▶ *The killing of seducers is legal where men are men.*

ADULTERY AND MURDER IN TEXAS

By William Seagle

One of the best known of American folkways is the so-called "unwritten law" which justifies a man in slaying the villain who has broken up his home by seducing his wife. A jury is especially likely to apply the "unwritten law" when the husband has caught the adulterer *flagrante delicto*. In such cases the husband may not get off scot-free but he is likely to be convicted of manslaughter rather than murder. A Philadelphia judge once remarked: "In this court the unwritten law isn't worth the paper it isn't written on." Be that as it may the vengeful husband has at least to take his chances with a jury. But there are two American states, Texas and New Mexico, in which the husband who slays the homebreaker is under certain circumstances expressly guaranteed absolute immunity by statute! In a third state, Georgia, a like result has been achieved by judicial construction. In a fourth state, Delaware, the husband who slays the adulterer is guilty only of a misdemeanor, for which the maximum penalty is a year's imprisonment, and the minimum, a fine of $100. Thus the "unwritten" law is written down in the plainest terms in four states.

The Texas Penal Code provides: "Homicide is justifiable when committed by the husband upon one taken in the act of adultery with the wife, provided the killing takes place before the parties to the act have separated," while the Penal Code of New Mexico is phrased thus: "Any person who kills another who is in the act of having carnal knowledge of such person's legal wife shall be deemed justifiable; provided, that said husband and wife are not living separate but together as man and wife." However, the courts of New Mexico, Georgia, and Delaware have restricted the scope of their statutes. They have indicated that the husband must actually take the adulterer in the act, and that it is justifiable to kill him only in the heat of passion or if necessary to prevent its consummation. This

ius ultimi noctis, so to speak, is thus preventive rather than punitive. But the Texas courts have interpreted the provision of the penal code with such extreme liberality that the husband has been made judge, jury and executioner all in one. The Texas Supreme Court has been even more liberal than Texas juries. Curiously, it is the Supreme Court of New Mexico that has declared that the Texas decisions create a system of "licensed murder."

The Texas Supreme Court has actually gone far beyond the language of the penal code. The husbands need not actually take the adulterer in the act. He is justified in killing if he merely catches him under incriminating circumstances. Moreover it has been held regularly that the words "before the parties have separated" mean merely that they are still in each other's company. In the leading case of *Morrison v. State*, decided in 1898, according to the husband's own story the slaying took place after the guilty pair had left the house, and were walking down the street. The husband, moreover, had waited outside the bedroom for over an hour, knowing that his wife was being unfaithful, before he followed her and her companion out into the street. The principle of this case was reaffirmed in 1925 in the case of *Cox v. State*. In *Stillwell v. State*, decided in 1926, the adulterer was slain although at the time of the homicide he was already sitting on the porch with the wife in the presence of other people, and in *Holman v. State*, decided in 1922, the husband killed the lover when he saw him get out of a car with his wife and start walking into a hotel. While in both these cases the plea of justifiable homicide was rejected, it is no wonder that the killings should have occurred, considering the judicial encouragement which husbands received in other cases.

II

It must be extremely perilous to make a chance call upon a Texas married couple at night. Should the husband be out, but return before the visitor has departed, the latter will be lucky if he is not shot because he has removed his hat and coat, and made himself comfortable in an easy chair. For, the Supreme Court of Texas has held in *Gregory v. State*, decided in 1906, it is error for a trial judge to have charged the jury that the husband must discover the parties "in such a position as indicates with reasonable certainty to a *rational mind*

that they had just then committed the adulterous act, or were then about to commit it." It is sufficient if the husband came to this conclusion in good faith although a rational mind might not. The husband, who is made the judge, is not required under the circumstances to think clearly. All that the husband saw in this case was that the man he proceeded to kill had his arm around his wife. No Texas husband should read too many Restoration comedies.

The husband, of course, may act upon appearances although, as the old adage has it, appearances are deceiving. Certainly he is not required to ask the lover if he knew that the lady was married. If in such cases ignorance is usually bliss, certainly it may be otherwise if the wife has visited a house of ill-fame. An inquiry into existing matrimonial relationships would under such circumstances be beside the point. Yet the Supreme Court of Texas held in *Giles v. State*, decided in 1902, that the husband may slay an adulterer even in a house of ill-fame! "The statute makes no exception in favor of one place or another," said the Court, "but is broad enough to include every place. It certainly does not authorize an immunity to one who has debauched the wife of a citizen, provided he shall induce her to meet him at a house of ill-fame, or assignation house. It occurs to us that this would violate not only the letter, but the spirit, of the statute, and would nullify it." It is the theory of the Texas system of invitation to murder that the husband is protecting an innocent wife who has been misled. She is compared to a citadel of virtue that has been set on fire. But surely this presumption, absurd in itself, should be disregarded when the wife has consented to go to a house of ill-fame.

The husband, of course, is not required by the law to conduct, in the moment between discovery and homicide, an inquiry into the question whether the wife took the initiative. Indeed he may act even if he had reason to think the wife had arranged the assignation. The wife may even be a habitual sinner, to the knowledge of the husband, provided that he has not connived in making himself a cuckold. Indeed, in some of the decided cases the wife was not much better than a common prostitute. Moreover, the husband need not necessarily act in the heat of passion for he is allowed to stalk his prey, and has done so in most of the reported cases. In other words, although

the husband had known of his wife's intimacy for several weeks he is justified in killing her lover when he finally catches him in the act of adultery. It is immaterial also that the husband has mistreated his wife, and that there is no love lost between them. There are indications in the cases, indeed, that the husband would succeed in a plea of justifiable homicide although he was at the time separated from his wife!

The records in some of the cases suggest indeed that the wife's unfaithfulness was probably not the real motive for the murders, and that the plea of justifiable homicide has been entered only after consultation with a good lawyer. In *Gregory v. State*, for example, the slain paramour was the husband's landlord, and they had been quarrelling over the renewal of the lease. In the nature of things there are rarely witnesses to the act of homicide. The paramour himself has been removed. The wife is not competent to testify against her husband. The husband is therefore quite free, as a rule, to concoct his own story. In *Morrison v. State*, where there was an eyewitness to the shooting, he swore positively that the husband had lain in wait for his victim, and had shot him in the back.

The Texas system of licensed murder is not without its wry humors. These may be attributed to the fact that the Texas Supreme Court has vacillated between a strict and liberal interpretation of the statute. Although, if literally construed, it quite obviously allows the husband to kill the paramour only, nevertheless the Texas Supreme Court long held that the husband was privileged also to slay his wife. This rule was laid down in two cases decided in 1914 and 1915 respectively, *Williams v. State*, and *Cook v. State*, which are perhaps the most remarkable in the whole history of the Texas adultery murder statute, for they illustrate most of the fantastic faults of the law.

In the Williams case the wife was so frequently and notoriously unfaithful that the husband had previously been requested by his landlord to move, which he had done. The wife had previously left Sid Williams on two occasions. At the time of her murder she was carrying on with a cousin, Jim Pollard, to the knowledge of Sid Williams. The latter's own story was that he had discovered the pair in the barn, from which he chased them back into the house. There they had a considerable altercation or "discussion," and Pollard threat-

ened to kill Sid Williams, who thereupon shot at him but missed and shot his wife through the back of the head. According to Sid Williams his wife then performed the remarkable feat of running 100 yards from the house with a bullet in her brain before she dropped dead. The State contended, however, that Sid Williams had never left the house or surprised the couple in the barn, and had intentionally shot at the wife first in order to do away with her. There was unimpeachable evidence, moreover, that Sid Williams had supplied himself with a gun the night before. Despite the fact that the wife and Pollard had tried to scatter before getting to the house, and a long discussion had ensued, Sid Williams was held to be entitled to a charge under the adultery murder statute. The trial court instructed the jury that if they believed that defendant came upon Jim Pollard in the act of adultery with defendant's wife and in shooting at Pollard defendant accidentally shot and killed his wife, he should be acquitted, as this would be an accidental killing while defendant was engaged in performing a lawful act, that of attempting to kill Pollard. Judge Davidson commented thus, in an opinion of the Court of Criminal Appeals:

> The court limited appellant's right to kill to the fact that he shot at Pollard and incidentally killed his wife. We are of the opinion that this is too restrictive, though the question is not raised. We simply call attention to this so upon another trial this may not arise. . . . If Judge White is right, appellant would be also justified in killing his wife intentionally as well as incidentally in shooting at Pollard.

In the Cook case, the court began its discussion by remarking: "This case, *as is usual*, has two sides to it." Mrs. Cook, on the night of the murder went to a dance hall while her sisters went to the movies. When they returned without her at 11 P.M. her husband went out looking for her, because, as he said, she had been staying out late for quite a while. He went a block from the house, and sat down on the stoop of a vacant house. In about a half hour, Mrs. Cook and one Grimes came into sight. According to the state, the husband then shot Grimes in the stomach, and the wife in the back of the head as she attempted to run away. The husband's story, however, was that he saw them standing in a lascivious embrace, and shot them when they refused to separate. Despite the fact that they were embracing on a public street, the husband was held entitled to a charge under the adultery murder statute.

These two cases were partly overruled in *Billings v. State* decided in 1925, which held that the privilege of the statute was confined to the killing of the adulterer only. In 1933, however, in the case of *Reed v. State* the Supreme Court of Texas was faced with the question whether a wife could slay the woman whom she surprised in an act of adultery with her husband. Despite its earlier generosity in construing the law so as to permit a husband to slay an erring wife, the Supreme Court of Texas unequivocally answered the question in the negative. Women might otherwise have equal rights but they could not avenge the disruption of their homes.

The Supreme Court of Texas has been equally inconsistent in answering two other puzzling questions. Suppose the irate husband merely attempts to beat up his wife, and kills the paramour only in self-defense when he interferes to protect the wife? The Court has said that the homicide is still justifiable although the husband's intention was not to kill, and the killing was an accident. But suppose the husband instead of shooting the adulterer merely proceeds to maim him? In *Sensobaugh v. State*, decided in 1922, the Supreme Court of Texas said that he might be convicted of criminal assault! The provision of the Texas Penal Code may accurately be described as an "Act to Encourage Straight Shooting."

III

Curiously the act which under the law of Texas is punishable by death at the hands of the husband is not even a crime in the State. It is true that adultery is under the Texas Penal Code a misdemeanor punishable by a fine from $100 to $1000 but adultery as defined by the code is habitual cohabitation. But for the purposes of the law of justifiable homicide there suffices a single act of adultery, i.e., the ecclesiastical conception of adultery. An even stranger anomaly is to be found under the law of New Mexico which permits the slaying of an adulterer actually taken *flagrante delicto*. In New Mexico adultery is not any sort of a crime at all; it is not even a misdemeanor although habitual.

Until 1927 a husband in Texas was also directly encouraged to take the law into his own hands whenever he received information that his wife had been unfaithful. The Penal Code expressly provided that the offense of murder should be reduced to manslaughter

if the husband slew the guilty man as soon as he discovered the fact of illicit connection. It was immaterial how long before the slaying the adultery occurred provided the husband acted promptly in avenging his honor. Interpreting this provision of the Penal Code the Courts even held that it was immaterial that the husband's information had been unreliable, and that in fact the suspected pair were innocent! In fact a like liberality was also extended until 1927 towards all Texas citizens who undertook to avenge insulting words spoken concerning female relations. The Penal Code also provided that if the foul-mouthed villain was slain, the crime should be manslaughter rather than murder. The punishment was usually trifling.

There are no figures available to show the number of "justifiable" homicides in Texas arising from attempts to avenge the violation of conjugal rights. But the problem has occupied the attention of the Texas Supreme Court so frequently that it hardly can be doubted that the number of such homicides is considerable. There are twenty-six cases in which the Texas Supreme Court has had to construe the adultery murder statute, while there are only a few for the three other states where the law is similar. Appealed cases are, of course, only a faint indication of the number disposed of in the lower courts. Texas, like all the Southern States, has an extremely high homicide rate, and its two largest cities, Houston and Dallas, are among the thirty most murderous cities in the country. The adultery murder law, which has been an important factor in encouraging this contempt for human life, has been on the books in Texas since 1856, and remained unchanged in the 1927 revision of the homicide law.

The Texas law of justifiable homicide is truly atavistic, harking back to the remote days of the blood-feud. Even after the law had succeeded in curbing self-help, it was often deemed politic to allow the individual himself to wreak immediate vengeance under aggravating circumstances. Thus one of the laws of Solon allowed the slaying of the adulterer. The Roman Civil Law, however, confined the privilege to the case in which the adulterer was discovered by the husband in his own house. In this limited form the privilege still exists under the law of France, and perhaps a few other Latin countries. It is safe to say, however, that nowhere today is the privilege as extravagant as it is in Texas.

THE STATE OF THE UNION

The Limits of Free Speech

By Max Eastman

We must not forget that democracy is fighting totalitarianism on the home as well as the foreign front. On the home front, moreover, the agents of Stalin and Hitler, although no longer polite to each other, are working to the same ends. Their activities are the spearhead of the world attack on democracy. And this spearhead is not directed primarily against munition dumps, nor against factories either. It is directed against democracy's vital essence — those social habits, laws and principles and institutions which make it what it is. To supplant our democratic "way of life" with the way of life under the rule of a dictator and an armed party is their primary task.

In fighting this mortal danger, democrats find themselves in a peculiar and seemingly hopeless dilemma. The democratic way of life, honestly lived, involves granting to minorities the right to advance their views. If that right is denied to the totalitarians, democracy seems to be destroying itself. If it is freely granted, democracy seems to be surrendering to its enemies without a fight.

What are we going to do about this? Are we going to extend the full enjoyment of minority rights to citizens who aim to destroy democracy and replace it with gang-rule under a tyrant? Pure theory seems to say yes. Common sense says no.

Common sense is backed up by the testimony of refugees from countries already fallen to the tyrants. It was only the liberality of their democratic governments toward the internal enemy, they tell us, which made possible the overthrow of democracy. Pure theory, on the other hand, is backed up by organizations like the American Civil Liberties Union, which not only give legal counsel to arrested Stalinists, but actually lacerate themselves from time to time by defending avowed