



## Article

# Adultery as a Defence: The Construction of a Legally Permissible Violence, England 1810

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**Abstract:** The Mawgridge's case in 1707 set the precedent where adultery was recognised as a justified trigger for the husband's killing of his wife's lover; this crystallised a partial defence for provocation. However, in an 1810 case, the killing of the unfaithful wife followed a manslaughter conviction rather than murder for the first time. This study aims to investigate the shaping of a legally permissible violence, that is, the mitigation of the husband's culpability in killing his adulterous wife. This provides the opportunity to question the (ir)rationality behind the judiciary's discourse in the case of *R v Clinton* 2012; here, despite infidelity being abolished in 2009 in England and Wales as a defence for murder, the judges still insisted on its relevance in our culture and hence on legal culpability. The theoretical framework in this paper draws upon the scholarship of masculinity, the family, and the law. This paper discusses the contribution of the hegemonic male identity in creating this legal violence and fortifying social-hierarchical structure.

**Keywords:** homicide; defence; adultery; provocation; criminal law; violence



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## 1. Introduction

The criminal case of *R v Clinton* (2012) EWCA Crim 2 drew attention to a feature debated in Parliament when reforming the law of the partial defence of provocation in 2009. At the report stage of the Coroners and Justice Bill 2009, the Lords considered whether the new legislation needed to explicitly exclude 'sexual infidelity' as a qualifying trigger to the defence. Those who supported the explicit exclusion, such as Lord Bach, argued that 'killing in response to sexual infidelity is, well into the twenty-first century, not a defensible basis for' a reduction in culpability.<sup>1</sup> This exclusion was made, and the new law reads as follows: 'In determining whether a loss of self-control had a qualifying trigger [...] the fact that a thing done or said constituted sexual infidelity is to be disregarded'.<sup>2</sup> The Court of Appeal's judgment in *Clinton* then came as a surprise.

Jon-Jacques Clinton killed his wife by beating her with a wooden baton and strangling her with a belt; the cause of death was head injury and asphyxia caused by a ligature compression of the neck.<sup>3</sup> Trial Judge Smith refused to allow the defence. She concluded that, despite the admission of infidelity and the accompanied taunts preceding the killing, this was not enough to constitute the defence of loss of control, certainly not after infidelity being specifically excluded by the recent legislation. However, the Court of Appeal concluded differently. Lord Judge, Mr. Justice Henriques, and Mrs. Justice Gloster considered whether, although sexual infidelity is explicitly excluded as a trigger for a loss of control defence, it could still be taken as evidence suggesting the gravity of the context in which the killing took place. They argued that 'the idea that, in the search for a qualifying trigger, the context in which such words are used should be ignored represents an artificiality which the administration of criminal justice should do without'.<sup>4</sup> Indeed, a new trial was ordered, where the defence of loss of control was left to the jury.

The *Clinton* case attracted some attention because, as better put by Horder and Fitz-Gibbon, the judiciary treated the change in the law as a technicality instead of regarding 'the change as entailing or demanding a more general shift in moral thinking concerning

the relative seriousness of murders committed in response to sexual infidelity' (Horder and Fitz-Gibbon 2015, p. 309). Indeed, the case opens the opportunity to reflect on the possibility that past cultural attitudes on adultery have left a social memory echoing well into the twenty-first century. Moreover, apart from the contrasting views expressed in Parliament in the debate concerning the legislative exclusion of sexual infidelity, some legal scholars also felt the need to defend the existence of infidelity as a trigger to loss of control. In his memorandum to the House of Commons at the Committee Stage to the Coroners and Justice Bill, Horder considered that the exclusion of infidelity as a trigger should not be absolute because there may be 'rare meritorious cases' which should not be liable for murder (cited in Slater 2012, p. 165).

This study aims to investigate the construction of a legally permissible violence, that is, the mitigation of the husband's culpability in killing his adulterous wife. Kesselring identified a 1600 case as the first instance where a judicial discussion took place concerning the question of whether a provoked retaliation could be taken as mitigation for murder and thus reduce the defendant's culpability (Kesselring 2016, p. 207). It is only in a 1671 case, involving the killing of the wife's lover by the husband, that adultery was first considered as a possible provocative trigger (ibid., p. 208). The precedent was established following the *Mawgridge's case* in 1707 (ibid., p. 207), and then it was engraved into the first modern criminal law textbook, Blackstone's *Commentaries on the Laws of England* (Blackstone 1766). Finally, it is with an 1810 case where, for the first time (as far as accessible data could reveal), the killing of the unfaithful wife followed a conviction of manslaughter, rather than murder. This paper will only concentrate on the early 1800s; it will take the 1810 Richard Griffin case as a departure point for the analysis.

This study is interdisciplinary; it examines the law doctrine and legislation and the period's socio-political and cultural mentality. Rose argues that a mere legal-historical analysis may produce a simplistic account that sees the law as omnipresent, standalone, a-human, and timeless (Rose 1987, p. 66). Fundamentally, one of the unique characteristics of common law is that it is a 'live' project, or as put by Gearey et al., 'a living history' (Gearey et al. 2013, p. 59). Certainly, the law and its relationship with the social construct of private intimate relations could be understood as an expression of power; alternatively, the law could also be considered as reflecting an 'organic social order', where judges 'are conduits' for it (ibid., p. 52) whilst also being an integral part of this dynamic and therefore inevitably affected by it. Fletcher further argues that the relationship between individual autonomy, public interest, harm, and unlawfulness is 'rooted in social experience' (Fletcher 2000, p. 117).

Hence, the question leading this study is as follows:

What was the contribution of the hegemonic male identity in shaping the defence of adultery in murder cases in early nineteenth-century England?

This study will examine the doctrine of the defence during the early 1800s by drawing upon Richard Griffin's trial transcript and Blackstone's and Eden's criminal law textbooks. Drawing on Rose's and Goodrich's (Rose 1987; Goodrich 1986) critical approach to legal history, the common law will not be seen as exclusively generative of social control; therefore, the study will engage with social, family, and gender history methodologies where a range of primary sources such as newspapers and advice literature will be used. The materials will be analysed by following a critical and socio-legal discourse approach to identify what Goodrich calls 'socio-linguistic insignia of hierarchy, status, power and wealth' through a close reading of the texts (Goodrich 1987, p. 171). I will draw upon secondary sources on the historical examination of adultery, the family, divorce, and female sexual mischief in the early 1800s.

This paper's theoretical framework is based on gender studies, specifically masculinity. The investigation relies upon an interdisciplinary understanding of masculinity, drawing upon socio-legal, legal-feminist, and historical perspectives. Although such a theoretical framework moves away from an inquiry into women's inequality (Collier 1995, p. 44), it allows the interrogation of socio-legal structures which sustained men's patriarchal

authority (Griffin 2012, p. 6). In this study, I will draw on Tosh's perspective. Tosh argues that masculinity is not primarily about the oppression of women, but rather, it is about the centrality of men in society (Tosh 2005, p. 34). In other words, the expression of masculinity in earlier centuries reflected notions of expected male behaviour, in how men related to men and how men—and women—judged men (Tosh 2005, p. 5). For example, and of interest to this study, Griffin argues that politicians expressed their masculine identities in political debates; in turn, this affected the nature of the content of legislation. Furthermore, he suggests that concerns expressed in Parliament about the harmony of the family 'formed part of a coherent pattern of thought that dominated the thinking of the educated classes' (Griffin 2012, pp. 24, 38).

However, the use of masculinity as a theoretical framework may be problematic considering critiques by postmodernism. The argument lies in the risk of classing all men under one homogeneous notion of masculinity, thus ignoring subjectivities (Collier 2010, pp. 440, 457). There has been an attempt to overcome this concern by drawing upon what has been termed hegemonic masculinity (Connell and Messerschmidt 2005). Historians<sup>5</sup> and legal scholars have used this notion, and it expresses 'a configuration of gender practice [...] which guarantees the dominant position of men' (Connell cited in Collier 2010, p. 455). Significantly, hegemonic masculinity recognises subordinated masculinities (those which may 'undermine' patriarchy); thus, it is constructed in relation to these and in relation to women (ibid.; Tosh 2005, p. 44). To put it simply, the notion of hegemonic masculinity is dynamic and unique to a specific time and space (Connell cited in Collier 1995, p. 41; 2010, p. 455); it represents generic assumptions and expressions of masculine attributes (Tosh 2005, p. 44). Following this approach, the masculinity of the law and that of the 'man of law'<sup>6</sup> is not taken as unitary and unchangeable. On the contrary, the analysis in this study demonstrates otherwise—for example, the conflict between several assertions of masculinities hindered the criminalisation of adultery on the one hand; but on the other hand, it allowed for the indirect reproof of adultery through the reduction in culpability of the murderer husband.

This study will first provide a historiographical overview of the legal and historical scholarship concerning the defence of provocation. The historical development of this defence has not been much researched; the only study solely dedicated to the defence of provocation is the one by Jeremy Horder, *Provocation and Responsibility*. Next, the discussion will consider the defence of provocation and the trigger of adultery; here, the core focus of this study—the trial of Richard Griffin in 1810—will be evaluated against the criminal law doctrine of that period. The discussion will draw upon the concept of hegemonic masculinity to make sense of the masculinity of 'the man of law' and the masculine norm. The study follows with a discussion concerning the wife perceived as a commodity. It is considered here that the law fed into the idea of the objectification of women, for they were considered by law as the property of the father or the husband. The final three parts of the study draw upon historical scholarship and primary resources concerning regulating adultery through divorce, gender expectations, and social attitudes towards prostitution. Despite the socio-political belief in separate spheres, the private and intimate relationships between individuals became less private and more of public interest. Divorce and prostitution were two of the many ways private life was exposed to the public and regulated by the law. This part of the study examines how stereotypes and myths about the integrity of the family and patriarchal authority have fed a hegemonic masculine law.

### 1.1. A Note on the Historical Development of Adultery as a Defence

The roots of the defence of provocation can be traced back to the *Maddy's case*, 1671. The phrase which has repeatedly been featured in murder case law related to adultery—'because there is no greater provocation'—was first used in the first recorded criminal case of a murder triggered by the in flagrante discovery of a wife's adultery. According to the judgment transcript of John Maddy's trial in 1671, Maddy did not have 'precedent malice' towards his wife's lover; in other words, he did not have the intention to kill—this, as opposed

to another case considered by the court where the husband publicly declared his desire for revenge.<sup>7</sup> For that reason, it was open to the jury to decide whether Maddy was guilty of manslaughter instead of murder, which they did. It is this option given by the judge to the jury which, in turn, created a new ‘space’ for the construction of permissible violence: reduction in culpability in case of murder provoked by adultery; significantly, this was then encapsulated in the precedent judgment of the *Mawgridge’s case* in 1707.

On the face of it, the *Maddy’s case* is not problematic: lacking intention, the killing could not have been murder anyway. Hale explained that the killing would be manslaughter and not murder when ‘the voluntary killing of another [was] without malice expressed or implied’ (Hale 1736, I, p. 466), that is, without a deliberate intention to cause harm (ibid., p. 451). But there is more to it. Hale classified homicide offences under three categories: the purely voluntary, the purely involuntary, and the mixed one. The second category included killing as an unfortunate consequence of a certain act; whilst the third category included several sub-categories of what Hale saw as actions aiming at some sort of self-preservation (i.e., necessity) leading to the unfortunate death of the threatening person—all these lead to a certain reduction in culpability (ibid., p. 424). The category of purely voluntary homicide included murder and manslaughter. The action classed as manslaughter was unlawful, but as opposed to murder, it was committed without intent and required a sudden reaction to a provocation; hence, it lacked deliberation (ibid., p. 450). The case scenario of the killing of the adulterer was specifically classed by Hale as manslaughter when ‘A commits adultery with B, the wife of C who comes up and takes them in the very act, and with a staff kills the adulterer upon the place’ (ibid., p. 486). However, Hale does not explain nor draw upon other texts to justify the creation of a specific defence of adultery.

It is difficult to tell whether there was a point of convergence between the *Maddy’s case* and Hale’s writing. Although Hale’s text was published in 1736, it was inevitably written before his death in 1676 (Yale 2022). Even if written before the *Maddy’s case* in 1671, the writing would have been private, and there is no indication suggesting that the judges of the *Maddy’s case* referred to Hale’s writing in any way. Similarly, there is no clue as to whether Hale, perhaps, was inspired by the *Maddy’s case*. It is easy to guess, however, what Hale’s feelings were about adultery. In a letter to his grandchildren, he grouped adultery with other immoral acts and crimes, suggesting that these ‘are commonly the great root of all the disorders in the world’ (Hale 1816, p. 91). It may well be that both Hale and the judges of the *Maddy’s case* reflected a general popular view about adultery. Indeed, just a few years earlier, the adulterous woman and her lover could be punished by death:

In case any married woman shall [...] be carnally known by any man (other than her Husband) [...] every such Offence and Offences shall be and is hereby adjudged Felony: and every person, as well the man as the woman, offending therein, and confessing the same, [...] shall suffer death as in case of Felony, without benefit of Clergy (British History 1911a).

Thus, it is possible that if the trial had taken place a few years earlier, Maddy could have been acquitted or at least far more lightly punished. Eden also favoured this approach. When explaining in his *Principles of Penal Law* that one of the situations leading to justifiable homicide is the fatal apprehension of a capitally punishable offence, he used the example of infidelity. Of course, at the time of Eden’s writing, adultery was not capitally punishable anymore; however, to illustrate the argument, Eden placed this discussion within the context of Athenian law, where adultery was capitally punishable, and the killing of the adulterers attracted no punishment (Eden 1771).

The law that made adultery punishable by death in England for a short period of time was the Act for Suppressing the Detestable Sins of Incest, Adultery, and Fornication 1650 (British History 1911b). Although it did not survive after the Restoration (Thomas 1959, p. 211; Kesselring 2016, p. 211), it is certainly an indication of the strongest views during the Puritan period of the Republican Commonwealth. The Act made adultery a criminal offence, to be dealt with by the Magistrates rather than by the Church courts. It was meant to function as a means of deterrent, counterbalancing views promoted by the spiritually

and sexually extremist liberals known as Ranters (Hill 1991, p. 208). To put it simply, the Cromwell government was up against preachers such as Abiezer Coppe, who asserted that ‘I can kiss and hug ladies and love my neighbor’s wife as myself without sin’ (cited in Fraser 1984, p. 225). The humanitarian and equality messages this movement attempted to put across (Scott 2000, p. 260) were overshadowed by accompanying messages of sexual transgression. Smith explains that preachers such as Coppe considered sex holy, so it was ‘as innocent as swearing in the name of the Lord’. Sex was holy because it was the ‘time and place where God’s presence is fulfilled in a man’ (Smith 2014, p. 30).

The significance of this short-lived legislation lies in the shifting of jurisdiction for the policing and prevention of immoral acts from the Church to the secular courts (Dabhoiwala 2001, p. 91). Adultery remained a prominent social topic of discussion. Benry’s research illustrates how through the popular *Athenian Mercury*, the public was keen to discuss questions concerning adultery during the 1690s (Berry 2016, pp. 192–212). The questions were answered by male editors (Steeves 1912, p. 364), who approached the issue with typical Christian values. To a female reader who sent a question in 1692 asking whether she would be excused if she were to respond to a certain gentleman’s advances given that her husband was ‘intolerable’, the editors replied:

Adultery is absolutely forbid, without any restriction whatever [...] God Almighty made no provisions [...] and the penalty [...] is no less than a certain exclusion out of Heaven.<sup>8</sup>

The discussion also took place in Parliament, where in 1699 a bill was proposed for the fining and imprisonment of those committing adultery and fornication (Dabhoiwala 2007, p. 295). Although unsuccessful, the attempt indicated the need to codify what was already in practice under common law. According to Dabhoiwala’s research, in London during the 1660s, 1670s, and 1680s, people were prosecuted under common law for adultery as a misdemeanour in their hundreds (Dabhoiwala 2001, p. 92).

Therefore, it could be argued that the reduction in culpability for the killing of his wife’s lover in the *Maddy’s case* in 1671 reflected general social views. In fact, encouraged by the campaigns pursued by The Society for the Reformation of Manners during the 1690s, the public actively assisted in the condemnation of sexual vice. Dabhoiwala explains that lists and pamphlets were distributed across towns naming the culprits; private counselling sessions were carried out to reason with offenders, and parochial discipline was likewise recruited to affect reason (Dabhoiwala 2007, p. 300). Despite the above views and actions, however, the first half of the eighteenth century faced a general decline in prosecutions for adultery as a misdemeanour, and Dabhoiwala indicates that the last such prosecution took place in 1746.<sup>9</sup>

### 1.2. Historiographical Review

Legal scholars have paid great attention to the defence of provocation. This is a defence that, if successful, can reduce a murder charge to manslaughter. It seems that it is in the case of *Watts v Brains* (1600), Cro. Eliz. 778, where human frailty was first recognised as a valid mitigation to murder, whilst it is only in 1707 with the *Mawgridge’s case* that the precedent concerning the common law doctrine of provocation was crystallised (Kesselring 2016, p. 207). Blackstone explained in what could be considered the first systematically written criminal law textbook that this is the case where the law pays that regard to human frailty, as not to put a hasty and a deliberate act upon the same footing with regard to guilt (Blackstone 1766, p. 191).

However, the historical development of this defence has not been as well researched; legal scholars have been mainly concerned with understanding the rationale behind this defence by looking into its doctrinal building blocks. The seminal writing by Ashworth, *The Doctrine of Provocation*, opens up with a historical assessment of the ‘emergence of the defence’ (Ashworth 1976, p. 292); the analysis addresses several cases that are used to understand the construction of the doctrine before moving on to consider the modern law of provocation as consolidated in the Homicide Act 1957. Another important writing



is Dressler's *Provocation: Partial Justification or Partial Excuse?* Here, Dressler addresses the underlying theoretical framework, paying great attention to whether the defence is a justification or an excuse. Dressler discusses a significant difference in the theoretical understanding of these two concepts: if the act of killing is understood as 'excusable', it implies that the 'fault' falls on the defendant because he could not control his 'passion'; however, if the killing is understood as 'justifiable', it suggests that the 'fault' falls on the wrongful conduct of the provoker (Dressler 1988, pp. 467, 474).

The historiography of the defence of provocation touches on some aspects concerning adultery as a provocative trigger to killing. The most revealing study is by Krista Kesselring; *No Greater Provocation?* (Kesselring 2016, pp. 199–225) aims 'to correct a [number of] pervasive misconception[s]' (ibid., p. 201). The first misconception seems to be set by Jeremy Horder in the only study solely dedicated to the defence of provocation, *Provocation and Responsibility* (Horder 1992). Horder's contribution to the study of provocation lies in his approach; inspired by the history of ideas, Horder attempts to rationalise the existence of the defence by drawing upon Aristotelian notions of honour and anger. However, Horder's analysis is small when it comes to adultery as a provocative trigger, and it appears that a significant detail is overlooked. Indeed, Kesselring draws attention to a case law identified by Horder, dated 1617 (Horder 1992, p. 39; Kesselring 2016, p. 208). This case has been taken as the first criminal case where the court recognised adultery as mitigation to the husband's killing of his wife's lover; the events took place 54 years later in 1671.<sup>10</sup> This is a significant revelation because, as explained by Kesselring, it illustrates the rather late development of the defence of adultery in relation to the defence of provocation per se (this is if the 1600 first case of provocation is taken as a benchmark). This, therefore, suggests that adultery as a provocative trigger and a defence to killing was not immediately conceived as such by the common law, hence suggesting a slower socio-cultural acceptance of such a defence.

Another significant historical misconception that Kesselring attempts to correct is 'the timelessness and tenacity of the notion that a husband might kill his adulterous wife with some degree of impunity' (Kesselring 2016, p. 201). In other words, several much-cited histories have suggested that the husband killing his adulterous wife was a social practice of the Middle Ages.<sup>11</sup> Kesselring's research reveals, however, that this was not the case. Otis-Cour takes this further, arguing that the idea suggesting that wife killing in these circumstances and during this period reflects views of 'contemporary imagination than of medieval reality' (Otis-Cour quoted in Kesselring 2016, p. 203). Blackstone indeed identified the adultery defence in his 1769 *Commentaries*, but this was a defence to mitigate the killing of the 'lover', not the wife. Research of homicide cases during this period seems to suggest that the killing of a wife, for whatever reason, was indeed treated as murder.<sup>12</sup> Based upon available records, it is only as late as 1810, with the case of Richard Griffin, that the judiciary has, for the first time, offered the reduction in a husband's culpability for killing his adulterous wife (Kesselring 2016, p. 215).

The historical misconception that killing one's adulterous wife might be carried out with impunity has also significantly impacted the (mis)understanding of judicial approaches to the reprimand of violence. The seminal study by Martin Wiener, *Men of Blood* (Wiener 2004), confirms what has been identified as a general trend in social and judicial intolerance towards male violence during the nineteenth century. Wiener's cultural approach to history and his gender analysis suggests that a decline in tolerance was consequential to changes in the understanding of the 'true' manhood and the 'true' womanhood (Wiener 2004, p. 5). Wiener argues that the relatively lenient approach to the killing of the wife's lover, as opposed to the killing of the adulterous wife, exemplifies the new social expectation of a husband's gentlemanly nature. Indeed, the two cases between 1811 and 1841 in which adultery appeared to be the trigger for the killing of the wife ended up with a sentence of death (Kesselring 2016, p. 218) (although this does not mean that an execution took place). However, Wiener's study does not investigate the circumstances of these cases against the period's doctrine of provocation. Moreover, Wiener's study fails to explain how

the several homicide cases post-1841, which have led to sentences of manslaughter for the killing of the adulterous wife, sit within his argument concerning increased intolerance to this sort of violence—in fact, his (hi)story tells a story of judicial inconsistency (Wiener 2004, pp. 202–17).

Significantly, Horder attempts to explain the possible reason behind the legally acceptable trigger of adultery as a criminal law provocation defence. His analysis engages with a feminist theoretical framework, recognising the law's masculine construction (Horder 1992, p. 194). Indeed, Horder asks whether the defence of provocation 'simply reinforces the conditions in which men are perceived [...] as natural aggressors, and in particular women's natural aggressors'—his answer is 'yes'.<sup>13</sup> Collier sees this approach as important to uncover the 'truth' behind the social discourse created by the law (Collier 1995, p. 80). For Collier, the law is just another manifestation of power: 'the power of the masculine norm' (ibid., pp. 70, 73). However, Horder does not interrogate the legitimacy of these masculine values in shaping the doctrine of provocation; rather, he is merely concerned with rationalising the use of these values. Possessiveness and sexual jealousy are identified by Horder as core values constituting male self-worth. Thus, he argues that it is unsurprising, given the masculine construction of the law, that an injury to this self-worth might attract a retaliation seen by the law as 'human frailty', thus justifying a reduction in culpability (Horder 1992, p. 194).

The historiography of the defence of provocation leaves unexplored one of the key issues raised by Dressler, that is, the fault of the provoker in triggering the fatal retaliation (Dressler 1988, pp. 467, 474). Indeed, according to Blackstone, 'if a man takes another in the act of adultery with his wife, and kills him directly upon the spot [...] it is manslaughter. It is however the lowest degree of it [...] because there could not be a greater provocation' (Blackstone 1766, p. 191). However, criminal law scholars do not appear to have engaged with the reasons behind this perception; indeed, a discussion of adultery as a provocative trigger has been kept within writings of ecclesiastical law and family law. Norrie's brief comment in *The Structure of Provocation* hints at a connection between adultery, social control, and the defence of provocation. According to Norrie:

The defence, under the cover of neutrality, encourages and admits a set of stereotypes that support killings in the context of patriarchal, heterosexual family life through assumptions of what is reasonable (Norrie 2001, p. 343).

However, it is risky to suggest that the State is condoning killing by allowing a gender-biased defence of provocation. Rose's short genealogical study concerning the law and power in the family encourages us to look beyond the law to understand how social perceptions might have infiltrated the law (Rose 1987, p. 63). For Rose, law coexists with other regulatory systems and should not be studied in isolation (ibid., pp. 69–75). Generally, although the historiography on the early nineteenth-century family identifies increased social and legal (see Griffin 2012; Wiener 2004) condemnation of male violence, this still does not reflect the common law development of the defence of provocation. However, the historiography on marriage, adultery, and divorce (Bailey 2010; Kesselring 2016) highlights a double standard exercised by society (see discussion in Dabhoiwala 2007) and emphasised through the law concerning women's general legal position (Bland 2013). The suggestion that the defence of adultery operates upon a stereotypical understanding of social roles explains the permissibility of this violence (i.e., the reduction in culpability for the killing) (Norrie 2001). This study will explore this thesis.

## 2. The Defence of Provocation and the Trigger of Adultery

On the 8th of September 1810, the *London Morning Chronicle* reported that the jury in the trial of Richard Griffin, after almost seven hours of deliberation, returned a verdict of manslaughter.<sup>14</sup> Significantly, although it did not set a judicial precedent, it stands as the first known trial in which a husband was indicted for murder but sentenced to manslaughter for killing his adulterous wife. Technically, the Griffin case is identical to *R v Clinton*.<sup>15</sup> In both, although it was clear that the wife's infidelity played a major role in how

the relationship ended, the judiciary set aside this aspect, opting for the alternative—that this might have been the context but not the trigger to the killing. From a doctrinal point of view, if adultery was indeed the trigger to the provocation, both Griffin and Clinton should have been found liable for murder. Judge Baron Wood clarified that Griffin had no right ‘to take the punishment into his own hands’ even though he might have been ‘irritated by the infidelity of his wife’. And yet, the judge instructed the jury to consider whether Griffin killed his wife out of revenge or whether, as the jury concluded, the death was merely an unfortunate consequence of a ‘sudden impulse of the moment’ happening during the quarrel they had.<sup>16</sup> For the slashing of his wife’s throat with a razor and her subsequent death, Griffin was fined one shilling and sent to Newgate for a year.<sup>17</sup>

At face value, there is no reason to question the outcome of the Griffin case; the problem lies, however, in the clear statements given by Griffin to the two watchmen who were on the scene, the Clerkenwell prison’s watchhouse keeper and the constable who apprehended him. The men asked Griffin how he could have performed ‘such a rash act’. But Griffin said he was ‘very happy’ and that he ‘should die a happy man’. The constable said that Griffin was ‘upon his soul’, suggesting that Griffin was exhilarated. Griffin told one of the watchmen that for ‘what I have done I shall be happy if she is a dead woman’; to the other officer, he said he ‘hoped she was dead’ and that he ‘would not mind being hanged, as to-morrow’. However, the clue is in what Griffin repeated several times: ‘how should I like another man to go along with my wife [...] that is the reason I done it’; ‘how would you like to see another man brought under your nose ...’; and ‘how would any of you like it, if your wife was to bring a man home before your face’.

At this point in history, the Griffin case’s outcome was an exception. The reduction in culpability for killing the adulterous wife was not part of an English legal tradition.<sup>18</sup> The doctrine of the defence of provocation was consolidated in the *Mawgridge’s case* (1706) 90 E.R. 1167, which proposed adultery as one of several legally admissible provocative triggers. The defence, however, was only available for killing the ‘lover’: if the husband stabs him or ‘knock out his brains’, this is ‘bare manslaughter’.<sup>19</sup> Indeed, Blackstone’s *Commentaries*, 1766 only instructed for the admission of the defence when it is immediate to the in flagrant discovery (Blackstone 1766, p. 191). Blackstone justified the defence upon the law’s recognition of human frailty, thus distinguishing a provoked retaliation from ‘a hasty and deliberate act’. This is because, Blackstone explained, ‘there could not be a greater provocation’ (Blackstone 1766, pp. 191–92). This is perhaps the first hint as to the gendered nature of this defence. It is not surprising that there is no record of women pleading this defence; it was simply not available to them—this was an exclusive defence for the male perpetrator. Up until 1790, women killing their adulterous husbands would be prosecuted for petty treason and sentenced to death by burning.<sup>20</sup> Both the reduction in husbands’ culpability and the severity with which wives were treated in analogous cases inevitably affirm gender hierarchy.

This is not to suggest that the law, as a mechanism for enforcing norms, propagated the tolerance of certain kinds of violence. However, it is argued here that the reduction in culpability, and thus the creation of legally permissible violence, was an expression of a generic discourse of masculinity—where, as put by Tosh, domestic disorder meant a serious blow to a man’s reputation (Tosh 2005, p. 72). Within the same discourse, and to a great extent ironical, for Blackstone, the difference in punishment between men and women for petty treason was significant: the female murderer was burned on the gallows as opposed being hanged in public—this was because ‘the natural modesty of the sex forbids exposing and publicly mangling their [women’s] bodies’ (Blackstone 1766, p. 93). However, although arguably suggesting a considerate gesture, it disguises a sense of the ‘man of law’ reputation (see discussion in Naffine 1990); it also nicely illustrates the hegemonic perspective of masculinity for that period, that of the gentleman.

The ‘man of law’ is not only the representative voice for anyone else in a society whose legal identity is marginal or nonexistent (see discussion on that in Collier 1995, p. 216) but also, primarily, the term reflects an expectation of male behaviour (Tosh 2005,



pp. 31–32). In fact, the view that this expectation was culturally an elitist one (Naffine 1990, p. 32) is perhaps not accurate. It is true that the late eighteenth-century courts became less and less tolerant towards domestic violence, feeding into already changing ideas of what was perceived to be appropriate manly behaviour. However, as explained by Emsley, the artisans and the working class would only start to condemn domestic violence in their community in the later part of the nineteenth century (Emsley 2018, pp. 106–7). Still, given that many defendants coming in front of the criminal courts were from the working class, it does not seem that the ‘elitist’ judiciary took the chance to educate against domestic violence—on the contrary, this is the period where they started to endorse the legally permissible violence discussed in this study. Moreover, following the perspective that masculinity is not primarily about women’s oppression but rather about male reputation, representation, and experience (Tosh 2005, p. 34), hegemonic masculinity goes beyond class barriers. Here, the aim was to reinstate male authority in the family, and of course, in the law.<sup>21</sup>

The notion discussed above is even more relevant, considering that many did not support the criminalisation of the killing of adulterous wives. Eden, for example, in his 1775 *The Principles of Penal Law* criminal law textbook, expressed regret that such killing was not lawful. Indeed, only killing consequential to an apprehension of a crime, which would be anyway subject to capital punishment, should have been considered justifiable. Adultery was not capital punishable; for Eden, this was ‘an imperfection in our system’ (Eden 1771, p. 194). Indeed, Parliament was presented with several bill proposals tackling this issue during the late eighteenth and early nineteenth centuries. Proposals for legal reform are particularly significant in this context. For example, the House of Lords presented in 1771 the bill ‘To restrain—divorced from marrying with the offending Party’. Those supporting the bill argued that infidelity would be curtailed by limiting the attractive possibility of the adulteress remarrying her lover.<sup>22</sup> This noted, the proposal also reflects the issue of the need to reinstate the mainstream perception of male identity—by allowing remarrying, the law recognised other masculinities, in particular, one which undermined patriarchy (Tosh 2005, p. 35). Similarly, allowing the adulteress to remarry posed a threat to patriarchal hierarchy whilst it blurred the certainty of a wife’s duty. Significantly, even those opposing the bill drew their arguments on what became a common idea from the 1750s, that is, sexual and biological differences between the sexes (ibid., pp. 68–69): female nature being irrational and emotional, such legislation would not stand as a deterrent; instead, it was argued, it ‘would leave the seduced wife in a truly hopeless situation’ (Andrew 1997, p. 9; *British History 1767–1830*)—a situation that the patriarchal ‘man of law’ could not possibly bear.

Another bill was levelled in 1779, ‘To Prevent Adultery’, that is, to criminalise it. However, fifty-one Members of Parliament against forty opposed the bill (Stockdale 1802, pp. 398–400). The discussion in Parliament almost gives a sense of a pro-feminist approach taken by the Houses. Indeed, the parliamentary register of the debate indicates that the Commons were surprised that there were no women in the public galleries; Earl Nugent thought this was a matter concerning their welfare (Stockdale 1802, pp. 398–400). The unfairness of not attributing fault to the male lover and punishing only the adulteress was noted in the House. The Duke of Richmond even suggested that her husband’s cruelty and neglect could drive a wife’s infidelity (*Parliamentary History 1779*, p. 226). However, the narrative used by the Commons reveals a strongly gendered perception. Those considering the bill’s proposal unfair felt that it would not be a deterrent to women because they were ‘by nature feeble’. For example, Lord Carlyle considered that:

[...] the man was not to be at all punished by this bill; all was to fall on the unfortunate woman, who generally possessed stronger inclinations, without an equal power of imposing that restraint of thought, and reasoning, concerning consequences [...] (ibid., p. 225).

### 3. Regulating Gender Roles and Social Attitudes

Revisionist histories of English criminal law have engaged with the question of whose interest the criminal law serves. The edited collection of *Albion’s Fatal Tree* has emphasised

the centrality of criminal law as an instrument of government (Hay et al. 1975). In particular, the study by Hay introduced the notion that the force behind the development of criminal law lies in the need to protect property interests (Hay 1975). However, these interests were almost exclusive to men; women could not own property. Thus, the law fed into the idea of the objectification of women, for they were considered by law as the property of the father or the husband. As explained by Griffin, married wives shared their legal identity with their husbands (albeit not in criminal cases) (Griffin 2012, p. 4). Blackstone put it in very simple terms: ‘The very being or legal existence of the woman is suspended during the marriage’ (Blackstone 1766, p. 442).

The idea that a wife had a proprietary value in law has been identified in legal proceedings from the thirteenth century: husbands could prosecute their wife’s lover for ‘wife theft’, demanding damages (Dunn 2012, cited in Kesselring 2016, p. 204). In this sense, the loss of property has been explained in several ways. For example, as opposed to bastard children produced by an adulterous husband, the children produced by an adulterous wife would have had a significant effect on the husband’s finances and inheritance (Thomas 1959, p. 209). However, beyond such technicality, Tosh draws attention to the notion that the transmission of names and assets to future generations was perceived as a masculine attribute (Tosh 2005, p. 36); thus, not being able to perform that posed a threat to the husband’s lineage and also to his male identity. Thomas also suggests that this property loss concerned the actual ‘property of men in women’ as a consumable good. She argues that ‘virginity’ and ‘chastity’ represented the values on which the woman as a good was defined (Thomas 1959, p. 210). Indeed, the 1704 edition of the treaty *The Whole Duty of Man*, dedicated to ‘all families’ and ‘to be used by all’, instructed the readers that the wife is a ‘principle part of his [her husband’s] possessions’—and this was such common knowledge, according to the treaty, that ‘it was vain to say anything in proof of it’. Therefore, the treaty goes on, having this right ‘invaded’, ‘none that does this injury to another can be ignorant of the greatness of it’. For the woman, the treaty explained, the act robs her ‘of her innocency [sic]’ and ‘her credit’. For the husband, ‘the corruption of a man’s wife, enticing her to a strange bed, is by all knowledge to be the worst sort of theft, infinitely beyond that of the goods’ (Allestree 1704). This would have been of great significance because the unfaithful wife, by breaking the chain of patriarchal hierarchy, had damaged her husband’s reputation and possibly his social standing among his peers.

This is not to suggest that the harm suffered was also not recognised to be a loss of love. Indeed, the 1704 treaty considered that one of the first injustices caused to the husband is the ‘robbing him of that, which of all other things he accounts most precious, the love and faithfulness of his wife’ (ibid., p. 235). However, within the context of law, attention turned to the contractual nature of marriage. Anything that might go wrong in the ‘romantic union’ was merely, Blackstone explained, ‘a civil inconvenience’ (Blackstone 1766). For the civil inconvenience of a wife’s suspected infidelity, a husband could claim compensation in civil courts from the mid-eighteenth century under common law. The question that Judge Denison had to decide in the civil case of Mr. Cook and Mr. Sayer in 1758, for damages of GBP 200, was the actual nature of what was defined as criminal conversation, in this case, committed by Mr. Sayer with Mr. Cook’s wife. It was agreed that because the ‘assault’ was not directed towards Mr. Cook, what appeared to be a forceful imposition of Mr. Sayer upon Mr. Cook’s wife was considered to be trespass ‘upon the case’,<sup>23</sup> that is, trespass against something actionable (see Dix 1937)—the wife. In 1772, Blackstone delivered his judgment on a similar case following a different reasoning, thus further allowing for the carving of a space to recognise the direct harm caused to the husband. In the case of Mr. Batchelor and Mr. Biggs, the court thought that the damages were not merely consequential; thus, Mr. Biggs’s criminal conversation with Mr. Batchelor’s wife was considered as actual trespass and assault directly on Mr. Batchelor.<sup>24</sup>

Although short-lived, the offence of criminal conversation<sup>25</sup> was an attempt to take over what once used to be the role of the Ecclesiastical Courts—to condemn and abate infidelity. However, few were satisfied with the effectiveness with which criminal conver-

sations were resolved. According to Staves, cash reparation was considered a petty option (under civil tort) for the restoration of honour (Susan Staves cited in [Kesselring 2016](#), p. 222). Indeed, Leonard Logarithm commented in *The Satirist* in 1807 on the inconsistency of the damages awarded in some recent cases: the ‘plump young women valued at a shilling’ whilst the ‘old toothless crones at twenty thousand pounds’ ([Logarithm 1807](#), p. 134). The *Examiner* published a complaint by A. Briton to Parliament concerning the inadequacy of ‘compensation in money for injury sustained by the frequent crime of adultery’; the author went as far as suggesting that ‘if any crime beside murder deserves death for its mischievous consequences, it is that of adultery’ ([Briton 1808](#), p. 526). A. Briton suggested that both offenders (the wife and her lover) should be subject to either public whipping or banished to Botany Bay—and this should be enforced on offenders from all social classes (*ibid.*, p. 327).

More significantly, however, some persisted with the view that divorce law was advantaging the adulterous couple by allowing them to remarry, doing nothing to prevent (or rather, punish) adultery. The unsatisfied need to restore household integrity was expressed through the proposal of other bills for the specific punishment of adultery. Supporting a bill presented in 1800, Lord Auckland argued that the remarriage of ‘a woman who has violated a solemn vow’ represents an authorisation by Parliament ‘to exhibit a mockery of Heaven’ ([Eden 1800](#), p. 7). The editor of *Anti-Jacobin*, John Gifford, condoned this view; for him, the attempt by Parliament to pass a bill regulating adultery was significant because it ‘involves [...] the future salvation of the people of this country’ ([Gifford 1800](#), p. 202). A similar tone can be found in the debate to a proposal for a similar bill a year before; as a reply to those Lords considering that adultery was a moral issue and not a legislative concern, Lord Chancellor asked the House whether it did not think it was worthwhile to interpose by some method for the prevention of a crime that does not only subvert domestic tranquillity but has a tendency by contaminating the blood of illustrious families, to affect the welfare of the nation [...]? ([Parliamentary History 1779](#), p. 226).

Indeed, the concern was never really confined to the household and the family; it was a matter of public interest. This was a threat to what Naffine calls the ‘natural order’ of the ‘man of law’ ([Naffine 1990](#), p. 100); in other words, the ‘disorder’ risked the displacement of those masculine attributes perceived as such by hegemonic masculinity. Therefore, by equation, it inevitably threatened the general social order too.

Although these views capitalised on the wife’s sins, there was also a discussion turning the attention to the actual behaviour of the husband. Andrew’s research demonstrates that the discourse related to the husband’s behaviour towards his wife was also taking shape within the various debating societies. The end of the eighteenth century saw several organisations, such as the Society for Free Debate, the Coachmakers’ Hall Society, City Debates, and the Ancient London Debating Society, asking their members who was responsible for ‘conjugal infidelity’. The responses suggest that several members thought that a wife’s ‘misbehaviour’ was due to her husband’s misconduct ([Andrew 1997](#), p. 13). Even Parliament was aware of this ‘option’: a wife is driven to adultery by her husband’s improper demeanour ([Parliamentary History 1779](#), p. 226). These views can be taken as the first seeds of the changing perception of male violence, especially within the family, which would become far more apparent and vocal in the mid-nineteenth century.

Still, as it stood, the criminalisation of adultery continued to be a matter of concern in Parliament well into the nineteenth century. In a debate in the House of Lords in 1809, Lord Auckland considered that ‘it had long been a matter of regret to many, that a vice of such malignity and mischief is not yet considered by our laws as a crime’. He went on to say that ‘we provide rigorously and industriously for the punishment of a long list of trivial offences against the persons and properties of individuals: but we totally overlook the assassins of domestic happiness’.<sup>26</sup> The narrative is significant here; the suggestion is that the wife is liable for adultery and ‘homicide’. The ‘assassination’ of domestic happiness is the undermining of male authority. The issue raised by Lord Auckland concerned the divorce law where the ‘faithless wife [...] receives hire and salary instead of punishment

and becomes an encouragement to others to pursue the same course'.<sup>27</sup> As did most Lords in this debate, Lord Erskine supported the motion too;<sup>28</sup> for him, there could not be a 'greater misdemeanour [...] than seductive adultery'. He explained that 'a misdemeanour was a private wrong, but a wrong that injured the peace and happiness of society; and surely nuisances and assaults were inferior in the comparison'.<sup>29</sup>

The bill was not successful, and regardless of other attempts being made to push forward similar legislations, adultery was never legally criminalised. However, it is argued that although criminalisation was not enforced by legislation, it found its way instead through common law. Going back to the question of adultery as a defence to a provoked fatal retaliation and the wife's proprietary value, a close reading of the *Mawgridge's case* and Blackstone's and Eden's textbooks reveals that the loss of a property right was of great significance even within the context of homicide. Judicial narrative in this context suggests a preoccupation with the diminished value of a property: the wife. In the *Mawgridge's case*, the harm caused by adultery is equated with theft; Lord Chief Justice Holt explained that 'if a thief comes to rob another, and he kills him, it is not murder, but a lawful act'. In the case of adultery, although the killing would be a felony, according to Lord Chief Justice Holt, it will not be murder because 'adultery is the highest invasion of property'.<sup>30</sup> Similarly, Eden, in his *Principles of Penal Law*, illustrated the difference between murder and manslaughter by drawing upon theft and adultery: theft was capitally punishable; thus, the killing of a thief by the owner of the property will be lawful; adultery, Eden explained, being 'the highest invasion of property' but not capitally punishable, the killing of the wife's lover by the husband will attract a conviction of manslaughter but not of murder (Eden 1771, pp. 192–93).

Debates in Parliament, the proposal of bills to curtail adultery, and their unsuccessful materialisation into legislation suggest that the law cannot be taken on its own as the ultimate regulatory social system.<sup>31</sup> After all, Parliament was never unanimous on the criminalisation of adultery; on the contrary, allowing the adulterous wife to remarry suggests a rather liberal view on the issue. And yet, the submission here is that through the case of Richard Griffin, who in 1810 was convicted of manslaughter for the murder of his adulterous wife, the common law opened a back door for the criminalisation of adultery. The above discussion reveals a conflicting interest within the hegemonic masculinity of this period: on the one hand, it sees the need to restore male identity; whilst on the other hand, the 'man of law' had to reflect the expectation of what was manly reasonable in this context. In other words, it could be argued that the 'man of law' expected the lover to take responsibility for his un-manly action, thus restoring his reputation; in turn, this would counterbalance the broken reputation of the idea of the family and thus restore the damaged patriarchal authority. It is argued here, however, that the 'man of law' expressed a societal discourse of masculinity rather than a mere positivist legal discourse. Judges are a conduit of norms shaped by social mores. Therefore, the above legal history needs to be complemented by an investigation of the social history of adultery and gender expectations.

As explained by Andrew, adultery along with duelling, suicide, and gambling featured high on the list of social mischiefs (Andrew 1997, p. 7). Therefore, it is not surprising that attempts were made to regulate these through legislation. However, what Foucault referred to as the 'administration of sex' (Foucault 1990, p. 24) was already prevalent in many other areas of social life. Significantly, research illustrates that by the 1740s, the common law courts were less involved in dealing with private family affairs, including charges of adultery (Turner 2002, p. 5; Dabhoiwala 2007, p. 297), hence suggesting recognition of what was perceived as the separation between the private and public spheres. However, discourses after this period indicate that, in one way or another, adultery was still a social and public concern; Turner advises caution with those arguments related to the privatisation of adultery (ibid., p. 7). Indeed, historians and legal historians agree with the perspective that the private was public and the public was private.<sup>32</sup> Horwitz explains that the discourse maintaining that there were two different spheres of social regulation, the



public and the private, stems from the political need in the late seventeenth century to limit the power and sovereignty of the State (Horwitz 1982, p. 1423; see also Turner 2002, p. 7).

On the face of it, Parliament only intervened and made private actions public when there was a public interest to be protected. In practice, the private and intimate relationships between individuals became less private and of more public interest (Turner 2002, p. 8), especially with the advances in medicine and science (Giddens 1992, p. 21). Despite what appeared to be a secretive approach to 'sex', Foucault argued that the period was characterised by a 'discursive explosion' concerning sex; this, however, was controlled, regulated, and confined (Foucault 1990, pp. 17–18; see also, Giddens 1992, p. 24). Turner further indicates that sex and marriage were 'consuming interests' divulged through various media, including in playhouses. These were topics discussed in the new coffee houses and taverns, and due to increasing literacy, they could be read and debated on paper too.<sup>33</sup> Another way private life was discussed in public and by the law was through the practice of divorce. This was particularly so in cases of sexual mischief such as adultery.

After the Restoration, whilst the Ecclesiastical Courts still granted 'separation' but not the annulment of marriage, Parliament took over the power to grant divorce through Private Acts (Turner 2002, pp. 4–5). This practice led to several consequences. First, legal divorce lifted the ban on remarriage in cases of adultery (Akamatsu 2016, p. 19)—this was the core of concern voiced by those lobbying for legislation criminalising adultery, as discussed earlier. Despite this apparent liberal take on remarriage, the actual procedure for obtaining divorce reflected problematic social expectations. The historiography of eighteenth-century divorce identifies that the idea of the double standard shaped societal, familial, institutional, and legal practice (see, for example, Thomas 1959; Stone 1990; Holmes 1995; Bailey 2010; Akamatsu 2016). This was particularly so in cases of adultery; 'mischievous' wives could expect lower levels of sympathy from the courts. Moreover, from after the Restoration up to 1714, Parliament appeared to have granted only ten such divorces. However, despite the literature of the period emphasising the stability of marriage as a reflection of the stability of the nation (see a discussion on that in Andrew 1997, and Bailey 2010), Parliament granted, throughout the first half of the nineteenth century, as many as three more divorces a year than between 1714 and 1800 (Holmes 1995, p. 604). Significantly, Holmes identified that throughout these years, 300 Private Acts were granted to the cuckold husband, as opposed to only four successful divorces motioned by women.<sup>34</sup>

The significance of the above, for the interest of this study, lies in the fact that these few divorces granted to the claimant's wife were due not to the actual infidelity of the husband but rather because of his abuse and cruelty towards her (Akamatsu 2016, pp. 22, 28; Turner 2002, p. 146). The double standard perspective illustrates the inequality of treatment; however, assessing this through the lens of the masculinity of the law, the position of the man of law is clear. Allowing divorce motioned by the cuckold husband accomplished several aims: the husband could restore his familial authority and social order by remarriage; if payment of alimony was due, it merely endorsed the paternalistic idea of female protection; thus, it was the right manly thing to do; it allowed the wife's lover to restore his reputation by establishing a family, restoring the adulteress's honour and guaranteeing her a means of living—again, the right manly thing to do. This, however, would not have been always possible in the opposite case scenario. Allowing the wife's divorce from her adulterous husband might have left her with reduced means of living—going against the right manly action of protecting the gentle sex.

The discussion so far has been concerned with the law's dealing with adultery. More specifically, it has looked at how a hegemonic masculine law has fed into stereotypes and myths about the integrity of the family and patriarchal authority. However, it is argued here that the different perceptions and discourses about women's and men's sexual life are in themselves a force in the shaping of social norms; after all, judges are an integral part of the society in which they live and give judgments. Therefore, in the context of sexual mischief, investigating the social repercussions of men's and women's sexual liberties is of fundamental relevance.

Male sexual mischief might have been the object of disapproval, but a transgression would have not brought any substantial change in their reputation. The controversial philosopher Mandeville equated the damages that a man can suffer from attending prostitutes to drinking: possible damages to health and wallet.<sup>35</sup> In defending the practice of prostitution for the sake of preserving wives' and daughters' sexual chastity, Mandeville explained that it is only natural that 'many marry'd men [...] only do more mischief for having their tails ty'd', not least because lust is in their nature (*Phil-Porney (Mandeville) 1740*, p. 7). The historiography in this area suggests that availing of commercial sex was a masculine rite (see for example, *Tosh 2005*, p. 33), especially before getting married. But even after, maintaining peers' views about one's sexual adequacy might have enforced the practice of extra-marital sexual encounters. Indeed, Razack further emphasises the role of prostitution in enforcing hegemonic masculinity during this period.<sup>36</sup>

Turner suggests that earlier in the century, male sexual mischief was seen as particularly serious because of his hierarchical position in the family and society. However, later in the century, conduct literature adopted the approach of channelling women's behaviour instead as a means to guarantee familial fidelity (*Turner 2002*, p. 62). The reminder given to wives in one conduct book was that their duty was to keep on top of their game in terms of behaviour, attractiveness, and delightfulness; this was because of the 'numberless temptation to vice, to profusion, to idle amusement, with which he [her husband] is encompassed' (*Gisborne 1797*, p. 330). Another advice book to married women, one written by Mrs. Elizabeth Griffith, explained that 'every man ought to be the principle object of attention in his family'; in this way, he would 'delight in her [his wife] society, and not seek abroad for alien amusements' (*Griffith 1782*, pp. 24–25). Griffith further argued that it would be the wife's fault if her husband met a woman 'that he thinks more amiable' (*ibid.*, p. 25). This was not advice for an exceptional, albeit regretful, situation. Griffith's advice implicitly suggested that a husband's sexual liberties were rather common; she even gave some tips as to what to do when this happened:

The first step that I would recommend to her, is, that of entering into a serious, strict, and impartial review of her conduct, even to the minute of her dress, and the expression of her looks [...] (*ibid.*, pp. 27–28).

Wives' duties and expectations were reiterated through the media too, as in the case of the essay published in the *Gentleman's Monthly Intelligencer* by A.B. The author made sure to clarify to the readers that the woman 'is intended for a helpmate or companion for man' and that she 'is bound by her duty to obey him'. The author went on to say that 'for whenever a woman enters into the matrimonial state she immediately forfeits all right to her passions and becomes dependent upon her husband' (*A.B. 1779*, pp. 203–4).

In contrast, the predominant discourse concerning women's mischief was less forgiving. Her fall from virtue would damage her reputation and any prospect of an honest life, including getting married (*Thomas 1959*, p. 195; *Turner 2002*, p. 13). This reflected the patriarchal understanding of the role of married women in social utility. The popular conduct book<sup>37</sup> by the Anglican priest and writer Thomas Gisborne emphasised the importance of the female character's 'virtuous exertion [sic]' upon society's happiness (*Gisborne 1797*, p. 13). According to Gisborne, it is because women have been assigned the role of taking care of anyone 'in the intercourse of domestic life, under every vicissitude of sickness and health, of joy and affliction' that her good character is fundamental. Moreover, if seen as an educator for 'forming and improving general manners' and for 'modelling the human mind during the early stages of its growth' (*ibid.*, pp. 12–13), the expectation was that wives had to subscribe to specific codes of behaviour. But there is more to it.

The panic underlining the regulation of women's conduct in all its areas was due to the understanding that women suffered from various deficiencies. Gisborne had a clear explanation for that. Those qualities, such as the 'power of close and comprehensive reasoning [...] and intense and continuous application', are not needed by women; therefore, the 'Giver of all good, after bestowing those powers on men with a liberty proportioned to the subsisting necessity, would impart the female mind with a more sparing hand

(ibid., pp. 21, 33). Here, Gisborne celebrates those qualities that God did give to women: sprightliness and vivacity, quickness of perception, fertility of invention; he emphasised the expectation that women would show dispositions of the ‘most amiable tendencies and affections implanted in human nature, of modesty, of delicacy, of sympathising sensibility [...]’ (ibid., pp. 22–23).

However, Gisborne also unveiled a contradiction. Although he stated that ‘the superiority of the female mind is unrivalled’, it was also subject to ‘failings and temptations’ due to its ‘native structure and disposition’. Women’s ‘unsteadiness of mind’, their ‘acute sensitivity’, and ‘irritability’, according to Gisborne, can be a consequence of their ‘vivacity of imagination’, ‘fondness of novelty’, ‘dislike of sober application’, ‘unreasonable regard for wit’, ‘to a thrive for admiration’, and ‘to vanity’. Gisborne considered that the woman who had ‘obliterated’ her ‘feminine delicacy’ by excessive drinking and the ‘use of profane language’ has so much offended social utility that he considered her guilty of a crime and should be ‘regarded as having debased herself to the level of brute’ (ibid., pp. 22, 33–34). Mandeville expressed similar feelings concerning the woman lapsing into sexual mischief; recovery was almost impossible because ‘the minds of women are observ’d to be so much corrupted by the loss of chastity [...] and they can never recover that good name’ (Phil-Porney (Mandeville) 1740, p. 7).

For the reasons indicated above, the education of female conduct was fundamental. For Gisborne, this was a preventive education: ‘to anticipate the mistakes, to restrain the excess, to guard against the unwarrantable passions’ (Gisborne 1797). However, and perhaps reflecting changing feelings towards husbands’ cruelty, Gisborne did not instruct for wives’ unconditional submission to their husbands, albeit confirming the husband’s authority within the familial context (ibid., Chapter XII). Still, not even touching upon the subject of sexual mischief, Gisborne warned against the risks of a wife being blunt and demonstrating ‘unrestrained familiarity’ towards any other man who was not her husband (ibid., p. 261). Indeed, conduct books had a major stake in fortifying gender roles, clarifying to each member of the family their place within the patriarchal hierarchy of family and society (Stafford 1997, p. 34).

This, however, was also a lesson taught by other ‘social media’ such as newspapers and literature. Stafford’s research on women’s narratives in novels written by women during the eighteenth and nineteenth centuries illustrates the attempt by these women to avert, at least in writing, patriarchal hierarchy and male brutality. The novels, however, clearly confirm not only the unchallenged women’s position in this hierarchy and male power but also that a transgression from it did not, in practice, favour women (ibid., pp. 27–28, 30). In her attempt to vindicate the civic rights of women, Mary Wollstonecraft’s writing demonstrated how the understanding of equality was very much entrenched in the discourse of women’s positions in society. Proposing a more equal type of education, Wollstonecraft asked, ‘how can a woman be expected to cooperate unless she knows why she ought to be virtuous?’ (Wollstonecraft 1790, p. vii); accordingly, she argued that:

The more understanding women acquire, the more they will be attached to their duty—comprehending it—for unless they comprehend it, unless their morals are fixed on the same immutable principle as those of man, no authority can make them discharge it in a virtuous manner (Wollstonecraft 1790, p. x).

Whether this was Wollstonecraft’s way to reach out to the likely male audience of her treaty, it still stands that she justified the vindication of women’s rights to avert unhappy marriages. According to Wollstonecraft, the lack of these rights made women ‘vicious, to obtain illicit privileges’, leading to the ‘neglect of her children’ and ‘the arts of coquetry’.<sup>38</sup>

It could be argued that another way in which social attitudes towards female sexual mischief were voiced was through the question of prostitution. Of interest here is the relationship between the legality and control of prostitution and hegemonic masculinity during this period. Such an analysis could be instrumental for further understanding social views responsible for shaping perceptions leading to lesser levels of male culpability in this study.

Significantly, in the period examined in this study, this cannot be attributed to specific legislation criminalising prostitution (Simpson 1996, p. 57). It was only in 1824 that the new Vagrancy Act attempted to widen the scope of previous legislations by punishing the 'idle and the disorderly persons, and rogues and vagabonds [...]'.<sup>39</sup> The act instructed that a charge could be placed on 'every Common Prostitute wandering in the public streets or public Highways, or in any Place of public Resort, and behaving in a riotous or indecent Manner'.<sup>40</sup> Moreover, Simpson argues that an attempt at systematic and consistent repression of prostitution only started in the 1830s (Simpson 1996, p. 62). Otherwise, prostitutes would be arrested and charged with violations against medieval laws, such as nightwalking; laws regulating the displacement of the destitute; or laws criminalising different forms of fourteenth- and seventeenth-century thieving, such as Roberdesmen, wasters, draw-latches, and sturdy beggars (Henderson 1999, p. 76). Interestingly, medieval discourses concerning prostitution connected it with adultery; indeed, prostitution was a far wider social concern than it was during the eighteenth century and was dealt with by both the Church and lay courts (Henderson 1999, p. 77).

However, specifically in the period in question, Simpson demonstrates a lack of consistency in dealing with prostitution. Whilst in the City of Westminster, arrest rates were relatively high,<sup>41</sup> and judges in the City of London may have been more critical of over-zealous constables. Simpson cites several instances where judges dismissed charges of improper apprehension; evidence of soliciting in a 'restrained manner', 'sitting quietly', or merely 'standing in the street' suggested no grounds for arrest (ibid., p. 58). Some criticised the lack of clarity of the laws, that 'if a woman of good character walks down the streets these days, she's liable to be seized by an officious, ignorant constable and carried off to a magistrate or the Round-House'.<sup>42</sup> Moreover, one of the issues fuelling uncertainties as to the abatement of prostitution may have been that any woman engaged in a relationship that did not sit well within the ideal of familial unity could be termed a 'prostitute' or, rather, 'a whore'.<sup>43</sup> Hence, women could be labelled with the term without engaging in the trade itself.<sup>44</sup> Therefore, an adulterous wife may have been at risk of being labelled a whore; in turn, this would damage her reputation. Most importantly, it would attract unwelcomed judgments of the cuckold husband's manliness.

Nevertheless, social attitudes towards prostitution were far more complex. The general view was that prostitution offended public morals; however, it was also seen by many as a social necessity, ironically, to facilitate public morality. Typical of such a view was that of Mandeville, who saw prostitution as a means to guarantee better marriage (Primer 2006, p. 11). Mandeville went as far as suggesting that allowing regulated prostitution could benefit commerce through the spending of money on luxurious clothing, accommodation, entertainment, food, and drink.<sup>45</sup> For Mandeville, the 'vice' was not 'so criminal'; rather, its encouragement would reduce its 'ill consequences' such as the transfer of venereal diseases (Phil-Porney (Mandeville) 1740, p. 2). Regulating prostitution through legislation meant, for Mandeville, that men could acquire sexual experience before marriage, disease-free; also, it would create a 'safe' employment for those women whose modesty has been compromised because of wrong life choices (ibid., p. 9). Moreover, in response to the increased apprehension of prostitutes following the 1752 Act 'for regulating Places of Publick Entertainment, and punishing Persons keeping disorderly Houses',<sup>46</sup> another author argued against punishment:

What is to become of these women after their imprisonment? Will anyone take them into service even if they wish to reform? Won't they simply return to their trade through need for bread [...]?'<sup>47</sup>

Other authors, such as Richard Steele, suggested that men are to be blamed for 'deluding women' and leaving 'after possession of them without any mercy to shame, infamy, poverty, and disease'.<sup>48</sup> Mary Wollstonecraft went as far as suggesting that following the seduction of a woman by a man the 'man should be legally obliged to maintain the woman



and her children’—she also made the point that it was only adultery that had the power to ‘abrogate the law’ and function as ‘a natural divorcement’ (Wollstonecraft 1790, p. 92).

Others expressed less forgiving views, such as that of Henry Fielding in the *Covent-Garden Journal*. Fielding thought prostitution was the ‘meaner and baser’ mean of livelihood; for him, ‘whores are the basest, vilest, and wickedest of all creatures [...] guilty of spreading venereal disease, a crime little short of murder’.<sup>49</sup> Moreover, the constable Saunders Welch published in 1758 a proposal to remove the ‘common prostitutes from the streets of this metropolis’, arguing that:

Prostitutes swarm the streets of this metropolis to such a degree [...] to the great scandal of our civil polity, that a stranger would think that such practices, instead of being prohibited, had the sanction of the legislature and that the whole town was one general stew (cited in Cruickshank 2009, p. 27).

However, popular culture, such as William Hogarth’s paintings depicting *The Harlot’s Progress* (1731), may better indicate the mixed social views on the issue (Cruickshank 2009, p. 1). Cruickshank explains that the paintings reflected the ambiguity of public perception: the prostitute ‘is deeply desirable yet [she] is also an image of degeneration and disgust’ (ibid., p. 2). Also, the satirical artwork *Progress of a woman of Pleasure* (1798) by Richard Newton suggests that in this period a prostitute might still have a chance to get married. Unlike treatises by social activists, popular culture seems to have provided a more realistic and accessible way of discussing prostitution. For example, Rosenthal explains that poems about prostitutes and prostitution may have had a dual function. On the one hand, they would function as a warning ‘against giving in to seduction’; on the other hand, the writing would have an erotic appeal, offering a ‘sensual and sentimental journey’ (Rosenthal 2008, p. ix).

The period’s mixed emotions towards prostitution nicely reflect a culture of patriarchal hierarchy (Razack 1998, p. 339; Connell 1993, p. 602; also see discussion in Donaldson 1993). It could be argued that whatever approach is considered—controlling prostitution or eradicating it—both reflect, as suggested by Razack, the regulation of the sexuality of women; this, in turn, is instrumental to the production of hegemonic masculinity (Razack 1998, p. 355). Male sexual appetite was recognised as inevitable—indeed, a culturally perceived masculine characteristic (Razack 1998, p. 348; Porter 1982, p. 4); however, it was also considered to threaten the notion of the ideal family—thus, it had to be controlled through the trade of prostitution. Significantly, those calling for the abatement of prostitution reproach the women themselves, where Razack made the point that the law and society themselves had normalised the ‘space’ (physical and perceptual) where prostitution occurred (Razack 1998, p. 357). Indeed, Razack explains that men’s temporary abandonment of societal norms does not weaken these men’s claims of respectability, but, rather, it puts the mark of degeneracy on the women in prostitution and thus reaffirms the men’s position within the dominant group (Razack 1998, p. 357).

The sense of hegemonic masculinity, represented by an elitist understanding of what is manly, is further strengthened by writings expressing concerns about the risk of prostitution deteriorating other social classes. For example, Henry Fielding suggested that prostitution would bring about the impotence of the ruling class.<sup>50</sup> However, it was also the hierarchy set between women—the whore versus the chaste wife and daughter—which helped antagonise the discussion around the subject of prostitution (Razack 1998, p. 339; Henderson 1999, p. 173). In 1786, an unusual exhibition in Somerset House presented portraits ‘in which the speculative eye may easily distinguish the vicious courtesan from the modest maiden or chaste wife’ (*The Times* 1786, p. 2). This divide may have been particularly important to the respectable husband given that, as discussed by Henderson, prostitutes’ clothing and make-up became fashionable to be imitated by the woman of the hour (Henderson 1999, p. 174).

#### 4. Conclusions

This study investigated the legal and social opportunity for the reduction in culpability of the husband who murdered his adulterous wife. The interest in the topic sprang out of the Court of Appeal's controversial judgement in *Clinton*, a 2012 English criminal law case, where the judiciary insisted on considering adultery as the context of the provoked killing—this, despite recent legislation specifically eliminating the long-lasting common law precedent allowing such a defence. Significantly, although it was only in 1707 that the legal precedent was established for the defence of the husband who killed his wife's lover, the first recorded trial took place in 1671. This gives an idea of the remit of the social attitudes, which in turn have penetrated the legal system—adultery, albeit for a short period, was punishable by death. However, moving forward to the eighteenth and nineteenth centuries, the first recorded case where the defence was pleaded by a husband killing his adulterous wife took place only in 1810; nothing in any of the prominent legal writings of the period, such as, for example, those of Blackstone or Eden, suggested that the reduction in culpability, in this case, was available.

Therefore, this research went beyond a mere legal history investigation to understand the defence of adultery as a construction of legally permissible violence for the killing of the adulterous wife. The scope of this study was widened by drawing upon historical scholarship in gender, family, divorce, and prostitution. This study only concentrates on the early 1800s, having as a reference point the murder trial of Richard Griffin in 1810. The research reveals conflictual legal and social attitudes towards adultery; in turn, these had a major effect on the development of adultery as a defence of murder. The gender bias of this defence should not be underestimated—it was only available to the murderer husband.

By engaging with the concept of hegemonic masculinity, the law is not taken as a standalone entity; rather, the social and the legal are seen as structures sustaining men's patriarchal authority. This study has drawn on the perspective that masculinity is primarily about the centrality of men in society. It is a 'hegemonic' masculinity, as it is the 'man of law' because it reflects a general practice of a paternalistic nature. Domestic order is one expression of such masculinity; thus, anything that contravenes it should be reprimanded. This study demonstrates that, in the case of adultery, the law was driven by this social need to reinstate familial order. The conflict exposed in parliamentary debates about adultery, divorce, and prostitution reflects the problematic nature of hegemonic masculinity and the 'men of law' as representative of a culturally idealised form of masculinity. The balance had to be struck between paternalistic protection of his property—the woman or the family—and male hierarchical authority and his reputation.

It is submitted here that the law cannot be taken as the ultimate regulatory, social system. Moreover, the case of Richard Griffin illustrates how the strong socio-moral views during this period affected legal justice and the shaping of legal norms. In this case, the judge offered the jury the option for the reduction in Griffin's culpability despite no available precedent. The jury's unanimous decision to find Griffin guilty of manslaughter and not murder showcases the harsh social view on wives' infidelity. It is with this case that the common law has created an unofficial legal precedent for the admissibility of a legally permissible violence, that is, the reduction in a husband's culpability for the killing of his adulterous wife. Therefore, although this study only focuses on a very narrow period two centuries away from the 2012 *Clinton* adultery case, its importance lies in understanding the genealogical development of adultery as a criminal law defence.

#### 5. Postscript

The story reported by *Bell's Life in London and Sporting Chronicle* in 1824 perhaps sets the grounds for further analysis of the theme investigated in this study. The article 'Murder of an Unfaithful wife' told the readers about a wife whose 'love of pleasure and lively disposition' led her 'into an inattention to her domestic duties'. Inevitably, the woman suffered some form of reprimand given that the husband was not 'of the most patient

temper'; also, they were frequently heard 'quarrelling violently'. Finally, his suspicion of her infidelity turned out to be true.

The murder was discovered when blood dropped through the floor panels to the lodging below. The news reported that when the husband was apprehended, the 'unfortunate man [...] seemed like one labouring under some dreadful anguish'. The police arrived too late; the husband committed suicide with the same razor he cut his wife's throat.

The final words by the editors of the news story nicely sum up the socio-cultural attitude addressed in this paper:

Judging from all the circumstances of the case, there can be no doubt that the poor man was worked up by jealousy to a state of fury, to which the wicked woman to whom he had the misfortune to be united fell the first sacrifice. The husband, by all accounts, deserved a better end (*Bell's Life in London and Sporting Chronicle* 1824, p. 315).

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## Notes

<sup>1</sup> HL Deb 26 October 2009, vol 713, cols 1062.

<sup>2</sup> Criminal and Justice Act 2009, s.55(6)(c).

<sup>3</sup> *Clinton* at n.54.

<sup>4</sup> *Clinton* at n. 21.

<sup>5</sup> See for example early engagements with such concepts: (Donaldson 1993; Connell 1998).

<sup>6</sup> On the perspective of the masculinity of the law, see (Collier 2010; Goodrich 1987; Duncan 1994; Naffine 1990).

<sup>7</sup> *Maddy's case* (1671) 86 E.R. 108.

<sup>8</sup> *Athenian Gazette or Casuistical Mercury*, 5 (26 July 1692).

<sup>9</sup> Dabhoiwala (2007), p. 297. Beattie's research also indicates that in the eighteenth century this type of manslaughter was a minority within the prosecuted homicide cases (Beattie 1986), p. 95. Further discussion on the fluctuation of this type of prosecution is available in Foyster (2014), pp. 177–93.

<sup>10</sup> The name of the case is Manning's Case (1671), 83 Eng. Rep. 112; although it has sometimes been referred to as the Maddy's case (1671), 86 Eng. Rep. 108 (1 Ventris, 158).

<sup>11</sup> Kesselring cites the work of Keith Thomas (1978), Elizabeth Foyster (2005), and Martin Wiener (2004).

<sup>12</sup> See research by Panek (1994); and Huebert (2003). According to Kesselring, this is further supported by Frederick Pollock and Maitland (1895), where they identified that if there was a social norm accepting the husband's right to kill his wife, it was dying out by the 13th century (cited in Kesselring 2016, note n. 45, p. 212).

<sup>13</sup> Italic in the original. Horder (1992), p. 192.

<sup>14</sup> 'Palace Court 7th Sep', *Morning Chronicle* (8 September 1810), p. 3.

<sup>15</sup> [2012] EWCA Crim 2.

<sup>16</sup> 'Murder', *London Courier and Evening Gazette* (25 September 1810), p. 4.

<sup>17</sup> Richard Griffin (1810), 19 September 1810, Old Bailey Proceedings, Ref. t18100919-56, <https://www.oldbaileyonline.org/> (accessed on 18 August 2018).

<sup>18</sup> See a discussion on that regard in Kesselring (2016), p. 201.

<sup>19</sup> *Mawgridge's Case* (1706) 90 E.R. 1167.

<sup>20</sup> *ibid.*, p. 93, 204; from 1790 to 1828, women convicted for petty treason were subject to the same punishment as men, that is, hanging (Kesselring 2016, p. 213; Walker 2003, p. 139).

<sup>21</sup> Walker refers to the offering by the law of a 'positive masculine behaviour' (Crime, Gender, and Social Order, p. 128), which was endorsed by the category of manslaughter (p. 130).

<sup>22</sup> As indicated by Donahue, this reflected the cannon law rule applied up to then (Donahue 2008, p. 26).

<sup>23</sup> *Cook v Sayer* (1758) 96 E.R. 1214.

<sup>24</sup> *Batchelor v Biggs* (1772) 96 E.R. 504.

- 25 The practice was abolished with the Matrimonial Causes Act 1857.  
 26 *HL Deb 2 May 1809 vol 14 cc326-35, cc326.*  
 27 *ibid.*, cc327.  
 28 28 Lords supported the motions, and 12 were against it (*ibid.*, cc335).  
 29 *HL Deb 2 May 1809 vol 14 cc326-35, cc332.*  
 30 *Mawgridge's Case* (1706).  
 31 See a discussion on those scholars supporting this view in Collier (1995), pp. 63–67.  
 32 See, for example, the discussion in (Tosh 2005; Collier 1995).  
 33 Turner (2002, pp. 8–9) refers to several media reports, for example An essay in the *London Magazine* (Sept. 1772); a letter to the *Morning Post* (25 March 1777); and several articles in *The Times* titled “Chiefly on the Profligacy of Our Women” (1771), “Reflections on Celibacy and Marriage (1771), and “Reflections on the too Prevailing Spirit of Dissipation” (1771).  
 34 *ibid.* See also historical cases in the collection by Bladon (1780).  
 35 Phil-Porney (Mandeville) (1740). Irwin Primer confirms that the true author of this pamphlet was Bernard Mandeville rather than either Phil-Porney or Colonel Harry Mordaunt as in the bibliographical details of this 1740 publication (Primer 2006, pp. 109–110).  
 36 Razack (1998, p. 339). This will be further discussed below.  
 37 The text was first published in 1797 and reached its 6th edition by 1805, and it appears that even Jane Austen came across it (Uphaus 1987, p. 334).  
 38 Wollstonecraft (1790, p. xii). Other educators engaged with gender-related education during this period, such as Catharine Macaulay (Titone 1997, pp. 179–208).  
 39 5 Geo. 4, c.83.  
 40 5 Geo. 4, c.83, sec.3.  
 41 Simpson considers that the City of Westminster’s Magistrates could use the power conferred by the Justices of the Peace, Metropolis Act, 32 Geo. 3, c.53; this allowed the arrest and conviction of people found “loitering about in such a manner, and under such circumstances, as might create reasonable suspicions of his character and intentions” (p. 59).  
 42 Humphry Meanwell in *Covent-Garden Journal* no.50 (23 June 1752) cited in Goldgar (1985), p. 268.  
 43 Primer explains that although the terms ‘whore’ and ‘prostitute’ were used interchangeably, it was only the prostitute who would receive payment for sex. The ‘whore’ was perceived as any woman who may have ‘violated the rules of modesty and chastity’ (2006, p. 2).  
 44 Flanders (2014), ‘Prostitution’, in *Discovering Literature: Romantics and Victorians*, the British Library, <https://www.bl.uk/romantics-and-victorians/articles/prostitution> (accessed on 25 July 2018).  
 45 Mandeville in *Fable of the Bees* cited in Primer (2006), p. 11.  
 46 Geo. 2, c.36.  
 47 Meanwell in *Covent-Garden Journal* no.50 (23 June 1752) cited in Goldgar (1985), p. 12.  
 48 Richard Steele in the *Spectator* cited in Cruickshank (2009) p. 37  
 49 Henry Fielding in *Covent-Garden Journal* No. 57, quoted in Goldgar (1985), p. 271.  
 50 Henry Fielding, *A Charge Delivered to the Grand Jury, 1749*, cited in Henderson (1999), p. 170.

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