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## **The Rise and Fall of the Unwritten Law: Sex, Patriarchy, and Vigilante Justice in the American Courts**

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### INTRODUCTION

In the late 1850s, Daniel Edgar Sickles, a congressman from New York, received an anonymous letter with shocking news.<sup>1</sup> Sickles was a married man. His attractive wife, Teresa Bagioli, was much younger than Sickles—he was 37; she was about half his age. Your wife, the letter said, is carrying on an affair with a man named Philip Barton Key.<sup>2</sup> The letter disturbed Sickles greatly. Sickles confronted his wife and asked her whether the letter told the truth; tearfully, she admitted that it did.<sup>3</sup> She confessed that she used to meet with Key in a house on Fifteenth Street, where she “did what is usual for a wicked woman to do,” on a bed on the second floor.<sup>4</sup> Sickles was a man of action. He took his guns and looked for Key on the streets of the capital.<sup>5</sup> When he found him, he shouted, “Key, you

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1. See W.A. SWANBERG, *SICKLES THE INCREDIBLE* 4, 46 (1956).

2. *Id.* at 46. Key was the son of Francis Scott Key, who wrote “The Star-Spangled Banner.” Philip Barton Key was young, good-looking, and a widower.

3. See *id.* at 49.

4. *Id.* at 50.

5. See *id.* at 54.

scoundrel . . . you have dishonored my bed—you must die!”<sup>6</sup> And Key did die; one bullet pierced his thigh, another his liver.<sup>7</sup> Sickles was arrested and charged with first-degree murder.<sup>8</sup> At the end of the trial, the jury, in almost indecent haste, brought in a verdict of not guilty.<sup>9</sup>

Fifty years later, Margaret Finn shot and killed J.E. Mahaffey on a crowded Los Angeles Street.<sup>10</sup> Finn and Mahaffey were engaged to be married.<sup>11</sup> Moreover, Finn was pregnant with Mahaffey’s child.<sup>12</sup> But Mahaffey was having second thoughts. He was running out of money, he told her, and wanted to postpone the wedding indefinitely.<sup>13</sup> Devastated by the scoundrel’s betrayal, Finn found a revolver, tracked Mahaffey down, and shot him dead.<sup>14</sup> She claimed that she could not remember firing the gun. Her mind had gone totally blank: what happened was “a mystery.”<sup>15</sup> Still, she refused to apologize: “I had placed my honor and my life in his trust and he betrayed that trust . . . .”<sup>16</sup> Mahaffey “deserved death for the way he treated me.”<sup>17</sup> The judge agreed. He dismissed the case against her without trial.<sup>18</sup>

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6. *Id.*

7. *Id.* at 55. Of course, the double standard was in full flower. Daniel Sickles was hardly the faithful husband. He spent a number of evenings at a Baltimore hotel with a woman who registered as Mrs. Sickles, but was not Teresa; and he engaged in “adulterous intercourse.” See NAT BRANDT, *THE CONGRESSMAN WHO GOT AWAY WITH MURDER* 90-91 (1991).

8. SWANBERG, *supra* note 1, at 55-58.

9. *Id.* at 66.

10. See *Woman Murders Man on Crowded Street*, L.A. TIMES, July 6, 1908, at I4.

11. *Id.*

12. See *id.*

13. See *id.*

14. See *id.*

15. *Id.*

16. *Tells Why She Killed Lover*, L.A. TIMES, July 7, 1908, at I13 (internal quotation marks omitted).

17. *Id.* (internal quotation marks omitted).

18. *Margaret Finn Is Acquitted*, L.A. TIMES, Oct. 17, 1908, at II2.

And on January 13, 1912, John Beal Sneed, a member of a wealthy Texas family, shot and killed Captain Al Boyce Sr., a millionaire banker, in the lobby of the Fort Worth Hotel.<sup>19</sup> Sneed's young wife, Lena, was in love with Boyce's son, Al Jr., whom she had met while they were students together at Southwestern University.<sup>20</sup> Lena confessed to her husband that she was in love with Boyce and sought permission to run away with him to South America.<sup>21</sup> Instead, Sneed committed her to a nearby sanitarium.<sup>22</sup> But Al Jr. arranged for her to escape, and the couple eloped to Canada, where they hoped to start a new life together.<sup>23</sup> It was not meant to be. Sneed learned of the escape, retrieved Lena, and returned to Texas—humiliated, jealous, bent on retribution.<sup>24</sup> Convinced that Boyce Sr. had helped his son, Sneed shot the old man, claiming afterwards that “it had to be done.”<sup>25</sup> He was tried for murder, but the jury could not agree on a verdict. A mistrial was declared.<sup>26</sup> Before Sneed could be retried, he tracked down Al Jr. in front of a Methodist church in Amarillo, Texas. Disguised as a tramp “with a heavy growth of beard and wearing overalls,” Sneed shot the younger Boyce.<sup>27</sup> Wounded and bleeding, the victim pleaded with Sneed to spare his life, but Sneed shot him again.<sup>28</sup> “I guess you are dead,” he said.<sup>29</sup> A jury acquitted him of both killings.<sup>30</sup>

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19. *Unwritten Law Issue in Trial*, ATLANTA CONST., Feb. 6, 1912, at 8.

20. Thomas H. Thompson, *Boyce-Sneed Feud*, TEXAS STATE HISTORICAL ASS'N, <http://www.tshaonline.org/handbook/online/articles/jcb02> (last visited Sept. 23, 2013).

21. *He Slew Wife's Lover; Sneed Is Acquitted*, ATLANTA CONST., Feb. 26, 1913, at 9.

22. *Id.*

23. *See id.*

24. *Id.*

25. *Unwritten Law Issue in Trial*, *supra* note 19.

26. *Sneed Kills Young Boyce*, BOS. GLOBE, Sept. 15, 1912, at 2.

27. *Id.*

28. *Wounded Boyce Begged for Life*, ATLANTA CONST., Sept. 24, 1912, at 1.

29. *Id.* (internal quotation marks omitted).

30. *See He Slew Wife's Lover*, *supra* note 21.

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These three cases are illustrations of the so-called “unwritten law.” The phrase refers to a phenomenon that can be traced back to the middle of the nineteenth century. As applied to trials like the trial of Daniel Sickles, it had a clear social meaning. Criminal defendants who could convince a jury that they killed in defense of the sanctity of their home, and the virtue of their women, were almost certain to be acquitted. Killing a wife’s lover was the paradigm case.

State penal codes, of course, never recognized any such thing—not officially. The penal code of Texas came about as close as any, in the nineteenth century. If a husband committed a homicide “upon one taken in the act of adultery with the wife,” this was justifiable killing.<sup>31</sup> But the homicide had to take place “before the parties to the act have separated.”<sup>32</sup> This was obviously quite a narrow defense. The victim would have to be amazingly unlucky, or careless, or carried away by passion, for the statute to apply. Otherwise, killing an adulterer was (in theory) no different from killing a total stranger.

But in practice, the unwritten law cast its wings of protection over those who killed to defend the honor of women. And one can distinguish a number of variations. First, a husband, brother, or father could justifiably kill any man who had a sexual relationship outside of marriage with the killer’s wife, daughter, sister, or mother, or who played a substantial role in such an affair. Second, a betrayed woman could kill an abusive husband; or a man who “ruined” her and refused to correct the wrong through marriage. No statute ever said so, but American juries from New York to Georgia to California simply refused to convict under these circumstances.

Criminal trials are important social documents. They shed light on social norms that might be otherwise difficult

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31. Hendrick Hartog, *Lawyering, Husbands’ Rights, and “the Unwritten Law” in Nineteenth-Century America*, 84 J. AM. HIST. 67, 68 (1997) (quoting TEX. PENAL. CODE ANN. art. 1220 (West 1961)) (internal quotation marks omitted).

32. *Id.*

to demonstrate. They are evidence of current ideas, practices, beliefs, and stereotypes. They reflect, and also influence, public attitudes and ways of thinking. A jury, after all, is a cross-section of the public—a small but significant sample of public opinion. To be sure, until recently, it was exclusively a cross-section of *male* opinion (and middle-class opinion at that). But this was an important segment of society.

In a big trial, lawyers on both sides appeal to popular justice, in the broadest sense. They evoke attitudes and norms that they think will influence the judge and jury. The stories they tell have to be sympathetic and persuasive. Lawyers have to give jury members something reasonable, something familiar, something they can carry with them into the locked rooms where they argue, discuss, and decide. For this reason, arguments in jury trials are important windows into the soul of their period. Of course, jury decisions are limited forms of social evidence. Jurors rarely talk about why they reached their decision. They come out of their room, only to utter a few terse but significant words. Their reasoning can only be inferred from their behavior. The jury room is the blackest of black boxes.

Lawyer rhetoric and jury behavior are, of course, hardly rigorous evidence of cultural attitudes. Sometimes, however, they are the best we can do. And especially for historical research—research on the dark ages before opinion polls. The way these trials turned out can help show us which norms, ideas, and attitudes packed the most social punch. And, while a single trial can be idiosyncratic, *patterns* of verdicts and decisions are not. The more pervasive the pattern, the better the evidence.

For this reason, the unwritten law offers fascinating insight into American life during the century from 1850 through 1950. Cases of the unwritten law tell us about evolving attitudes towards women and marriage; about theories of masculinity and vigilante justice; and, more fundamentally, about popular conceptions of right and wrong. Juries sided with whichever lawyer could best argue that he was on the side of justice. And for nearly a century, juries across America agreed that justice was served by the

swift, extrajudicial killing of any man who sexually betrayed a wife, daughter, or sister.

A number of scholars have looked at the unwritten law before,<sup>33</sup> and their work is valuable and insightful. But nobody has tried to look at this phenomenon in a systematic way; and no one has traced its rise and fall. Many important questions about the unwritten law have therefore not yet been answered. When and how did the unwritten law take root in the United States? How frequently was it invoked? How often, and in what circumstances, was it successful? What was the impact of geography, race, or social class? When and why did the unwritten law die out? This article tries to shed light on these issues.

Based on a review of every case that invoked the unwritten law reported in three major American newspapers from the mid-nineteenth century on, we found that the unwritten law was a firmly established feature of the criminal justice system across the United States. Its climax was a number of sensational cases in the early twentieth century. Since this was an *unwritten* law, one might think of it as limited and unpredictable. But our research emphasizes that it was a *law*—a well-understood and routine plea that a defendant might well invoke whenever the circumstances were right. This is a story of a rise and fall: how the unwritten law reached its peak; what social and culture forces underlay it; and why it fell into disuse in the mid-twentieth century.

#### METHODOLOGY

The data that this article reports was derived from the digital database of three newspapers dating back to the middle of the nineteenth century. The newspapers are the *Atlanta Constitution*, the *Los Angeles Times*, and the *New*

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33. See generally CAROL HABER, *THE TRIALS OF LAURA FAIR* (2013); BILL NEAL, *SEX, MURDER, AND THE UNWRITTEN LAW* (2009); Hartog, *supra* note 31; Robert M. Ireland, *The Libertine Must Die: Sexual Dishonor and the Unwritten Law in the Nineteenth-Century United States*, 23 J. SOC. HIST. 27 (1989); Martha Merrill Umphrey, *The Dialogics of Legal Meaning: Spectacular Trials, the Unwritten Law, and Narratives of Criminal Responsibility*, 33 LAW & SOC'Y REV. 393 (1999).

*York Times*. We compiled every instance in which the terms “unwritten law” and “trial” both appeared in an article. Some high-profile cases were reported in all three newspapers. But most instances were more provincial—appearing in only one newspaper, usually, but not always, dictated by geography. From the mid-nineteenth century on, we found a total of 201 reported instances in which the unwritten law was invoked as a major part of the defendant’s case.<sup>34</sup>

Why newspaper research? Because the unwritten law is an aspect of living law that leaves virtually no trace in standard legal sources. The prosecution cannot appeal from an acquittal; hence it would be useless to look at reported cases (almost invariably appeals) for evidence of such a practice. A computer search engine might some day make it possible to search trial court records; but as of now that is out of the question. Newspapers, on the other hand, provide a rich trove of data.

Newspapers are a rich source—but not a perfect one. There are good reasons to believe that these 201 cases represent only a modest sample of cases of the unwritten law, rather than a comprehensive list. First, many cases involving the unwritten law were undoubtedly not reported at all in these newspapers—either because they took place outside the area which the newspaper regularly covered, or because they were insufficiently important or interesting to warrant coverage. Further, it is likely that certain unwritten law cases were reported in these newspapers but did not use the terms “unwritten law” and “trial”—and thus were not captured by our search. Nonetheless, the newspaper search does provide us with far more data than has been available up to this point about the unwritten law.

For each case in our sample we noted the gender of the defendant; the region in which the trial took place; the date of the trial; and the outcome of the trial. Men were the defendants in the overwhelming majority of the cases. In

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34. Because our focus is on the history of the unwritten law in the United States, we omitted cases reporting on unwritten law trials abroad. But the three newspapers reported six such trials—in England, France, Belgium, Germany, South Africa, and Canada—all of which resulted in acquittals.



163 cases (81.1%) the defendant was a man on trial for killing or attempting to kill another man who wronged the defendant's wife or female relative. In 38 cases (18.9%) the defendant was a woman on trial either for killing or attempting to kill a man who "betrayed" her, or for killing or attempting to kill another woman who stole her husband's affection.

To evaluate the geographic scope of the unwritten law, we divided the country into four regions: the Northeast,<sup>35</sup> the South,<sup>36</sup> the Midwest,<sup>37</sup> and the West.<sup>38</sup> We included as part of the South the border states of Maryland, West Virginia, Kentucky, and Oklahoma, as well as the District of Columbia. These places were culturally Southern at the turn of the twentieth century, and thus seemed to belong in the South more than in any other region. The South accounted for 104 (51.7%) of the unwritten law cases in our sample. The Northeast accounted for 26 (12.9%) of the sampled cases. The Midwest accounted for 15 (7.5%) of the sampled cases. And the West accounted for 56 (27.9%) of the sampled cases. Our sample included one newspaper from each region except the Midwest. It is therefore no surprise that the Midwest accounted for the fewest cases; it does not mean that the unwritten law was less common in the Midwest than in other regions. Our conclusions are on firmer ground, of course, in the other three regions.<sup>39</sup>

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35. The Northeast comprised Delaware, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine.

36. The South comprised the District of Columbia, Maryland, Virginia, West Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Kentucky, Tennessee, Arkansas, Oklahoma, and Texas.

37. The Midwest comprised Ohio, Indiana, Illinois, Michigan, Wisconsin, Minnesota, Iowa, Missouri, Nebraska, South Dakota, and North Dakota.

38. The West comprised Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Nevada, Washington, Oregon, California, and Hawaii.

39. Further, it is possible that differences in newspapers' editorial choices affected the geographical spread of our sample. For example, if the editors of the *Atlanta Constitution* believed criminal trials to be more newsworthy than did the editors of the *New York Times*, we might expect the *Atlanta Constitution* to report unwritten law cases more frequently than the *New York Times*. Because each newspaper was responsible for local coverage, the *Atlanta Constitution's*



We also noted the year in which each trial took place. There was a noticeable jump in the cases during the first two decades of the twentieth century, with a significant spike in 1907.<sup>40</sup>

Finally, we noted whether the plea of the unwritten law was successful or not. The cases, of course, had various outcomes. At one end of the spectrum were the acquittals; at the other, death sentences. In between, there was a range of punishments from lenient to severe. We classified outcomes into three categories. The first category included all cases in which the defendant escaped scot-free. This category included acquittals, as well as cases where a grand jury declined to indict a defendant, where a coroner's jury found that no crime had been committed, or where a prosecutor declined to bring charges.

The second category included outcomes where the defendant was technically found guilty, but the punishment was lenient—lenient enough that one assumes the unwritten law influenced the result. This category included cases in which the defendant was fined, was sentenced to probation, or was sentenced to a term of imprisonment of eight years or less. Here we also put cases where the defendant was convicted, but the state governor granted clemency.

The third category included cases in which the unwritten law did not seem to help the defendant, and the defendant was convicted and sentenced to death or to a long term in prison. We thought the eight-year divide between a lenient sentence and a severe sentence was reasonable,

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relative emphasis on criminal trials might wrongly suggest that there were disproportionately more unwritten law cases in the South than in the Northeast. For this reason, it is impossible to be sure whether differences in reported unwritten law cases by region were the product of differences in the frequency with which the unwritten law was invoked, or of editorial choices—or some combination of the two.

40. In some cases, it was impossible to tell the year in which the trial took place. These were cases that newspapers referred to, without giving a trial date. We used other sources to fix the date of these trials; but in eight cases this proved impossible. We therefore fell back on the assumption that these cases took place in the year they were reported, which is probably but not certainly right.

though of course it is somewhat arbitrary.<sup>41</sup> There were, however, only a few cases in which the unwritten law did in fact produce sentences higher than eight years.

On the whole, the unwritten law was hugely successful—or so it seemed. We should, however, point out a few cautions. First, it is possible that successful invocations of the unwritten law were overrepresented in our sample because of selection bias. Newspaper editors might have found these cases more newsworthy than cases where the defense failed.

But on the other hand, the sample itself might overcount cases in which the unwritten law failed and undercount cases where a defendant was treated leniently. This is because the unwritten law operated at many different phases of the trial process. A defendant could be convicted on one day, but given only a token sentence on the next day. Likewise, a defendant could be sentenced to life in prison one day, and then granted a full pardon on the next day. Newspapers may have covered the first day, but not the second, simply on the grounds that one sort of event was more newsworthy than the other. This would leave the false impression that a defendant received a harsher punishment than he received in fact. In three cases, the *Atlanta Constitution* reported that a jury convicted the defendant but recommended that the judge show “mercy” in sentencing.<sup>42</sup> No follow-up story on the judge’s actual sentence was written in these cases, and so we classified them as cases where the unwritten law failed. But it is possible—even likely—that the judges took the jury’s recommendation seriously, and gave a light sentence.

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These qualifications aside, these cases represent the most comprehensive sample ever assembled on the

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41. In one case, a defendant received an eight-year sentence and thanked the judge for the judge’s “leniency.” See *J.H. Hartley Gets 8-Year Sentence*, ATLANTA CONST., Dec. 8, 1911, at 3. This seemed as good a reason as any to choose eight years as a dividing line between lenient and severe sentences.

42. See *Unwritten Law Plea Fails to Save Short*, ATLANTA CONST., May 11, 1913, at 1; *Manslaughter Was the Verdict*, ATLANTA CONST., Oct. 3, 1908, at 11; *Pleaded the Unwritten Law*, ATLANTA CONST., June 30, 1907, at C5.

unwritten law. At the least, the sample provides insight into the kinds of cases newspapers thought their readers would be interested in. The sample gives a sense of the geographic scope of the unwritten law, and the different sorts of cases that used or tried to use this defense. And, because newspapers were the principal means by which Americans learned about criminal justice during this period, the cases also tell us about what contemporary Americans—or at least American males—understood about the unwritten law.

The sampled cases tell a clear story. The unwritten law emerged in the mid-nineteenth century, rose sharply in the early twentieth century, and then declined gradually, ending altogether in the 1950s. The defense was predicated on notions about manhood, and also on notions about feminine subservience and innocence. And the defense's success shows how judges and juries across the country encouraged a kind of vigilante justice by letting hundreds—if not thousands—of men and women get away with what would today be considered murder.

### I. THE RISE OF THE UNWRITTEN LAW

The unwritten law was a fairly rare defense in the last half of the nineteenth century, and was invoked mostly in high-profile cases. But in 1907, the frequency with which the defense appeared in newspapers suddenly jumped. The figure below tells the story.

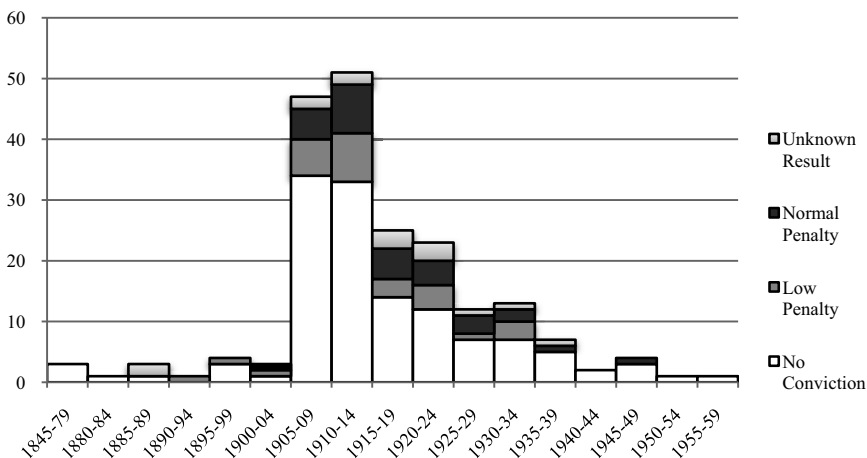


Figure 1: Unwritten Law Cases Sampled from Three Major American Newspapers

Daniel Sickles' lawyers may have been the first to plead what would later come to be known as the unwritten law. Certainly, the Sickles trial of 1859 was the first trial in which the unwritten law captured national attention.<sup>43</sup> Sickles' lawyers had few other options. After all, their client shot Key in broad daylight in Lafayette Park, directly across from the White House. And Sickles readily confessed to the killing. So at the trial, the defense hammered away at one great theme: Philip Barton Key deserved to die.<sup>44</sup> He was an adulterer, a libertine, an evil home-wrecker. The Good Book itself prescribed death by stoning for adulterers.

Of course, the Good Book might say what it pleased; no such provision appeared in the District of Columbia code. As far as the formal law was concerned, killing an adulterer was no different from killing anybody else. It was simply murder. So while the lawyers made a powerful *social* argument for innocence, their only *legal* defense was temporary insanity. Sickles, they claimed, had become unhinged by the dread news that his wife was unfaithful. He had killed Philip Key in a sort of temporary frenzy. Whether anybody on the jury actually believed this argument is hard to say. Most likely, the jury simply felt that Key got what was coming to him. But temporary insanity gave the jury a legal hook upon which to hang its decision.

The insanity defense—or, to be more accurate, temporary insanity—became a staple of the unwritten law.<sup>45</sup>

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43. To explain the absence of the unwritten law in early American society, Robert Ireland has argued that life in the colonial period and early republic simply provided few opportunities for adultery. See Ireland, *supra* note 33, at 27. There was little privacy; and society in small towns was vigilant for signs of moral indiscretion. See *id.* at 27-28. The fact that the law prescribed rather severe punishments for adultery, at least on the books, may have further deterred the practice. See *id.* Ireland's argument is plausible for the seventeenth century but somewhat dubious for the late colonial period and the period of the republic. In any event, by the time young Philip Key and Teresa Sickles were having their fling, the social conditions for the commission of adultery were quite different.

44. Hartog, *supra* note 31, at 78.

45. *Id.* at 83.

It would be naïve to take it literally. Temporary insanity was hardly a medical category. Rather, it was (if anything) a kind of emotional state. The murderous rage of someone in Sickles' position was, as one author put it, an emotion "to which all good men alike were subject"; it was a "legitimate and appropriate attribute of male identity."<sup>46</sup> Any decent and honorable husband, in other words, would feel the same way. And would perhaps act the same way. It was the manly thing to do.

During the remainder of the nineteenth century, a number of other high-profile trials stretched the unwritten law into new territory. In 1867, Major General George Cole, having recently returned from the Civil War, interrupted the New York State constitutional convention by killing L. Harris Hiscock, a delegate who had allegedly prevailed upon Cole's wife to "submit to his caresses" during the war.<sup>47</sup> Although he was perfectly sane before and after the killing, he claimed he was insane when he pulled the trigger.<sup>48</sup> And the jury agreed.<sup>49</sup> The *New York Times* called this "the most extraordinary verdict ever returned by a jury made up of men supposed to be sane themselves."<sup>50</sup>

Then, in 1869, Daniel McFarland shot and killed Albert Richardson, a well-known journalist.<sup>51</sup> McFarland believed that Richardson had lured away McFarland's wife, an aspiring actress named Abby Sage. Sage had separated from her husband years earlier and had since taken up with Richardson.<sup>52</sup> At the trial it became clear that McFarland was an abusive drunk, resentful of his ex-wife's success.<sup>53</sup>

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46. *Id.* at 84.

47. *The Cole-Hiscock Case—Argument for a Postponement of the Trial—The Cause to Be Tried at a Special Term of the Oyer and Terminer*, N.Y. TIMES, Feb. 3, 1868, at 1.

48. *The Cole-Hiscock Murder*, N.Y. TIMES, Dec. 9, 1868, at 6.

49. *See id.*

50. *Id.*

51. *See* GEORGE COOPER, LOST LOVE: A TRUE STORY OF PASSION, MURDER, AND JUSTICE IN OLD NEW YORK 127 (1994).

52. *See* Hartog, *supra* note 31, at 73-74.

53. *See id.* at 73.

But the defense attorney deftly portrayed McFarland as a victim—of Richardson’s wiles; of shifting social values that encouraged women to abandon their husbands; of modernity itself.<sup>54</sup> The lawyers also brought in medical evidence. One Dr. Hammond visited McFarland in jail and claimed he saw evidence of “cerebral congestion.”<sup>55</sup> “[H]is face and head [were] abnormally hot”; the “carotid and temporal arteries” were “throbbing”; and when shown photos of his wife he became “incoherent” and his pulse “rose to 142.”<sup>56</sup> Hammond’s conclusion was “transitory mania, temporary insanity, and morbid impulse.”<sup>57</sup> The jury acquitted him in short order, to the cheers of the crowd in the courtroom: “ladies crowded around McFarland . . . some kissing him.”<sup>58</sup>

The unwritten law also figured in the trial of the famous photographer (and protégé of Leland Stanford) Eadweard Muybridge. Muybridge became famous for proving through photographs that a horse could have all four of its legs off the ground at once.<sup>59</sup> He became infamous when he was tried for the murder of one Harry Larkyns, who had an affair with Muybridge’s wife, Flora. When Muybridge found out, he became enraged: “His appearance was that of a madman. He was haggard and pale, his eyes glassy—his lower jaw hung down, showing his teeth—he trembled from head to foot, and gasped for breath.”<sup>60</sup> He was much calmer when he went to Calistoga, California, found Larkyns at the Yellow Jacket Mine, and shot him.<sup>61</sup> Larkyns realized that Muybridge knew about the affair, and that he was in danger. “He turned to run,” said Muybridge, “like a guilty craven . . . and I had to shoot him. The only thing I

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54. *See id.* at 73-75.

55. COOPER, *supra* note 51, at 191-92.

56. *Id.*

57. *Id.*

58. *Id.* at 225.

59. EDWARD BALL, *THE INVENTOR AND THE TYCOON: A GILDED AGE MURDER AND THE BIRTH OF MOVING PICTURES* 122 (2013). The Muybridge case is one of the main themes of the book.

60. *Id.* at 162 (internal quotation marks omitted).

61. *See id.* at 56.

am sorry for is that he died so quickly.”<sup>62</sup> The jury acquitted Muybridge; and when he left the courthouse, “a large crowd in front of the courtroom erupted in cheers and applause, and he was mobbed.”<sup>63</sup> A reporter felt that there was “nearly unanimous” agreement that the verdict was just.<sup>64</sup>

All of these murders involved the rich and famous—the upper crust of American society. Their trials were national sensations. And, as Hendrick Hartog has argued, each trial extended the unwritten law a bit further.<sup>65</sup> The Sickles case was a fairly straightforward application of the unwritten law. Sickles acted promptly—presumably still under the influence of the terrible news, which clouded his judgment. But in later cases, it was harder to argue that the defendant had acted in a sudden frenzy of insanity. George Cole, for instance, after learning that he had been betrayed, set about consulting various friends, “procuring a pistol, arranging his plans, writing letters to screen himself and traveling to find his victim.”<sup>66</sup> This was surely enough time to calm down and think over what he was doing. And McFarland’s killing of Richardson took place even further from the heat of passion. Two full years had passed between the failure of McFarland’s marriage and the killing.<sup>67</sup> Indeed, it appeared that Richardson and Abby Sage did not even begin a relationship until after the marriage had been dissolved.<sup>68</sup> Nonetheless, the unwritten law, and the legal excuse of temporary insanity, were a potent combination.<sup>69</sup>

Above all, the unwritten law was grounded in the idea that the victim deserved to die. Slowly but surely, these cases began to accumulate in American courts. And by the

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62. *Id.* at 166 (internal quotation marks omitted).

63. *Id.* at 279.

64. *Id.* (internal quotation marks omitted).

65. Hartog, *supra* note 31, at 70-75.

66. *The Cole-Hiscock Murder*, *supra* note 48.

67. Hartog, *supra* note 31, at 74.

68. *See id.*

69. Professor Hartog has a fascinating account of these three trials, and how the defense attorney at each new trial built on past precedents to extend the unwritten law. *See generally id.* at 69-96.



early twentieth century, they amounted to something more than a collection of cases here and there: they now constituted an actual *law*.

## II. THE GOLDEN AGE OF THE UNWRITTEN LAW

Although some nineteenth century cases were big news across the United States, our sampled newspapers covered the unwritten law only rarely until the beginning of the twentieth century. Then, seemingly all at once, reported cases of the unwritten law mushroomed.

A number of factors might account for this sudden jump. First, there is some evidence that the term “unwritten law” did not take root nationally until some time in the early twentieth century.<sup>70</sup> Thus, there may have been some pre-1907 cases of the unwritten law that were not included in our sample simply because newspapers did not use that term. Also, yellow journalism was on the rise in this period; newspaper editors understood that sensational trials—full of sex, violence, and scandal—were a good way to sell newspapers. This had been true, to be sure, for some time, but it did reach something of a crescendo in the early twentieth century. Most importantly, however, one particular sensational trial, in 1907, may have ignited unwritten law fever. This was the trial of Harry K. Thaw, which would become one of the most famous trials in American history.

Like the rest of these trials, Thaw’s trial involved a love triangle: two men and a woman. The dead man was Stanford White. White was one of the country’s most prominent architects, the designer of Madison Square Garden and many other buildings.<sup>71</sup> He was also a notorious womanizer. The killer was Harry Thaw, a wild and wealthy young man, who had been kicked out of Harvard for

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70. Our search for cases involving the “unwritten law” yielded only a handful of stories written before 1900. But many stories written after 1900 used the term “unwritten law” when referring back to earlier cases, suggesting that the term was coined later.

71. Umphrey, *supra* note 33, at 399.

misbehavior.<sup>72</sup> But it was Thaw's wife, Evelyn Nesbit Thaw, a ravishingly beautiful and famous showgirl, who was in many ways the star of the show. Thaw claimed that White took Evelyn to her room, at the tender age of sixteen, drugged her, and raped her.<sup>73</sup>

That was her story, at least: a wicked man had "ruined" her. He gave her champagne that was "bitter and funny-tasting."<sup>74</sup> Then, "[e]verything went black" and she passed out.<sup>75</sup> When she woke up, she was naked, and there were "blotches of blood on the sheets."<sup>76</sup> White brought her a kimono, and said, "It's all over."<sup>77</sup>

Murdering White was, according to Thaw, payback for despoiling young Evelyn. As the defense described her, she had been a hapless victim, an innocent dove; and White was a vicious libertine.<sup>78</sup> But the District Attorney ridiculed this idea. Evelyn was no "angel child . . . reared chastely and purely . . . [d]rugged and despoiled."<sup>79</sup> That story was "nonsense."<sup>80</sup> After all, Evelyn was not exactly brought up in a convent. She had become a showgirl at a very young age, part of the "Florodora chorus."<sup>81</sup> The idea that she had been dragged into a "den of vice and drugged" was simply absurd.<sup>82</sup>

The Thaw trial was regarded as a case of the unwritten law; but it was hardly typical. The incident that "ruined" young Evelyn took place long before she married Harry Thaw. This surely made a difference. In the usual case, the

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72. *Id.* at 401.

73. *Id.* at 414-15.

74. DEBORAH DORIAN PAUL, TRAGIC BEAUTY: THE LOST 1914 MEMOIRS OF EVELYN NESBIT 46 (2006).

75. *Id.*

76. *Id.*

77. *Id.* (internal quotation marks omitted).

78. Umphrey, *supra* note 33, at 414-15.

79. *Id.* at 418 (internal quotation marks omitted).

80. *Id.* at 418-19 (internal quotation marks omitted).

81. *See id.* at 419 (internal quotation marks omitted).

82. *See id.* (internal quotation marks omitted).

seduction or adultery is recent; the wound to the male ego is raw. No doubt juries found such cases most appealing. In the Thaw case, the facts were a good deal murkier. Thaw himself was a dubious character, a rich boy with wild, profligate, and somewhat pathological habits.<sup>83</sup> This was one case where literal use of the insanity defense would not have been out of place. Thaw's first trial resulted in a hung jury.<sup>84</sup> A second trial found him not guilty by reason of insanity, and he was sent off to an asylum.<sup>85</sup>

Hardly any trial in American history created such a storm of publicity and excitement. It was the first great trial of the century. A movie, *The Unwritten Law: A Thrilling Drama Based on the Thaw White Case*, appeared on the nation's screens soon afterwards (and ran into a good deal of censorship trouble).<sup>86</sup> And a play by Edwin Milton Royle, *The Unwritten Law*, opened on Broadway in 1913.<sup>87</sup> A husband in the play is accused of killing a man who paid too much attention to his wife. In the play, as in life, the verdict was "not guilty."<sup>88</sup>

What followed the Thaw trial might be called the golden age of the unwritten law. Before the trial, our three

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83. *See id.* at 401.

84. *Id.* at 394.

85. *Id.* at 419.

86. A nickelodeon was fined \$100 in 1907 for showing the film, and thus "imperiling the morals of young boys." Daniel Czitrom, *The Politics of Performance: Theater Licensing and the Origins of Movie Censorship in New York*, in *MOVIE CENSORSHIP AND AMERICAN CULTURE* 16, 22 (Francis G. Couvares ed., 1996); *see also* LEE GRIEVESON, *POLICING CINEMA: MOVIES AND CENSORSHIP IN EARLY TWENTIETH-CENTURY AMERICA* 37 (2004). Another movie, *The Girl in the Red Velvet Swing*, appeared in 1955.

87. *Royle's New Play*, N.Y. TIMES, Feb. 8, 1913, at 13.

88. A review of the play appeared in the *New York Times* on February 8, 1913. In the play (according to the review), Kate Wilson, a married woman, is seduced by a blackguard. *See id.* She plans to divorce her husband and marry her seducer, but he refuses her, and she kills him. *See id.* Her husband, who was drunk at the time of the killing, takes the blame; but the foreman of the grand jury whispers to the prosecutor that the unwritten law will prevail, and the husband will go free. *See id.* The *Times* did not think much of the play and its "almost unrelieved gloom." *Id.* There were some scenes of "considerable power," wrote the critic; but there was "little freshness in the inspiration." *Id.*

newspapers reported less than a trial each year. But in 1907 alone our newspapers reported twenty-three trials involving the unwritten law, in every region of the country. That year, the writer of a St. Louis editorial (reprinted in the *Atlanta Constitution*) commented that “precedents are almost unanimous in favor of the assertion that any man has a right to kill the betrayer of his wife, his sister or his daughter.”<sup>89</sup> It would be “almost fair to say that the ‘unwritten law’ has become the law of the land.”<sup>90</sup> And at a meeting of the American Bar Association in St. Paul, Minnesota, a Louisiana lawyer, tongue in cheek, proposed codifying the law: “Any man who commits a criminal indiscretion may be put to death with impunity by the injured husband, who shall have the right to determine the mode of execution, be it never so cowardly.”<sup>91</sup> Between 1905 and 1909, the unwritten law figured in nearly fifty reported trials in our sample.

As the unwritten law expanded after the Thaw trial, the cases developed a predictable pattern. The defense attorney would explain how the victim had insinuated himself into a married woman’s affection—using his “wiles” and his superior intellect to dupe the innocent woman into betraying her husband. Eventually, the husband would learn that he had been cuckolded, and the wife would tearfully confess to the affair. Often, the wife herself would testify at trial, insisting that her husband was not to blame, that it was her betrayal that had caused the sorry affair to unfold. The defense attorney would claim that the husband then looked for the betrayer, armed for self-protection. Betrayer and betrayed would meet—often in some public place. The husband would denounce the villainous seducer; the seducer would reach for his weapon. And then, in self-defense, and overcome by a temporary frenzy, the husband would fire the fatal shot.<sup>92</sup>

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89. *Freed by the Unwritten Law*, ST. LOUIS GLOBE-DEMOCRAT, reprinted in ATLANTA CONST., Aug. 26, 1907, at 4.

90. *Id.*

91. *Id.*

92. For example, these are the rough facts of the C. Walter Jones case. Jones was on trial for murdering Sloan Rowan in Montgomery, Alabama. He claimed

It was an ingenious defense. It gave juries two excuses, other than the unwritten law, for entering a verdict of not guilty—temporary insanity and self-defense. In most cases, both defenses were probably fabricated. Days, weeks, or months often passed between the time the husband learned of the affair, and the murder of the wife's lover. This made the claim of temporary insanity dubious. And even if a victim did reach for a weapon—which in many cases seems equally dubious—this would have been a wise move. The home-wrecker must have known that a vengeful husband could kill him with almost total impunity. Killing the husband first might be the libertine's only hope.<sup>93</sup>

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Betrayed husbands were not the only men protected by the unwritten law. The defense protected fathers, brothers, and sons as well. In 1907, two brothers, James and Philip Strother, were put on trial for killing William Bywaters, husband of their sister, Viola.<sup>94</sup> Actually, he was her husband for at most a few hours, and most reluctantly.<sup>95</sup> Bywaters had gotten Viola pregnant; she had an abortion in Washington, D.C.; the operation left her ill and in pain.<sup>96</sup> When her brothers learned the story, they insisted that Bywaters marry their sister.<sup>97</sup> Shortly after the shotgun wedding, the new bridegroom tried to get away—first down

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that Rowan had branded his wife "as without womanly character and had made evil charges, boasting of a personal liaison"; that he confronted Rowan at a train station; and that he shot Rowan after the victim attempted to draw his gun. See *Unwritten Law and Self-Defense*, ATLANTA CONST., Aug. 1, 1912, at 16.

93. Our newspapers only turned up one case where a libertine succeeded in killing the cuckolded husband during a fracas. Not surprisingly, the killer's attempt to plead a sort of reverse-unwritten-law was unsuccessful. See "*Unwritten Law*" *Plea Fails to Acquit Butt*, ATLANTA CONST., Oct. 1, 1916, at B13. We did not include this case in our unwritten law sample, since it involved a home-wrecker killing a husband, rather than a husband killing a home-wrecker.

94. See *Widowed Bride Tells Her Pathetic Story to Save Her Brothers*, ATLANTA CONST., Feb. 28, 1907, at 1.

95. See *id.*

96. *Id.*

97. *Id.*

a back stairway, and then through a window.<sup>98</sup> At that point, the brothers killed him.<sup>99</sup>

One of the brothers was a representative in the West Virginia legislature. The victim was “a clubman, horseman, politician, and general ‘good fellow’ about town.”<sup>100</sup> The high point of the trial was the testimony of Mrs. Viola Bywaters. Her sister wheeled her into court “in an invalid’s chair.”<sup>101</sup> “Pale and wan, her face showing traces of illness and suffering,” she told her tale of woe.<sup>102</sup> The judge, in his charge, did not specifically mention the unwritten law, but he did tell the jury about “emotional insanity,” which was, as usual, the main *legal* defense.<sup>103</sup> The outcome was probably never much in doubt. The verdict was not guilty.<sup>104</sup> Cheers broke out in the courtroom.<sup>105</sup> Even the judge told the jury they had done the right thing: in Virginia, “no man tried for defending the sanctity of his home should be found guilty.”<sup>106</sup>

Two decades later, Ray Kilgore, a twenty-three-year-old Stanford graduate, was found not guilty in the murder of Francis A. Bartley, who had been a “clandestine lover of the defendant’s mother.”<sup>107</sup> After intercepting a love letter from his mother to Bartley, Kilgore drove to Bartley’s home with a shotgun and ambushed him in a pasture of his dairy

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98. *Id.*

99. *Id.*

100. *Unwritten Law Again*, OSHKOSH DAILY NW., Feb. 21, 1907, at 11.

101. See *Widowed Bride Tells Her Pathetic Story to Save Her Brothers*, *supra* note 94, at 1.

102. *Id.*

103. *Unwritten Law in His Charge*, ATLANTA CONST., Mar. 6, 1907, at 5. On the testimony (on both sides of the issue) relating to the “emotional insanity” of the brothers, see *Made Insane by the Wrong Done Sister*, ATLANTA CONST., Mar. 3, 1907, at B1.

104. *Strother Boys Freed and Judge Approves Verdict of the Jury*, ATLANTA CONST., Mar. 8, 1907, at 1.

105. *Id.* (internal quotation marks omitted).

106. *Id.*

107. *Jury Acquits Ray Kilgore*, L.A. TIMES, Feb. 21, 1929, at I14.

ranch.<sup>108</sup> Kilgore's lawyer breathlessly told the jury: "In any land where the honor of woman is recognized, where the virtue of a mother is prized and where the sanctity of home and fireside is revered, no jury would convict a man who defends that honor and virtue and sanctity."<sup>109</sup> Apparently, the jury agreed.<sup>110</sup>

Most newspaper accounts describe actual trials of the unwritten law—cases in which the prosecution at least *tried* to get the killer punished.<sup>111</sup> But other cases never got as far as a jury trial. In San Francisco, in 1907, Charles Hess, a barber, found his wife alone in a room with one Charles Gaskell, a "teacher of advertising."<sup>112</sup> The barber chased Gaskell for twelve blocks, shooting at him; Gaskell was wounded slightly.<sup>113</sup> Gaskell was lucky to get out of this situation alive. This may have made it a bit easier for the judge to invoke the unwritten law and simply to dismiss the charge of attempted murder.<sup>114</sup> And in Richmond in 1926, a grand jury, "recognizing the 'unwritten law,'" simply refused to indict James C. Moore, a railroad flagman who killed W. Lee Gordon "when he found him seated in an automobile with Mrs. Moore in front of the Moore home."<sup>115</sup>

Conversely, the unwritten law sometimes made a mark even after a jury brought in a verdict of guilty. Letha Purdue killed the widower of her deceased sister, after the man "paid attentions to her" and then left her for another woman.<sup>116</sup> She was found guilty, but the judge fined her only

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108. *Id.*

109. *Id.* (internal quotation marks omitted).

110. *Id.*

111. It would have been very difficult to ignore these episodes completely; after all, there was usually a dead body; and usually the event took place in daylight and sometimes in public.

112. *Judge Admits Unwritten Law*, S.F. CHRON., July 3, 1907, at 10.

113. *Id.*

114. *See id.*

115. *Slayer Is Cleared by 'Unwritten Law'*, WASH. POST, Feb. 3, 1926, at 2.

116. *Fined \$71 for Killing Her Brother-in-Law*, ATLANTA CONST., Nov. 18, 1913, at 1.



\$71, a laughable punishment.<sup>117</sup> A few years earlier, Bert Taylor was ordered to pay a \$500 fine in Washington State, for emptying a revolver into W.F. Wibie after discovering that his unmarried sister had died giving birth to Wibie's child.<sup>118</sup> Unsatisfied with this sentence—and in testament to the power of the unwritten law—Taylor filed a motion for a new trial.<sup>119</sup> In 1924, F.C. Gossett, a Tennessee man, dropped a piece of gas pipe on the head of a man who was in his wife's room when Gossett came home unexpectedly from work.<sup>120</sup> Gossett was fined \$5 for this crime. In a moment of refreshing candor, the sentencing judge told him: "You are guilty, technically, but I would have done the same thing."<sup>121</sup>

These cases are extreme. Usually, after a guilty verdict, the judge at least sentenced the killer to some jail time; but the sentence was often conspicuously short. In 1898, Mrs. M.I. McGuirt got off with two years imprisonment after killing her husband, allegedly in self-defense.<sup>122</sup> The headline in the *Atlanta Constitution* read *Another Woman Who Will Not Hang*.<sup>123</sup> A Georgia man, Rush Irwin, killed John George Moody, a boarder in his home; he said he caught Moody creeping into his wife's room.<sup>124</sup> He was sentenced to one year in prison; but this seemed to him too severe, and he asked for clemency.<sup>125</sup> In 1930, Shelton W. Herrin shot and wounded John A. Quickel after climbing through a window in his home to find Quickel in bed with his wife.<sup>126</sup> The jury declined to acquit him, but convicted

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117. *Id.*

118. *Meets Luck, Eyes Shut*, L.A. TIMES, Apr. 17, 1909, at I3.

119. *See id.*

120. "Unwritten Law" *Made to Let Man Preserve Home*, ATLANTA CONST., Mar. 9, 1924, at C3.

121. *Id.* (internal quotation marks omitted).

122. *Another Woman Who Will Not Hang*, ATLANTA CONST., Oct. 12, 1898, at 3.

123. *Id.*

124. *Trial of Rush Irwin Will Begin Tomorrow*, ATLANTA CONST., Nov. 4, 1919, at 11.

125. *See Irwin Will Ask for Clemency*, ATLANTA CONST., Jan. 10, 1920, at 1.

126. *Unwritten Law Fails to Acquit*, L.A. TIMES, Aug. 2, 1930, at II3.

him of simple assault rather than attempted murder.<sup>127</sup> The judge must have sympathized with the defendant; he sentenced Herrin to serve a single day in prison.<sup>128</sup>

And even when the jury convicted, and the judge handed down a sentence normally given to murderers, state governors routinely interceded to grant a pardon. Pardons were common in the South, and appeared particularly common in Alabama—although this could be a peculiarity of our sample. In 1907, the Governor of Alabama, B.B. Comer, pardoned W.E. Shill, who had been convicted for killing the man who “betrayed” his youngest daughter.<sup>129</sup> The Governor explained simply that “a man had the right to protect his own home.”<sup>130</sup> Later that year, the same Alabama Governor pardoned J.D. Williams, who killed a man who had “invaded” his home.<sup>131</sup> Alabama governors had a particularly strong reason to favor the unwritten law. John Anthony Winston, a Governor of Alabama in the late 1800s, had himself had been acquitted under the unwritten law; in 1847 he had killed Sidney S. Perry, a physician who had supposedly “wrecked his home.”<sup>132</sup>

In short, the unwritten law operated at all stages of the criminal process. Prosecutors declined to bring charges; grand juries refused to indict; coroners’ inquests found no wrongdoing; juries failed to convict or recommended mercy; judges sentenced leniently; governors pardoned; and prisons granted early parole. The unwritten law seeped in at every pore of the system of criminal justice.

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127. *Id.*

128. *See Husband Who Wounded Rival Punished Lightly*, L.A. TIMES, Aug. 6, 1930, at I18.

129. *Unwritten Law Up to Governor*, ATLANTA CONST., Mar. 23, 1907, at 4.

130. *Id.*

131. *Comer Favors Unwritten Law: Governor Pardons Man Who Killed Invader of Home*, ATLANTA CONST., Aug. 28, 1907, at 3.

132. *See Freed by the Unwritten Law*, *supra* note 89; *John Anthony Winston*, ENCYCLOPEDIA OF ALABAMA, Aug. 4, 2008, <http://www.encyclopediaofalabama.org/face/Article.jsp?id=h-1621>.

## III. THE UNWRITTEN LAW AND THE SO-CALLED WEAKER SEX

There was an important variant of the unwritten law for women defendants, which also appears to have taken firm root by the early twentieth century. Carolyn Ramsey has argued that judges and juries at the turn of the century tended to acquit women who killed their abusive husbands or the men who “ruined” them—that is, men who maintained a sexual relationship with them but refused to make them honest women through marriage.<sup>133</sup> Our sample of cases confirms her findings. We found thirty-eight cases in which a female defendant invoked the unwritten law. In the vast majority of these cases, the defense was successful.<sup>134</sup>

Even before the turn of the century, there was precedent for extending a kind of unwritten law to women. An 1887 editorial in the *Los Angeles Times* argued in favor of permitting women to invoke the unwritten law, claiming that a woman is “guiltless who in the desperation of her sorrow, or in the face of a dishonored life, sheds the blood of her betrayer.”<sup>135</sup> This principle was on full display in the trial of Clara Falmer, who was prosecuted for murder in Oakland, California, in the 1890s.<sup>136</sup> Clara was fifteen-years-old and pregnant.<sup>137</sup> She met her boyfriend, Charles LaDue, at a Grant Street restaurant in San Francisco and begged him for help.<sup>138</sup> He laughed; and she shot him.<sup>139</sup> At the trial,

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133. See Carolyn Ramsey, *Domestic Violence and State Intervention in the American West and Australia, 1860-1930*, 86 IND. L.J. 185, 236-54 (2011) [hereinafter Ramsey, *Domestic Violence*]; Carolyn Ramsey, *Intimate Homicide: Gender and Crime Control, 1880-1920*, 77 U. COLO. L. REV. 101, 118-40 (2006) [hereinafter Ramsey, *Intimate Homicide*].

134. See *infra* Part IV.

135. See Ramsey, *Domestic Violence*, *supra* note 133, at 250 (quoting *Two Women: On Trial for Their Lives for Murder in California*, L.A. TIMES, Jan. 28, 1887, at 10) (internal quotation marks omitted).

136. LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870-1910*, at 239 (1981).

137. *Id.*

138. *Id.*

139. See *id.*

the defense portrayed Clara as an innocent victim, seduced and abandoned by a heartless rogue who deserved to die.<sup>140</sup> Clara's lawyers stage-managed Clara with great skill. She sat in court, dressed demurely in blue, with a veil over her young face, clutching a bouquet of violets.<sup>141</sup> A "morbid crowd" filled the courtroom.<sup>142</sup>

The prosecution warned of dire consequences if Clara got off. Acquittal might encourage "disreputable women" to point guns at men and "demand to be made their wives."<sup>143</sup> The prosecutors also hinted strongly that Clara was not quite so innocent as the defense had claimed.<sup>144</sup> On the first ballot, the jury was eleven to one for acquittal; on the second ballot, the vote was unanimous.<sup>145</sup> Clara went free.<sup>146</sup>

Women apparently began to invoke the unwritten law more frequently after 1900. In 1902, a judge in Chicago made news by declaring that "it is the duty of a wife to shoot her husband when he beats her."<sup>147</sup> Four years later, some defendants seem to have taken the judge's counsel to heart. There were so many acquittals that one prosecutor warned, in 1906, that if any woman "who is attacked or is beaten by her husband" would be allowed to shoot him, "there won't be many husbands left in Chicago six months

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140. *See id.* at 241.

141. *Id.*

142. *Id.* at 243.

143. *Id.* (internal quotation marks omitted).

144. *See id.*

145. *Id.* at 244.

146. *Id.* Clara Falmer's case was another of those cases in which the real defense was simply that the victim deserved what he got; the legal hook was temporary insanity. Today, we would probably weigh the facts rather differently. Clara would be neither an angel nor a harlot, but an ordinary teenager who happened to be sexually active. But in the 1880s, a young girl in Clara's position was either a blameless victim or a fallen woman. There was basically nothing in between—at least nothing that worked in court. See also Ireland, *supra* note 33, at 34 for a discussion of the case of Mary Harris, who was acquitted in 1865 for murdering her former fiancé; the jury seemed to think that "any woman who considers herself aggrieved in any way by a member of the other sex, may kill him with impunity."

147. "Shoot Him on the Spot!," ATLANTA CONST., May 1, 1902, at 6.

from now”—a sorry commentary on Chicago husbands.<sup>148</sup> These were not traditional cases of self-defense; usually, the wife did not kill her husband in the process of fending off an attack. Rather, like other cases of unwritten law, these cases gave a woman the right to commit premeditated murder—not because she was in imminent danger, but because the victim’s violence meant that he *deserved* to die. Men who savagely beat their wives violated a powerful social norm, and most juries seemed to feel the wives had a right to kill.

In addition to protecting women from physical abuse, social norms also protected women against certain types of sexual betrayal. In 1906, Angie Birdsong, a Mississippi woman, was convicted of manslaughter and sentenced to five years in prison for killing one Dr. Butler, who had “cast[] reflections on her character.”<sup>149</sup> This was certainly a fairly lenient sentence. And yet, in an emotional op-ed, a writer for the *Atlanta Constitution* bitterly criticized the verdict. “A woman and a southerner, and a senator’s niece at that, confronted with a jail term of possibly five years for avenging her honor in the conventional way! Is southern chivalry declining and is the weaker sex denied man’s refuge in the ‘unwritten law’ . . . ?”<sup>150</sup> Almost immediately, Mississippi Governor Vardaman pardoned Birdsong; she never saw the inside of a jail cell.<sup>151</sup> In 1907, Estelle Corwell was tried for killing George Bennett, her unmarried lover, “after she had been threatened with the exposure of her six years of shame.”<sup>152</sup> The trial was quite a sensation—in part because Wyatt Earp, the famous gunslinger, was a witness

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148. Jeffrey S. Adler, “*I Loved Joe, But I Had to Shoot Him*”: *Homicide by Women in Turn-of-the-Century Chicago*, 92 J. CRIM. L. & CRIMINOLOGY 867, 883 (2002) (quoting *Finds Mrs. Trope Guilty of Murder; Gives her 14 Years*, CHI. INTER-OCEAN, Jan. 10, 1906, at 1) (internal quotation marks omitted).

149. *Chivalry and “Unwritten Law,”* ATLANTA CONST., Dec. 23, 1906, at B8.

150. *Id.*

151. *Mrs. Birdsong Is Pardoned*, L.A. TIMES, July 19, 1907, at II11.

152. *Held By Jury for Murder*, L.A. TIMES, July 25, 1907, at II3.

for the defense.<sup>153</sup> She was found not guilty by reason of insanity.<sup>154</sup>

The trial of Gabrielle Darley, in 1918, was another variant—and another testimony to good lawyering. Gabrielle was, in fact, a prostitute, who shot and killed her pimp and lover, Leonard Tropp, in Los Angeles.<sup>155</sup> Gabrielle's lawyer, Earl Rogers, had a difficult job ahead of him, but he handled it magnificently. Gabrielle claimed the gun went off accidentally. But the real defense was Rogers' masterpiece: to turn a prostitute into a "pitiful young woman," a "soul-starved little waitress" who, until Tropp entered the picture, was "as pure as the snow atop Mount Wilson."<sup>156</sup> This was almost pure fantasy, but it worked. The jury acquitted her.<sup>157</sup>

In 1919, Mrs. Emma Simpson shot her husband to death.<sup>158</sup> They were separated and quarreling over money.<sup>159</sup> Emma told a newspaper reporter that she would win because of the "new unwritten law, which does not permit a married man to love another woman."<sup>160</sup> She said, "I will tell my whole story to the jury, and they will free me."<sup>161</sup> She was wrong about that; the jury convicted her.<sup>162</sup> But there was, in fact, an unwritten law in Chicago. Records compiled by Marianne Constable show that 265 women killed a

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153. *Gun Fighter for Defense*, L.A. TIMES, Jan. 23, 1908, at II1.

154. *Mrs. Corwell Clear of Murder Charge*, L.A. TIMES, Feb. 22, 1908, at III1.

155. ALFRED COHN & JOE CHISHOLM, TAKE THE WITNESS 259-60 (1934).

156. *Id.* at 262-64.

157. *Id.* at 265. The book is about the career of Earl Rogers. Gabrielle later made legal history by suing the makers of a movie, *The Red Kimono*, which was about her life, including the trial. In this case, she also succeeded in bamboozling a California court into thinking she was a reformed woman, though in fact she remained a prostitute and madam for most of her life. The case is *Melvin v. Reid*, 112 Cal. App. 285 (1931), a leading case on the right to privacy.

158. Marianne Constable, *Chicago Husband-Killing and the 'New Unwritten Law'*, 124 TRIQUARTERLY REV. 85, 85 (2006).

159. *Id.*

160. *Id.* (internal quotation marks omitted).

161. *Id.* (internal quotation marks omitted).

162. *Id.*

husband or lover between 1870 and 1930; but only 24 were convicted; and very few ever went to prison.<sup>163</sup>

There were also a few cases of woman-on-woman violence. In 1904, Nancy May went on trial for the murder of Alice Smith; she believed Smith “was her rival for her husband’s affections.”<sup>164</sup> A jury convicted her; she was sentenced to ten years in prison, but the Governor of Kentucky pardoned her before she served a day.<sup>165</sup> Four years later, a coroner’s jury in Kentucky acquitted Mrs. Nancy Murrill in the killing of Mrs. Mary Terry, who “had stolen Mrs. Murrill’s husband’s affections.”<sup>166</sup> And in the 1940s, Gwendolyn Wallis was tried for killing Ruby Clark, after Clark (she claimed) stole her husband’s love.<sup>167</sup> Her first trial ended in a hung jury.<sup>168</sup> And the judge in her second trial dismissed the case; “by the written letter of the law,” he said, Gwendolyn was “guilty of murder, but we would be no more successful in a retrial than we were in the first.”<sup>169</sup> As usual, courtroom spectators applauded wildly.<sup>170</sup>

#### IV. SUCCESS AND FAILURE OF THE UNWRITTEN LAW

One reason why the unwritten law rose sharply in use in the early twentieth century was surely because the defense was spectacularly successful. Of the 201 cases in our sample, in 64% (128 cases), the defendant got off scot-free. In another 14% (28 cases), the penalty was light: a fine, a sentence of eight years or less, or a pardon. In only

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163. *Id.* Juries, Constable thinks, were applying their notions of what later came to be called the battered woman syndrome; or, perhaps, an expanded notion of self-defense, which a woman could use if she were locked into an abusive relationship. *See id.* at 89-92. Exactly what juries were actually thinking is of course a closed book.

164. *Pardon for Murderess*, N.Y. TIMES, July 8, 1904, at 1.

165. *Id.*

166. *Woman Freed By “Unwritten Law,”* ATLANTA CONST., June 11, 1908, at 2.

167. *Unwritten Law Plea Made in Wallis Trial*, L.A. TIMES, Mar. 7, 1946, at A2.

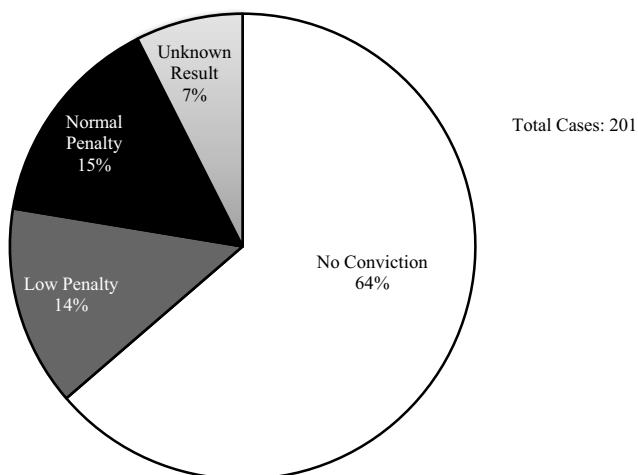
168. *Wallis Murder Case Dismissed*, L.A. TIMES, Mar. 12, 1946, at II2.

169. *Id.* (internal quotation marks omitted).

170. *Id.*



15% (30 cases) did the defendant receive a serious sentence—more than eight years in prison. The newspapers might have been guilty of selection bias—acquittals are, in general, rarer than convictions in criminal cases, and hence perhaps more newsworthy. Still, the success rate of the unwritten law is staggering.



**Figure 2: Unwritten Law Cases Sampled from  
Three Major Newspapers 1845-1959**

In the vast majority of our cases, juries simply did not convict. A male defendant was almost always acquitted if he could tell a plausible story that the victim had slept with his wife, sister, daughter, or mother. The same was true of female defendants who could convince a jury that the victim had beaten her; or, in some cases, jilted her.

Some acquittals were truly jaw-dropping. In 1907, a former Virginia judge, William Loving, was tried for shooting and killing Theodore Estes.<sup>171</sup> Loving claimed that Estes had taken his daughter riding, gotten her drunk, and assaulted her when she was unconscious.<sup>172</sup> At least, this

171. *Miss Loving Tells of Estes's Wrong*, N.Y. TIMES, June 26, 1907, at 1.

172. *Id.*

was what she told her father. It “tore” all his “heartstrings,” he said, to “know that she had been . . . defiled.”<sup>173</sup> He ordered his buggy, “intending to seek this man and put him to death.”<sup>174</sup> The prosecution tried to show that Miss Loving might have been telling her father a lie.<sup>175</sup> But the judge refused to admit any such evidence. According to the judge, it was “not material whether her story was true or not.”<sup>176</sup>

Loving’s attorney advanced the insanity defense, but (no surprise) the main argument was the unwritten law.<sup>177</sup> The state was asking for the life of the defendant, but Loving’s attorney asked: “[F]or what? I do not undervalue life,” he said, “but there is something sweeter to all Virginians—the purity of our women.”<sup>178</sup> Loving’s daughter was “his pride. He admired her beauty and her purity.”<sup>179</sup> Another defense lawyer begged the jury not to “let it go out to the world that a jury of Virginia gentlemen put the felon’s stripes on a Virginia gentleman.”<sup>180</sup> Still another argued that the “gift of God” was the “purity and the dignity of our homes.”<sup>181</sup>

The prosecution asked the judge to tell the jury not to follow the unwritten law. Under the plain, unvarnished law of Virginia, “No man . . . has a right to be the avenger of his own wrongs . . . . The unwritten law . . . has no place in the criminal jurisprudence of Virginia.”<sup>182</sup> But the judge refused

173. *Id.* (internal quotation marks omitted).

174. *Id.* (internal quotation marks omitted).

175. *Jerome Gives Aid to Loving Judge*, N.Y. TIMES, June 28, 1907, at 1.

176. *Id.* The headline of the story refers to the fact that William Travers Jerome, the New York District Attorney, had sent a telegram to the judge, pointing out legal authorities on the subject, that is, whether evidence could be admitted to show whether the daughter’s story was true or not. *See id.*

177. *Unwritten Law for Loving*, N.Y. TIMES, June 29, 1907, at 2.

178. *Id.* (internal quotation marks omitted).

179. *Id.* (internal quotation marks omitted).

180. *Judge Loving Is Acquitted in 30 Minutes*, ATLANTA CONST., June 30, 1907, at 1.

181. *Id.* (internal quotation marks omitted).

182. *Unwritten Law Is the Keynote of the Defense*, ATLANTA CONST., June 29, 1907, at 1 (internal quotation marks omitted).

to give any such charge.<sup>183</sup> The result, by this time, seemed foreordained. The jury spent all of thirty minutes in the jury room.<sup>184</sup> On the very first ballot, the vote for acquittal was unanimous.<sup>185</sup> The (legal) basis for acquittal was insanity, apparently.<sup>186</sup> After the trial, the foreman (a merchant and farmer) claimed that the jury believed that "Judge Loving was out of his mind" when he killed young Estes: "The stress . . . had been brought on by the story told him by his daughter."<sup>187</sup> We can only speculate as to whether the foreman, and the rest of the jury, really thought this amounted to insanity. In any event, the verdict was no doubt popular. Judge Loving's friends congratulated him on his victory, as tears streamed down his face.<sup>188</sup>

In another astounding case, R.E. Culley was tried in Kentucky for murdering W.E. Proctor, a prominent politician.<sup>189</sup> Culley's wife had apparently been feeling unloved at home.<sup>190</sup> To make her husband jealous, she told him that Proctor had "assaulted" her.<sup>191</sup> Predictably, Culley shot Proctor.<sup>192</sup> At his trial, Culley claimed that the killing was justified—even though there had been no actual affair.<sup>193</sup> In short order, he was acquitted under the sheltering wings of the unwritten law.<sup>194</sup> The jury apparently thought that a man was justified in killing another man, even if his belief that the man had cuckolded

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183. *Id.*

184. *Judge Loving Is Acquitted in 30 Minutes*, *supra* note 180. The *New York Times*, reporting on the acquittal, said that the jury was out for an hour. See *Unwritten Law for Loving*, *supra* note 177. In either case, it was a very short period of deliberation.

185. *Judge Loving Is Acquitted in 30 Minutes*, *supra* note 180.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Stands Pat on Worn Excuse*, L.A. TIMES, Apr. 1, 1910, at I5.

190. *See id.*

191. *See id.*

192. *Id.*

193. *See id.*

194. *See id.*

him was mistaken. Poor Mr. Proctor was simply collateral damage. In this case, at least, the community was “astonished” by the verdict—or so a journalist reported.<sup>195</sup>

Acquittals under the unwritten law often came with lightning speed. In 1908, in Oklahoma, one Dr. E.W. Dakan slit the throat of his wife’s lover.<sup>196</sup> The jury deliberated all of ten minutes before finding the doctor not guilty.<sup>197</sup> Even this was longer than the work of a jury in Richmond in 1900; this jury needed only seven minutes to acquit William J. Rhodes, who “shot down Frank Barnett for having destroyed his home.”<sup>198</sup> In Alameda County, California, in 1912, the jury acquitted Harry F. Prescott, who had killed Ralph Thompson, “the despoiler of his home.”<sup>199</sup> The jury took two hours, but much of that consisted of lunch; the verdict, according to the local press, was a “direct application of the ‘unwritten law.’”<sup>200</sup>

The unwritten law was equally successful for female defendants. Indeed, if our sample is to be trusted, it was even more successful for women than for men. In thirty-three out of thirty-four of the sample cases where the outcome was known, women defendants were acquitted or won light sentences. By contrast, men were either not convicted or sentenced lightly in 80% of the cases where the outcome was known (122 out of 152).

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195. *Id.*

196. *Saved By Unwritten Law*, ATLANTA CONST., Jan. 19, 1908, at B1.

197. *Id.*

198. *Unwritten Law Saves*, WASH. POST, May. 13, 1900, at 11. The wife was a “woman of refinement and considerable beauty.” *Id.* Her testimony, “substantiating the defense in every detail at the cost of her own good name,” was apparently a crucial factor. *Id.*

199. *Unwritten Law Applied in H.F. Prescott Case*, S.F. CHRON., May 30, 1912, at 8.

200. *Id.*

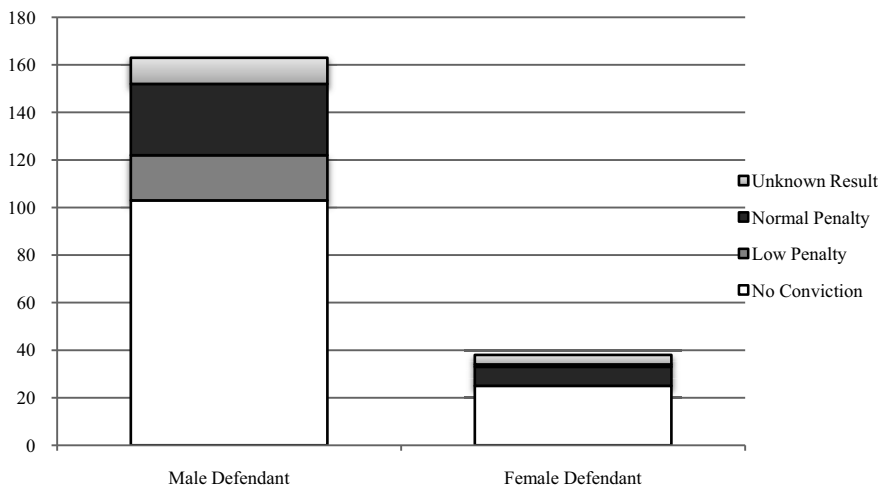


Figure 3. Sampled Unwritten Law Cases by Gender of the Defendant

Possibly, newspapers treated male and female defendants differently, and were more apt to report acquittals for women, compared to men. Also, since there were far fewer cases with women defendants, the small sample size might have skewed the results. But clearly the unwritten law was strong protection for women who killed their betrayers.

Juries did the actual acquitting; but judges were hardly neutral in many cases. Some judges did not even bother to pretend that the unwritten law had no basis in the penal code. After a Pennsylvania jury acquitted James Nutt of murdering a home-wrecker,<sup>201</sup> the judge declared that “for my own private self I have no hesitancy of saying a proper retribution followed the act of a villain. I could scarcely have done less as a private [citizen] myself.”<sup>202</sup> When J.L. Gibson, a former Georgia sheriff, was tried for killing Elgin Stewart after discovering love letters between Stewart and his wife,<sup>203</sup> the judge directed a verdict of acquittal.<sup>204</sup> He

201. *Young Nutt Acquitted*, ATLANTA CONST., Jan. 24, 1884, at 1.

202. *What the Judge Said*, ATLANTA CONST., Jan. 25, 1884, at 1 (internal quotation marks omitted).

203. *Love Letters Will Play Part in Trial of Deputy Sheriff*, ATLANTA CONST., Aug. 11, 1918, at 1.

explained that murder was justifiable in two instances: self-defense, and “the protection of . . . honor as a husband and father.”<sup>205</sup>

In other cases, to be sure, a judge sternly admonished the jury against applying the unwritten law. In many sampled cases, the judge instructed the jury to forget the unwritten law; their duty was to obey the written law. These admonitions usually fell on deaf ears. In 1934, a California jury acquitted Judson Doke of murder.<sup>206</sup> Doke was a milk inspector from San Leandro.<sup>207</sup> His wife was a poetry buff; her “poetry activities” brought her in contact with Lamar Hollingshead, a student at the University of California.<sup>208</sup> The two of them published poetry and shared ideas.<sup>209</sup> One thing led to another. A neighbor tipped off Doke and handed him a set of incriminating love letters.<sup>210</sup> Doke took the letters and a pistol and confronted Hollingshead “in the bunk house of a ranch where the young poet had been working.”<sup>211</sup> Doke wanted Hollingshead to write a letter ending the affair.<sup>212</sup> Hollingshead said no, “and the fatal shot rang out.”<sup>213</sup> The judge insisted to the jury that the law “provides ample redress” for men with unfaithful wives, short of murder.<sup>214</sup> But the “unwritten law” had its way”; Doke went free, to the cheers of the courtroom crowd.<sup>215</sup>

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204. *Gibson Acquitted of Murder Charge*, ATLANTA CONST., Aug. 17, 1918, at 7.

205. *Id.*

206. *Jury Frees Doke in Murder of Poet*, N.Y. TIMES, Dec. 16, 1934, at 22.

207. *Id.*

208. *Id.* This was Doke’s second trial. The first jury was deadlocked. *Id.* Now that Doke was set free, his attorneys said “he would file suit for a divorce” from his wife. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* (internal quotation marks omitted).

215. *Id.*

In 1922, “Handsome” Jack Bergin, a film actor, was killed by George Cline and two accomplices after Bergin “attacked” Cline’s wife—apparently after plying her with liquor.<sup>216</sup> The judge instructed the jury that no evidence could sustain an acquittal.<sup>217</sup> Nonetheless, the jury acquitted all three defendants.<sup>218</sup> One juror said, “I have a wife and daughter, and what Bergin said impressed me and all of us.”<sup>219</sup>

The unwritten law even made its way across the Atlantic. English judges were hostile; English juries were not. In 1931, Andrew Frederick Neely, a ship’s electrician, murdered Wilfred Powley, a sometime lodger in his house; Neely thought Powley was trying to seduce his wife.<sup>220</sup> Again, the jury was told that the unwritten law had no basis in law; but they were also told that the victim was a scoundrel, who had insinuated his way into the house, “corrupted the mind of the wife,” and destroyed the happiness of a man’s home.<sup>221</sup> The verdict: guilty but insane.<sup>222</sup>

The astonishing success of the unwritten law raises the question: can we explain the unusual cases where it failed? Mostly, the answer seems to be simply that the jury was unconvinced by the defendant’s story. The unwritten law was a ticket to freedom. Some defendants grasped at it, even though their story lacked the ring of truth. If the jury thought the story was a lie, they were likely to convict.

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216. *The Unwritten Law Invoked by Cline*, N.Y. TIMES, Oct. 25, 1922, at 2.

217. *All Three Acquitted in Bergin Tragedy*, N.Y. TIMES, Oct. 26, 1922, at 1.

218. *Id.*

219. *Id.* (internal quotation marks omitted). In one case, in 1930, the Kansas Supreme Court weighed in, declaring that no such thing as the unwritten law existed in Kansas. See *State v. Kelly*, 291 P. 945, 947 (Kan. 1930); “*Unwritten Law*” *Is Barred as Defense by Kansas Court*, N.Y. TIMES, Oct. 12, 1930, at 3. Whether Kansas juries paid attention is dubious.

220. *Murder of Lodger: Woman’s Husband Found Insane*, MANCHESTER GUARDIAN, Dec. 8, 1931, at 6.

221. *Id.*

222. *Id.*



It is impossible to know how often a defendant fabricated the defense—and how often juries saw through the fabrication. In Mississippi, in 1910, John T. Carter was on trial for killing Dr. R.P. Wendell.<sup>223</sup> Carter alleged that Wendell had “drugged” his wife “with cocktails.”<sup>224</sup> When Carter “heard the bed springs creaking” in his wife’s room, he claimed, he barged in and found the pair in bed together, his wife wearing “a pink kimono.”<sup>225</sup> But Carter’s wife took the stand and, in a shocking development straight from a Hollywood script, denounced her husband as an outright liar.<sup>226</sup> Carter was convicted and sentenced to twenty years in prison.<sup>227</sup> Similarly, a year earlier, a Mississippi millionaire named Smith was convicted of murdering a man who had allegedly “ruined” his daughter. But the daughter refused to corroborate the story.<sup>228</sup> Smith was convicted and sentenced to life in prison.<sup>229</sup> A writer in the *L.A. Times*, commenting on this case, expressed the view that “usually” murderers who plead the unwritten law are motivated simply by “homicidal mania, jealousy or some other equally contemptible motive.”<sup>230</sup> A case in 1914 might have given him some support. Walter B. Brooks, a Savannah man, was acquitted of the murder of Charles Barbour, who he claimed had been paying unwanted attention to his wife. Later, the wife insisted in divorce proceedings that she had never even met Barbour, and that her husband resorted to the unwritten law “to save his own skin.”<sup>231</sup>

The case of Sam Aiken presents an extreme example. An unemployed painter in Georgia, Aiken was a bootlegger

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223. *Husband’s Hope Shattered by Testimony of His Wife*, L.A. TIMES, Apr. 2, 1910, at I8.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Jury Turns Down Unwritten Law*, ATLANTA CONST., Apr. 6, 1910, at 3.

228. “Unwritten Law” Gets Jolt, L.A. TIMES, Feb. 16, 1909, at II4.

229. *Id.*

230. *Id.*

231. *Wife Brands as Fake Unwritten Law Plea Which Saved Husband*, ATLANTA CONST., Nov. 18, 1914, at 5.

during Prohibition.<sup>232</sup> In 1929, he shot and killed his wife and his neighbor.<sup>233</sup> He defended himself on the grounds that his "home had been wrecked,"<sup>234</sup> but the jury didn't buy it.<sup>235</sup> His neighbor had been his partner in the bootlegging business; they were believed to have recently fallen out over a liquor deal.<sup>236</sup> Aiken apparently killed his partner in a business dispute. Aiken's wife had been killed to make the unwritten law defense plausible. He was sentenced to death, though his sentence was later commuted to life imprisonment.<sup>237</sup>

The Aiken case illustrates another situation where the unwritten law was unlikely to work: cases where the defendant killed the wife herself. Harming a woman was unmanly. Carolyn Ramsey's data strongly suggests that judges, juries, and law enforcement officers in the nineteenth and early twentieth centuries condemned, and punished, violence against women—at least extreme violence.<sup>238</sup> If a man went so far as to kill his wife, for whatever reason, he could expect little mercy. Ramsey's data comes from Western states, especially Colorado, from New York, and from Australia.<sup>239</sup> But it is likely to hold more generally.

It is interesting to consider the cases where a man kills the wife's lover *and* the wife. Juries were not of one mind on

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232. *Liquor-Selling Feud Seen in Double Killing*, ATLANTA CONST., June 19, 1929, at 1.

233. *Id.*

234. *Id.*

235. *Sam F. Aiken Found Guilty of Murder of His Wife*, ATLANTA CONST., July 4, 1929, at 1.

236. *See Liquor-Selling Feud Seen in Double Killing*, *supra* note 232.

237. Aiken later escaped from prison, but was caught years later, living in Texas with a new wife. *See Sam Aiken Flees from Chain Gang*, ATLANTA CONST., Apr. 17, 1937, at 1. It was this wife's pleas that apparently moved the governor to commute Aiken's sentence. *See Embarrassing Quiz Faces Sam Aiken*, ATLANTA CONST., Dec. 4, 1937, at 7. But Aiken escaped again. *Id.* He then turned up in Texas once more—and again with a new wife. *Id.*

238. Ramsey, *Intimate Homicide*, *supra* note 133, at 179-80, 187-89.

239. *See Ramsey, Domestic Violence*, *supra* note 133, at 222-31; Ramsey, *Intimate Homicide*, *supra* note 133, at 179-91.

situations of this type. Sam Aiken got no mercy for killing his wife. Nor did Joseph L. Steinmetz, whose trial caused quite a stir in 1929.<sup>240</sup> The Steinmetz case was a bizarre and pitiful one. Steinmetz, a young divinity student, was on his honeymoon in New York City with his bride of only sixteen days.<sup>241</sup> After an all-night drinking party, he claimed he found his bride in bed with a Catholic priest in the Knights of Columbus Hotel.<sup>242</sup> Drunk and furious, he killed them both on the spot.<sup>243</sup> He was tried for double-homicide, but the killing of his wife dominated the proceedings.<sup>244</sup> His defense attorney boldly invoked the unwritten law. When Steinmetz found his wife together with this priest, the lawyer told the jury, “a monkey wrench was thrown into his mental machinery, robbing him of his stability of mind.”<sup>245</sup> Steinmetz merely “did what any red-blooded man with a spoonful of manhood would have done under the circumstances.”<sup>246</sup> But the jury had a different idea. Steinmetz was convicted of one count of first-degree manslaughter and sentenced to eight to sixteen years in Sing Sing.<sup>247</sup> He was not retried for killing the priest; killing his rival was apparently defensible, but killing his wife was a step too far.<sup>248</sup>

On the other hand, some cases came out differently. In a widely covered California case, Paul A. Wright was tried for “empty[ing] [a] weapon’s nine bullets” into his wife and his best friend, John B. Kimmel, after finding them “in a

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240. See ‘Unwritten Law’ Cited by Steinmetz Aid, ATLANTA CONST., May 28, 1935, at 3.

241. *Unwritten Law Plea Hinted in Priest Slaying*, CHI. DAILY TRIB., Nov. 28, 1934, at 7.

242. See *Steinmetz Weeps as His Trial Opens*, N.Y. TIMES, May 17, 1935, at 14.

243. See *id.*

244. See *id.*

245. *Id.* (internal quotation marks omitted).

246. *Id.* (internal quotation marks omitted).

247. *Steinmetz Gets 8 to 16 Years in Hotel Slaying of Young Wife*, N.Y. HERALD TRIB., June 15, 1935, at 28.

248. *Id.*

passionate embrace" in his home.<sup>249</sup> The newspapers called the affair the "White Flame" killing—apparently because Wright committed the act in a "white flame" of jealous frenzy.<sup>250</sup> The prosecutor instructed the jurors that "there is no such defense as the 'unwritten law.'"<sup>251</sup> Nevertheless, the jury let Wright go free. Technically he was guilty, but they acquitted him on the separate grounds that he was temporarily insane.<sup>252</sup>

More than forty years earlier, Nellie Gordon and the son of Governor Brown of Kentucky were found in bed by Gordon's husband.<sup>253</sup> He killed them both on the spot, and a grand jury refused to indict him.<sup>254</sup> In a breathtaking testament to the power of the unwritten law, Governor Brown—the father of one of the victims—said he would have immediately pardoned his son's killer had he been convicted.<sup>255</sup>

#### V. THE GEOGRAPHY OF THE UNWRITTEN LAW

The unwritten law prevailed across regions and social classes. Our sample of 201 American cases included trials in thirty-one states and the District of Columbia. There were no cases from New England in our sample, but every major American region was represented—the Northeast, the South, the Midwest, and the West. And although our sample is drawn exclusively from the United States, there is ample evidence that the unwritten law was not a piece of American exceptionalism; there were many foreign cases,

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249. *Heated Legal Clash Marks Wright Trial*, L.A. TIMES, Jan. 14, 1938, at I1.

250. *'White Flame' Wife Slayer Goes on Trial*, ATLANTA CONST., Jan. 14, 1938, at 1.

251. *Wright Seen in Triangle*, L.A. TIMES, Jan. 15, 1938, at II1.

252. *Jury Declares Wright Insane*, L.A. TIMES, Feb. 17, 1938, at I1.

253. *Freed by the Unwritten Law*, *supra* note 89.

254. *Id.*

255. *Id.*

particularly from England.<sup>256</sup> The geographical breakdown of our findings is represented below.

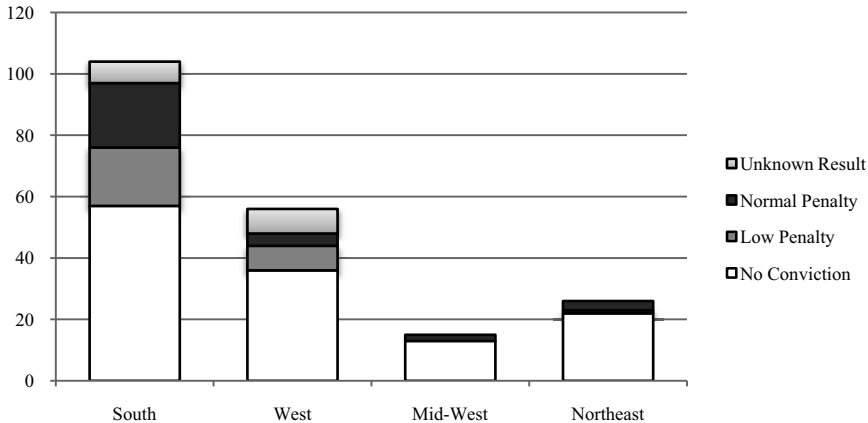


Figure 4: Sampled Unwritten Law Cases by Region

Our sample does not include a newspaper in the Midwest; this may well account for the poor showing of this region. It seems clear, though, that the unwritten law was strongest in the South and the West. Contemporaries seem to have thought so. Mary Ertell ran away with the man who “fascinated” her.<sup>257</sup> When he abandoned her, she shot him down, admitted the crime, and expressed no remorse. A New York jury acquitted her. Newspapers commenting on the case called it “an importation of Kentucky law.”<sup>258</sup>

256. In one well-known case, in 1917, defense counsel, Sir John Simon, referred to the unwritten law as a noxious doctrine from “another country”—presumably the United States. *Acquittal of Lieut. Malcolm*, MANCHESTER GUARDIAN, Sept. 12, 1917, at 5. The judge, too, warned against it. *Id.* The accused in this case, Lt. Douglas Malcolm, shot to death a “scoundrel” named Anton Baumberg. *Id.* Malcolm found him in a room with Malcolm’s wife. *Id.* The defense was a rather flimsy claim of self-defense. *Id.* Despite the judge’s lecture, the jury found Lt. Malcolm not guilty in less than half an hour. *Id.* A “roar of joy” burst out in the courtroom, and a group of women “shouted with exultation.” *Id.* The American newspapers also occasionally referred to miscellaneous continental European cases, all of them acquittals. *See, e.g., Unwritten Law Wins in Paris*, ATLANTA CONST., May 12, 1907, at 1.

257. *The Unwritten Law*, ATLANTA CONST., Apr. 1 1901, at 4.

258. *Id.*

Human nature was "very much the same everywhere," a reporter for the *Atlanta Constitution* wrote in 1901.<sup>259</sup> "There is unwritten law in New York as well as in the south and west."<sup>260</sup> Later, in 1909, an editorial in the same newspaper bemoaned the "increase in the number of acquittals of men charged with murder in this state"; the danger was that Georgia might develop "as great a disregard for human life . . . as ever existed in the lawless days of the west."<sup>261</sup>

In some parts of the country, the unwritten law was, indeed, a source of pride, a kind of distinction. It was, after all, Governor Brown of Kentucky who endorsed the unwritten law even after his own son became a victim of it. And, after pardoning Nancy May in the killing of Alice Smith, another Kentucky governor remarked that the unwritten law was a "certain sentiment in Kentucky . . . which has prevailed in many cases."<sup>262</sup>

Southern juries that applied the unwritten law appear to believe it was a distinctive, homegrown brand of justice. After acquitting John Sneed in the murder of Al Boyce, Jr., the foreman of the Texas jury was asked why the jury handed down a verdict of not guilty. His answer: "because this is Texas. We believe in Texas a man has the right and the obligation to safeguard the honor of his home, even if he must kill the person responsible."<sup>263</sup>

Our figures confirm that the unwritten law was strongest in the South and West. But many famous trials that invoked the unwritten law took place outside of these regions. George Cole and Harry Thaw were both tried in New York. And while Congressman Sickles was tried in D.C., he was himself a New Yorker. In 1913, a jury in St. Paul, Minnesota, acquitted Professor Oscar Olson in the murder of Clyde N. Darling, "alleged wrecker of the Olson

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259. *Id.*

260. *Id.*

261. *The Elasticity of the "Unwritten Law,"* ATLANTA CONST., Jan. 22, 1909, at 6.

262. *Pardon for Murderess*, *supra* note 164.

263. Thompson, *supra* note 20 (internal quotation marks omitted).

home,” on the basis of the unwritten law.<sup>264</sup> In 1938, Rudolph Sikora, a dispatcher’s clerk in Chicago, killed Edward Solomon, described as the “rival for his wife’s love.”<sup>265</sup> The jury was out for two hours and then announced a verdict of not guilty.<sup>266</sup> A crowd of some 200 in the courtroom, “most of them women,” screamed and cried in delight; many “burst into wild tears.”<sup>267</sup> “Above the noise came the piercing hallelujah of a tall woman in black, who cried ‘Bless his sweet heart . . . !’”<sup>268</sup>

In the Northeast, the trials that invoked the unwritten law tended to be sensational. A reader senses that, in the North, the unwritten law was something rare, something reserved for the upper echelons of society—those who could afford the sort of legal team that could pull off an audacious defense.<sup>269</sup> In the South and West, the unwritten law seemed to be more routine. The defendants were not the rich and famous; rather, they were a cross-section of society—farmers,<sup>270</sup> airport workers,<sup>271</sup> miners,<sup>272</sup> immigrants.<sup>273</sup> In the South and West, there were also occasional non-white defendants. In 1911, James J. Manuel, an African American in Denver, was acquitted after killing the Rev. Alexander Edwards, his pastor, who had confessed “improper relations” with Manuel’s wife.<sup>274</sup> In 1915, a black man from Georgia, Will Maxon, was acquitted of attempting

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264. *Prof Olson Freed by Jury: “Unwritten Law” Plea Wins*, CHI. DAILY TRIB., Apr. 9, 1913, at 2.

265. Marcia Winn, *Sikora Free in Love Murder*, CHI. DAILY TRIB., Oct. 22, 1938, at 1.

266. *Id.*

267. *Id.*

268. *Id.*

269. See Hartog, *supra* note 31, at 75 (describing the pedigree of the lawyers in three famous cases).

270. See *West Pardons Aged Farmer*, L.A. TIMES, Oct. 4, 1912, at I3.

271. See *Heated Legal Clash Marks Wright Trial*, *supra* note 249.

272. See *Unwritten Law Frees Slayer*, L.A. TIMES, Sept. 8, 1913, at II7.

273. See *Pleads Unwritten Law*, L.A. TIMES, May 7, 1925, at II2.

274. *Unwritten Law Covers Black as Well as White*, ATLANTA CONST., Nov. 3, 1911, at 5.



to kill Dud McGregor, who accused Maxon's wife of stealing his chickens—apparently a grave affront in Georgia.<sup>275</sup> And surprisingly, two decades earlier, the Governor of South Carolina pardoned Robert Stenhouse, a black man who killed a white man after finding him *in flagrante delicto* with his wife.<sup>276</sup> Stenhouse was originally sentenced to two years imprisonment, but the Governor pardoned him on the ground that “the unwritten law on this subject was as good for the negro as the white man.”<sup>277</sup> This was an extraordinary act of clemency in the Jim Crow South.

It would be hasty to conclude that the unwritten law was an equal-opportunity doctrine. In 1925, a young Filipino waiter, Yatko, shot and killed Harry L. Kidder, a white man; he claimed that Kidder was having an affair with his white wife.<sup>278</sup> The wife wanted to testify against her husband, but this would violate the California rule about marital privilege.<sup>279</sup> The judge found a way to let the testimony in. Under California's old miscegenation law, “persons of opposing races” were not permitted to marry in California.<sup>280</sup> The marriage was invalid; and the wife was allowed to testify.<sup>281</sup> Yatko was found guilty and sentenced to life in prison.<sup>282</sup>

Race and the unwritten law were elements of the famous Massie case in Hawaii, in the 1930s. Hawaii, then and now, was home to a mixture of races—and not by any means a harmonious mixture. Thalia Massie, the white wife of a young naval officer, left a party at night and walked home.<sup>283</sup> An incident occurred—only Thalia knows what

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275. *Protected His Wife, Says Little Negro; Plea Wins Freedom*, ATLANTA CONST., July 1, 1915, at 5.

276. *Justice to the Negro*, ATLANTA CONST., Aug. 12, 1893, at 1.

277. *Id.*

278. *See Pleads Unwritten Law*, *supra* note 273.

279. *Id.*

280. *See Life Term for Filipino Slayer*, L.A. TIMES, May 9, 1925, at II2.

281. *Id.*

282. *Id.*

283. DAVID E. STANNARD, *HONOR KILLING: HOW THE INFAMOUS ‘MASSIE AFFAIR’ TRANSFORMED HAWAII* 54-55 (2005).

really happened—and she turned up later with bruises and a broken jaw.<sup>284</sup> She claimed a gang of Hawaiian men had attacked and raped her.<sup>285</sup> Five men—none of them white—were arrested. But there was no evidence against them, and Thalia was almost surely lying.<sup>286</sup> The local jury failed to reach agreement, and the men went free.<sup>287</sup> Lieutenant Massie, together with his mother, Grace Fortescue, kidnapped one of the defendants, Joe Kahahawai.<sup>288</sup> The idea was to get him to confess, but the plan went awry, and Kahahawai was shot to death.<sup>289</sup> A second trial now took place: Massie and his mother, among others, went on trial for killing the young Hawaiian.<sup>290</sup> The local mixed-race jury brought in a verdict of guilty.<sup>291</sup> The governor of Hawaii—a white man—commuted their sentence to one hour and set them free.<sup>292</sup>

## VI. PATRIARCHY AND THE UNWRITTEN LAW

What accounts for the rise of the unwritten law? Clearly, ideas about gender roles were crucial. Underlying the cases was a conception of a woman as a “domesticated and passionless being without a public role.”<sup>293</sup> Women’s sphere was the domestic sphere; they were intended by God and Nature to be wives and mothers. Moreover, respectable women were weak, innocent, easily fooled, and basically passive; potential prey for powerful, evil, and seductive men. The cases of the unwritten law presuppose this conception of women. In the typical case, the woman figured

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284. *Id.*

285. *Id.* at 55.

286. *See id.* at 174.

287. *See id.* at 217.

288. *See id.* at 240-45.

289. *See id.* at 240-47.

290. *See id.* at 376.

291. *See id.* at 377, 382.

292. *Id.* at 389-90.

293. Rosemary Gartner & Jim Phillips, *The Creffield-Mitchell Case, Seattle, 1906: The Unwritten Law in the Pacific Northwest*, 94 PAC. NW. Q. 69, 79 (2003).

only as a kind of passive bystander, “seduced” or “betrayed” by the villainous libertine whom the defendant killed. Women had no agency of their own. Nor did they have sexual appetites. Defense attorneys argued to jurors that it was a crime to “ruin” a pure and innocent woman—married or not. This was a crime “more injurious . . . than murder.”<sup>294</sup> Jurors, for their part, seemed to agree.

Of course, to us today this seems like utter rubbish. Obviously, in many cases, women were willing, even eager, for the affair that led down the path to murder. There is no reason to think of Teresa Sickles as an innocent victim. But the cases almost never point a finger of blame at the wives. It was as if the wives were not really unfaithful; they were unwitting and unwilling participants in a man’s dastardly crime.

In some cases, the claim was that the wife was assaulted against her will, or was drugged or “plied with” alcohol before sex.<sup>295</sup> Yet newspaper articles about the unwritten law never once described the dead man’s action as “rape.” The accounts, and the cases, not only ignore the possibility that the woman in the case was a willing participant; they equally ignore the possibility that she might have been a genuine victim. The dead man’s acts were an offense against the woman’s husband; *his* marriage had been invaded; *he* had been wronged and humiliated; *he* was the injured party, whose very manhood demanded that he take revenge. As Hendrik Hartog has argued, the “unwritten law,” in a curious way, had very little to do with the wives themselves, even though a woman was always a central figure in the drama.<sup>296</sup> The real struggle was

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294. See Ireland, *supra* note 33, at 34 (internal quotation marks omitted).

295. See, e.g., *Unwritten Law Fails to Save Rush Strong*, ATLANTA CONST., June 2, 1917, at 10 (defendant claimed that his victim had “drugged and assaulted” his wife); *The Unwritten Law Invoked by Cline*, *supra* note 216 (defendant claimed his wife had been “plied with liquor”); *Unwritten Law Is the Keynote of the Defense*, *supra* note 182 (defendant claimed the victim had drugged his daughter during a buggy ride); *Unwritten Law Plea of Vawter*, ATLANTA CONST., May 2, 1917, at 1 (defendant said he found the victim in “a compromising position” with his wife after bringing her “intoxicating liquor”).

296. See Hartog, *supra* note 31, at 79.

between men.<sup>297</sup> Women's voices were rarely heard—unless they testified to their own infidelity.<sup>298</sup>

The cases rested on stereotypes about women; but also, and perhaps more powerfully, norms about the rights and duties of men. The key factor in these cases was male jealousy and sexual insecurity. The unwritten law reinforced, at least symbolically, the power of men to control the lives and sexual behavior of their women. Killing a man who trespassed on the sacred rights of husbands was not only justified, it was solid manly behavior. To be cuckolded was emasculating and humiliating.<sup>299</sup> It destroyed the sanctity of the home, poisoned the marriage, and cast doubt on the paternity of children. It was a sort of psychic castration. Defense attorneys in many prominent unwritten law cases insisted “that their clients could not have faced their public had they failed to kill the men who had ruined their marriages.”<sup>300</sup> The only solution was to prove one's manhood through a terrible act of violence.

Unwritten law cases in which women rather than men were the killers also reflected the stereotypes of the times. Women who killed men who abused or betrayed them were not to be blamed. As an editorial in 1887 put it, “[t]heirs was the impulse of outraged womanhood—their act was the despairing deed of wronged and helpless women, who struck back upon those who had thrown them like weeds upon the

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297. *Id.*

298. Sometimes, in order to establish a basis for the defense of the unwritten law, a husband made his wife suffer the public humiliation of going on the stand and admitting her infidelity in open court. As one newspaper account suggested in a case involving a father and his daughter, there was considerable hypocrisy to the notion of “defend[ing]” the honor of a woman “by the process of putting her on a public witness stand to tell her shame to the world.” “*Unwritten Law*” *Gets Jolt*, *supra* note 228. Indeed, some men were apparently willing to plead guilty, rather than making a loved one testify, to save them “from the necessity of relating in court the domestic affairs that led up to the slaying.” *Pleads Guilty to Save Wife*, L.A. TIMES, Apr. 2, 1920, at II1. But such cases were the exception, not the rule.

299. The wife had, of course, committed adultery, and that was a very serious breach of the social order. This was the age of the double standard: *his* adultery, if he committed this offense, was much less serious.

300. See Ireland, *supra* note 33, at 33.

world, wrecks in all the humanizing virtues and decencies of life."<sup>301</sup> Women had more delicate nervous systems than men. When a judge acquitted Margaret Finn, who killed her absconding fiancé on a crowded Los Angeles street, he claimed that she was "hysterical at the time of the killing," in a "peculiar nervous state," and "probably did not know what she was doing."<sup>302</sup> American myths about feminine frailty and subservience sustained the unwritten law in all its variations.

## VII. THE FALL OF THE UNWRITTEN LAW

After a golden age in the early twentieth century, the unwritten law faded away gradually. By the 1950s, it all but disappeared from our newspapers. More than sixty cases were reported during the five-year period from 1910 to 1914. By 1920-1924, this figure dropped to just over twenty. Over the next ten years, just thirteen unwritten law cases were reported. And during the 1950s, only two lonely cases cropped up.

From the outset, the unwritten law was controversial. As we have seen, judges often instructed juries to pay no attention to any such thing as the unwritten law—and juries routinely disregarded these instructions. At a 1906 meeting of the American Bar Association, the unwritten law was roundly denounced.<sup>303</sup> Newspaper stories and editorials were also usually critical. Some writers called the unwritten law barbaric. One op-ed, from the *Atlanta Constitution* in 1907, warned that the "safeguards of civilization" were "emphatically imperilled by the mawkish sentimentality which seeks to screen downright crime under the guise of the 'higher law.'"<sup>304</sup> A writer in the *Los Angeles Times* wrote in 1922 that the unwritten law was "a tragic specter that

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301. *Two Women: On Trial for Their Lives for Murder in California*, *supra* note 135.

302. *Margaret Finn Is Acquitted*, *supra* note 18 (internal quotation marks omitted).

303. See *Unwritten Laws Govern Everywhere*, ATLANTA CONST., Aug. 31, 1906, at 2.

304. *Warning from a Capable Source*, ATLANTA CONST., Dec. 3, 1907, at 6.

has haunted the American mind, a wraith of the past when every man was a law unto himself.”<sup>305</sup>

These criticisms did not win many converts in the short term, but perhaps they became more convincing as time passed. There is reason to believe that public opinion had at least some effect on the prevalence of the unwritten law. A good example is the famous Hains case. In 1908, Captain Peter C. Hains, Jr., with help from his brother Thornton, killed William E. Annis after his wife confessed to “improper relations” with Annis.<sup>306</sup> Thornton was tried first, and was promptly acquitted under the unwritten law.<sup>307</sup> A wave of negative publicity followed the verdict. One magistrate called the result a “gross miscarriage of justice.”<sup>308</sup> A former judge called the trial and verdict “monstrous.”<sup>309</sup> An editorial in the *Atlanta Constitution* warned that the unwritten law was being “stretched to cover unmeritorious cases.”<sup>310</sup> When Thornton’s brother, Peter, went on trial later that year, he was found guilty and sentenced to up to twenty years in prison.<sup>311</sup> One juror explained that, although they all agreed that the victim “deserved his fate,” none of them felt they should consider the unwritten law.<sup>312</sup>

But the real damage to the unwritten law was done by social and cultural change. As the century progressed, the stereotypes and gender images that buttressed the unwritten law fell into decay. It was no longer easy to assume that women were pure victims, and that adulterers were libidinous monsters. Women, throughout the nineteenth century, and deep into the twentieth century, were slowly gaining agency (to use the current cliché). More

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305. *The Unwritten Law*, L.A. TIMES, Sept. 26, 1922, at II4.

306. *Jury Convicted Captain Hains*, ATLANTA CONST., May 12, 1909, at 3.

307. *Id Do It Again, Declares Hains*, ATLANTA CONST., Jan. 17, 1909, at C7.

308. *Serious Menace in the Unwritten Law*, N.Y. TIMES, Jan. 17, 1909, at 2 (internal quotation marks omitted).

309. *Id.* (internal quotation marks omitted).

310. *The Elasticity of the “Unwritten Law,” supra* note 261.

311. *Jury Convicted Captain Hains, supra* note 306.

312. *Id.*

of them worked outside the home. By the 1950s, society was in the early stages of the feminist and sexual revolutions. Marriage was losing its monopoly over legitimate sex, and was also becoming more of a partnership. Men could no longer claim their wives as a kind of possession. The rise of divorce gave women (and men) an escape valve from abusive or otherwise intolerable marriages.<sup>313</sup> As time went on, the image of women as innocent, weak, naïve, and passive creatures grew less tenable. The moral order evoked by the unwritten law hearkened back to an image of a simpler age, when wives were chaste and subservient and when husbands exercised absolute power over family life. If such a golden age of patriarchy ever existed, it was much weaker by 1900; and by 1950 had eroded beyond repair.<sup>314</sup>

Lawyers still made the attempt once in a while; but the magic was gone. In 1949, Robert C. Rutledge, a “handsome young” pediatrician in St. Louis, twenty-nine years old, killed one Byron Hattman, an aircraft engineer.<sup>315</sup> Supposedly, Hattman had seduced Dr. Rutledge’s “tall, statuesque wife,” Sydney Goodrich Rutledge, after a drinking party in the city.<sup>316</sup> The doctor followed Hattman to Cedar Rapids, Iowa, confronted him in a hotel room, and stabbed him to death.<sup>317</sup> Rutledge claimed self-defense.<sup>318</sup> His lawyers brought up the old story of the unwritten law: Dr. Rutledge was “defending the sanctity of his home” against

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313. On the rise of divorce, see generally JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE* (2011); WILLIAM L. O’NEILL, *DIVORCE IN THE PROGRESSIVE ERA* (1967).

314. Unwritten law killings were almost always committed with a revolver. At least one newspaper suggested that easy access to firearms was partly to blame for the frequency of these impulsive, vengeful killings. See *Blood Flowed in a Crimson Stream During Year 1912*, ATLANTA CONST., Jan. 1, 1913, at 1. And when asked whether he would continue to carry a handgun after his acquittal for murder, Thornton Hains responded: “Certainly, I’ll carry a gun. . . . A man can’t tell when he might have to use it.” *I’d Do It Again, Declares Hains*, *supra* note 307 (internal quotation marks omitted).

315. *Unwritten Law Appeal Fails for Rutledge*, CHI. DAILY TRIB., Apr. 5, 1951, at 3.

316. *Id.*

317. *Id.*

318. *Id.*



“a venomous viper.”<sup>319</sup> This time, however, the jury did not take the hint; Rutledge was convicted and sentenced to seventy years in prison.<sup>320</sup> The Iowa Supreme Court affirmed his conviction in 1951.<sup>321</sup>

Were there fewer incidents that would have been solid cases for the unwritten law? It is hard to say. Perhaps lawyers, aware of changing times and changing mores, were less likely to trot out the unwritten law and would try something else instead—and meanwhile bargain for a lesser punishment. Or perhaps newspapers were less likely to use the unwritten law label.

Oddly, the two last gasps of the unwritten law both involved dentists. In 1954, Dr. Kenneth B. Small, a Michigan dentist, shot and killed New York “playboy industrialist” Jules H. Lack, president of the Majestic Air Conditioning Company.<sup>322</sup> Dr. Small was convinced Lack had broken up his marriage.<sup>323</sup> His wife wanted a divorce, and he suspected that Lack was the home-wrecker.<sup>324</sup> He shot him dead and was acquitted on grounds of temporary insanity; he was, however, required to report to a state mental facility.<sup>325</sup> Four years later, Bobby Gene Hunter was found not guilty of attempted murder in the stabbing of Dr. John Henry Glascock.<sup>326</sup> Hunter’s wife was an assistant in Dr. Glascock’s dental office, and the stabbing occurred after she admitted to her husband that they had “engaged in an

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319. *Id.* (internal quotation marks omitted).

320. *Rutledge Given 70 Years in Love Triangle Killing*, L.A. TIMES, Aug. 9, 1949, at I2.

321. *State v. Rutledge*, 47 N.W.2d 251, 258 (Iowa 1951). The issues on appeal, of course, had nothing to do with the unwritten law; they concerned (as usual) jury instructions, admission of evidence, and the like. *Id.* at 260-64.

322. *Dentist Is Cleared*, N.Y. TIMES, July 17, 1954, at 28; *Industrialist Is Slain*, N.Y. TIMES, May 31, 1954, at 27.

323. *Industrialist Is Slain*, *supra* note 322.

324. *See id.*

325. *Dentist Is Cleared*, *supra* note 322.

326. Art Ryon, *Husband Cleared in Knifing Dentist in Row Over Wife*, L.A. TIMES, June 12, 1958, at I2.

office romance.”<sup>327</sup> The fact that Hunter did not actually succeed in killing his rival might have made it easier for the jury to acquit him.

After these two trials, our newspapers were almost entirely silent about the unwritten law. It cropped up once, in 1974, when Inez Garcia, a woman from Monterey, California, went on trial.<sup>328</sup> Garcia killed a man who she claimed had been an accomplice in her rape.<sup>329</sup> (This was the first story in which the term “rape” was used to describe the dead man’s act). Garcia claimed that a woman who has been raped has “the right to kill back”—a claim that made her a hero in some circles.<sup>330</sup> But the jury disagreed; she was convicted of second-degree murder.<sup>331</sup> And there were faint echoes of the unwritten law in the famous trial of Jean Harris, the former headmistress of an elite girls’ high school in Virginia and the jilted lover of Dr. Herman Tarnower, the “Scarsdale Diet Doctor.”<sup>332</sup> After years of mistreating Harris and carrying on dalliances with younger women, Tarnower finally planned to leave her, and she shot him dead.<sup>333</sup> But apparently nobody so much as mentioned the unwritten law at her trial; she was convicted and given a prison sentence of fifteen years to life.<sup>334</sup>

In the early twentieth century, these would have been classic cases of the unwritten law. Indeed, it takes a serious act of imagination to distinguish Inez Garcia’s act of retribution from that of Carrie Davis, a Canadian woman who, sixty years earlier, lay in wait and killed Bert Massey,

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327. *Id.*

328. Lacy Fosburgh, *Assertion of Rape and ‘Unwritten Law’ Form a Coast Woman’s Murder Defense*, N.Y. TIMES, Aug. 31, 1974, at 32.

329. *Id.*

330. *Id.* (internal quotation marks omitted).

331. *Id.*

332. See Joseph Berger, *Headmistress, Jilted Lover, Killer, Then a Force for Good in Jail*, N.Y. TIMES, Dec. 29, 2012, at 1.

333. *Id.*

334. *Id.* Since the term was not used in the press in describing her trial, her case is not in fact part of our data set.

who “mistreated her” after a dinner party.<sup>335</sup> And it is equally hard to distinguish Jean Harris’s murder of the Scarsdale Diet Doctor from the murder, sixty years earlier, of Ellis Kinkead at the hands of Olivia Stone, his “common law wife” whom he planned to abandon after years of living together in sin.<sup>336</sup> The facts were very much the same; but the underlying social norms were entirely different.

Today, the unwritten law is a distant memory. Of course, love, sex, and marriage still evoke the very strongest of emotions. But virginity and chastity are no longer such cardinal values. And, surely, fewer people would agree that true manhood consists of enforcing family honor with deadly violence.<sup>337</sup> Men no doubt still kill their rivals and their faithless wives, but they no longer claim these killings are justified—at least not overtly. And while women who kill abusive husbands or lovers are often acquitted, the courts have evolved new mutations of self-defense to reach this result—using, in particular, the battered woman syndrome.<sup>338</sup> Women on trial can appeal to a firm, overt, written doctrine. The unwritten law is no longer necessary.

#### VIII. WHY UNWRITTEN?

One important question emerges from America’s experiment with the unwritten law: Why did it remain unwritten? If the social norms that bolstered it were as strong as they seemed to be, why did they remain formally illegitimate? If the law reflects social values and attitudes, as it surely does, why the discrepancy between official doctrine and the actual behavior of the system?

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335. *Unwritten Law in Canada*, N.Y. TIMES, Feb. 28, 1915, at 1.

336. *Jury Frees Nurse at Murder Trial*, ATLANTA CONST., Apr. 7, 1922, at 1.

337. There are, of course, societies where such killings are not only believed to be justified but are considered a duty.

338. See, e.g., *Smith v. State*, 277 S.E.2d 678 (Ga. 1981). Josephine Smith was charged with “murdering her live-in boyfriend.” *Id.* at 678. The boyfriend was physically extremely abusive, and Smith said she shot him “in fear of her life.” *Id.* at 679. The issue in the case was whether the court should have allowed expert testimony on the battered woman syndrome. *Id.* at 678. Smith had been convicted, but the Supreme Court of Georgia reversed, holding that the “expert’s opinion . . . was improperly excluded.” *Id.* at 683.

There is the familiar floodgates argument. Open the sluices, even a little bit, and the waters will pour in and drown you. Judges often invoked this argument: If you let people take the law into their own hands, where will it end?

Consider the famous English case of *The Queen v. Dudley & Stephens*, decided in the late nineteenth century.<sup>339</sup> The two men, Dudley and Stephens, had been in a small boat, "cast away in a storm on the high seas 1600 miles from the Cape of Good Hope."<sup>340</sup> They were alone in the limitless ocean, and at the point of slowly starving to death.<sup>341</sup> In desperation, they killed Richard Parker, a boy of some seventeen or eighteen years, who was "lying at the bottom of the boat quite helpless, and extremely weakened by famine."<sup>342</sup> The defendants "fed upon the body and blood of the boy for four days."<sup>343</sup> They survived long enough to be rescued.<sup>344</sup> Back in England, they were put on trial and charged with murder.<sup>345</sup> A jury found them guilty.<sup>346</sup> The sole question on appeal was a legal one: can a killer, who acted out of hunger and desperation, plead the defense of "necessity"?<sup>347</sup>

Lord Coleridge, who delivered the judgment of the court, admitted that the defendants faced "terrible" temptations.<sup>348</sup> Anyone under the circumstances, he said, would find it hard to keep "judgment straight and . . . conduct pure."<sup>349</sup> Nonetheless, the court rejected the defense.

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339. *The Queen v. Dudley & Stephens*, (1884) 14 Q.B.D. 273 (Eng.). A full account of this case is in A. W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW* (1984).

340. *Dudley & Stephens*, 14 Q.B.D. at 273.

341. *Id.* at 273-74.

342. *Id.*

343. *Id.* at 274.

344. *Id.*

345. *Id.* at 275.

346. *Id.*

347. *Id.* at 287-88.

348. *Id.* at 288.

349. *Id.*

Lord Coleridge insisted that “[w]e are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy.”<sup>350</sup> He sentenced the two men to death.<sup>351</sup> And yet, interestingly, the government promptly commuted the sentences to six months.<sup>352</sup> Dudley and Stephens, then, were hardly punished at all. The formal rule remained intact. To the court (and society) that somehow seemed vitally important.

Dudley and Stephens got the benefit of a kind of unwritten law. In extreme and desperate situations, the law bends and adjusts. But it refuses to do so openly. In their case, royal clemency was the source of the bending and adjusting. Flexibility is also one of the virtues of the jury system. The jury system allows for pious deception. In Great Britain, the punishment for murder was death. But, as Brian Simpson has pointed out, “if all murderers had been hanged, the number of executions would have been alarming.”<sup>353</sup> In fact, juries routinely bent the law.<sup>354</sup> The same was true of other crimes. In eighteenth century England, it was a capital offense to steal property worth more than a certain minimal amount. A jury could find a man guilty, and yet spare the thief’s life, simply by valuing the goods at some absurdly low figure. In Maryland, in the 1660s, a man named Pope Alvey was charged with stealing a “Certaine Cow of black culler” worth two pounds and ten shillings.<sup>355</sup> The jury found him guilty of the crime, but “the cow worth eleven pence and no more”—a figure that seems almost ridiculous.<sup>356</sup>

The unwritten law is a rich illustration of the importance of the jury in making sure that the judicial

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350. *Id.*

351. *Id.*

352. *Id.* n.2.

353. SIMPSON, *supra* note 339, at 242.

354. *See id.*

355. *See* ARCHIVES OF MARYLAND: PROCEEDINGS OF THE PROVINCIAL COURT OF MARYLAND 1663-1666, at xix-xx (J. Hall Pleasants ed., 1932).

356. *Id.* The judge reprimanded the jury and sent them back into their room to reconsider their valuation.

system stays flexible. A jury rarely gives reasons for its decisions. It deliberates in secret, and it simply decides. For Max Weber, the great German sociologist, the common-law jury was a prime example of "irrational" decisionmaking.<sup>357</sup> Weber put the jury in the same category as oracles, trial by ordeal, or decisions based on reading the entrails of birds, because jury decisions could not be analyzed rationally.<sup>358</sup> But precisely *because* the jury never gives reasons, it can bend the law without owning up to what it is doing.

In a way, then, juries who acquitted under the unwritten law were performing their intended function—as an extrajudicial check on the rigidity of the formal law. Juries can temper the formal law, while still cautiously avoiding the (perhaps imaginary) floodgates problem. After all, the jury is not a programmed computer. It is a panel of human beings.

#### CONCLUSION

The term unwritten law at one time had a fairly concrete meaning. It permitted men and women to kill in defense of female honor and virtue. Even though state criminal codes defined these killings as murder, juries across the country acquitted defendants who could tell a persuasive story that the homicide was necessary to protect the fairer sex. Our research suggests that, in its heyday, the unwritten law tended to be spectacularly successful. Although unwritten law trials were more common in the South and West, and more sensational in the Northeast, they cropped up everywhere, and succeeded wherever they cropped up.

The unwritten law was an example of a far more common feature of most legal systems. In practice, most

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357. MAX WEBER ON LAW IN ECONOMY AND SOCIETY 63 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1954). Lawmaking and lawfinding are "formally irrational" when they use "means which cannot be controlled by the intellect, for instance when recourse is had to oracles." *Id.* The jury, according to Weber, resembles the oracle, "inasmuch as it does not indicate rational grounds for its decision." *Id.* at 79.

358. *See id.*

systems are flexible and case-specific. They are shot through with discretion. At least in certain contexts, they are what we might call dual systems: systems where the formal law and the law in action are almost totally at odds with each other.

Unwritten laws go beyond the usual gap between theory and practice, or the usual leeways and flexibilities. They represent patterns that flatly *contradict* formal law but are nonetheless overt and well respected. Indeed, as the *Atlanta Constitution* argued in an article from the early twentieth century, the trouble with the unwritten law was that it was not unwritten *enough*. The writer thought it was best just to leave matters to the jury; they would do the right thing in quiet, in their locked rooms and secret discussions.<sup>359</sup> No need to talk about unwritten laws.<sup>360</sup> Just let them happen.<sup>361</sup>

It is not hard to find other examples of unwritten laws. The treatment of divorce is one example. During the long years before the no-fault revolution, the formal law did not allow consensual divorce.<sup>362</sup> A court was not supposed to grant a divorce even if husband and wife both *wanted* one.<sup>363</sup> There had to be specific “grounds” for divorce—adultery, desertion, cruelty, depending on the particular state

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359. See *The Menace of “Unwritten Law,”* ATLANTA CONST., Nov. 14, 1907, at 6.

360. See *id.*

361. *Id.* The editorial huffed and puffed and called the unwritten law a device to “shackle justice and to chloroform the judgments and consciences of jurymen.” *Id.* The author continued: “Like many of the quasi-truths of civilization and legal jurisprudence, its chief deadliness lies in the fact that it wears no bridle and admits no check.” *Id.* He was commenting on the case of Anne Bradley, who shot a man whom she claimed had used his “wiles” to “lay her life in ruins.” *Id.* No, the writer insisted, the *written* law must prevail. *Id.* But his point was not to insist on sending this sort of woman to prison. *Id.* Rather, it was a criticism of the blather that surrounded the unwritten law, the “hysterics and melodrama,” the “intoxicated and unrestrained emotions.” *Id.* Simply lay the facts before the jury—“men with mothers and sisters and wives of their own”—and they would be able to “discern the provocation” that led to the shooting, and reach a verdict “based on mercy and equity; and yet founded in the law of the land.” *Id.*

362. See LAWRENCE M. FRIEDMAN, PRIVATE LIVES: FAMILIES, INDIVIDUALS AND THE LAW 29 (2004).

363. *Id.* at 35.



statute.<sup>364</sup> Yet judges from about 1870 allowed consensual divorce all the same.<sup>365</sup> Divorce complaints went by default; or the court simply ignored a kind of perjury.<sup>366</sup> Similarly, during the long years (not over yet in most jurisdictions) in which prostitution was never legalized, an unwritten norm allowed houses of prostitution to function, so long as they stayed inside “red light” districts.<sup>367</sup> As a Minneapolis Vice Commission Report put it in 1911, people felt that “houses of prostitution” were “necessary evils”; they were “permitted to exist in the localities given over to them,” and were even (informally) licensed by the city.<sup>368</sup> This despite the utter illegality (on paper) of such houses.

Mercy killing is another, more extreme example of an unwritten law. Nothing in the penal code excuses killing an old, suffering spouse who begs to be put out of her misery. Yet juries often simply acquit the perpetrator of a mercy killing. Judges, too, are sympathetic. In 1953, an English judge confronted a case of an attempted mercy killing.<sup>369</sup> The husband of Mrs. Julia King was dying of cancer.<sup>370</sup> She tried to suffocate him by putting a pillow over his face.<sup>371</sup> The judge clearly sympathized: “only those who had kept the heartbreaking vigil by the bed of some beloved one who was slowly dying could realize the strain imposed.”<sup>372</sup> The situation no doubt made Mrs. King “distraught.”<sup>373</sup> He

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364. *Id.*

365. *See id.*

366. *Id.*

367. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 227 (1993).

368. REPORT OF THE VICE COMMISSION OF MINNEAPOLIS 23 (1911). The “indirect license system” consisted of “regular monthly fines” paid into the Municipal Court. *Id.* The brothel owners would come to court “without the formality of arrest,” and plead “guilty to a charge . . . of keeping a house of ill-fame.” *Id.* A fixed fine would then be paid. *Id.*

369. *See Attempted Murder of Husband*, TIMES (London), Oct. 16, 1953, at 4.

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

granted her a “conditional discharge”; but he insisted he was not “lending countenance to what is sometimes loosely called ‘mercy killing.’”<sup>374</sup> What she did was “wrong and wicked.”<sup>375</sup> Wrong, perhaps, but how can we interpret the judge’s action, except as a kind of tacit approval?

In 1950, Dr. Herman Sander went on trial in New Hampshire.<sup>376</sup> He was accused of killing a patient, Abbie Borroto, by injecting air into her veins.<sup>377</sup> She was dying of cancer, bedridden, and in excruciating pain.<sup>378</sup> The facts were in some dispute, but the newspapers called it a mercy killing.<sup>379</sup> At the trial, everybody seemed to be on the side of Dr. Sander, including the dead woman’s family.<sup>380</sup> The real defense was a sort of unwritten law. Dr. Sander did not deserve to be punished. He was a kind, devoted, and caring doctor, and a “tireless and conscientious worker.”<sup>381</sup> The judge in this case did his official duty: he charged the jury that if Dr. Sander caused the woman’s death, this was murder, plain and simple.<sup>382</sup> The prosecutor told the jury that people “must abide by” the law; no one, “high or low, was entitled to take the law into his own hands and arbitrarily end the life of another person.”<sup>383</sup> But the jury—“twelve middle-aged and elderly men”—spent only a bit more than an hour before reaching a verdict: not guilty.<sup>384</sup>

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374. *Id.* (internal quotation marks omitted).

375. *Id.* (internal quotation marks omitted).

376. Russell Porter, *4th Witness Heard Against Dr. Sander*, N.Y. TIMES, Mar. 1, 1950, at 6.

377. *Id.*

378. Russell Porter, *Defense Opens Case, Says Sander Will Testify Air Followed Death*, N.Y. TIMES, Mar. 3, 1950, at 1 [hereinafter Porter, *Defense Opens Case*].

379. *See, e.g.*, Russell Porter, *Dr. Sander Denies He Killed Patient; Says Mind Snapped*, N.Y. TIMES, Mar. 7, 1950, at 1.

380. Porter, *Defense Opens Case*, *supra* note 378.

381. *Id.*

382. Russell Porter, *Sander Acquitted in an Hour; Crowd Outside Court Cheers*, N.Y. TIMES, Mar. 10, 1950, at 1.

383. *Id.* (internal quotation marks omitted).

384. *Id.*

When the news got out, “[w]omen spectators gasped and cried out in joy.”<sup>385</sup> Reginald Borroto, Abbie’s husband, found the verdict “heart-warming.”<sup>386</sup> Later, letters and telegrams “poured in” congratulating Dr. Sander.<sup>387</sup> Dr. Sander was a hero, not a killer.

No doubt there are other unwritten laws and some which are not only unwritten but unspoken. They flourish quietly underground. If we had ways to study patterns of behavior, by judges and juries, we might learn a lot more about these subterranean norms and patterns. But this history is bound to be murky: the more unwritten and unspoken the law, the deeper its obscurity. Sometimes patterns that change, like soft-bodied animals, leave little behind in the way of fossilized remains. Unwritten laws are likely to change in unwritten ways.

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385. *Id.*

386. Russell Porter, *Borroto Calls Verdict ‘Most Heart-Warming,’* N.Y. TIMES, Mar. 10, 1950, at 23.

387. Russell Porter, *Messages Flood in on Sander Verdict,* N.Y. TIMES, Mar. 11, 1950, at 28. Dr. Sander did lose his license to practice, but it was later restored.