequacy of the legal remedy of damages" But *Brown* concludes that the practical obstacles are too formidable.).

216. E.g., *Devine v. Devine*, 20 N.J. Super. 522, 90 A.2d 126 (1952).

217. E.g., *Stark v. Hamilton*, 149 Ga. 227, 99 S.E. 861 (1919).

218. E.g., *Latham v. Kanger*, 267 Ala. 433, 103 So. 2d 336 (1958).

219. *Smith v. Womack*, 271 S.W. 209 (Tex. Civ. App. 1925); *Witte v. Bauderer*, 255 S.W. 1016 (Tex. Civ. App. 1923); *Ex parte Warfield*, 40 Tex. Crim. 413, 50 S.W. 933 (1899).

for subsequent debate, was the 1899 Texas case of *Ex parte Warfield*.²²⁰ In that case, an applicant for a writ of habeas corpus had been enjoined from visiting Mrs. Morris or from interfering with Mr. Morris' attempts to communicate with her. The applicant had violated the terms of the injunction, was fined one hundred dollars, and was ordered to serve three days in jail. The Texas Supreme Court denied the habeas corpus petition, stating that it was fully within the lower court's equitable jurisdiction to issue such an injunction.²²¹ Subsequent cases have upheld similar injunctions.²²²

Commentators have addressed two main issues in this area: first, the academic issue of whether the court is protecting property rights or personal rights, and second, the practical issue of whether the courts should be enjoining extra-marital affairs. Whether it is a personal or a property right that is protected, an injunction is a great invasion of personal liberty. An injunction is, however, the most "civilized" of the remedies available to the discovering cuckold. It is a preventive measure, rather than vengeful, designed to allow the husband to restore happy marital relations with his wife. It does not actually damage the interloper in his person or his property. It is also not very co-optive of any vengeance that the cuckold might desire.

C. The Criminal Law

In the few jurisdictions where adultery remains a crime, the husband may decide to avenge himself on the marital interloper by invoking the heavy wrath of the criminal law.

Adultery was not a common-law crime, but rather was an ecclesiastical offense. With the decline of ecclesiastical authority, the offense grew less severely punished.²²³ However, due to our Puritan heritage, adultery has been a crime in most American jurisdictions.²²⁴ In 1650, the Puritans of the Commonwealth made adultery a capital offense by statute,²²⁵ and although this statute was nullified after the Restoration,²²⁶ the Puritans in the American colonies made adultery with a married woman a capital offense.²²⁷

In colonial times, adultery was seen almost entirely as an offense

220. 40 Tex. Crim. 413, 50 S.W. 933 (1899).

221. *Id.* at 425-28, 50 S.W. at 936-38.

222. *E.g.*, *Smith v. Womack*, 271 S.W. 209 (Tex. Civ. App. 1925); *Witte v. Bauderer*, 255 S.W. 1016 (Tex. Civ. App. 1923).

223. 2 F. POLLOCK & F. MAITLAND, *supra* note 52, at 543-44.

224. For a brief history, see *United States v. Clapox*, 35 F. 575, 578 (D. Or. 1888).

225. 4 W. BLACKSTONE, COMMENTARIES *64-65.

226. As was all Commonwealth legislation. Stat., 12 Car. 2, cap. 12 (1660).

227. *Commonwealth v. Call*, 28 Mass. (21 Pick.) 509, 511 (1839); Wolford, *The Laws and Liberties of 1648*, 28 B.U.L. REV. 426, 461 (1948); *cf.* N. HAWTHORNE, *THE SCARLET LETTER* (1850) (portraying the life of an unwed mother in colonial New England).

against morality and chastity and far less as a wrong against the husband.²²⁸ As in all capital cases of the time, convictions were rare.²²⁹ This Puritan legacy, however, remained with us, and adultery was made an offense by statute in most states.²³⁰ These statutes were so poorly enforced that their effect was to breed disrespect for law while providing an opportunity for blackmail.²³¹ In 1955, the American Law Institute recommended in its Model Penal Code that adultery be decriminalized,²³² and many states have followed that recommendation.²³³ Where it survives, the crime is usually a misdemeanor,²³⁴ but in some jurisdictions, it has merited imprisonment.²³⁵ Adultery prosecutions still take

228. In Rhode Island in 1661 a husband forfeited his bond of £10 when his wife failed to appear to answer a charge of adultery. R. MORRIS, *STUDIES IN THE HISTORY OF AMERICAN LAW* 194 (2d ed. 1959) (citing Hick's Case, 1 R.I. Court Rec. 76, 77, 79 (1661-62)).

229. Wolford, *supra* note 227, at 461.

230. Examples of current statutes include COLO. REV. STAT. § 18-6-01 (1973); D.C. CODE ANN. § 22-301 (1981); FLA. STAT. ANN. § 798.01 (West 1976); GA. CODE ANN. § 26-2009 (Harrison 1983); IDAHO CODE § 18-6601 (1979); ILL. ANN. STAT. ch. 38, para. 11-7(a) (Smith-Hurd 1979); MD. ANN. CODE art. 27, § 4 (1957) (\$10 fine); MASS. GEN. LAWS ANN. ch. 272, § 14 (West 1970) (up to three years imprisonment); MICH. COMP. LAWS ANN. §§ 750.29-.30 (West 1968) (felony); MINN. STAT. ANN. § 609.36 (West Supp. 1985); NEB. REV. STAT. § 28-704 (1985); N.H. REV. STAT. ANN. § 645:3 (1974); N.Y. PENAL LAW § 255.17 (McKinney 1980); OKLA. STAT. ANN. tit. 21, §§ 871-872 (West 1983) (up to five years imprisonment); R.I. GEN LAWS § 11-6-2 (1981); S.C. CODE ANN. §§ 16-15-60, -70 (Law. Co-op. 1976); UTAH CODE ANN. § 76-7-103 (1978); VA. CODE ANN. § 18.2-365 (1982 & Supp. 1985) (Virginia also criminalizes conspiring to cause one's spouse to commit adultery. *Id.* § 18.2-367.); W. VA. CODE § 61-8-3 (1984) (minimum \$20 fine); WIS. STAT. ANN. § 944.16 (West 1982). For American adultery laws generally, see 2 C. TORCIA, *WHARTON'S CRIMINAL LAW* §§ 214-216 (1979 & Supp. 1985).

231. R. PERKINS & R. BOYCE, *CRIMINAL LAW* 455 (3d ed. 1982).

232. MODEL PENAL CODE § 207.1, comments at 204-10 (Tent. Draft No. 4, 1955).

233. *E.g.*, CAL. PENAL CODE §§ 269a-269b (West 1955), *repealed by* 1975 Cal. Stat. ch. 71, §§ 5-6, 131, 133, *commented upon in* Finz, *California's New Sex Law: A Beginning*, 1 CRIM. JUST. J. 79 (1976), and Note, *Updating California's Sex Code*, 1 CRIM. JUST. J. 65 (1976); IOWA CODE ANN. § 702.1 (West 1950), *repealed by* 1976 Iowa Acts (66 G.A.) ch. 1245, ch. 4, § 526 (effective Jan. 1, 1978); KAN. STAT. ANN. § 21-908 (1964), *repealed by* 1969 Kan. Sess. Laws ch. 180, § 21-4701 (effective July 1, 1970); KY. REV. STAT. ANN. § 436.070 (Michie/Bobbs-Merrill 1970), *repealed by* 1974 Ky. Acts ch. 406, § 336 (effective Jan. 1, 1975); ME. REV. STAT. ANN. tit. 17, § 101 (1964), *repealed by* 1975 Me. Laws ch. 499, § 5 (effective May 1, 1976); N.J. STAT. ANN. § 2A:88-1 (West 1969), *repealed by* 1978 N.J. Laws ch. 95, § 2C:98-2 (effective Sept. 1, 1979); N.D. CENT. CODE § 12-22-09 (1960), *repealed by* 1973 N.D. Laws ch. 117, § 4; OR. REV. STAT. § 167.005 (1965), *repealed by* 1971 Or. Laws ch. 743, § 432; PA. STAT. ANN. tit. 18, § 4505 (Purdon 1963), *repealed by* 1972 Pa. Laws No. 335 § 5; S.D. COMP. LAWS §§ 22-22-17, -18 (1967), *repealed by* 1976 S.D. Laws ch. 158, § 22-8; VT. STAT. ANN. tit. 13, §§ 201-202 (1979), *repealed by* 1981 Vt. Laws No. 223 (Adj. Sess.) § 24; WASH. REV. CODE § 9.79.110 (1961), *repealed by* 1975 Wash. Laws 1st ex.s. ch. 260, § 9A.92.010 (effective July 1, 1976). *But see* practice commentary to N.Y. PENAL LAW § 255.17 (McKinney 1980).

234. *E.g.*, ARIZ. REV. STAT. ANN. § 13-1408(A) (1978); GA. CODE ANN. § 26-2009 (Harrison 1983); MD. ANN. CODE art. 27, § 4 (1957) (\$10 fine); W. VA. CODE § 61-8-3 (1984) (minimum \$20 fine).

235. *E.g.*, ALA. CODE tit. 14, § 16 (1958) (up to two years imprisonment), *modified by*

place, and the statutes have consistently withstood attacks on their validity.²³⁶

Prosecutions for adultery are rare, and although the husband may have the option of filing a criminal complaint,²³⁷ the actual decision to prosecute is not his. Furthermore, if there is a prosecution, the same humiliation to the husband and his family that occurs in the civil actions can take place.

Thus, Puritanism, and the absence of any ecclesiastical jurisdiction, led to the incorporation of sanctions against adultery in American criminal law, but these laws do not always effectively co-opt the cuckold's vengeance. Laws that more effectively institutionalized the cuckold's vengeance, by permission, are discussed in the next section.

VI. Permission: The "Unwritten Law"

The "unwritten law"²³⁸ is part of the American legal system and has institutionalized the cuckold's vengeance by permitting direct action. The husband, upon discovering his wife and the marital interloper in the act of adultery, might choose to kill the marital interloper then and there without later suffering a conviction for homicide.

The "unwritten law" alters the conclusions that would otherwise be reached under criminal law. If a husband, upon discovering an act of adultery, forms a conscious plan to kill the interloper and carries it out,

1977 Ala. Acts No. 607, § 7005, to ALA. CODE § 13A-13-2 (1982) (misdemeanor); ARIZ. REV. STAT. ANN. § 13-221 (1956) (up to three years imprisonment), *modified by* 1977 Ariz. Sess. Laws ch. 142, § 64 (effective Oct. 1, 1978) (codified as amended at ARIZ. REV. STAT. ANN. § 13-1408 (1978)) (now a misdemeanor); CONN. GEN. STAT. ANN. § 53-218 (West 1958) (up to five years imprisonment), *modified by* 1969 Conn. Pub. Acts 828, § 82 (effective Oct. 1, 1971) (codified as amended at CONN. GEN. STAT. ANN. § 53a-81 (West 1985)) (now a misdemeanor); MASS. GEN. LAWS ANN. ch. 272, § 14 (West 1970) (up to three years imprisonment); MICH. COMP. LAWS ANN. §§ 750.29-30 (West 1968) (felony); OKLA. STAT. ANN. tit. 21, §§ 871-872 (West 1983) (up to five years imprisonment); VT. STAT. ANN. tit. 13, § 203 (1974) (up to three years imprisonment if caught in bed), *repealed by* 1979 Vt. Laws No. 152 (Adj. Sess.).

A federal statute makes it a felony to transport a woman across state lines for any immoral purpose. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (1982)). This act has been used to prosecute adulterous interstate liaisons. *See* Caminetti v. United States, 242 U.S. 470 (1916); *Reamer v. United States*, 318 F.2d 43 (8th Cir. 1963) (prosecution for interstate "date").

236. *See, e.g.*, *Kraus v. Barrington Hills*, 571 F. Supp. 538 (N.D. Ill. 1982); *State v. Ronek*, 176 N.W.2d 153 (Iowa 1970); *Commonwealth v. Stowell*, 389 Mass. 171, 49 N.E.2d 357 (1983); Annotation, *Validity of Statute Making Adultery and Fornication Criminal Offenses*, 41 A.L.R. 3d 1338 (1972).

237. *E.g.*, ARIZ. REV. STAT. ANN. § 13-1408(B) (1978); MINN. STAT. ANN. § 609.36(2) (West 1984).

238. *See* 43A WORDS AND PHRASES 197 (1969).

he commits murder.²³⁹ If the discovery provokes the husband to such a heat of passion that he kills the interloper before his passions have cooled, he commits manslaughter,²⁴⁰ sometimes said to be manslaughter of "the lowest degree."²⁴¹ In theory, the finding by a husband of an interloper in bed with his wife should be taken as a circumstance tending to show adequate provocation.²⁴² In some states, however, it has been per se adequate provocation.²⁴³

There are two manifestations of the unwritten law. The first is a state's decision not to prosecute the husband for homicide, because avenging an incident of adultery is legal in the jurisdiction. In such a case, the unwritten law is in fact "written." The second is the jury's refusal to convict the cuckold of the charged offense. This is the "unwritten" part of the unwritten law.

A. The Origins of the "Unwritten Law"

The "unwritten law" emerged from the power and willingness of a jury to refuse to convict a man charged with a law that members of the jury did not like.²⁴⁴ This unwillingness to convict originated after almost all homicides were classified as capital offenses.²⁴⁵ The early English

239. See generally 1 O. WARREN & B. BILAS, WARREN ON HOMICIDE § 96 (1938 & Supp. 1962).

240. *Rex v. Maddey*, 1 Vent. 158, 86 Eng. Rep. 108 (K.B. 1670) (record is in A. KIRALFY, A SOURCE BOOK OF ENGLISH LAW 32-34 (1957)); *Regina v. Mawgridge*, Kelying 119, 137 n.1, 84 Eng. Rep. 1107, 1115 n.1 (Q.B. Hil. 5 Anne (1707)) ("but this law hath been executed with great benignity"); *State v. Flory*, 40 Wyo. 184, 276 P. 458 (1929).

241. Blackstone wrote that

if a man takes another in the act of adultery with his wife and kills him directly upon the spot . . . it is not absolutely ranked in the class of justifiable homicide . . . but it is manslaughter. It is, however, the lowest degree of it; and therefore in such a case the court directed the burning in the hand to be lightly inflicted, because there could not be a greater provocation.

4 W. BLACKSTONE, COMMENTARIES *191-92.

242. Note, *The Unwritten Law as a Defense to Homicide*, 19 NEB. L. BULL. 146, 147 (1940).

243. See, e.g., *State v. Yanz*, 74 Conn. 177, 181, 50 A. 37, 39 (1901); 2 BISHOP'S CRIMINAL LAW § 708 (9th ed. 1923).

244. See generally Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 MICH. L. REV. 413 (1976) [hereinafter Green, *Jury and Homicide*]; Green, *Societal Concepts of Criminal Liability for Homicide in Medieval England*, 47 SPECULUM 669 (1972) [hereinafter Green, *Societal Concepts*].

245. Henry II expanded the king's peace to cover all cases of homicide, suppressed private composition, and made all homicides capital except the most desperate self-defense. Green, *Jury and Homicide*, *supra* note 244, at 417-20. These highly formal and inelastic rules would have hanged many who would otherwise have been able to make composition, or who were not truly culpable of murder. "In an age without police so that even the good citizen could hardly avoid participation in fights, and without much medical knowledge so that wounds were often fatal, killing was a hazard of the same order as today's involvement in a road accident." S. MILSON, *supra* note 182, at 422.

jury was self-informing and composed of persons supposed to have a first-hand knowledge of the events and persons in question: "The judge instructed the jury on the law, but was himself almost entirely dependent upon the jury for his knowledge of the case."²⁴⁶ The trial jury thus had the power to state the verdict in a form that compelled the judgment it believed the defendant deserved, and thereby to effectively amend established laws to reflect prevailing social attitudes.²⁴⁷ Further, "[j]urors made unacceptable rules produce acceptable results by adjusting the facts, and since it was the result that they desired to control, any facts they stated would be those of a clear and predictable case."²⁴⁸

Juries believing that a defendant should not be hanged soon developed a formulaic verdict that the defendant had been cornered by the deceased and could not otherwise have escaped death.²⁴⁹ Once they agreed upon a verdict, the jurors stuck to their story. They could also find a defendant entirely innocent and acquit. By the mid-fourteenth century, juries were acquitting or giving verdicts of self-defense in eighty percent of homicide cases.²⁵⁰

Among these cases were homicides committed by a husband who had discovered his wife in bed with an interloper. Thus, in a case in 1341, the jurors were faced with a murder prosecution of a husband who, upon finding his wife and the interloper in bed together, had taken revenge with an axe. The petty jury found the defendant had killed the interloper because he was under attack and could not otherwise have escaped death.²⁵¹

Similar refusals by juries to render guilty verdicts in cases in which they believed the killing was justified became the "unwritten law." This compassion became most famous in cases of a husband killing a marital interloper.

B. The Written Part of the "Unwritten Law": Justifiable Homicide

Some American states, either by statute or judicial decision, made it legal for a husband to kill an interloper caught in the act of adultery with his wife.²⁵² This legalization represented institutionalization of the cuck-

246. Green, *Jury and Homicide*, *supra* note 244, at 414.

247. *Id.*

248. S. MILSOM, *supra* note 182, at 422.

249. "[M]edieval juries tended to characterize felonious but not especially heinous homicides as acts of self-defense." Green, *Jury and Homicide*, *supra* note 244, at 427.

250. *Id.* at 430-32.

251. Green, *Societal Concepts*, *supra* note 244, at 679-80.

252. The civil law provides an interesting comparison. Its primary difference from the common law is that since ancient times the cuckold was allowed to kill the wife as well as the marital interloper. The law permitted slaying as an immediate expression of the husband's just resentment, rather than an exercise of the ancient Roman *patria potestas*. 2 B. COHEN, *JEWISH AND ROMAN LAW: A COMPARATIVE STUDY* 635 (1966) (citing 1 WESTRUP, *INTRODUC-*

old's vengeance by explicit permission. This section presents those laws. It also compares the statutory scheme that was used by Texas with the judicial solution reached by Georgia. In discussing these rules, the marital interloper will be referred to as the "paramour," the term used by the courts.

There are advantages for a state willing to commit the "unwritten law" to writing. If sympathetic prosecutors or juries follow the unwritten law in contravention of existing statutes, then it would improve the perceived authority of the state to incorporate the unwritten law explicitly in its statutory scheme. If the state asserts that it is the source of the legality of a practice, that assertion may gradually be accepted, and the state, as source of the law, may be able to change it. Further, if an act of violence must be tolerated, it is better for the state if the act is seen as conforming with the law of the state. Explicit acquiescence enhances the state's perceived authority; forced toleration of an "illegal" act discredits the state's laws and authority.²⁵³

(1) *Texas*

The Texas justifiable homicide statute essentially permitted vengeance.²⁵⁴ The Texas statute was not an attempt to co-opt the cuckold's vengeance, but rather authorized direct exercise of that vengeance. The Texas statute thus was the truest example of a modern law that achieved institutionalization by permission. Until 1974, when it was repealed, the Texas statute provided:

Homicide is justifiable when committed by the husband upon one taken in the act of adultery with the wife, provided the killing take place before the parties to the act have separated. Such circumstance cannot justify a homicide where it appears that there has been, on the part of the husband, any connivance in or assent to the adulterous connection.²⁵⁵

Initially, the statute was given a broad, liberal interpretation, but by the 1930s it came to be construed more strictly. The early case of *Price v. State*²⁵⁶ set the pattern for a liberal reading of the statutory terms. In

TION TO EARLY ROMAN LAW 176 (1944)); P. CORBETT, *THE ROMAN LAW OF MARRIAGE* 127-29 (1930). "Likewise, the Divine Hadrian wrote that the murderer of a man who violated him or his own should be discharged." DIG. 48.8.1.4. However, at times the husband was expected to kill the wife or daughter as well. 2 C. SHERMAN, *ROMAN LAW IN THE MODERN WORLD* § 923, at 478 (1937); DIG. 48.5.39.8 (Pap.).

These Roman laws were the probable roots of the French C. PEN. art. 324 (Daloz) (repealed 1975): "[I]n cases of adultery, . . . the murder of one's spouse as well as the accessory, at the very moment of discovery in the very act in the matrimonial home, is excusable."

253. See Roberts, *The Unwritten Law*, 10 KY. L.J. 45 (1922).

254. TEX. PENAL CODE arts. 561-562 (1857); art. 567 (1879); art. 672 (1895); art. 1102 (1911); art. 1220 (Vernon 1925); *repealed*, 1973 Tex. Gen. Laws ch. 399, § 3(a).

255. TEX. PENAL CODE art. 1220 (Vernon 1925).

256. 18 Tex. App. 474 (1885). The court adopted a liberal Delaware decision on provoca-

Price, the court interpreted "taken in the act" to mean not the *very act*, but circumstances that reasonably suggested to the husband that adultery had occurred or was about to occur; the phrase "before they have separated" was taken to mean while the wife and her paramour were still in each other's company.²⁵⁷

The Texas statute justified homicide if the husband discovered the parties copulating,²⁵⁸ wherever that was,²⁵⁹ if he acted on reasonable appearances.²⁶⁰ Despite the Texas courts' willingness to construe the justifiable homicide statute broadly, there were nonetheless limitations on its breadth. The actual adultery must have been a surprise to the husband,²⁶¹ the killing must have been motivated by the present adultery,²⁶² and there must have been some indecency between the paramour and the wife.²⁶³ Although an early case established that the statute permitted the husband to kill his wife as well as her paramour,²⁶⁴ Texas courts criticized this interpretation and reversed it the following decade.²⁶⁵ Furthermore, Texas judges refused to extend the statute to permit a wife to kill her husband's paramour.²⁶⁶

Under the Texas statute, the injury to the paramour was only justifi-

tion, *State v. Pratt*, 1 Del. Crim. (1 Houst.) 249 (1867), save that what was provocation for manslaughter in Delaware justified homicide in Texas.

257. *Price*, 18 Tex. App. at 479-84; *accord Shaw v. State*, 510 S.W.2d 926, 930-31 (Tex. Crim. App. 1974); *Cox v. State*, 100 Tex. Crim. 402, 403-04, 273 S.W. 580, 581 (1925); *Williams v. State*, 73 Tex. Crim. 480, 484-85, 165 S.W. 583, 585-87 (1914).

258. *E.g.*, *Dewberry v. State*, 74 S.W. 307, 308-09 (Tex. Crim. App. 1903).

259. *Giles v. State*, 43 Tex. Crim. 561, 564, 67 S.W. 411, 412 (1902). Note that this is broader than Alfred's statute. *See supra* note 90 and accompanying text.

260. "[I]f the circumstances were such as to cause appellant reasonably to believe from his standpoint that his wife and the deceased . . . were about to copulate, [then] he would be justified in acting on such appearances." *Gregory v. State*, 50 Tex. Crim. 73, 78, 94 S.W. 1041, 1043 (1906); *accord Shaw v. State*, 510 S.W.2d 926, 930-31 (Tex. Crim. App. 1974).

261. *Burton v. State*, 129 Tex. Crim. 234, 239, 86 S.W.2d 768, 771 (1935) (husband had twice before found his wife and deceased in a compromising position; murder); *Zimmerman v. State*, 121 Tex. Crim. 468, 473-74, 51 S.W.2d 327, 329 (1932) (wife was living in adultery with deceased; husband planted dynamite in deceased's stove; murder).

262. *Morrisson v. State*, 39 Tex. Crim. 519, 521, 47 S.W. 369, 370 (1898); *Massie v. State*, 30 Tex. App. 64, 69-70, 16 S.W. 770, 772-73 (1891).

263. *McFarland v. State*, 149 Tex. Crim. 516, 520-21, 196 S.W.2d 829, 831 (1946) (flirting not enough); *Ryan v. State*, 122 Tex. Crim. 464, 470, 55 S.W.2d 829, 832 (1932) (had arm around wife, saw husband, fled, shot in back; not enough); *Holman v. State*, 92 Tex. Crim. 364, 367, 243 S.W. 1093, 1095 (1922) (sitting in lap, going into hotel together not enough).

264. *Cook v. State*, 78 Tex. Crim. 116, 120, 180 S.W. 254, 256 (1915).

265. *Billings v. State*, 102 Tex. Crim. 338, 343-44, 277 S.W. 687, 689 (1925); *accord Morris v. State*, 442 S.W.2d 703, 704 (Tex. Crim. App. 1969); *Steadham v. State*, 119 Tex. Crim. 475, 476, 43 S.W.2d 944, 945 (1931); *Jimenez v. State*, 103 Tex. Crim. 163, 167, 280 S.W. 829, 832 (1925); *see also Note, Is Husband's Act in Killing Wife Taken in Act of Adultery Justifiable Homicide in Texas?*, 2 TEX. L. REV. 111, 114 (1923); *Recent Case*, 4 TEX. L. REV. 383 (1926) (killing of wife taken in adultery not justified).

266. *Barr v. State*, 146 Tex. Crim. 178, 188, 172 S.W.2d 322, 325 (1943); *Reed v. State*, 123 Tex. Crim. 348, 351-52, 59 S.W.2d 122, 123-24 (1933).

able when inflicted with the intent to kill. This rule was highlighted by the decision in *Sensobaugh v. State*,²⁶⁷ when the court affirmed the appellant's conviction for aggravated assault. Sensobaugh had found the paramour with his wife under circumstances that justified the conclusion that they were about to engage in intercourse. Sensobaugh drew a gun, but stated that he did not want to kill the paramour and castrated him instead.

The appellant contended that he was immune under the statute. The court held that:

Under the facts, the statute might have justified the appellant had he killed the injured party. He chose, however, not to kill him, but to maim him, or to inflict serious bodily injury upon him without the intent to kill. We find no warrant for extending the statute so as to give immunity for such conduct. . . . Even under our statute, the paramour does not forfeit his privilege of escape, nor does he wholly forfeit his right to defend his life. Doubtless, if serious bodily injury had been inflicted by the appellant in an attempt to kill the injured party, his immunity would be secure under the statute, but the record negatives such an intent, and makes it plain that his intent was not to kill, but to torture and maim the paramour.²⁶⁸

Although the husband was required to act with intent to kill, he did not have to kill the paramour in the heat of passion; he was permitted to kill in cold blood.²⁶⁹ Thus, with legislative policy allowing the husband to lawfully execute the paramour,²⁷⁰ a husband so wronged could have appointed himself the lawful executioner of one he found in bed with his wife.

(2) Georgia

Until 1977, Georgia also permitted a husband or father to kill the paramour of his spouse or child under limited circumstances.²⁷¹ This rule

267. 92 Tex. Crim. 417, 244 S.W. 379 (1922).

268. *Id.* at 417-18, 244 S.W. at 379 (citation omitted).

269. Stumberg, *Defense of Person and Property under Texas Criminal Law*, 21 TEX. L. REV. 17, 17-19 (1942) ("[T]he judicial decisions give the paramour a sporting chance, since if he counter-attacks and kills the husband in order to escape death or bodily injury at the hand of the husband his offense is . . . murder without malice, which is the Texas equivalent of voluntary manslaughter.").

270. MODEL PENAL CODE, comments at 208-09 (Tent. Draft No. 4, 1955). But the adulterous interloper need not have expected execution, at least by 1971. *Great Am. Reserve Ins. v. Sumner*, 464 S.W.2d 212, 216 (Tex. Civ. App. 1971) ("[P]articipation in an adulterous affair does not naturally lead to a violent and fatal ending. [The] Penal Code provi[sion] that homicide is justifiable when committed by the husband . . . does not necessarily mean that every adulterer is bound to anticipate death as the inevitable result of his act." Plaintiff succeeded in collecting on her husband's accidental death policy, after he was killed by another who found him in adultery with his wife.). *Contra McCrary v. N.Y. Life Ins.*, 84 F.2d 790, 794 (8th Cir. 1936); *Szymanska v. Equitable Life Ins.*, 37 Del. (7 Harr.) 272, 278, 183 A. 309, 313 (1936).

271. This interpretation of the statute was abrogated in 1977:

was a creature of judicial interpretation²⁷² of a general justifiable homicide statute.²⁷³

The Georgia courts interpreted the justifiable homicide law as a class of self-defense, while the Texas statute was in effect a law allowing revenge. The most significant distinction between the Georgia and Texas rules was that the killing under the Georgia rule was defensive in nature and had to be necessary to prevent and defend against the adultery. A killing after the adultery was vengeance, and therefore was murder or manslaughter depending on whether it was committed in the sudden heat of passion.²⁷⁴ The defensive nature of the justification allowed killing to

In this day of no-fault, on-demand divorce, when adultery is merely a misdemeanor, and when there is a debate raging in the country about whether capital punishment even for the most heinous crime is proper, any idea that a spouse is ever justified in taking the life of another—adulterous spouse *or* illicit lover—to prevent adultery is uncivilized. This is murder; and henceforth, nothing more appearing, an instruction on justifiable homicide may not be given.

Burger v. State, 238 Ga. 171, 172, 231 S.E.2d 769, 771 (1977) (citations omitted).

272. The leading Georgia Supreme Court justices to so construe the statute were Joseph Henry Lumpkin (1799-1867) in *Biggs v. State*, 29 Ga. 723 (1860); his father's great-grandson, Samuel Lumpkin (1848-1903), in *Wilkerson v. State*, 91 Ga. 729, 17 S.E. 990 (1893); and his own grandson, John Henry Lumpkin II (1856-1916), in *Gossett v. State*, 123 Ga. 431, 51 S.E. 395 (1905). A HISTORY OF THE GEORGIA SUPREME COURT 48, 168, 192 (J. Harris ed. 1948).

273. GA. PENAL CODE § 75 (1910); GA. CODE ANN. § 26-1016 (1933); *id.* § 21-901(f) (1972). The rule owed its origins to the antebellum case of *Biggs v. State*, 29 Ga. 723, 728-29 (1860) (Lumpkin, J.), in which the court held that the statute was intended

to clothe the juries in criminal cases, in which they are made the judges of the law as well as the facts, with large discretionary powers over this class of offenses; and leave it with them to find whether the particular instance stands on the same footing of reason and justice as the cases of justifiable homicide specified in the code[.] Has an American jury ever convicted a husband or father of murder or manslaughter, for killing the seducer of his wife or daughter? And with this exceedingly broad and comprehensive enactment on our statute book, is it just to juries to brand them with perjury for rendering such verdicts in this State? Is it not their right to determine whether, in reason or justice, it is not as justifiable in the sight of Heaven and earth, to slay the murderer of the peace and respectability of a family, as one who forcibly attacks habitation and property? What is the annihilation of houses or chattels by fire and faggot, compared with the destruction of female innocence; robbing woman of that priceless jewel, which leaves her a blasted ruin, with the mournful motto inscribed upon its frontals, thy glory is departed? Our sacked habitations may be rebuilt, but who shall repair this moral desolation? How many has it sent suddenly, with unbearable sorrow, to their graves?

In what has society a deeper concern than in the protection of female purity, and the marriage relation? The wife cannot surrender herself to another. It is treason against the conjugal rights. Dirty dollars will not compensate for a breach of the nuptial vow. And if the wife is too weak to save herself, is it not the privilege of the jury to say whether the strong arm of the husband may not interpose, to shield and defend her from pollution?

274. *E.g.*, *Cloud v. State*, 81 Ga. 444, 451, 7 S.E. 641, 642 (1888):

Speaking for myself, I think that gunpowder and ball are great preservers of human virtue; and if I were on a jury, I do not hesitate to say that I would acquit a man who would kill another under such circumstances. But the law is . . . that the killing must

stop an adulterous relationship of which the husband or father was aware if it seemed to the husband or father to be the only way to do so.²⁷⁵ In contrast, under the Texas statute a husband was only permitted to act if he was surprised with a present adultery. However, the Georgia rule did allow the killing of the paramour if he was "taken in the act."²⁷⁶ It extended to the protection of daughters²⁷⁷ and fiancées,²⁷⁸ although evidence of the woman's chastity was admissible on the question of whether it was necessary to kill to protect it,²⁷⁹ which was a question for the jury.²⁸⁰

In contrast to the situation in Texas, in Georgia the wife *could* kill her husband's paramour,²⁸¹ but just as in Texas, the spouse was not per-

be to prevent the adultery, and it is only in such case that the killing would be justified.

This quote is from the regional reporter; the first sentence is not in the official report. *See also* Ellison v. State, 137 Ga. 193, 73 S.E. 255 (1911) (syllabus by the Court); O'Shields v. State, 125 Ga. 310, 314-15, 54 S.E. 120, 121-22 (1906); Baker v. State, 111 Ga. 141, 142, 36 S.E. 607, 608 (1900); Farmer v. State, 91 Ga. 720, 727-28, 18 S.E. 987, 990 (1894); Mays v. State, 88 Ga. 399, 402, 14 S.E. 560, 561 (1891); Stewart v. State, 66 Ga. 90, 100 (1880) (Jackson, C.J., concurring); Hill v. State, 64 Ga. 453, 469 (1880).

275. *Miller v. State*, 9 Ga. App. 599, 599-600, 71 S.E. 1021, 1021 (1911) (involuntary manslaughter conviction overturned after trial court failed to instruct jury that a father had a right to protect his daughter from a continuing adulterous relationship, by homicide if necessary); *see Brown v. State*, 228 Ga. 215, 219, 184 S.E.2d 655, 658 (1971) ("The gist of [*Miller*] is that where a continuing adulterous affair exists, as opposed to mere past acts of misconduct, if a jury believes the killing was done to prevent future misconduct, an acquittal is authorized."); *Scroggs v. State*, 94 Ga. App. 28, 30, 93 S.E.2d 583, 585 (1956) ("[I]n order to justify such a killing it is not necessary that the act be in progress, or that it is to be committed then and there. It is enough if it be apparent that the killing is necessary to prevent a planned act of sexual intercourse."). But if defendant killed the paramour "under a violent sudden impulse of passion engendered by the circumstances and conditions," the jury could have convicted the husband of voluntary manslaughter. *Todd v. State*, 75 Ga. App. 711, 716-17, 44 S.E.2d 275, 280 (1947); *accord Campbell v. State*, 204 Ga. 399, 403, 49 S.E.2d 867, 870 (1948).

276. *Coart v. State*, 156 Ga. 536, 556, 119 S.E. 723, 733 (1923) ("justified more as a concession to that righteous and justifiable indignation which is a natural concomitant of those holy feelings upon which love of home and the protection of its purity must of necessity rest"); *Richardson v. State*, 70 Ga. 825, 830-31 (1883) (adopting the rationale of Jackson's concurrence in *Stewart v. State*, 66 Ga. 90 (1880)); *Lassiter v. State*, 61 Ga. App. 203, 208, 6 S.E.2d 102, 104, (1939) ("[T]here is no distinction which makes the killing of an adulterer by a husband while engaged in the act any different from a killing which takes place as the guilty adulterer rises and attempts to flee."); *Gibson v. State*, 44 Ga. App. 264, 161 S.E. 158 (1931); *see also Miller v. State*, 63 S.E. 71, 573 (Ga. 1909) ("[T]he human cur who has invaded the domestic fold and who is likely to invade it further, may be killed, even though the injured person does not catch him in the very act.") (dictum in a case about animals).

277. *Gossett v. State*, 123 Ga. 431, 434, 51 S.E. 394, 395 (1905); *Miller v. State*, 9 Ga. App. 599, 601-02, 71 S.E. 1021, 1021-22 (1911).

278. *Futch v. State*, 90 Ga. 472, 479-80, 16 S.E. 102, 104 (1892).

279. *Gossett v. State*, 123 Ga. 431, 437-40, 51 S.E. 394, 396-97 (1905).

280. *Cloud v. State*, 81 Ga. 444, 450, 7 S.E. 641, 641 (1888); *Rossi v. State*, 7 Ga. App. 732, 737, 68 S.E. 56, 59 (1910).

281. *Daniels v. State*, 162 Ga. 366, 369, 133 S.E. 866, 869 (1926) ("Under the homely

mitted to kill the other spouse.²⁸² Another difference between the Georgia and Texas justifiable homicide rules was that, in Georgia, the paramour was not given the so-called "sporting chance." "[A] man surprised by the husband immediately after an actual, or immediately before an intended adulterous connection, can lawfully defend himself against the husband's violence by flight only, or at least by means short of deadly."²⁸³ However, the paramour in Georgia justifiably could have defended himself with deadly force in the limited circumstance when the husband, knowing of the adultery, hoped to avail himself of the justifiable homicide law by lying in wait for the paramour so as to "catch him in the act" to become his legal executioner.²⁸⁴

In the published appellate decisions of the Georgia courts, judges typically were careful to point out that the rule was "not an exposition of any 'unwritten law,' but [was] a well-defined principle of the law reduced to writing."²⁸⁵ Yet the Georgia rule did in fact allow the killing of an adulterer "taken in the act," and, thus, like the Texas statute, institutionalized the revenge of the cuckold by permitting it, rather than by co-opting it.

(3) Other American Jurisdictions

At one time, two other American jurisdictions, New Mexico and Utah, had statutes justifying the killing by a husband of his wife's paramour if he found them together in adultery.

New Mexico's statute provided the unwritten law as a defense if the interloper had been caught "in the act."²⁸⁶ This language was inter-

maxim that what is sauce for the goose is sauce for the gander, the . . . principles are applicable in a proper case where the wife is the slayer."); accord *Scroggs v. State*, 94 Ga. App. 28, 93 S.E.2d 583 (1956). This rule also extended to common-law wives. *Drewry v. State*, 208 Ga. 239, 244, 65 S.E.2d 916, 919 (1951).

282. *Henderson v. State*, 136 Ga. App. 490, 491, 221 S.E.2d 633, 635 (1975).

283. *Drysdale v. State*, 83 Ga. 744, 746, 10 S.E. 358, 358 (1889); see *supra* note 269.

284. *Wilkerson v. State*, 91 Ga. 729, 735, 17 S.E. 990, 992 (1893) ("[T]he law never makes justifiable a homicide committed in the spirit of revenge, and for the purpose of revenge only.").

285. *Coart v. State*, 156 Ga. 536, 555, 119 S.E. 723, 732 (1923); see *Miller v. State*, 9 Ga. App. 599, 601, 71 S.E. 1021, 1022 (1911) ("There is no 'unwritten law' in this State in criminal cases.").

286. The statute read:

Upon a prosecution for murder or manslaughter, in addition to other defenses which may be offered, it may be shown as a complete defense that the homicide resulted from the person's use of deadly force upon another who was at the time of the homicide in the act of having sexual intercourse with the accused's wife. In order for this defense to be available to the accused, the accused and his wife must have been living together as husband and wife at the time of the homicide.

N.M. COMP. LAWS § 1076 (1897); N.M. PENAL CODE § 1468 (1915); N.M. STAT ANN. § 40A-2-1 (1972), 1636 N.M. Laws ch. 303, §§ 2-4; *repealed*, 1973 N.M. Laws ch. 241, § 6. The statute was repealed when New Mexico was confronted with ratification of the Equal

preted in the lone reported case more narrowly than the similar language in the Texas statute. In *State v. Greenlee*,²⁸⁷ the court said that

[t]he purpose of the law is not vindictive. It is humane. It recognizes the ungovernable passion which possesses a man when immediately confronted with his wife's dishonor. It merely says the man who takes life under those circumstances is not to be punished; not because he has performed a meritorious deed; but because he has acted naturally and humanly.²⁸⁸

The strict language of the statute did not require heat of passion, however, and so, like the Texas statute, it allowed a husband to execute the paramour in cold blood. Thus the husband's vengeance, not otherwise effectively co-opted, was permitted by the state.

Utah also had an unwritten law statute.²⁸⁹ In the scant case law, courts interpreted the Utah statute to cover situations similar to those covered by the Texas or New Mexico laws, but also to require a sudden heat of passion.²⁹⁰ The effect of the statute was to transform what would have been manslaughter into justifiable homicide.

C. The "Unwritten" Part of the "Unwritten Law": Jury Verdicts

Juries sometimes refuse to convict defendants charged with behavior they do not believe should be criminal.²⁹¹ Although the judge can instruct the jury with law that, if followed, would require conviction, the jury may disregard it and apply the law as it sees fit. Juries have the power to do this, have been doing so for centuries, and continue to do so. The double jeopardy clause of the United States Constitution²⁹² ensures the jury the last word in criminal cases, because once the cuckold has been acquitted, he cannot be retried by a prosecutor hoping to find a less sympathetic jury.

Juries have shown a propensity to acquit husbands charged with the murder or manslaughter of a marital interloper. All "normal" sources of

Rights Amendment. Daniels, *The Impact of the ERA on the New Mexico Criminal Code*, 3 N.M.L. REV. 107, 107-09 (1973).

287. 33 N.M. 449, 269 P. 331 (1928).

288. *Id.* at 455, 269 P. at 333.

289. "Homicide is also justifiable . . . [w]hen committed in a sudden heat of passion caused by the attempt of the deceased to commit a rape upon or to defile the wife, daughter, sister, mother or other female dependent of the accused, or when the defilement has actually been committed." UTAH COMP. LAWS § 1925 (1876); UTAH COMP. LAWS § 4461(3) (1888); UTAH REV. STAT. § 4168 (1898); UTAH COMP. LAWS § 8032(4) (1917); UTAH CODE ANN. § 76-30-10 (1953); *repealed*, 1973 Utah Laws, ch. 196, § 76-10-1401.

290. *State v. Besares*, 75 Utah 141, 144, 283 P. 738, 738-39 (1929); *State v. Williams*, 49 Utah 320, 328, 163 P. 1104, 1107 (1917) (dictum); *State v. Botha*, 27 Utah 289, 300-03, 75 P. 731, 736-37 (1904); *Territory v. Halliday*, 5 Utah 467, 473-74, 17 P. 118, 122 (1888).

291. See generally Roberts, *supra* note 253; Note, *supra* note 242.

292. U.S. CONST. amend. V ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb").

law, that is, positive law emanating from the state, direct a conviction, yet the repeated acquittals suggest another law, and this is the "unwritten law." Its source is the lay community from which the jurors are drawn, and it reflects the popular will.²⁹³ Although courts often vehemently denounce it for virtually bypassing the judicial system,²⁹⁴ until recently, they seemed to expect it.²⁹⁵ Certainly, in some parts of the country, the local bar expected it.²⁹⁶

The unwritten law has been criticized because it breeds disrespect for the written law.²⁹⁷ It is also said to damage legal doctrine because the

293. See Frank, *Lawlessness*, in 9 *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 277-79 (1937).

294. See, e.g., *People v. Young*, 70 Cal. App. 2d 28, 36, 160 P.2d 132, 136 (1945); *Jones v. People*, 23 Colo. 276, 283, 47 P. 275, 277 (1896); *Stean v. Commonwealth*, 267 Ky. 413, 420, 102 S.W.2d 363, 367 (1937); *Wehenkel v. State*, 116 Neb. 493, 495, 218 N.W. 137, 138 (1928). Official judicial hostility towards the "unwritten law" provokes interesting questions in a land where the people are theoretically the ultimate sovereign. See generally H. HART, *THE CONCEPT OF LAW* chs. I-IX (1961); H. KELSEN, *GENERAL THEORY OF LAW AND STATE* (1945).

295. *McCrary v. N.Y. Life Ins.*, 84 F.2d 790, 794 (8th Cir. 1936) ("[I]njury at the hand of an incensed husband who, in his own home, finds one in adultery with his wife . . . is reasonably foreseeable."); *Szymanska v. Equitable Life Ins.*, 37 Del. (7 Harr.) 272, 278, 183 A. 309, 313 (1936) ("[O]ne, who in the pursuit of his lust, makes improper advances to the wife . . . of another, in her own home, creates voluntarily a situation fraught with danger to himself in that discovery by and violence at the hands of the outraged husband are reasonably foreseeable, and such as naturally and probably will result."). These acts might not be thought so foreseeable if they usually resulted in murder convictions. It seems almost as if the courts think the killing is proper.

296. The most well-documented example is Oklahoma. The reported Oklahoma cases renouncing the unwritten law exceed all those from the rest of the country. "The so-called unwritten law, . . . 'the right to avenge a wrong done a female member of one's family by killing the wrongdoer' does not exist in this jurisdiction." *January v. State*, 16 Okla. Crim. 166, 175, 181 P. 514, 517 (1919); see *Neece v. State*, 70 Okla. Crim. 60, 67, 104 P.2d 568, 571-72 (1940) ("Under the facts and the law, a judgment and sentence of murder would be upheld in this case. . . . [T]he jury was lenient."); *Alexander v. State*, 66 Okla. Crim. 219, 226, 90 P.2d 949, 953 (1939); *Merrick v. State*, 56 Okla. Crim. 88, 93-94, 34 P.2d 281, 283 (1934); *Kell v. State*, 53 Okla. Crim. 45, 53, 6 P.2d 836, 839 (1931) ("[T]he defendant should have been convicted of murder instead of manslaughter, and the fact that he was only convicted of manslaughter . . . is probably due to the illicit relations which existed between deceased and defendant's wife, which the jury considered as mitigation of the offense."); *Posey v. State*, 50 Okla. Crim. 129, 296 P. 527 (1931); *Pickett v. State*, 40 Okla. Crim. 289, 296, 268 P. 732, 734 (1928). Clearly, Oklahoma lawyers would not have repeatedly appealed on this ground without some reason for believing it existed. Finally, the problem was last addressed in *Hamilton v. State*, 95 Okla. Crim. 262, 244 P.2d 328 (1952), which suggested a rebuttable presumption of temporary insanity:

The unwritten law . . . does not exist in Oklahoma, but we can perceive where a man of good moral character . . . , highly respected in his community, having regard for his duties as a husband and the virtue of women, upon learning of the immorality of his wife, might be shocked, or such knowledge might prey upon his mind and cause temporary insanity. In fact, it would appear that such would be the most likely consequence of obtaining such information.

Id. at 269, 244 P.2d at 335.

297. The theory of Roberts, *supra* note 253.

insanity defense is often successfully used—or abused—to present the circumstances of the adultery to the jury.²⁹⁸ However, the written law failed to institutionalize the cuckold's vengeance through co-optation. Thus, by approving self-help, the "unwritten law" emerged to institutionalize it through permission.

Conclusion

Adultery was the only great wrong in primitive society that, save for a few short periods, remained a private wrong as other anti-social behavior became criminalized. For other serious wrongs, the state co-opted the victim's vengeance by acting it out, as in the Roman law of theft. However, because the wrong remained either private or a matter for religious authorities, the state could not co-opt the rage of the marital interloper's victim. Instead, the state institutionalized the cuckold's vengeance by permitting its actual exercise. To protect its monopoly of violence, the state would logically be forced to punish the husband who takes the law into his own hands. Yet sometimes, as in Texas, it would not, and other times, inhibited by juries, it could not do so.

The fundamental problem with the law concerning adultery has been that the act of adultery is not thought to merit death, while the discovering cuckold is thought entitled to exact it. Whether this paradox derives from the social importance of the marital relationship, from the dominance of the male in our culture, or from a combination of these and other factors, is a question beyond the realm of legal theory. It is clear, however, that adultery presents a gap in the theory of co-optation, which otherwise accounts for much of the law's response to anti-social behavior. This Note, by presenting the parallel theory of state permission of private vengeance, suggests a solution to this problem and a way to understand more fully the development of our law.

*Jeremy D. Weinstein**

298. The thesis of Note, *supra* note 242.

* Member, Third Year Class