NO GREATER PROVOCATION?
ADULTERY AND THE MITIGATION OF MURDER IN ENGLISH LAW

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K.J. KESSELRING

ABSTRACT: Proponents of equality before the law have recently sought to eradicate partial defences in homicide cases premised on a wife's adultery, an effort given greater resonance by concerns that lighter sentences contribute to the high numbers of women killed by intimate male partners. Participants in these discussions sometimes imagine that the adultery defense has a centuries long history, an assumption shared by some historians. This article demonstrates that in English law, judges only came to accept adultery as a provocation sufficient to mitigate a charge of murder to manslaughter in the late 1600s. Even then, adultery served to moderate the punishment for a man who killed his wife's sexual partner, not the wife. That a woman's infidelity partially excused her killing only entered into legal practice in the nineteenth century, this article suggests. While the article's primary purpose is to correct a pervasive misconception of the timelessness and tenacity of notions that a husband might kill his unfaithful wife with some degree of impunity, it also suggests that altered perceptions of female sexuality, male honor, and the purposes of marriage, as well as shifting attitudes to crime and punishment, drove the emergence of this "long tradition" in the nineteenth century.

Reformers in much of the common law world have recently turned their attentions to laws pertaining to murder and manslaughter, but perceptions of the past maintain a hold. In England and Wales, the Coroners and Justice Act (2009) abandoned notions of provocation that developed in the seventeenth century, instead stipulating that "loss of control" will serve as the means of mitigating charges of murder to a lesser offence. If a person has reasonable grounds for losing control, of a sort that accords with contemporary norms and values, that loss of control can be adduced as a partial defense on a homicide charge. Concerns about blaming victims and gender bias have helped shape the shift away from provocation defenses. Whether a married woman's sexual infidelity might in some way serve as a partial defense that moderates her husband's killing of her from murder to something less serious has proven especially controversial. (The reverse, a wife killing an adulterous husband, gets far less attention, but then women far less often kill their partners for any reason.[1]) Drafters of the

Krista Kesselring is a professor of History at Dalhousie University. She wishes to thank those who commented upon earlier drafts, including Drs. Sara Butler, Marisha Caswell, Jennine Hurl-Eamon, Cynthia Neville, and Tim Stretton, as well as the journal's anonymous reviewers. The author gratefully acknowledges, too, support from the Social Sciences and Humanities Research Council of Canada.

2009 Act expressly abandoned the older notion that sexual infidelity constituted sufficient provocation to mitigate charges in a husband's killing of his wife. Angry, jealous men killing their spouses in revenge or a passionate rage might no longer cite infidelity as sufficient provocation to kill. Some people, including lawmakers and judges, expressed concerns about the change. One MP (and later Attorney General) complained that "thousands of years of human experience and history should be jettisoned for a piece of political correctness."[2] He need not have worried: recently, the decision in R. v. Clinton (2012) reintroduced the substance of the defense in a new guise, seeing a wife's adultery not as provocation, but as a trigger for a husband's understandable "loss of control." Amongst other factors, the Court of Appeal alluded to "experience over many generations" in treating a man's suspicion of his wife's sexual infidelity as reasonable grounds for mitigation.[3]

Defenders of the adultery defense, in whatever shape it appears, tend to mention some mix of history, the Bible, or evolutionarily derived aspects of human nature in support of their position.[4] This article tackles the supposed historical narrative used to sustain such a defense.

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[1] The most recent data for England and Wales from the Office for National Statistics indicates that in 2013/14, 46% of female homicide victims (84/183) and 7% of male victims (24/343) were killed by a current or ex-partner. The report does not specify the sex of the partner, so one is left to assume that these were heterosexual unions. Violent Crime and Sexual Offences- Homicide (ONS, 12 February 2015), p. 1.

[2] 9 November 2009, House of Commons Debates, Hansard, col. 85; for similar objections in the House of Lords, see 7 July 2009, House of Lords Debates, Hansard, cols 589-90.

[3] Coroners and Justice Act 2009, especially s. 55 (6)(c); [2012] EWCA Crim 2., 1 Cr App R 26. For discussion of this case, see: Dennis J. Baker and Lucy X. Zhao, "Contributory Qualifying and Non-Qualifying Triggers in the Loss of Control Defence: A Wrong Turn on Sexual Infidelity," Journal of Criminal Law 76 (2012): 254-75. For discussion of the broader effort to reform homicide law in ways that diminish traditional gender biases, see Danielle Tyson, Sex, Culpability and the Defense of Provocation (New York: Routledge, 2013); Jeremy Horder, Homicide and the Politics of Law Reform (Oxford: Oxford University Press, 2012), esp. pp. 205-11; and Carolyn B. Ramsay, "Provoking Change: Comparative Insights on Feminist Homicide Law Reform," Journal of Criminal Law and Criminology 100 (2010): 33-108. Such reform efforts have both contributed to and drawn from directives issued by the United Nations. The UN Division for the Advancement of Women, for example, has urged that states remove both "honor" and adultery from defenses for either premeditated killings or so-called "crimes of passion." See Good Practices in Legislation on "Harmful Practices" against Women (2009), 19-20; http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Report%20EGM%20harmful%20practices.pdf (Accessed 19 September 2015.)

[4] See, for example, Martin Daly, Margo Wilson, and Suzanne J. Weghorst, "Male Sexual Jealousy," Ethology and Sociobiology 3 (1982): 11-27, which uses the (commonly mistaken) view that early modern law treated a husband's killing of his adulterous wife as something less than murder as evidence for the argument that "coercive constraint of female sexuality by the use or threat of male violence appears to be cross-culturally universal." Biblical injunctions usually cite Leviticus 20:10 and Deuteronomy 22:22, though of course they then run up against John 8:7.

While dogmatic assertions purporting to be grounded in evolutionary psychology or biblical warrant might resist any such intervention, justifications for the defense based on understandings of history should be open to revision. Two corrections need to be made: One, the judicial acceptance of adultery as a legitimate provocation came relatively late in the seventeenth-century development of provocation defenses, and later than seems to be accepted even amongst those few who do acknowledge its historical rather than timeless nature. Two, when it developed, and for a long time thereafter, it mitigated only a husband's killing of the other man, not of his wife. The adultery defense as we understand it today seems to be a product of the nineteenth century.

Historians as well as legal professionals often share the widely held but erroneous assumption that, as Keith Thomas once wrote in a much-cited essay, "In England, there was a well-established tradition that a husband could lawfully kill an adulterous wife caught in flagrante delicto."[5] Not so. We have seen in the distant past things that are not there, filtering the evidence through assumptions that serve modern ends in ways that distort our discussions of how past practice ought to inform present action and that twist our readings of law, literature, and history more broadly. Only in the nineteenth century do we see mounting evidence of popular beliefs, held by jurists as well as jurors, that husbands might be somewhat excused for killing their unfaithful wives, not just their male rivals, with the novelty masked by talk of an "unwritten law" sanctioned by long history.

After tracing pre-modern iterations of the infidelity defense, this article turns to the early modern distinction between murder and manslaughter and subsequent development of the doctrine of provocation, nodding as well to the context afforded by practices surrounding adultery and divorce. In the second half, it moves into homicide trials of the eighteenth and nineteenth centuries to locate the appearance of the modern infidelity defense. While the

[5] Keith Thomas, "The Puritans and Adultery: the Act of 1650 Reconsidered," in Puritans and Revolutionaries, ed. Donald Pennington and Keith Thomas (Oxford: Clarendon Press, 1978), 257-83, quote at 268. For other, more recent expressions of this belief, see for example works cited in notes 50, 63, and 66.

primary purpose here is to correct a pervasive misconception of the timelessness and tenacity of notions that a husband might kill his adulterous wife with some degree of impunity, the discussion also draws upon and will hopefully contribute to a diffuse body of work revising our understandings of marriage and homicide more generally. It suggests that altered perceptions of female sexuality, male honour, and the purposes of marriage, as well as shifting attitudes to crime and punishment, drove the emergence of this "long tradition" in the nineteenth century.

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Some suppose that the adultery defense has an ancient history; and indeed it does, but it lacks a continuous history. The great eighteenth-century jurist William Blackstone observed that "the laws of Solon, as likewise by the Roman civil law…and also among the Goths" did not just mitigate the more serious charge of murder to a lesser but still culpable form of homicide, but indeed treated such killings as justified.[6] This constituted something of an oversimplification, however. The Augustan law of 18 CE, the first to make a wife's adultery a public, criminal offence, did so by restricting private sanctions. It denied the husband any right to kill his wife, allowing him only to kill the other man, and only if the interloper was of low status. The father, or paterfamilias, might still kill the adulterous woman, but in much narrowed circumstances: he had to kill both parties together, and could do so only if they were found in the act, in his own or his son-in-law's home.[7] True, though, later Roman laws extended a husband's prerogative, either granting impunity or punishing such killings more

[6] William Blackstone, Commentaries on the Laws of England (Oxford, 1768), IV. 191. And, indeed, in the much more recent past, some American states came to pass laws that made the killing of the other man a form of justifiable homicide, too: Texas, Georgia, Utah and New Mexico. See Jeremy D. Weinstein's overview of relevant common law developments in "Adultery, Law, and the State: A History," Hastings Law Journal 38 (1986): 195-238.

[7] See especially Eva Cantarella, "Homicides of Honor: The Development of Italian Adultery Law over Two Millennia," and David Cohen, "The Augustan Law on Adultery: The Social and Cultural Context," in The Family in Italy, ed. David I. Kertzer and Richard P. Saller (New Haven: Yale University Press,1991), 229-46 and 109-26.

lightly than others. Germanic laws and customs sometimes did allow deadly responses, but not uniformly. Early codes of the Burgundians, Visigoths, and Lombards allowed a husband to kill his adulterous wife, as long as he killed the other man, too, but later Lombard codes denied the husband the power of life and death, instead stipulating that the offending man pay the husband the value of the wife's wergeld.[8] Over the centuries that followed, medieval canon law and theological discussions denied the husband any right to kill: Gratian, Aquinas, and others expressly forbade private vengeance of this sort, against either the wife or the other man. If adulterers were to suffer death, it must be inflicted by public authority.[9]

Leah Otis-Cour has traced such texts throughout the Middle Ages, delving particularly into the customs of what is now southern France where she finds that most either explicitly reject or make no mention of a husband's right to kill an unfaithful wife. Even more tellingly, her work and that of Claude Gauvard on late medieval French court records and letters of remission demonstrate that such killers were indeed tried, found guilty, and sometimes executed. While some such men secured pardons for their offences upon their tales of righteous anger and passion, such remissions were "anything but automatic." Indeed, they were "much more the exception than the rule."[10] Otis-Cour concludes that "the idea of systematic impunity of the murdering husband of the adulterous wife is more a reflection of contemporary imagination than of medieval reality."[11]

Work by Otis-Cour, Gauvard, and more recently by Sara McDougall thus challenges assumptions about the lenience of medieval continental courts in dealing with men who killed

[8] See the survey in Theodore John Rivers, "Adultery in Early Anglo-Saxon Society: Æthelbert 31 in Comparison with Continental Germanic Law," Anglo-Saxon England 20 (1991): 19-25.
[9] Leah Otis-Cour, "De jure novo: Dealing with Adultery in the Fifteenth-Century Toulousain," Speculum 84 (2009): 357. For Aquinas, see Summa Theologica, 5.60.1. One reviewer asked if commentators ever excused a wife's killing of an adulterous husband; not that I have found, and indeed that such an action so manifestly violated any sort of law, human or divine, influenced Aquinas's condemnation of the reverse, given his belief that husbands and wives should be judged on par.
[10] Otis-Cour, "Adultery in the Fifteenth-Century Toulousain," quotes at 358 and 366; and Claude Gauvard, 'De grace especial': Crime, état et société à la fin du moyen âge (Paris: Publications de la Sorbonne,1991), 818-22.
[11] Otis-Court, "Adultery in the Fifteenth-Century Toulousain," 366.

their unfaithful spouses.[12] Early modern continental courts' dealings with such men still warrant further study, but works touching on Italian and French legal codes, commentators, and practice of the era suggest a revival of late Roman treatment of a wife's adultery as a justification or at least an extenuating circumstance in her slaying, based either on notions of just anger or affronted familial honour.[13] Some codes, such as the 1532 *Constitutio Criminalis* of the Holy Roman Emperor Charles V, mandated public punishment for the adulterers but no private right of vengeance against the wife.[14] Some seem to have found ways to combine the two: according to Mary Elizabeth Perry, in early modern Seville, a wronged husband could act as the state executioner and personally kill his wife and her lover in the public square.[15]

In English legal development, however, for a very long time adultery neither justified nor excused a man's killing of his wife. Certainly, it did not do so formally, and evidence of informal mitigation is both scant and focused on the male rival. Anglo-Saxon codes seem to have favoured payments of wergeld, calibrated by the aggrieved husband's status rather than the wife's value.[16] In their foundational History of English Law before the Time of Edward I, F.W. Maitland and Frederic Pollock note that already by the thirteenth century "there are

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[12] See Sara McDougall's work for shifts in late medieval notions of adultery and its punishment, especially important in challenging assumptions of the ubiquity of a sexual "double standard" in which public authorities supposedly overlooked husbands' adultery and focused on wives: "The Opposite of the Double Standard: Gender, Marriage and Adultery Prosecution in Late Medieval France," Journal of the History of Sexuality 23 (2014): 206-25 and "The Transformation of Adultery in France at the End of the Middle Ages," Law and History Review 32.2 (2014): 491-524.

[13] Cantarella on Italy: "Homicides of Honor," 240-44. Sara Beam notes that early modern French law gave a husband the right to punish his adulterous wife, but also that popular publications sometimes condemned such actions: "Les canards criminels et les limites de la violence dans la France de la première modernité," Histoire, économie, et société 2 (2011): 21. Stuart Carroll, Blood and Violence in Early Modern France (Oxford: Oxford University Press, 2006), 237-8, notes that pardons for killers of adulterous wives could be obtained, but indicates that "Revenge on the cuckolder was more likely to be applauded than wife murder and killing him was easily defensible."

[14] Joel F. Harrington, Reordering Marriage and Society in Reformation Germany (Cambridge: Cambridge University Press, 1995), 228. Die Peinliche Gerichtsordnung Kaiser Karls V, ed. Heinrich Zoepfl (Leipzig, 1883), Clause 120 (p. 101) is actually somewhat ambiguous about the punishment for adultery, leaving it to be punished according to the traditions of imperial justice. Clause 150 (p. 129) notes that a husband's killing of his wife's lover would not be punished as murder, but says nothing of killing the wife. My thanks to Julia Poertner for her translations of these passages.

[15] Mary Elizabeth Perry, Gender and Disorder in Early Modern Seville (Princeton: Princeton University Press,1990), 73, 120.

[16] See Rivers, "Adultery in Early Anglo-Saxon Society," 20-1 and Carole Hough, "Women and Law in the Anglo-Saxon Period," Early English Laws [http://www.earlyenglishlaws.ac.uk/reference/essays/women-and-law/; accessed 15 August 2014.]

signs that the outraged husband who found his wife in the act of adultery might no longer slay the guilty pair or either of them"--though he might castrate the adulterer.[17] It seems that cuckolded men were far more likely to sue than to kill: with rights to a wife's services seen as something akin to property, from 1285, husbands could prosecute their male rivals for "wife theft" to secure damages and to ensure that wives who left not be able to claim their dower thereafter.[18]

T.A. Green suggested in his study of jury nullification that medieval juries of laymen might show sympathy for a man who killed, in flagrante, the man having sex with his wife; but to do so, he notes, they had to craft elaborate narratives that falsely depicted the killing as self-defense.[19] In the one case he cites, from 1341, Robert Bousserman came home unexpectedly at midday to find John Doughty "ad fornicandum*"* with his wife. He felled Doughty with a hatchet blow to the head. Sympathetic trial jurors concocted rather a different story, however, that portrayed the incident as a perfectly excusable act of self-defense. According to them, Doughty snuck into the house at night, while Bousserman slept. He then blocked the door and struck at Bousserman repeatedly with a knife. Only then, "seeing that his life was in danger and that he could in no way flee further, in order to save his life, he took up a hatchet and gave John one blow in the head."[20] Only this sort of story allowed Bousserman to go free. Sara Butler found a second, strikingly similar tale in her study of medieval court records: again, a husband who killed the man who had had sex with his wife, again benefitting from jurors' careful rewriting of the episode to a tale of night-time home

[17] F.W. Maitland and F. Pollock, History of English Law before the Time of Edward I (Cambridge, 1895), 2: 484. For recent examinations of the legal remedies available for rape, abduction, and adultery and their interrelations, see Caroline Dunn, Stolen Women in Medieval England (Cambridge: Cambridge University Press, 2012) and Sara M. Butler, Divorce in Medieval England (New York: Routledge, 2013).
[18] Dunn, Stolen Women, esp. 130, 144-5.
[19] T.A. Green, Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800 (Chicago: University of Chicago Press, 1985), 42-3.
[20] Green, Verdict According to Conscience, 42-3, citing The National Archives [hereafter TNA], JUST 2/211, m. 1 d/1 and JUST 3/78, m. 2d/1.

invasion and necessary self-defense.[21] Elizabeth Papp Kamali identifies a third: when Robert Mahen found his wife Alice in a compromising position alone with one Richard de Fenlake, he slapped her and killed Richard, with jurors depicting the killing as self-defense rather than as a retaliatory act of anger.[22] Thus, while medieval English law did not treat the killing of an adulterer caught in the act as justifiable or even as excusable, jurors might sometimes sympathize. Even so, the cases found to date in which jurors secured self-defense verdicts for such killings dealt with the violence between two men, not between a man and his wife.

Of course, medieval English law had not yet formalized a distinction between murder and manslaughter, or between more and less serious forms of culpable homicide. The law treated some homicides as justifiable and others as excusable, but did not yet delineate differing categories of criminal homicide. The excusable forms of homicide were limited to self-defense, misadventure ("infortuniam"), and those done while of "unsound mind." Even though excusable, such killings still resulted in a conviction, but with the offender guaranteed a pardon de cursu. A statute of 1390 seems to have introduced at least a short lived distinction between murder and simple homicide, but it was only really over the sixteenth century that "manslaughter" became formalized as a lesser form of culpable homicide.[23]

Neither excusable nor justifiable, manslaughter still resulted in a sentence of death, but conviction on such a charge made a discretionary pardon de gratia somewhat more easily

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[21] Sara M. Butler, The Language of Abuse: Marital Violence in Later Medieval England (Leiden: Brill, 2007), 98-103. Butler qualifies her suggestion that adultery "may have provided sound justification for homicide, not only of the wives' lovers," but perhaps even of the wives, by acknowledging that the only evidence offered for the latter is a sermon story in which the husband killed both guilty parties to general approbation. The two court cases she discusses--the killing of John Doughty noted by Green and the second case mentioned here--both deal with the killing of the other man, and through crafting narratives of self-defence.

[22] My thanks to Elizabeth Papp Kamali for sharing her in-progress work, "'The Devil's Daughter of Hell Fire: The Role of Anger in Medieval English Felony Adjudication." She cites TNA, JUST 3/1, m. 9.

[23] On medieval homicide law, see for example: Elizabeth Papp Kamali, "*Felonia Felonice Facta*: Felony and Intentionality in Medieval England," Criminal Law and Philosophy (2014): 1-25; J.H. Baker, Oxford History of the Laws of England, vol. vi: 1483-1558 (Oxford: Oxford University Press, 2003), 553-62; J.G. Bellamy, The Criminal Trial in Later Medieval England: Felony before the Courts from Edward I to the Sixteenth Century (Toronto: University of Toronto Press, 1998), 57-69; T.A. Green, "The Jury and the English Law of Homicide, 1200-1600," Michigan Law Review 74 (1976): 414-99; J.M. Kaye, "The Early History of Murder and Manslaughter," Law Quarterly Review 83 (1967): 365-95, 569-601; and W.D. Sellar, "Forethocht Felony, Malice Aforethought and the Classification of Homicide," in Legal History in the Making, ed. W.M. Gordon and T.D. Fergus (London: Hambledon Press, 1991), 43-60.

obtainable and typically fell within the coverage of the general pardon statutes issued at the conclusion of early modern parliamentary sessions.[24] Even more significantly, manslaughter convictions—unlike those for murder—remained open to pleas of "benefit of clergy." Loosely based in the medieval exemption of clerics from punishments in the king's courts, this legal fiction allowed men who could read to claim a fictional clerical status and thus to escape the full punishment for the first instance of one of a list of offences. After statutory refinements in the late sixteenth century, most men convicted of a "clergyable" offence exchanged a sentence of death for a branding, forfeiture of property, and up to a year in gaol. Manslaughter, unlike murder, remained a clergyable offence.[25]

By the late sixteenth century, then, manslaughter had been formalized as a charge distinct from murder, and men convicted on such a charge could very often plead benefit of clergy to avoid the punishment of death. What distinguished murder from manslaughter remained in flux: murder, initially defined by secrecy, came to include notions of premeditation and malice, whereas manslaughter was generally a sudden, unplanned, or "hot-blooded" killing. Notions of male honour and physiology shaped the distinctions that emerged. (Very few women were convicted of manslaughter, and if they were, they could not claim benefit of clergy to avoid the death penalty.[26]) After a pivotal case in 1600, as J.H. Baker has noted, provocation came to supplement notions of "hot-bloodedness" in decisions about manslaughter. The key issue was thus determining what constituted sufficient provocation. A widow appealed the conviction of her husband's killer merely for

[24] See the discussion in K.J. Kesselring, Mercy and Authority in the Tudor State (Cambridge: Cambridge University Press, 2003), 93-7, 102-5.
[25] Ibid., 46-8, and for a more extensive treatment, Lesley Skousen, "Redefining Benefit of Clergy During the English Reformation: Royal Prerogative, Mercy and the State," University of Wisconsin MA thesis, 2008. Women could claim benefit of clergy for minor thefts from 1624, and on par with men from 1693.
[26] See K.J. Kesselring, "Bodies of Evidence: Sex and Murder (or Gender and Homicide) in Early Modern England," Gender & History 27.2 (2015): 245-62 and Garthine Walker, Crime, Gender and Social Order in Early Modern England (Cambridge: Cambridge University Press, 2003) for discussion of the gendered nature of homicide law as it developed in these years. For the broader context of early modern perceptions of masculinity, male physiology, and male honour codes, see for a start Alexandra Shepard, Meanings of Manhood in Early Modern England (Oxford: Oxford University Press, 2003) and Mark Breitenberg, Anxious Masculinity in Early Modern England (Cambridge: Cambridge University Press, 1996).

manslaughter, successfully arguing that he ought to have been found guilty of murder instead: true, her husband had mocked and made faces at the shopkeeper who then stepped out to the street to deliver a fatal blow, but she and the judges thought that no matter how unplanned the killing, no matter how "hot-blooded" the punch, the underlying provocation did not suffice to moderate the charge.[27]

In an important book on Provocation and Responsibility, Jeremy Horder traced the subsequent evolution of provocation defenses over the seventeenth century. In brief, he notes that judges outlined four key provocations that could serve to reduce murder to manslaughter: seeing a friend or family member attacked (from two cases in 1612); seeing a man committing adultery with one's wife (from a 1617 case); experiencing grossly insulting though not dangerous physical assaults such as tweaks of the nose or boxes on the ear (from a number of early seventeenth-century cases); and finally, from a 1666 case, seeing an English person unlawfully deprived of his or her liberty by wrongful arrest or impressment. Offering a deadly response to any of these affronts to one's honor could not legally be excused; but while it merited punishment, such a killing did not necessarily merit death.[28] These four came together in the report on Mawgridge's Case (1707) to constitute the "modern doctrine of provocation" that has only recently been challenged for its gendered and outmoded medical bases--a challenge to which Horder himself was crucial, in his work as a Law Commissioner even more so than as an historian.[29]

Given the quality of the book and perhaps the direct role Horder himself has played in English homicide law reform, his account has been widely cited.[30] It includes one simple but significant mistake, however: it misdates the case that first saw judges decide that adultery

[27] J.H. Baker, Introduction to English Legal History, p. 601, citing Watts v. Brains (1600), Cro. Eliz. 778.
[28] Jeremy Horder, Provocation and Responsibility (Oxford: Clarendon Press, 1992), esp. 23-42.
[29] See Horder, op. cit.
[30] See, for example: David M. Turner, Fashioning Adultery: Gender, Sex and Civility in England, 1660-1740 (Cambridge: Cambridge University Press, 2002), 127; Elizabeth Foyster, Marital Violence: An English Family History, 1660-1857 (Cambridge: Cambridge University Press, 2005), 117; Dennis Klimchuk, "Outrage, Self-Control and Culpability," University of Toronto Law Journal 44.4 (1994): 454; and Stephen Gough, "Taking the Heat out of Provocation," Oxford Journal of Legal Studies 19.3 (1999): 482.

constituted sufficient provocation to justify a manslaughter verdict in lieu of murder, dating Manning's, or Maddy's, Case to 1617 rather than to 1671. In this case, John Manning was indicted at the Surrey assizes for murder. The jury determined that Manning had found the victim "committing adultery with his wife in the very act" and had thrown a stool at him, inflicting a fatal wound. The whole court resolved that this was merely manslaughter. As such, Manning was able to plead benefit of clergy and thereby to exchange the death penalty for a branding. In a much quoted line, moreover, the court directed the executioner "to burn him gently, because there could not be greater provocation than this."[31]

Does it much matter than this case happened in 1671 rather than in 1617? Yes, I would suggest: it means that adultery goes from being one of the first agreed upon provocations to the last. Judges had decades of familiarity with provocation defenses behind them before they included adultery. It was not an early or obvious component of the defense, but an issue that only acquired a clear statement in the 1670s.

Was there really nothing before Manning's Case? As Horder notes, one earlier case exists that spoke to these issues, but in ways we cannot now readily decipher. In an all too brief report of Parker's Case, most likely decided sometime between 1523 and 1538, we are told that "one Parker found a man between his wife's legs committing lechery, and he killed the man, and all the justices held this to be felony. But suppose a man means to ravish my wife against her will, and I kill him, it seems that I can do so in defense of my wife, just as in the case where he means to kill her."[32] Does the "felony" here imply a lesser form of criminal homicide than murder, what was then just coming to be known as manslaughter? The first sentence on its own might seem to imply that judges decided that Parker's act was a felony

[31] Manning's Case (1671), 83 Eng. Rep. 112 (Raym. 212). In 86 Eng. Rep. 108 (1 Ventris, 158) the accused is called John Maddy.

[32] R. v. Parker, in The Reports of Sir John Spelman, ed. J.H. Baker (London: Selden Society, 1994), 72. "Nota que fitzh[erbert] iustice monstre vn inditement que vn Parker troue vn home enter lez tibys de sa feme fesant lechery et il occise le home et toutz lez iusticez ten[ont] ceo estre felony mez posito que vn home volet ravishe ma feme encounter sa volunte et ieo luy occise semble que ieo puissa issint faier en defens de ma feme come en case que il violet luy occider."

less serious than murder, but when it is supplemented by the second line, the distinction being drawn here seems to be between culpable and excusable forms of homicide: Parker's slaying of a man having consensual sex with his wife constituted a felonious killing rather than an excusable act, like defense of oneself or one's wife from rape or deadly assault, that merited an automatic pardon. Either way, Parker's Case was not the one that would live on as precedent and reference point in courtroom conversations and legal literature: that honor went to Manning's Case of 1671.[33]

Also indicating that Parker's Case did not signal a shift towards seeing adultery as exculpatory, we find a couple of other incidents over the sixteenth century like that of Robert Bousserman, in which men who killed their wives' sexual partners secured punishments less than death only by crafting narratives of self-defense. Walter Basset sought pardon for his killing of William Brown in 1531, for example: in his account, he noted that Brown, a priest, had indulged his "voluptuous and sensual appetites" with Basset's wife, "to the great defamation of your said orator." When Basset warned the priest away, the latter purportedly threatened revenge. Basset later woke up one night to find the priest in his home. After a tussle, "perceiving that the said priest would have slain him," only then he gave the man an unarmed punch, "whereupon the said priest died."[34] Basset still seemed to think that he had to portray his killing of the adulterer as an act of self-defense to secure mercy. So, too, did those petitioning for pardon on behalf of William Wright, who killed his wife's lover in 1560, do so by using language found in accounts of killings done by accident or in self-defense: when the victim angrily confronted Wright, then "by misfortune the said Wright with his staff struck him upon the head whereof he died."[35]

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[33] For a case in which a husband killed the other man that specifically referenced Manning and the line about burning him lightly as "there could not be a greater provocation," see the Gentleman's Magazine, 26 (1756), 203.
[34] TNA, SP 1/73, f. 24.
[35] Discussed in Kesselring, Mercy and Authority, 105, citing British Library, Cecil Papers, vol. 153, no. 56.

Moreover, the various legal writers who described the emerging distinctions between murder and manslaughter, such as William Lambarde and Edward Coke, made no reference to adultery as grounds for mitigation. The first reference we find is in Matthew Hale's Historia Placitorum Coronae, which was likely finished just shortly before Hale's death in 1676.[36] Manning's Case in 1671 really does seem to be the hinge point, then. We find a scarce few earlier cases in which men who killed male rivals in the act benefitted from the discretion of jurors or the mercy of their sovereigns. Formally, though, in the lands of lawmakers and judges, such killers did not benefit from notions that their offence was justifiable, excusable, or even moderated to manslaughter by the provocation involved until the late seventeenth century. And nothing, as yet, indicated mercy either formal or informal for a man killing his adulterous wife.[37]

Stepping back from legal texts and court cases briefly to bring into view the broader cultural setting reinforces the case for this chronology and provides some context. In the interim between the development of manslaughter as an alternative verdict to murder and the Manning decision in 1671, we do see heated denunciations of adultery, with the issue of whether adulterers ought to die often lurking in the background and sometimes brought to the fore. Much discussion focused on whether adultery would count as grounds for divorce with remarriage. The official answer, in England, was "no." Unlike others who became Protestant in the sixteenth century (including the Scots), the English did not come out of the Reformation allowing divorce with remarriage, on any grounds. While divorce remained rare

[36] Matthew Hale, Historia Placitorum Coronae, ed. Sollom Emlyn, 2 vols. (Philadelphia, 1847), I. 486.
[37] As part of a broader project on early modern homicide, the author has compiled a database with a sample of 3601 inquests and indictments from c. 1500-1680, of which sixty-six detail accusations against men for killing their wives and thirty-two charge women for killing their husbands. While a few accuse adulterous partners of killing their innocent spouses, none of the records in this particular sample betray evidence of a spouse receiving a lighter sentence for killing an unfaithful partner. For details on the database, see Kesselring, "Bodies of Evidence," 245-62.

in other Protestant jurisdictions, the English forbade it altogether.[38] Only in the 1670s did divorces by Act of Parliament become possible, and then only for relatively few; only in 1857 did judicial divorces begin. In the early modern era, despite much agitation for change, the English retained older Catholic practice which treated marriage as indissoluble. Formally, adultery remained at best grounds for judicial separation, what was called a divorcium a menso et thoro or a separation of bed and board that could strip a guilty wife of her dower but allowed neither party to remarry.[39]

Might adultery become a capital offence, thereby bypassing the need for divorce, as it did in some other Protestant jurisdictions? Henry VIII had made adultery by a queen punishable by death, thus freeing himself to remarry; what of other men and marriages? In England, aside from the civil damages a husband could secure from the man who absconded with his wife, adultery had long been a matter for the church courts, sanctioned by public penance or financial penalty. Justices of the peace and borough courts had discretionary powers to whip or publicly shame notorious offenders, but some Reformation-era reformers wanted more. They sought harsher physical punishments enacted by the secular courts, with some arguing for Mosaic law and death for the guilty.[40] Such calls succeeded only very

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[38] See, for example, Robert Kingdon, Adultery and Divorce in Calvin's Geneva (Cambridge, Mass.: Harvard University Press, 1995), 175-8 and Harrington, Reordering Marriage and Society in Reformation Germany, 268-71.

[39] Informally, of course, many people did separate from partners for a variety of reasons, including adultery, and form new unions. For an overview of the history of divorce, see Lawrence Stone, Road to Divorce: England, 1530-1987 (Oxford: Oxford University Press, 1992) and for updates to relevant portions of the history, see, too, Sara M. Butler, Divorce in Medieval England; Tim Stretton, "Marriage, Separation and the Common Law in England, 1540-1660," in The Family in Early Modern England, ed. Helen Berry and Elizabeth Foyster (Cambridge: Cambridge University Press, 2007), 18-39; and Joanne Bailey, Unquiet Lives: Marriage and Marriage Breakdown in England (Cambridge: Cambridge University Press, 2003). The distinctiveness of the English case becomes clearer when we remember that in both the colony of Massachusetts and in Scotland, both divorce and public punishment of death for adultery became possible. For Scottish divorce law and practices, see, for example, T.C. Smout, "Scottish Marriage, Regular and Irregular, 1500-1940," in Marriage and Society: Studies in the Social History of Marriage, ed. R.B. Outhwaite (London: St. Martin's Press, 1981), 204-36 and Heather Parker, '"In all gudly haste': The Formation of Marriage in Scotland, c. 1350-1600," PhD Dissertation, University of Guelph, 2012. For the colonial context, see, for example, Nancy Cott, "Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts," William and Mary Quarterly 3rd series, 33 (1976): 86-614 and Cornelia Hughes Dayton, Women Before the Bar: Gender, Law and Society in Connecticut (Chapel Hill: University of North Carolina Press, 1995).

[40] Martin Ingram, Church Courts, Sex and Marriage in England, 1570-1640 (Cambridge: Cambridge University Press,1987), 150-3, 249-59.

briefly, and only in the context of revolutionary lawmaking in the Interregnum: after many earlier, failed attempts to pass such legislation, the infamous, so-called "Puritan Adultery Act" of 1650 did make adultery a hanging crime, thus freeing the innocent party to remarry. But the Act seems seldom to have been used to deadly effect and did not survive the Restoration of monarchy, episcopacy, and church courts in 1660.[41] Punishment for adultery thereafter reverted to the lighter sanctions imposed by church courts and justices of the peace, with the very notion that adultery constituted a public offence fading over the early 1700s.[42]

Adultery certainly figured into the jeremiads of moralists and dramatists throughout the post-Reformation years, but without calls to treat it as grounds for mitigating charges of murder to manslaughter. While some argued strongly that the state should kill the guilty party, and a few noted with seeming wistfulness the ancient laws which allowed the offended husband to kill the adulterers, they stopped short of suggesting that adultery constituted grounds for private homicide in their own day. Thomas Heywood famously engaged such issues in his early seventeenth-century play A Woman Killed with Kindness, in which the deceived husband refuses to "martyr" the adulterous pair, instead letting the other man travel abroad and ostracizing his wife, a "mild sentence" that invokes a fatal act of repentance from the guilty wife who starves herself to death.[43] In another work, Gynaikeion (1624), Heywood discusses ancient responses to adultery and comments: "much is that inhumane rashness to be avoided, by which men have undertook to be their own justicers, and have mingled the

[41] Thomas, "The Puritans and Adultery: the Act of 1650 Reconsidered," 257-83. See, too, Faramerz Dabhiowala, The Origins of Sex: A History of the First Sexual Revolution (London: Penguin, 2012), 42-55 for the broader regulatory impulses behind such legislative initiatives. James Cordy Jeaffreson's Middlesex County Records, 3 vols. (London, 1886-92), III, 207-96, notes indictments for some thirty individuals on charges of adultery over the 1650s; one woman, Ursula Powell, was found guilty and may have been hanged (p. 287); all the others were found not guilty, though some of them had to remain imprisoned until they could secure sureties for their good behaviour.

[42] Dabhiowala, Origins of Sex, 54-5. See also Turner, Fashioning Adultery and Bailey, Unquiet Lives, 140-67 for the history of adultery prosecutions in the years after the Restoration.

[43] Thomas Heywood, A Woman Kilde With Kindnesse (London, 1607), sig. G1r.

pollution of their own beds with the blood of the delinquents."[44] Husbands had a right to "correct" their wives, but not to kill them; any such power had to vest in the state alone.

In their studies of adultery in early modern tragedy, both Jennifer Panek and Ronald Huebert note that the belief that an aggrieved husband might kill the adulterous pair seems more widespread today than it was then. Huebert recites a list of modern critics' assertions that husbands of the era "had the right to kill" their unfaithful wives, but notes that they offer not a single example of a man who was legally exonerated after killing such a wife.[45] Indeed not. When sexual infidelity appeared alongside murder in the news pamphlets and bawdy ballads that began to proliferate in these years, it served as a motive for the adulterous wife to kill her innocent husband, an offence so heinous it was typically deemed not murder but petty treason and punished with burning at the stake.[46] Adultery in these accounts aggravated rather than mitigated murder: a woman's sexual infidelity might provoke her to the ultimate treachery of killing her husband, but does not serve as a motive moderating a man's killing of his wife or her lover.

Yet by the time that William Blackstone crafted his Commentaries on the Laws of England in the 1760s, opinion on the provocative qualities of adultery had changed. Blackstone observed that "if a man takes another in the act of adultery with his wife, and kills him directly upon the spot," it was "not absolutely ranked in the class of justifiable homicide,

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[44] Thomas Heywood, Gynaikeion (London, 1624), 179.

[45] Jennifer Panek, "Punishing Adultery in A Woman Killed with Kindness," SEL 34 (1994), 357-78; Ronald Huebert, The Performance of Pleasure in English Renaissance Drama (Basingstoke: Palgrave Macmillan, 2003), 90-1. If the critics on Huebert's list cite evidence for the claim, it is typically Keith Thomas's mistaken statement to that effect in "The Puritans and Adultery," 268. Turning to his citations, we find Pollock and Maitland's *History*, cited above in n. 17, which notes that that "tradition" had or was dying out by the thirteenth century and Manning's Case (1671), which came later and dealt with the guilty man.

[46] For the domestic murder pamphlets of these years, see in particular Frances Dolan, Dangerous Familiars: Representations of Domestic Crime in England, 1550-1700 (Ithaca: Cornell University Press, 1994) and Randall Martin, Women and Murder in Early Modern News Pamphlets and Broadside Ballads, 1573-1697 (Aldershot: Ashgate, 2005). See, too, Walker, Crime, Gender and Social Order, 143 for the linking of adultery with petty treason. The sentence of death by burning for petty traitors was abolished in 1790, and the offence itself only in 1828. For comparison with French materials, see Marie-Yvonne Crépin, "Violences Conjugales en Bretagne: La Répression de L'Uxoricide au XVIIIe siècle," Société d'Histoire et d'Archéologie de Bretagne 73 (1995): 164, 168, which notes that a quarter of her cases of spousal homicide involved adultery--but with the adulterous, "trapped" partner rather than an abandoned or betrayed partner doing the killing.

as in case of a forcible rape, but it is manslaughter." He went on to note, moreover, that "It is however the lowest degree of it" and echoed the wording used in Manning's case: "and therefore in such a case the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation."[47] In between the emergence of manslaughter in the sixteenth century and Blackstone's influential characterization of it in the mid-eighteenth had happened both Manning's Case in 1671 and the decision in Mawgridge in 1707.

The Mawgridge case, as noted above, came to be seen as bringing together all the core elements of the provocation defense. In it, Chief Justice Holt "gave the opinion of the Judges," saying that the distinction between murder and manslaughter originated in statutes under Henry VIII that took away the benefit of clergy from "murder committed upon malice prepensed." He described first the classic instance of manslaughter: if a man assaulted another person, "either by pulling him by the nose, or filliping upon the forehead, and he that is so assaulted shall draw his sword and immediately run the other through, that is but manslaughter, for the peace is broken by the person killed, and he that was so affronted might justly apprehend that one who treated him in that manner might have some further design against him." Holt then described instances of unlawful detention leading to manslaughter, including when one person killed someone who was injuring or restraining another by force, deeming the killing manslaughter alone, "because when the liberty of one subject is invaded, it affects all the rest and is a provocation to all people." And then in a short quote laden with significance, he noted that "where a man is taken in adultery with another man's wife, if the husband shall stab the adulterer or knock out his brains, this is bare manslaughter; for adultery is the highest invasion of property, and there cannot be a greater provocation: and jealousy is the rage of a man."[48]

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[47] Blackstone, Commentaries, IV: 191-2.
[48] Mawgridge's Case (1707), 90 Eng. Rep. 1167.

So, here, then, at the end of the seventeenth century and into the eighteenth, many years after manslaughter first emerged as a verdict, adultery becomes not just a provocation for killing but the greatest such provocation. Crucially, though, the killing being mitigated was explicitly and specifically that of the male "invader," not the wife. One might contrast the decision in Manning with the 1680 case of John Marketman, who did kill a wife suspected of adultery. Marketman hanged for killing his wife Mary, an act denounced in the popular press as a "bloody and execrable murder." The only hints of sympathy for John came in the suggestion that Mary's alleged lover--not Mary--shared somewhat in the blame.[49] Reports of Manning, Mawgridge, and the eighteenth-century cases that referenced adultery as a grave provocation, along with texts by Hale, Blackstone and the rest, all quite specifically noted that the killing made somewhat understandable by the provocative act of adultery was that of the husband's male rival, not of his wife. It was the offence one man offered another that constituted the provocation.

Yet it is the killing of the wife, today, that is said to be (or to have been) somewhat excusable, whether through provocation or loss of control, driven by some mix of outrage, jealousy, vengeance, or temporary defect of reason. Those citing the long history of such a defense mistakenly conflate the killing of either or both the adulterous wife and her male lover.[50] If the killing of the adulterous wife was not treated as manslaughter in the seventeenth

[49] David Turner notes the high profile of this case, which was made newsworthy in part by Mary's pregnancy, in Fashioning Adultery, 128-30. For contemporary publications on the crime, see Anon., The Full and True Relation of All the Proceedings at the Assizes Holden at Chelmsford (London, 1680), and True Narrative of the Execution of John Marketman (1680). One publication did acknowledge Mary's adultery as a provocation, but depicted it both as one John should have withstood and one that he could have withstood had he not neglected church attendance and thus denied himself God's grace. The account of Marketman's speech on the scaffold has him denouncing his own sexual sins and drunkenness, and speaking of his own pride: "I always (through my pride) would make her be subject to me, not minding my own duty to her, which if I had taken care to have performed, we had lived more comfortably, and these unhappy ends of both prevented." (sig. B2v, B3r). A copy of a letter he reportedly sent to Mary's lover ended the publication, with a note that Marketman forgave him, as he too was in "some part guilty" of the sad turn of events for robbing Mary of her innocence. See A Full and True Account of the Penitence of John Marketman (London, 1680).

[50] See, as simply one example, Elizabeth Foyster, Marital Violence: An English Family History, 1660-1857 (Cambridge: Cambridge University Press, 2005), 116-7, which claims that in the early part of the period under study, a husband who killed an adulterous wife could successfully secure a conviction for manslaughter rather

century, when did it become so? Can we find cases of husbands killing unfaithful wives in which jurors downgraded charges of murder to manslaughter, or in which petitions for pardon secured mercy for a convict on the grounds of provocation? And if so, when?

That change seems to date to the nineteenth century, not before. In her survey of criminal court records from London's Old Bailey from 1690 to 1750, Jennine Hurl-Eamon found thirty-eight cases in which men were charged with killing their wives. In only two of these did the husbands do so in a rage over adultery or suspicions of infidelity.[51] In both, juries found the men guilty of murder and the judges sentenced them to death.[52] Continuing the hunt from 1750 forward identifies a further forty-seven men charged with killing their wives before turning up the first case in which the victim's sexual infidelity clearly prompted the killer's conviction for manslaughter rather than murder: that trial happened in 1810.[53]

In the set of forty-seven Old Bailey cases of husbands accused of killing wives between 1750 and 1809, juries acquitted twelve men, generally because the evidence suggested that the victims had died of natural causes. Juries found thirty-one of the men guilty, convicting twenty-two of murder and nine of manslaughter. Four more men were deemed to have killed the victims, but while insane. Some of these killings constituted the final stop on a long line of horrific brutalities. Anne Williamson died of starvation, for example, after her husband John had long kept her handcuffed to the interior of a closet in which he would lock her away, apparently to keep her from complaining about him in public.

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than murder, but cites as evidence an eighteenth-century case in which a man killed not his wife, but his wife's lover.

[51] Jennine Hurl-Eamon, '"I Will Forgive You if the World Will': Wife Murder and Limits on Patriarchal Violence in London, 1690-1750," in Violence, Politics and Gender in Early Modern England, ed. Joseph P. Ward (Basingstoke, 2008), 223-47.

[52] Old Bailey Proceedings Online [hereafter OBP], (www.oldbaileyonline.org, version 7.1, 29 May 2014), January 1733, trial of Samuel Thomas (t17330112-24) and September 1745, trial of Thomas Morgan (t17450911-32).

[53] OBP, September 1810, trial of Richard Griffin (t18100919-56). I have included in these tallies cases where the man and woman might not have been legally married but were described by deponents as having lived or been accepted "as husband and wife." The search was done by using the keyword "wife" with the "offense" filter set to "Killing-All subcategories" and the dates set as noted above. All the results were then read to identify those where a man killed a woman treated as his wife.

(Neighbors knew of the mistreatment and remonstrated with him, but did nothing further.)[54] Some were the products of drunken brawls over drink, misspent money, or belated dinners. Adultery or imputations of a wife's infidelity appeared in five of these cases between 1750 and 1809, but in none of these five (summarized below) did it serve to moderate the charge. Nor did the defendants or their counsel even seem to try making it matter.

In 1754, Robert Finch killed his wife Elizabeth, almost severing her head from her body. He told those who arrested him that "the provocations were great, that was it to do again, he would do it." To one bystander he said "he would do it was it to do again, sooner than any man should enjoy his wife," suggesting that he suspected infidelity. Some people reported that he went by the name "Mad Finch," noting that he was often "phrensical." Yet neither his talk of his victim's "provocations" nor his madness served to deflect the jury, which found him guilty of murder.[55] In 1780, Albert Lowe killed his wife Mary, and one deponent did report that Lowe had at one point said that "he would never forgive her after what he had seen between her and those nasty fellows who were there last night, and that she should never lie in his bed again." Lowe was ultimately found guilty only of manslaughter, but the trial transcript focuses on Mary's near constant intoxication and quarrelsomeness as the factors inclining to moderation. (A former landlady described the victim as "a drunken wicked woman that quarreled with everyone.") Some suggested that her own drunken tumbles, or accidental swallowing of a pin, had in fact caused her death.[56] John Simpson's case in 1786 proved somewhat more complicated. He did say he had found a man in bed with his wife Elizabeth, but also maintained he had seen Gypsies there, too, along with sightings of black hogs and other things deemed part of his "distraction." The judge concluded "there can be no reasonable doubt that this poor woman received her death by the hands of the prisoner at the bar, and that it was done under no circumstances which could in any degree, in point of

[54] OBP, January 1767, trial of John Williamson (t17670115-24).
[55] OBP, July 1754, trial of Robert Finch (t17540717-43).
[56] OBP, May 1780, trial of Albert Lowe (t17800510-58).

law, operate either to justify or mitigate the fact," but ultimately acquitted him based on his "plain and evident insanity."[57]

In two cases from 1791 claims about the victims' adultery proved more central, but the courts still gave no sign of seeing the infidelity as sufficient provocation to mitigate the charges of murder. Winifred Taylor lived long enough after being injured by her husband Charles to tell several people her account. She said that after Charles had beaten her on Friday, she fled and stayed away for the night; he thought she had spent the time away with a Mr. Walker. She returned on Saturday "to make it up." They had their tea together, went to bed, "and had that together, which man and wife have together, and he grumbled because she was not altogether agreeable to his mind." She insisted that "she did all that lay in her power to please him in bed, when they were connected together, and he said that she could do nothing for him, for…she had lain with Mr. Walker." He turned his back, she thought to sleep. But then he turned again and cut her repeatedly with a razor or penknife. As she lay dying, he fled the house, only to be arrested by a constable called by his neighbors. When the constable asked how he could do such a thing, Taylor reportedly said that "it would have vexed any man to have his wife out all night and sleep with another man, and he said he was sorry she was not quite dead." At the trial, however, Charles Taylor made no defense other than saying that he could remember nothing from the night. The court found him guilty of murder, sentencing him to death and dissection.[58]

George Dingler also stood trial for killing his wife in 1791. In his testimony, he said that he and Jane had separated for a time, but after they reunited, he came to believe that she had been unfaithful; he said "that his son could attest that she had been seen in bed with several different men" in their time apart. Hearing of this, he took a knife and stabbed her. When it broke on her stays, he found a second knife and continued. At trial, he had acting on

[57] OBP, April 1786, trial of John Simpson (t17860426-42).
[58] OBP, April 1791, trial of Charles Taylor (t17910413-57).

his behalf William Garrow, the celebrated, confrontational barrister who did so much to reform criminal advocacy. Significantly, while Garrow did try to make a case for having Dingler found guilty only of manslaughter, he at no point referred to Jane's supposed adultery. Rather, he focused on the technicality of a flaw in the indictment (which attributed Jane's death to a beating, not to knife wounds) and then on claims that Jane's fighting back after an initial assault constituted enough of a threat to make the offence simply manslaughter. Garrow's efforts proved in vain: the court convicted Dingler of murder, sentencing him to be hanged and sent to the anatomists.[59]

Husbands tried citing their wives' drunkenness, profligacy, and "grossly abusive language" as provocations, but in these Old Bailey cases, the first in which a wife's adultery served as any sort of mitigating factor came with Richard Griffin's trial for killing his wife Anne in 1810. He cut her throat through. When asked by a witness why, he said that Anne had been out all the night before at a gin shop. He said that "he hoped she was dead, he would not mind being hanged." He asked the man "how should I like another man to go along with my wife; I said not at all; he said, that is the reason I done it." To a watchman who inquired, he responded similarly: "how would you like to see another man brought under your nose?" To another, he insisted that "he was very happy, he was, upon his soul; how would any of you like it, if your wife was to bring a man home before your face?" Despite the use of a weapon and despite the lack of remorse, the court found Griffin guilty only of manslaughter. As such, he faced a punishment not of death, but of a one shilling fine and one year in Newgate prison.[60] A newspaper account of the trial reports the judge's summation: "though the prisoner might have been irritated by the infidelity of his wife, that did not entitle him to take

[59] OBP, September 1791, trial of George Dingler (t17910914-1). On Garrow, see John Beattie, "Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries," Law and History Review 9.2 (1991): 221-67; Beattie, "Garrow for the Defence," History Today 41.2 (1991): 49-53; and Allyson May, The Bar and the Old Bailey, 1750-1850 (Chapel Hill: University of North Carolina Press, 2003), 40-2, 56-8.
[60] OBP, September 1810, trial of Richard Griffin (t18100919-56).

the punishment in his own hands. If he had killed her purely out of revenge for her infidelity, it was clearly murder." However: "if a quarrel had ensued, and he had perpetrated the deed during this quarrel and under the sudden impulse of the moment, this would only amount to manslaughter." Whatever the fine line the judge tried to draw, the jury reportedly deliberated for six and a half hours and ultimately decided that the killing constituted manslaughter.[61]

The Old Bailey was not, of course, England's only criminal court. Some others before Griffin may very well have benefitted from similar sympathies in earlier years in other jurisdictions; but the evidence surveyed here suggests that we need to prove and no longer assume earlier instances of lenience for men who killed unfaithful wives. Griffin may not have been the first, but neither did his case signal an immediate or marked shift in direction. From 1810 to 1841, Old Bailey records include a further forty-six cases of husbands killing their wives, in only two of which did the woman's infidelity (real or imagined) get raised in court, and in both the men were sentenced to death.[62]

Yet, around mid-century, it seems that such killings and such defenses became more common and more commonly treated with sympathy. Martin Wiener's survey of killings reported in newspapers throughout the country, from 1841-1900, found sixty-six trials for homicides purportedly done in response to a legally married wife's known or suspected infidelity.[63] They increased in frequency over the period, and as a proportion of the overall numbers of homicides. And in the middling decades of the century, at least, some such killers found mitigation in either manslaughter verdicts or reprieves after conviction for murder. In a subset of seventeen cases between 1841-1870 (most numerous in the 1860s) in which the adultery was proven, Wiener found that two men were found not guilty; ten men received

[61] The Times Digital Archive, 24 September 1810, p. 3.
[62] OBP, February 1818, trial of David Evans (t18180218-37) and October 1819, trial of John Holmesby (t18191027-35).
[63] Martin Wiener, Men of Blood: Violence, Manliness and Criminal Justice in Victorian England (Cambridge: Cambridge University Press, 2004), 201. Note that Wiener is careful to distinguish between legally married and more casually united couples, and between those where the infidelity was accepted by the court (43 cases) and those where it remained unsubstantiated (23).

manslaughter verdicts; and five had murder verdicts, but with four of the murderers later reprieved, only one suffered execution. In a set of twenty-five cases from 1871-1900, one man was deemed not guilty; five men were convicted of manslaughter; and nineteen were convicted of murder, with six executed.[64] By the end of the century, then, such men less often benefitted from special lenience on the grounds of this "provocation." "As the century wore on," Wiener suggests, "English juries and English public opinion seemed to be less inclined to excuse the lethal responses of men to their imagined or actual cuckolding."[65] True. I would suggest, though, that he (like others) has been misled somewhat by his subjects in thinking that this represented a repudiation of "traditional" or "longstanding" lenience for men who killed unfaithful partners. Rather, it was a reversal of a relatively short-lived and contested toleration for such killings.

Elsewhere, Wiener narrated the extraordinary case of George Hall, a young man convicted of murder in 1864, which we might briefly revisit here to get a sense of the strength of sentiment such killings could evoke in the mid-nineteenth century. George killed his estranged wife Sarah, not her lover. Moreover, he did so not when surprised by seeing them "in the very act," but with careful premeditation, having bought pistols on the morning he arranged to meet with her. The court, unsurprisingly, found him guilty of murder; but popular sentiment lay firmly on George's side. Nearly 70,000 people signed petitions requesting mercy for him. Lobbying the Home Office on his behalf, too, were men such as James Fitzjames Stephen, who assisted in his defense and later went on to write one of the more influential tomes on English criminal law. The petitioners cited what they, and Wiener, call an "unwritten law" and the "long tradition" which held, as Hall's defense counsel insisted, that

[64] Ibid., p. 206.
[65] Ibid., p. 205. See, too, Foyster, Marital Violence, 115-22, which also describes late nineteenth-century distancing from such defences as a narrowing or shift from a longstanding tradition.

"If a man detected his wife in the act of committing adultery and killed her paramour and herself on the spot, the crime was reduced from murder to manslaughter."[66]

Most everyone depicted the adultery as a great provocation, and a provocation by the wife, not by her lover--who remains all but a non-entity in this tragedy. Even the Lord Chancellor, arguing against mercy, saw it as such: "Cases of adultery occur constantly, and often under circumstances of the greatest provocation to the injured husband, and [but?] it would be of the most dangerous consequence to society, if such provocation were accepted as a reason for not capitally punishing the husband when he commits a coolly premeditated murder." True, some of the sentiment on George Hall's behalf emerged from an opposition to the death penalty: one group of petitioners urged the total abolition of capital punishment in all cases and referred to Sarah's actions simply as a "severe temptation" to kill. Most of the others, though, put the matter more strongly, disavowing any discomfort with the death penalty for murder, but insisting that Hall's act constituted no such crime. In petitions they advertised in the newspaper and circulated through churches and factories, they called Sarah's abandonment of her husband for another man an "extreme" or "grievous" provocation, or, indeed, "provocation of the most aggravated kind."[67] The popular outcry secured Hall a reprieve, just hours before his scheduled execution.

Wiener contextualizes the case with reference to other mid-to-late nineteenth-century killings of unfaithful wives by their husbands in which counsel appealed to the same "unwritten law." As Wiener notes, Hall's case did not really fit even this story of how adultery might mitigate guilt, and neither did most of the others: the husbands in question rarely killed their wives "in flagrante'" but after some pause and time for deliberation.[68] Even so, Wiener treats the difficulty in getting a reprieve as the change most needing explanation in

[66] Emphasis added. Martin J. Wiener, "The Sad Story of George Hall: Adultery, Murder and the Politics of Mercy in Mid-Victorian England," Social History 24.2 (1999): 174-95, quote at 178-9.
[67] Quotations taken from the various documents gathered in the relevant Home Office dossier: TNA, HO 45/9400/52638.
[68] Wiener, "Sad Story," 179 n. 23.

this story. He identifies a "growing idealization of domestic life" and "diminishing tolerance of violence in daily life" as factors working against Hall and other men brought before the courts for killing wives who had left or cuckolded them.[69] A "reshaping of national identity" contributed to what he sees as a new tightening of restrictions on men's lethal violence against their wives, with crimes of passion and the loss of self-control seen as "un-English": he cites Stephen himself as noting, despite his earlier pleas on Hall's behalf, that "It would be deplorable if we came to look upon passion and sentiment as any excuse whatever for crime, after the fashion of Frenchmen and Mexicans."[70] Wiener notes that by the end of the century, if men were to have their sentences for killing adulterous wives lessened, the mitigation more often came on the grounds of supposed insanity rather than provocation. Wiener is likely correct about these factors all playing parts in this story, but in having accepted the "unwritten law" as the product of "long tradition" and not noting the relative novelty of such defenses in wife-killings, mistakes the directions of some. The "diminishing tolerance of violence" and "growing idealization of domestic life" may well have been working not in tandem but at cross-purposes in this history.

The timing and nature of the changes traced here call to mind the chronology of the distinctively English action for "criminal conversation": in both, over the early nineteenth century the sense of the harm done to a cuckolded man became magnified and the balance of blame shifted from the male lover to the adulterous wife. As church courts gradually abandoned the business of prosecuting adultery in the late seventeenth century, common law courts stepped in by extending the action of trespass to cover a claim for damages by a husband against his wife's seducer. The seduction constituted the "criminal conversation"

[69] Ibid., 184.
[70] Ibid., 190-1, quote at 191. An examination of the treatment of adultery killings on the continent is unfortunately beyond the scope of this paper, but the Napoleonic Penal Code of 1810, which proved broadly influential in French colonies and other civil law jurisdictions, did expressly excuse the "crime passionnel." Article 324 deemed the killing of a wife and her "accomplice," when caught in the act in the conjugal home, an excusable homicide. See "Code Pénal de 1810," http://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes/code_penal_1810/code_penal_1810_3.htm, accessed 19 September 2015.

despite, as Lawrence Stone notes, "the fact that it was neither criminal nor a conversation in the usual sense of the word."[71] In an action between the two men that echoed medieval suits for "wife theft," the aggrieved husband could secure cash payment for his injured honor and the loss of "good company" with his wife. He might then also use the judgment as a basis for a parliamentary divorce, assuming he could afford the expenses incurred in either proceeding. Use of the so-called "crim. con." action peaked from about 1790-1830, finally being killed off in a clause inserted in the divorce act of 1857. Even as its use peaked, so too did criticisms: Surely no man of honor or feeling could accept a cash payment as sufficient reparation for the damage done him by the infidelity? Surely men of lesser means who could not afford such suits and parliamentary divorces suffered too? Surely punishing the adulterous woman in a criminal court made more sense?[72]

Repeatedly over these years, MPs considered bills to make a wife's adultery at least a misdemeanor, to supplement or replace the crim. con. action in a way that held the wife more directly accountable and that better recognized the nature of the injury done. One of the more concerted efforts happened in 1809. In those debates, Lord Auckland noted the inadequacies of crim. con. damages, which many an "injured husband is ashamed to receive," and which did nothing to deter the adulterous wife. He urged instead solitary imprisonment of two or three years as better for the "purposes of reform and of example."[73] In debates that led to the end of the crim. con. action, MPs denounced the acceptance of damages in such cases as "scandalous." Lord Lyndhurst wanted criminal process instituted against adulterers, not civil suits. Crim.con. actions, he asserted, constituted a "scandal to the country. There is no other country in the world where such actions are brought; on the Continent they are looked upon

[71] Stone, Road to Divorce, 231-300, quote at 233.
[72] On criminal conversation, see also Susan Staves, "Money for Honor: Damages for Criminal Conversation," Studies in Eighteenth-Century Culture 2 (1982): 279-97; Turner, Fashioning Adultery, 172-93; and Donna T. Andrew, Aristocratic Vice: The Attack on Duelling, Suicide, Adultery and Gambling in Eighteenth-Century England (New Haven: Yale University Press, 2013), 126-74, 230-6.
[73] 1 Hansard 14, 326.

with feelings of disgust and horror; and it is wondered at that a civilized country like this should maintain a law of this description." The Bishop of Oxford similarly called them "one of the most disgraceful proceedings that infected our social life."[74] That the wife was not implicated in the infliction of injury and that the affront of infidelity could be assuaged by cash no longer seemed tolerable to critics of the crim. con. action. The mounting opposition to crim. con. proceedings and the homicide cases thus both reveal a new sense that the adulterous wife, not her lover, was primarily to blame.

Shifting notions of marriage and of ideals of both femininity and masculinity presumably played parts in the nineteenth-century efflorescence of arguments that a husband's killing of an unfaithful wife was to some degree excusable. While not the loveless relationships some scholars once thought, early modern marriages took shape within different legitimizing frames than did later unions, when the rhetoric of companionate, affectionate partnerships based on love and emotional ties came to dominate talk of middle class marriage. So, too, did earlier depictions of women as sexually voracious lose ground to notions of the reluctant, restrained, or even passionless female.[75] As marriage became romanticized as the site of consolation and comfort and as women became idealized as the chaste guardians of virtue, the provocative quality of adultery inhered more in the wife's unfaithfulness than in the other man's "invasion" of a husband's rights.

Even as perceptions of the nature of the offence and the offender in cases of marital infidelity were changing, so, too, were attitudes to punishment. From the late 1780s, those convicted of manslaughter were no longer burned in the hand, but more often imprisoned, with the upper limit of jail terms increased from one to three years in 1822, and then to transportation for life from 1828. From 1837, in practice, murder was about the only crime

[74] 3 Hansard 142 1969-70, 1979.
[75] For recent reviews of the literature on nineteenth-century changes in view on sexuality and marriage, see Kate Fisher, "Marriage and Companionate Ideals Since 1750," and Tanya Evans, "Knowledge and Experience from 1750 to the 1960s," in The Routledge History of Sex and the Body: 1500 to the Present, ed. Sarah Toulalan and Kate Fisher (New York: Routledge, 2013), 328-47 and 256-75.

still punished with death. Manslaughter was thus subject to more substantial punishments than before, and murder charges singled out to cover only the most heinous of acts that still merited death. These broader changes in penal sanctions presumably shaped attitudes to the appropriate punishment for adultery killings, too.[76]

Such changes played out differently, of course, in other common law jurisdictions, but also with some striking similarities. Hendrik Hartog has examined a series of killings that became "media events" in nineteenth-century America. All involved men killing the male seducers, not their adulterous spouses; all harkened to the "unwritten law" and resulted in acquittals, though none happened in the moment of discovery. In 1859, Congressman Daniel Sickles shot the district attorney who had been sleeping with his wife Teresa; in 1867, in the midst of a state constitutional convention, doctor and major general George Cole shot the man who had had sex with his wife; and in 1869, Daniel McFarland shot the fiancé of his divorced wife Abby. In each of these cases the defenses borrowed both from notions of provocation and temporary insanity and the acquittals prompted much complaint and reaction--not least the acquittal of Daniel McFarland, which provided fodder for Elizabeth Cady Stanton's powerful reconceptualizations of women's rights within marriage. These cases, Hartog argues, "reveal a profound male disquiet about lost or changing rights and traditions," with lawyers and elements of the media using them "to create a new legal understanding designed to restore male honour and property rights in women."[77] Strikingly, too, Robert M. Ireland's examination of the "unwritten law" in nineteenth-century America notes the defense's relative novelty there. Ireland observes that although defense attorneys often asserted that American juries had always recognized a husband's right to kill his wife's lover, or at least his right not to die for doing so, that "there is no evidence that such leniency prevailed in the criminal

[76] See, for example, the discussion in TNA, HO 347/15, p. 17, where law reform commissioners advocated subdividing murder into first and second degrees, and used adultery killings as a specific example of a crime to be left in the non-capital degree.
[77] Hendrik Hartog, "Lawyering, Husbands' Rights, and "the Unwritten Law" in Nineteenth-Century America," Journal of American History 84.1 (1997): 67-96, quotes at 70.

justice system until the 1840s."[78] Moreover, as Carolyn Ramsey has demonstrated, from the 1880s at least, men who killed adulterous wives in the U.S. faced jurors concerned to maintain paternalistic protection of women and heightened standards of masculine self-control: the killers very often felt the full weight of the law for their actions.[79]

Considerations of space preclude a full examination of the reasons for the emergence in the nineteenth century of this "long tradition" of sympathy for husbands who killed unfaithful wives. Precisely what mix of factors shaped the chronologies of formal and popular attitudes to adultery slayings clearly merits further discussion. Why the myth (or fantasy?) of a husband's "right" to kill an unfaithful wife remains so strongly held today might also warrant examination. What should now be clear, though, is that such a "right" had a very short history in English legal practice. In England, the belief that a man might cite a woman's sexual behavior as a mitigating factor in her killing did not shape "experience over many generations," but took hold in the nineteenth century alongside newer notions of companionate marriage and women's sexual restraint. Charles Dickens in 1851 complained that "the fact of a woman being the lawful wife of a man appears to impress certain preposterous juries with some notion of a kind of right in the man to maltreat her brutally, even when this causes her death."[80] And indeed it did, in the case of adultery killings, but this was a relatively new and short-lived development. And it was in this relatively new and historically specific context that Charles Darwin would write in 1871 that sexual jealousy was a "universal instinct." Whatever the universal or instinctive qualities of the jealousy, seeing

[78] Robert M. Ireland, "The Libertine Must Die: Sexual Dishonor and the Unwritten Law in the Nineteenth-Century United States," Journal of Social History 23.1 (1989): 27-44, quote at p. 30. Note that Ireland also misdates Maddy's Case, identified in the record with the regnal date 23 Car II, to 1683 rather than 1671, presumably not having noted that Charles II's reign was somewhat flatteringly treated as beginning at the moment of his father's death in 1649, not at his accession in 1660.
[79] Carolyn B. Ramsay, "Intimate Homicide: Gender and Crime Control, 1880-1920," University of Colorado Law Review 77 (2006): 102-91. See also Carolyn Strange, "Masculinities, Intimate Femicide and the Death Penalty in Australia, 1890-1920," British Journal of Criminology 43 (2003): 310-39.
[80] Dickens and Richard J. Horne, "Cain in the Fields," Household Words, 10 May 1851, cited in Wiener, "Sad Story," 184.

adultery as grounds for excusing or justifying the killing of a married woman was neither. Rather, it was the product of an historical moment.
