THE UNWRITTEN LAW

BY NEWMAN LEVY

THE beginning of criminal law was private vengeance. Primitive man, emerging from the shadows of his primeval forest, smarting under the savage memory of an injury received, became at once accuser, judge, and executioner. The history of criminal law has been a history of curbing this primitive impulse and adapting it to social necessities. As communities developed, the social dangers of private revenge became apparent, and the group, and later its representatives, took over the function of vindicating injuries to the individual.

Even then exceptions remained. "The right of personal revenge," says Van Bar, "was, in many cases, a duty. A man was bound by all the force of religion and custom to avenge the death of a kinsman." In many primitive codes we find express sanction given to the right of a person, under certain circumstances, to inflict summary punishment. Thus we read in The Twelve Tables, "If by night (a man) have done a theft and (the owner) kill him, let him (be regarded as if) killed by law." And in the Law of Manu " . . . in order to protect women and Brahamanas, he who kills in the cause of right commits no sin." In the First Book of the Odyssey, Athena praises Orestes for killing Aegisthus and avenging his father's murder.

The most persistent of all exceptions to the prohibition against private homicide, lasting almost until our own time, was the right of a person to kill in defense of what is broadly called his "honor." This curiously comprehensive term has taken on various meanings according to the fluctuations in current *mores* and the customs of particular localities. It survives in such strange anachronisms as the Italian vendetta and the Kentucky feud. A little more than a century ago it was possible for Aaron Burr to take his seat as Vice-President of the United States with an indictment for murder pending against him for having killed Alexander Hamilton in a duel.

But the most interesting phenomenon, as old as civilization, has been the exalting of woman's sexual integrity, and the almost universal approval of any killing in vindication of it. The studies of Freud and his followers throw some light upon this, but long before the explorations of modern psychology it was traditional that any act of violence might be excused if committed "in defense of a woman's good name." Every early legal system permitted the killing of an adulterer caught *in flagrante*. The right of a father or brother to kill the violator of a daughter or sister had the sanction of customary if not explicit law.

It is evident, therefore, that the so-called Unwritten Law, although lacking in juristic respectability, has an ancient pedigree going back to the origin of the race. The quaint Victorian phrase "a fate worse than death" sounds strangely antique to some of us, but there are still many who accept

it as a literal truth. So, many verdicts that seem maudlin and sentimental to the strict legal mind are merely an expression of what Judge Ulman calls "jury-made law," a sacrifice of the letter of the law to the spirit of the community.

However, forms must be complied with. An acquittal in the daily newspapers has not yet been accepted as the equivalent of a jury verdict. A killing requires an indictment and a trial, with all the accompaniments of legal ritual. The man who has killed to save a woman from a fate worse than death, the woman who has murdered in defense of her good name, and the husband or the father who has slaughtered to protect the sanctity of the home must all have the stamp of approval placed upon their respective acts by a jury of their peers before they are permitted to resume their temporarily interrupted freedom.

There are several defenses to homicide recognized in law. The most effective, of course, is that the defendant did not do the killing, but this presents obvious difficulties in the typical crime of passion, usually committed in the presence of witnesses. For instance, it would have taxed the credulity even of a petit jury if Harry Thaw, who shot Stanford White in a crowded roof garden, had attempted to establish an alibi showing that he had been elsewhere on that night.

So, too, excusable homicide has limited possibilities. "Homicide is excusable," says the New York penal law, "when committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act by lawful means with ordinary caution, and without any unlawful intent." Unfortunately the immunity extended by a benign law to the killing of children and servants does not extend to the assassination of delinquent husbands.

This leaves the insanity defense (which, strictly speaking, is not a defense at all) as the only way out for the perplexed murderer. Most of the population, the psychiatrists tell us, suffers from some sort of mental aberration, so there is usually a slight basis of fact in every case for a defense of insanity. But the important thing is that no one takes it seriously. A plea of insanity resembles, somewhat, those quaint fictions that adorned the early pages of legal history. When counsel suavely says, "The defendant pleads guilty with a specification of insanity," there is this implicit in his statement: "I don't mean that this man claims that he is really insane, except in the sense that all of us are a bit queer. What he really means is that this crime was committed under extenuating circumstances that should appeal strongly to the sympathy of a jury. Unfortunately this sort of thing is not recognized in our jurisprudence, so we are obliged, to paraphrase the immortal Gilbert, 'in excellent diction to indulge in an innocent fiction.'"

II

There is an additional advantage to the plea of insanity. Under it a defendant may, according to the rules of evidence, introduce all sorts of apparent irrelevancies upon the theory that they might have tended to unsettle the defendant's mind. Thus, in the celebrated Harry Thaw case, his wife, Evelyn Nesbit Thaw, was permitted to tell the detailed history of her seduction by Stanford White, because it was contended that her narration of the story to Harry was what caused his mental derangement and induced him to go out and commit murder.

When Thaw was first arrested his family consulted several of the leading criminal lawyers in New York, who advised

that a defense of insanity was his only chance of salvation. This his family, for reasons best known to themselves, would not permit, so a lawyer was imported from California, a magniloquent tear-jerker named Delphin Delmas. His undying contribution to medico-legal science was the invention of the term *dementia Americana,* a description of the kind of insanity that is supposed to afflict every red-blooded he-man when American womanhood is outraged. Unfortunately the court and jury were not quite ready to accept this important scientific discovery and the jury disagreed. Consequently when Thaw was represented in his second trial by the less florid, but infinitely more able Martin W. Littleton, the defense relied upon the orthodox categories of psychiatry, with the result that Thaw was acquitted on the ground that he was insane at the time he shot White.

A case, notable in the history of criminal law, is the trial of Edward Divins. On a June day in 1892, Judge Martine was presiding in the ancient Court of General Sessions in New York City. A defendant named Max Clegert was called to the bar to answer an indictment for rape upon a fifteen-year-old girl. There was a brief discussion at the rail and then the defendant pleaded not guilty. As he did so a young boy, sitting in the front row of spectators, drew a revolver and fired and killed Clegert in the presence of the entire court. He was Edward Divins, the crippled brother of the girl who had been raped.

The court was in an uproar. Several court officers sprang at Divins, twisted his arm, and tore the smoking pistol from his hand. "Yes, I killed him!" Divins replied. "I killed him because he ruined my little sister — my little sister I loved!" This was what the crude slang of a later age would have described as a "natural." When it was revealed in the newspapers, a few weeks later, that Divins had spent the Sunday preceding the shooting at the graves of his parents, there was little left for the authorities to do but go through the vain motions of a trial.

Still there had been a shooting, apparently deliberate and premeditated, committed in the presence of one of the most august tribunals in the land. If it was not murder, it certainly was close to being contempt of court. So Edward Divins was brought to trial before Recorder Smyth and a jury of his peers in the same court in which he had committed his crime. He was defended by Abraham Levy.

His defense was, of course, insanity, and the evidence did indicate that he was definitely subnormal. But the real defense was that Eddie Divins, "this poor crippled lad," had killed to avenge his sister's dishonor. Learned alienists gravely explained the defendant's psychoses, or whatever the term was in the nineties, but it was the picture of crippled Eddie Divins, kneeling at his parents' grave, that Mr. Levy stressed to the jury in his eloquent peroration. "He simply did as I should have done," said counsel, "had the wrong been done to mine."

"The spectators began to cheer and stamp their feet," says a contemporary newspaper account, "when Mr. Levy concluded, but the Recorder arose in his wrath and cut it short." About an hour later Edward Divins walked out of court a free man.

The details vary but the pattern remains the same. Harry Thaw, Edward Divins, Josephine Terranova, Florence Carman, Blanca De Saulles, George Remus, all these cases follow a definite formula. In essence the Unwritten Law cases are predicated upon an emotional appeal. The acquittal of a brother who kills his sister's

seducer differs only in degree from the acquittal of a mother who steals bread to feed her starving child. In both cases there is a repudiation of the strict letter of the law in conformity with the sentiment of the community. This is all to the good. It is only when sentiment slops over into sentimentality that misgivings arise concerning the efficacy of our legal institutions.

The Remus trial, called in the newspapers "The Remus Burlesque" and "a travesty on justice," is a case in point. George Remus was a colorful figure. He had been a successful criminal lawyer in Chicago until he was disbarred. He then went to Cincinnati where he became one of the leading bootleggers, his operations running into the millions. This career was cut short by a sentence of imprisonment in the Atlanta Penitentiary.

Upon his return to Cincinnati, he discovered that during his absence his wife had been having illicit relations with Franklin L. Dodge, one of the federal agents who had been instrumental in obtaining his arrest. He sued her for divorce and a hearing was set for October 6, 1927. On October 7, Remus was to be examined concerning his personal fortune, which was considerable, and it was expected that this examination would disclose information of great interest to the income tax authorities. Mrs. Imogene Remus left her hotel with her twenty-year-old daughter Ruth for the divorce court, and as her taxicab sped through Eden Park it was passed by another car, which cut in front and crowded it to the curb. Remus jumped out of his car, and his wife jumped out of the taxicab and started to run. Remus grabbed her, pressed a revolver against her body, and fired. She died later in the hospital.

Remus walked calmly away, and about a half hour later surrendered to the police. His comment, on hearing that his wife had died, was: "She who dances down the primrose path must die on the primrose path."

Remus conducted his own defense which, to conform to the requirements of the law, was necessarily insanity, so there was presented the amazing spectacle of a shrewd and skillful lawyer endeavoring to convince a jury that he was mentally unbalanced. The trial was filled with forensic fireworks, hysterics, and melodrama. Remus wept, ranted, and fought with the judge who threatened to punish him for contempt of court. "My life is at stake!" Remus cried, apparently willing to risk a thirty-day sentence for contempt. Through it all his young daughter sat near him and consoled him.

The State produced the usual array of alienists who testified that Remus was sane. The defense did not rely upon expert testimony; instead, it called a number of lay witnesses, including Clarence Darrow, who gave evidence concerning the defendant's emotional instability. But the most telling evidence for the defense was the testimony concerning Mrs. Remus' infidelity, admissible, as in the Thaw case, because of its supposed effect upon the defendant's mind. One witness, a professional gunman, testified that the deceased had offered him $10,000 to kill Remus.

The trial lasted over a month, but it took the jury exactly nineteen minutes to acquit him. One of the jurors was quoted as saying, "He didn't have any Christmas last year and we wanted to see him have one this year." Remus thanked the jury. "I asked for American justice and I thank you," he said.

Unfortunately he was deprived of his Christmas that year, too. The aftermath of the trial presented several slightly hu-

morous aspects. Remus was not discharged after his acquittal, but was compelled to submit to a hearing upon the question of his sanity. The same alienists who had testified during his trial again swore that he was insane, and to his great indignation he was committed to an asylum. "It's the most humorous decision I've ever known in my life," he said. "A joke, a farce." So was the decision three months later of the Ohio Courts of Appeals, which, upon a writ of *habeas corpus,* declared that Remus was sane, and discharged him.

III

The Remus case was bizarre. Closer to the orthodox pattern was the celebrated trial of Blanca De Saulles. This *cause célèbre* contained every essential element of the classical Unwritten Law murder case. Blanca Errazuiz De Saulles was one of the most beautiful women ever to face a jury, charged with murder in the first degree. She was a niece of a former President of Chile, and a member of one of the wealthiest and most aristocratic families in South America. At the age of seventeen she had married John De Saulles, famous as a Yale football star and later to be appointed Minister to Uruguay by President Wilson. After several years of marriage she obtained a divorce. The custody of their young son was divided between them; part of the time the child stayed with his father and part of the time with his mother.

On the night of August 3, 1917, De Saulles was in the living room of his country home, The Box, together with his father, Major Arthur De Saulles, his sister, Mrs. Degner, and Marshall Ward, a business associate. Little Jack was playing on the floor near his father. The door opened and Blanca De Saulles, dressed in white, entered the room, followed by her maid. De Saulles, who was lying on a couch, sprang to his feet. "This is a surprise, Blanca," he said. She did not reply to his greeting. "I want to get Jackie," she said. "I want to take him away."

"You know that's impossible," De Saulles said. "This is my month. You can't have him. That's all there is to it." She took a revolver from her hand bag and fired five shots into him. When the police arrived she said, "I shot him because he would not give me my baby. I hope he dies."

Mrs. De Saulles was defended by Henry A. Uterhart, one of the most urbane and skillful of contemporary barristers, and particularly effective in saving beautiful ladies from the penalties of their indiscretions. For weeks preceding the trial the newspapers were filled with sob stories and poignant interviews from the defendant's cell, released reluctantly to the press by Mr. Uterhart.

"Picture this little woman," exclaimed Mr. Uterhart lyrically, "the great promise of her youth, the most sought-after senorita in all Latin America, and then see how it all ends in a tragic marriage. Love is destroyed and ideals gone; here she languished, a stranger in a strange land, self-banished from home and friends for the sake of this child whose very love they seek to deprive her of. Picture her desperation when she learns of this. I do not believe there is a jury in the land that will not free Blanca De Saulles."

Mr. Uterhart was, of course, right, but before that inevitable end could be achieved it was necessary to pay obeisance to legal ritual in the form of an insanity defense, an array of alienists, a 15,000-word hypothetical question, and a new form of mental affliction upon which the jury might hang its verdict — hyperthyreosis.

The trial was a social, dramatic, and legal success. The cruelties and humiliations the defendant suffered from the deceased were described by many witnesses — for the purpose of explaining the dethronement of her reason. But the climax of the trial came when Mrs. De Saulles, pale and beautiful, took the stand in her own behalf. Under the skillful questioning of Mr. Uterhart she told the poignant story of her life, told it with extraordinary calmness and lucidity for one who had been so recently afflicted with homicidal hyperthyreosis. Jurors and society women wept audibly. Thus she arrived by easy stages at the night of the shooting.

"Then he looked at me and said 'You can't have him — you can't ever have him.' I saw a look come over his face. I think I was stunned then. I felt a frightful pain in my head. I still seem to hear those words." At this point she paused. "That's all," she said.

"Is that all you know?" Justice Manning asked.

"Yes," she said, almost inaudibly. Her next recollection, she said, was of finding herself in jail a day or so later.

The jurors were in tears and the newspapers were in ecstasies. American Chivalry Is On Trial, said one headline. A gem of poesy from the gifted pen of Fannie Hurst deserves to be exhumed from the buried files and preserved for posterity:

> Try to imagine a magnolia against the deepest of night skies; a pearl against black plush; a nun, oh so whitely within her wimple, and you have Mrs. De Saulles as I saw her in court yesterday morning . . . Poor frail little *madre dolorosa* whom I saw being made ready for justice yesterday morning, stripped of plumage and in the penitential sackcloth and ashes garb of shirtwaist and skirt. What a burning crucible of the two, the murderess and the woman, there must be behind that white mask; how the flames must lick and curl.

What could the jury do? No red-blooded he-man would condemn a magnolia against the deepest of night skies, no American worthy of the name would convict a pearl against black plush. An hour and forty-three minutes after the case was submitted to them the jury returned with a verdict of not guilty. Blanca De Saulles, oh so whitely within her wimple, smiled tremulously and grasped Mr. Uterhart's hand. American chivalry had triumphed.

It is customary to regard the Unwritten Law as a survival of backwoods justice, an anachronism abhorrent to lawyers who like to consider our legal system adequate to meet any contingency. It is sometimes urged as a reason for abolishing the jury system. There is no doubt that the mawkishness and forensic claptrap that has become indispensable to the Unwritten Law in action would have little effect before a tribunal composed solely of jurists consecrated to the Written Law. To a limited degree it serves a useful purpose. Just as equity came into being to mitigate the rigors of the Common Law, so the Unwritten Law exists as an unacknowledged but none the less real escape from strict legal formalism. There are times when undoubtedly "the letter killeth but the spirit giveth life." But the danger lies in the fact that the Unwritten Law is not a law at all, but an affirmation of lawlessness. Lynch law, mob law, enjoy at certain times, and in certain localities, popular approbation. In the West it is frequently a matter of economic heterodoxy; in the South a matter of pigmentation. But whenever there is a prevailing acceptance of lawlessness there is a grave threat to social security.

Perhaps the best approach to the problem would be to ascertain whether there are elements in the Unwritten Law which might be assimilated into the written law.

A beginning could be made by a revision of the archaic definition of insanity. Mental science has advanced far since the McNaughten case, but criminal law still adheres to an obsolete formula. Justice Cardozo has said: "If insanity is not to be a defense, let us say so frankly and even brutally, but let us not mock ourselves with a definition that palters with reality. Such a method is neither good morals, nor good science, nor good law."

The law should recognize the emotional and compulsive factors of crime. Eventually there would come new classifications of delinquency and new methods of treatment. At present it is possible only to pose the problem. Without laboring to define "normal" and "abnormal," it will be accepted that Harry Thaw, Edward Divins, George Remus and Blanca De Saulles were not normal people. Neither were they (with the possible exception of Thaw) proper cases for an insane asylum. The law would have condemned them to death. The Unwritten Law turned them loose on society. Neither seems a sufficient solution. It is one of the major tasks of legal science to discover what is.

LADY WITH ARROWS

BY MARGARET MARKS

She is not mistress here, the arrows shake themselves
Free of her bow; they ride the carrying air
Straight to the mark that is forever there,
Contrive just not to lay it low, to leave it where
It sways a challenge to that practiced art
She most denies, in which she has no part.

Denies; mourns, even says: Is it indeed my hand,
This delicate blue veined, is it indeed my arm
That so directs, that points the sinewy dart
On that poor flesh to which I wish no harm?
Believe me when I say it is not so.
I am for nothing here; I am possessed;
I am the house of ghostly skill, the host
Of power. It is this commanding guest,
(Believe it!)
And not I, not I,
That bends the bow,
That bids the arrow fly.