The Beast and the Dwelling House: On Sleeping Safely in Early Upper Canada

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Abstract: The everyday dwelling house, an idea more often presumed than defined, finds sharp focus in a legal description of burglary. After acquiring a close categorical understanding of the burglar's target, the article explores nuances of the crime, first by examining a burglary trial from early Upper Canada and, second, by contrasting burglary with social and legal practices relevant to duelling. Combining these threads, the dwelling house emerges as a core social and moral space, one that puts the crime of burglary and its implicit presumptions about community into deeper social perspective.

Keywords: burglary, Upper Canada, dwelling house, British common law, duelling

Résumé : La maison d'habitation quotidienne, idée plus souvent présupposée que définie, est clairement cernée dans la description juridique d'un cambriolage. En acquérant une compréhension précise de la visée des cambrioleurs, cet article explore les nuances du crime, examinant tout d'abord un procès pour cambriolage des débuts du Haut-Canada, pour ensuite contraster le cambriolage à des pratiques sociales et légales relevant du duel. Combinant ces idées, la maison d'habitation apparaît comme un espace social et moral central, qui replace le crime de cambriolage et ses présomptions implicites sur la communauté dans une perspective sociale plus large.

Mots-clés : cambriolage, Haut-Canada, maison d'habitation, droit commun britannique, duel

Introduction

In British common law, which governed criminal cases in Upper Canada, burglary ranked among the most heinous offences, retaining a death sentence after most other crimes, including stealing from a church, had dropped it.[1] This article asks what made burglary's target, the dwelling house, worth such extreme legal protection.

The fact of its legal importance shows plainly in references to the dwelling house as a person's castle,[2] in the extreme severity of crimes against habitation and in these two elements as the expression of a legal system that viewed security as a basic shared right among members of society.[3] In its emergence from wilderness, moreover, the dwelling house embodied notions of property and privacy central to both law and society. But coarse observations such as these do not yield a fine-grained sense of what the dwelling house was, what an assault against it consisted of or, therefore, what the law sought to protect. They thus fail to resolve, in detail, the entailments of society implicit in protecting a dwelling house from burglars.

To acquire that level of resolution, this article combines three lines of inquiry. Looking first to a legal guide for the province's magistrates, it extracts a specific description of dwelling house embedded in the definition of burglary and thus identifies a close, categorical sense of what an unforgivable transgression against it consisted of. It then refracts this picture through a burglary trial from Upper Canada's new Court of Oyer and Terminer and General Gaol Delivery,[4] with special attention to key metaphors levelled at the convict in sentencing him to death. Informed by these two views, the third section explores formal codes of behaviour relevant to duelling, to understand its tacit legal acceptance in view of the law's explicit and extreme stance against it. What system for ensuring personal security hangs the burglar, even one who does no physical harm to others, but acquits a duellist who murders another?

After parsing what excused the latter crime of real legal consequences, we return in conclusion to the dwelling house, which in the moment of a burglary emerges from the haze of familiarity as a core moral and ideological space.

In presenting the dwelling house through the lens of burglary, a crime about crossing lines, this article acknowledges a significant literature on thresholds, ranging from Arnold van Gennep (1960) and Victor Turner (1969) on ritual and liminality, to Mary Douglas (2002) on pollution and the boundaries of social order, to more recent work including that of Irene Cieraad (1999a, 1999b), Céline Rosselin (1999), Lawrence Taylor (1999), Setha Low (2003) and others on the capacities of walls to shape behaviour, implicate gender and impose social order. Most of this research, like the broader literature on Western houses, households and domesticity, attempts to resolve its objects of study in terms of how they illuminate ideals, norms or social conventions or, in some cases, the capacity for these to change. In privileging systemic interactions and outcomes, violation of norms tends to be seen, if at all, either as a shadowy potential that rituals of control help to minimize (e.g., Rosselin 1999:53–59), or from the teleology of its ultimate redress, removal or reincorporation back into social order. From this control-eye view, it is easy to gloss over the specific nature and potency of a violation itself, and likewise the social values that emerge only through a tight spotlight on that act. Focusing on one of the worst violations imaginable in the early days of Upper Canada, and parsing it from multiple sides of the society that condemned it, I note both that this violent act helped constitute the threshold of a dwelling house in specific ways not apparent in its more mundane guises and that, in this rare moment, the threshold exposes a core value behind the settlement enterprise, one not often noted in relation to burglary.

Thresholds of Dwelling

In most of its everyday guises, calling a dwelling house "home" requires no elaboration. Indeed, the utility of casual terms often rests on vagueness, the lack of a need to spell out fine grains of meaning. In most everyday discourse, it scarcely matters that such a casual home starts to blur and fray conceptually the closer one looks or that, in highly specific moments such as a burglary trial, greater rigour is what decides between life or death for the accused. Different levels of resolution show different things, and when one sees the dwelling house through the eyes of a burglary charge, two specific things come into view.

First, a dwelling house is more than a familiar assemblage of domestic rooms, a title deed, a rental agreement, a set of trappings or a place of habitual private use. It is not sufficient that it be privately furnished with the intention that its legitimate residents will occupy it, or even just occupy it during the day, take meals or run a business from there. As William Keele (1835:84–85)[5] clarifies, it does not become a dwelling house until the moment its proper resident sleeps there, after which there is no going back until that person moves or sells or abandons the dwelling. Sleeping acts as a catalyst, permanently changing the relationship between that place and those who thereafter are understood to reside there.

Presuming this first condition, the second aspect of a dwelling house that burglary brings into view is a complex threshold revealed only in the act of crossing it. The threshold consists of four essential elements: breaking, entering, intent to commit a felony, and a nighttime hour for the deed. *Breaking* means undoing something that prevents passage into the house or from one part of the house to another. It includes acts such as picking a door lock or breaking window glass but also simply unlatching a door, pulling up a window casement or, if already inside, opening folding doors that are closed but not locked. It also includes making a hole in an outer wall to poke a gun through. By this definition, where *breaking* means undoing a state of closure, walking through an open door or squeezing through an open window is not breaking and cannot lead to burglary.

Entering occurs when any body part or extension of it, such as a gun held in the hand, crosses the threshold first marked by breaking. This includes mere fingertips reaching across the threshold of a broken window pane to extract an item. Intent to commit a felony colours this breaking and entering in a specific way. Breaking and entering in order merely to assault those inside could not lead to burglary since assault (unless aggravated) was a misdemeanour, not a felony. This preclusion from burglary holds even if the victim ends up dying as a result of the beating since the death, which becomes a felony, was itself unintended. As a threshold element, the intent of breaking and entering had to be particularly malicious, and it need not have been carried out to count toward burglary: embodying a malicious mindset in the act of breaking and entering *was* the crime.[6]

Finally, crossing the threshold leads to burglary only when these three other conditions coalesce at night, or, as Keele (1835:86) paraphrases Blackstone (n.d.: bk. 4, ch. 16, p. 224), after twilight has dwindled below the light level needed to discern a person's face. Burglary

can thus occur only after dark, yet darkness is not itself the key element, for burglaries also happen by the light of a full moon. The key is defencelessness, that the deed occurs "at the dead of night, when all the creation, except the beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenseless" (Blackstone n.d.: bk. 4, ch. 16, p. 224; Keele 1835:86). The point is not that a person inside the dwelling actually be asleep, at rest, disarmed or defenceless within the castle: the convergence of time and rest is categorical and thus marks the nighttime dwelling house as a category of place where becoming vulnerable safely is strictly protected by law—so strictly, indeed, that the trespass, though made against an individual, is deemed to be against all of society. As Blackstone says of the most extreme public wrongs: "In these gross and atrocious injuries the private wrong is swallowed up in the public: we seldom hear any mention made of satisfaction to the individual; the satisfaction to the community being so very great" (Blackstone n.d.: bk. 4, ch. 1, p. 6).

The burglary trial, to which I now turn, will allow us to view these abstractions in the concrete, not just as details of a particular case but as statements of a worldview, triggered by an attack against society. Through these optics, the nature and enormity of the crime will come into sharper focus.

The Josiah Cutan Burglary Case

In September 1792, a black slave in Detroit landed one of Upper Canada's first burglary convictions.[7] By various witness accounts and his own admission, Josiah Cutan had broken into a dwelling house at night with the intent to commit the felony attached to him by circumstance. Judge William Dummer Powell, who presided over this case,[8] summed up the particulars in sending the jury off to reach its verdict:

> It is proved ... that on the night of the 18th of October last, the Prisoner about midnight was found in the road near Mr. Campeau's house. That upon alarm of noise several persons assembled and found the Store of Mr. Jos. Campeau broke open. They found a Carpenter's adze near it, the supposed instrument of the violence, and merchandise and liquors were found near the store, but not proved to have been the property of Mr. Campeau—but the Prisoner's voluntary confession on examination before two Justices proved in evidence to you, shows beyond a doubt that he was guilty of the Burglary, that he forced the door with the adze, and took away the articles described. [William Riddell 1926:352]

Trial minutes report that Cutan was quickly overcome and co-operated thereafter, answering questions of those who had seized him, even giving his voluntary confession to two justices of the peace.

Viewed by today's standards of evidence, the trial raises some questions. We have Cutan's confession, but it seems odd that the stolen items were not otherwise proved to have been the property of the store owner, Joseph Campeau; as the one responsible for rallying help in apprehending the thief, he presumably had both opportunity and motive to notice what items of his had been burgled. Cutan also did not speak French. Called on to speak in his own defense in the courtroom, trial minutes record Cutan's response: "That true it is, Mr. Campeau took him prisoner; that he does not understand French, but that in answer to any questions he proposed to him, he may have said yes" (Riddell 1926:351–352). What were these questions? Were they proposed in French, and, if so, did Cutan understand what he was saying yes to? What does it mean, in a court that seeks hard facts with a death sentence on the line, that he "may" have said yes? Is it possible that a lone man captured by foes, especially a black slave in the custody of angry white men, might say whatever was necessary to appear conciliatory in the moment? These seem critical, common-sense things to be sure of, and yet they are not even mentioned. Whether unimportant in the day or a casualty of record-keeping, we can only wonder.

The important thing, though, is not what seems pressing in hindsight but whether the trial was fair in its day. Contemporaneous evidence certainly weighed against the accused. The stories of multiple witnesses who helped apprehend Cutan match well in their details. The circumstances of breaking, entering, theft and nighttime hour support the charge of burglary, assuming the value of stolen goods met the threshold of a felony. Most importantly, Cutan confessed, and, in the judge's summary of the trial, that confession evidently trumped any lack of confirmation from the owner that the stolen objects belonged to him. Perhaps this confession seemed even more secure given that one of the justices of the peace who obtained it was John Askin, a man widely esteemed for his fairness and unimpeachable character. Askin declared under oath that the confession was "voluntarily taken before him, without any threats or menace being used to obtain the same" (Riddell 1926:351). One can understand how a jury of the time took this evidence as sound, especially when corralled toward a guilty verdict by the judge's preamble. From that perspective, a different outcome becomes hard to imagine.

As for the charge, Powell reminds the jury that burglary was "a breaking of a dwelling house by night with intent to commit a felony." Powell goes on to clarify what is meant by a dwelling house: "to give to every house the character of a dwelling house, it is enough that the owner or someone having charge of it, sleeps in the house usually, although he may board elsewhere" (Riddell 1926:352).[9] Joseph Campeau's house, leased from Jacques Campeau to run a shop, fits this description since Joseph usually slept there. Given the hour of the deed, burglary it was. That leaves only the sentence, and, in British law at the time, conviction carried the death penalty without clergy,[10] mitigating circumstances notwithstanding.[11]

The Sentence

At the end of the trial, guilty verdict in hand, Judge Powell asked Josiah Cutan if he knew any reason why the court's sentence should not be carried out. Cutan said no, so Powell continued:

> Josiah Cutan, you have been found guilty by the verdict of twelve good and impartial men upon the plain evidence of your own voluntary confession in addition to other proof, of having committed on the eighteenth of October last a burglary in the house of Jos. Campeau. This crime is so much more atrocious and alarming to society as it is committed by night, when the world is at repose and that it cannot be guarded against without the same precautions which are used against the wild beasts of the forest who, like you, go prowling about by night for their prey. A member so hurtful to the peace of society, no good laws will permit to continue in it, and the Court in obedience to the law, has imposed upon it the painful duty of pronouncing its sentence, which is that you be taken from hence to the gaol, from whence you came, and from thence to the place of execution, where you are to be hanged by the neck until you are dead. And the Lord have mercy upon your soul. [Riddell 1926:354–355]

On the surface, this verdict assigns a sentence of death according to the law and thus brings an end to Cutan's life. Justice, of that time, is served. But Cutan is not merely sentenced to death in the above passage. The summation of the issues at stake in the trial could not be starker in imposing a boundary between society and wilderness and in distinguishing their inhabitants on either side. The civilized side of that divide features a particular sense of order and community, embodied in the productive trades of the jurors (armorer, trader, shoemaker, schoolmaster, innkeeper, tailor, cooper, joiner and blacksmith) and in the fair procedure available to everyone, including accused felons. On the other side, beasts of prey, burglars at night and Josiah Cutan all ranked the same.

These beasts who prey at night, however, are no ordinary wild animals but the sort with which no social person could ever coexist, and therein resides the damning intent of the metaphor. Ordinary wild beasts, while also dangerous and sometimes unwelcome, had their place in social terms. Geographically, they inhabited those necessary wild spaces whose contiguity with settlement not only delineated the latter but also helped constitute it, both as a resource for raw materials (including meat) and as land that could be transformed and settled. More fundamentally, transformation embodied a key notion of property and property rights, articulated most influentially by John Locke and entrenched by William Blackstone through the law, which underwrote the settlement enterprise.[12]

Certain wild animals had more formal and elevated social roles as targets of the hunt. As James Howe (1981), Nicholas Orme (1984), Emma Griffin (2007) and others observe, hunting crystallized class distinctions, whether by exclusion, like prohibiting the lower classes from boar and deer hunting; by inclusion, giving those of varying means and status their own ways to participate, as fox hunting tended to do; or in the disdain of aristocrats for the kinds of trapping and hunting practised by peasants (Griffin 2007:32).[13] Such distinctions wove together different threads of the social fabric. Materially, distinction manifested as presence or absence of land, horses, hounds and wealth, while, socially, the hunt realized pedigree, memberships and networks. Procedurally, it demanded knowledge of and adherence to specific rules and practices, which included the mastery of "an arcane world of complex terminology, patterned horn signals and hunting cries" (55); indeed, "it was the form and process of hunting rather than the end product that marked hunting out as a gentle pastime" (71).[14] This notion of hunting as social distinction resonates, on one hand, in the substantial space that surviving hunting manuals devote to an explanation of terms and procedure and, on the other, in the cultivation of hunting arts beginning in childhood (for which see Orme 1984).

In these ways, enduring traditions of the hunt gave wild animals constitutive roles in the practice of social class; in more exigent worlds where hunting and trapping meant survival, the value loaded onto animals and their distinctions was even more basic. The entire spectrum between these two poles forms a stark contrast

to the beast of a burglary trial.[15] The latter, resolved through the temporal and social coordinates defining burglary, through allusions to nocturnal prowling and prey and through the resulting victimization of society at large, is a singular entity that society has no place for, not even a jail. The singularity of this beast, a key element of its removal, is what gets punctuated through court procedure that aligns social power against it: in a judge who self-identifies as the collective institution of "the Court," in the exemplary productivity represented by jurors, in definitions of crime carried by the cumulative momentum of common law and in the materiality of a waiting hangman's noose. Through this alignment, the beastly burglar stands utterly bereft in the moment of sentencing, beyond identification with human society or redemption back into it.

But one may still ask, are all crimes not socially contrary in principle? Any crime might be crudely imagined as a superimposition of beastly acts onto social space. To bring the nighttime assault against a dwelling house into sharper relief, we turn to another space for becoming vulnerable, this one most unsafe, and that is the field set apart for a duel. Although hardly an everyday event, or broadly representative of society, a proper duel showed how compelling a social code could be for those it governed: individuals were ready to put their lives on the line for it, and even the institutions of law, whose formal letter called the duel abhorrent and warned that killing in a duel was no exception to guilt for murder, instead routinely acquitted duellists when all was deemed fair. And while the duel, historically and socially linked to class, does not portray society across classes, it represents precisely that segment of society—the well-to-do, the well-connected, the pedigreed—that had long defined and administered criminal laws and established the foundations of social sensibility on which they were based. What, then, was this code that drove people to duel? What principle enjoyed such high regard that even the most severe laws appeared to bend before it?

Honourable Murder

There is no mistaking the official legal standpoint on duelling. Under the category of murder, Keele says:

> And the law so far abhors all dueling in cold blood, that not only the principal, who actually kills the other, but also his seconds, are guilty of murder, whether they fought or not; and the seconds of the party slain are likewise guilty, as accessories. [1835:224]

Indeed, even to initiate a challenge to a duel was an indictable offence, and, as Keele stresses, "it is no excuse that the challenge is given under provocation, for if one person were to kill another in a deliberate duel, though under provocation, it would be murder in him and his second" (99). Deliberateness is key, suggested by the phrase "in cold blood." For, as Keele also states:

> If two fall out upon a sudden occasion, and agree to fight in such a field, and each of them go and fetch his weapon, and the one killeth the other—this is no malice prepensed; for the fetching of the weapon and going out into the field, is but a continuance of the sudden falling out, and the blood was never cooled; but if there were deliberation—as, where they meet the next day—nay, though it were the same day, if there were such a competent distance of time, that in common presumption, they had time to deliberate—then it is murder. [224]

This stance appears in courtroom transcripts, where the presiding judge advises the jury not to misunderstand the legal status of duels as anything but murder. At the same time, routine acquittal tells a different story, one not just apparently contrary to the letter of law but also, measured as outcomes, seemingly above it. After reminding the court that killing in duels was on the books as murder, Chief Justice Robinson goes on to say, "The practice of private combat has its immediate origin in high example, even of Kings. Juries have not been known to convict when all was fair, yielding to the practices of Society" (Riddell 1915:175). One could hardly find a higher directive to override the letter of law.

This stress on fairness echoes another telling passage in Keele, who warns:

> No breach of a man's word or promise, no trespass either to lands or goods, no affront by bare words or gestures, however false or malicious or aggravating, will excuse him from being guilty of murder, who is so far transported thereby, as immediately to attack the person who offends him, in such a manner as manifestly endangers his life, *without giving him time to put himself upon his guard*, if he kills him in pursuance of such an assault, whether the person slain did at all fight in his defense or not. [1835:224, emphasis added]

Read against the preceding passages, the above says two things: first, that despite the law's letter, actual practice establishes that breaches of word or promise, trespasses on lands or goods and affronts by word or gesture, especially when false, malicious or aggravating, can fairly (if illegally) be responded to with violence

given proper procedure; and, second, that none of the unofficial legal exemptions about responding to an offence mean a thing if you catch the opponent with his guard down. This core issue of fairness and honour continued centuries-long traditions and published codes of conduct relevant to duelling. From that perspective, the astonishing outcome would have been conviction. But what was it, exactly, that made this killing outside the law acceptable, while stealing some rum and a few furs without bodily injury to anyone warranted a death penalty, even if it was at night?

One explanation, advanced by Hugh Halliday (1999) and others, is that the duel reproduced ideals of conduct among the aristocracy where it originated; to protect the duel through legal attitudes and precedent meant protecting the class. Supporting this view, the *British Code of Duel* (hereafter the *Code*), a formal statement of British duelling practices as of its publication in 1824, locates duelling in "the higher orders of society, including legislators," among whom "it is indirectly proclaimed contrary to law" (4). Indeed, some of Upper Canada's most prominent duels settled disputes between fellow legislators. The *Code* also prohibits duelling across classes, noting that disagreements across class must be settled by legal action rather than gentlemanly combat (14). But an explanation of protectionism goes only so far. However class collusion may have helped protect an unlawful practice after the fact of a duel, and no matter the class habits and expectations that may have helped stoke temper and indignation on the way to a duel, reducing it to solidifying class ignores everything individual that made heads hot enough to fight and to risk being killed. Risk, which pertains solely to the two individuals facing each other, is the heart of a duel, and worth parsing more carefully.[16]

The *Code* notes that in a previous age in England, swords were the weapon of choice among duellists (43). This detail receives mention "only to mark its evils" in a new age that featured duelling pistols instead. Two of these evils—the severity of wounds from a sword cut and the absence of any natural pause in the action that might open a chance for reconciliation—clarify that duelling by the British code, while a form of combat, was not about fighting. At its core, it provided an unambiguous, socially meaningful and loaded means of recovering from an insult or engaging a challenge. Through the process of a proper duel, the society of peers who counted the duellists among its members deemed a grievance settled and the social fabric repaired. We see this pragmatic dimension of duelling again in the *Code*'s description of shots to be fired. "Three fires should be the ultimatum in any case; any further reduces duel to a conflict for blood, or must subject it to the ridicule of incapacity in arms" (50).

A third evil of swords, though, and the first mentioned in the *Code*, is perhaps the most telling. Swordplay easily exposes and exploits differences of skill level, making the contest riskier for one than the other, whereas the *Code* does just the opposite. Duelling pistols were notoriously inaccurate to begin with, a good equalizer in itself. Acknowledging nonetheless that superior weapons existed, duelling weapons were to be inspected to ensure that "the same degree of excellence ... be used by both parties" (45). In a set of further equalizers, pistols are examined for condition to preclude the misfire of one, after which each pistol is loaded in the presence of both parties. The ground for combat is inspected with regard to obstacles, line of sight, slope of the ground and location of the sun to ensure no advantages on one side. Distance along that ground is then measured by pace, to a distance not less than ten paces but otherwise at the discretion of the seconds. Parties then agree to a firing signal, commonly the movement of a handkerchief. By its suddenness, the signal "prevents that decisive aim, which might give one party the advantage over another, and is always to be avoided" (48). In addition to such preventative equalizers, severe redress faced any duellist who sought advantage. In the 1817 duel between John Ridout and Samuel Peter Jarvis, Ridout fired preemptively but missed his mark. The seconds consulted and agreed that Jarvis was then to get a free shot, which mortally wounded Ridout. The message of redress against advantage waxed even further in that case. According to rumour, Ridout stayed on his feet just long enough to shake Jarvis' hand and at least end well, for, as the *Code* states, parties should not separate without mutual forgiveness. Whether true or not, and perhaps especially if not, this apocryphal swansong recognized the breach of procedure and the redemptive value of the equalizing shot.

Proper procedure in a duel entailed the equivalence of risk. As Justice Robinson noted, the companion value to risk was fairness; to the degree that duellists face equivalent risk, they act fairly. If one of them acts unfairly, he faces severe redress to bring fairness back into balance. From this perspective of meticulously orchestrated equivalence, a proper duel brings to mind Clifford Geertz's (1973) observation of the Balinese cockfight, where the closer and more equivalent the match, the deeper the play—or, here, the more honourable the contest and courageous its participants, and the more complete, therefore, its restorative alchemy. This heady brew of fair play and ultimate risk deserves emphasis, on one hand, for drawing attention to the

poignant, irreducibly personal dimension of duelling that gets elided from arguments about reproducing class in the courtroom. The weight of insult, progress through failed attempts at reconciliation and, finally, the intense fortitude to look death in the eye at just a few paces, for all their embedding in society and class, have no surrogates outside an agitated individual psyche—not in a class of peers or in the system of law. On the other hand, it was precisely the urgency of proper standing in the eyes of peers that drove men toward duels in the first place and prevented them from opting out of a process once it started. This sense of standing, David Fischer (1989:396–397) suggests, meant social death if one lost. Perhaps that exaggerates slightly, given the possibility of recovery from disgrace, but an appropriate notion of standing certainly reflected a gentleman's commitment to virtue, the sort that stood tall while facing down a pistol in circumstances meticulously orchestrated to maximize fairness. Stressing that virtue must never flinch, the *Code* says:

> While honour and dignity are the reward of virtue, any lapse of it that may tend to affect the character of Gentleman, is punishable by formal degradation, expulsion from peculiar association, and, ultimately, with loss of privileges, from society in general. A Dignitary is bound by the most solemn oaths, the perpetuity of which is supposed to render that test unnecessary to Peers, where required in inferior orders. These declare only upon honour. [9–10]

The threat of lapsed virtue, combined with the sheer mass of worth and expectation loaded onto words—meaning and keeping to what one says—suggests the need for extreme vigilance about action and reaction, about rendering virtue as deed. Or, to take it a bit further, virtue crucially depends on deeds to make it visible to peers, and remains unproven, hypothetical and possibly even pretentious without them. Virtue, in short, is extremely fragile and must be guarded as such.

The Beastly Burglar

Virtue and fair play, expressed in but not limited to duels, help inform the sentencing of Josiah Cutan for a crime "so much more atrocious and alarming to society as it is committed by night, when the world is at repose" or, in Blackstone's version, when all of creation save beasts of prey "are at rest; when sleep has disarmed the owner, and rendered his castle defenseless" (n.d.: bk. 4, ch. 16, p. 224). In the code of duelling and legal attitudes toward it, we have just seen that attacking the person fairly lets you get away with murder. It is no surprise, then, that attacking where and when a person should be safely horizontal in bed with eyes closed will not end well for the perpetrator. As in the duel, virtue or its absence comes down to deeds, and the nighttime dwelling house, in its essential characteristic as a safe haven during one's moments of greatest vulnerability, thereby also provokes the greatest opprobrium when violated.

One also grasps why the theft of mere goods brings on such extreme punishment and condemnation from the judge. For one thing, burglary is not about theft, even if it occurs; it is about the intention to commit a felony, which, at least in theory, needs not to have actually happened to incur a fatal judgment. It is crucially about when this assault occurs and what it targets, a dwelling house, the hard-won safe haven produced by transforming wildness into its opposite. As both a product and the process that created it, this space embodied core ideas about what society was and where it came from. As a place to become vulnerable safely, assault against it would mean violating both deeply ingrained sensibilities about fair conduct and the most basic conditions of a successful and secure society, both of which a proper duel upholds.

It is worth stressing again that, in the specific significance of thresholds discussed in this article, burglary and the dwelling house are mutually constituting. Not only do those meanings not otherwise define the walls, doors, windows, latches or other surfaces of a dwelling house, but also some of the deepest, most socially resonant potentials of those surfaces emerge only rarely, and never in the routines around which research on houses, households and domesticity has tended to proliferate. But in that rare moment when a burglary occurs, the usually mundane threshold crystallizes into the absolute edge of society, a line of no return whose crossing transforms a mere outsider into the very worst kind of intruder; indeed a human into a beast. Physically, the dwelling comes alive along these lines—walls, windows, exterior and interior doors, closets, containers and other types of closure. Socially, the line marks one of the basest transgressions possible against an individual, violating the space for becoming vulnerable safely. The line is also social in the sense that burglary, classified as a public wrong, was understood to be an attack against community, even if it targets an individual body. But the threshold and therefore the offence are also ideological. As a safe haven against the physical and metaphorical dark, won by transforming wildness into property and civilization, the dwelling house stands, in the moment of a burglary, as the apotheosis of society, a division between the civilized and wild, light and dark, order and chaos, right and wrong, and, in a society that saw

Christianity as part and parcel of governing,[17] between good and evil. It is this context-specific density of meanings that identifies the burglar with a feral world beyond this one and registers any attack as against the very essence of the society in which the crime occurred.

Just as the definition of a dwelling house acquires fine nuance in a burglary charge, so the notion of society being protected was highly specific. Settlements, and the communities they comprised, meant fixed walls, roofs, doors and other surfaces that achieved states of closure, understood as such through the lens of particular notions of property, privacy and relationship to things in the world, including land.[18] Burglary brings this constellation of ideas, usually out of sight in the form of habits and daily routines, into sharp focus. In particular, this article has found a sensibility about fairness central both to that crime and to a notion of society in late 18th-century Upper Canada, and therefore crucial to understanding the ultimate sanction of a death sentence. In the case of burglary, violation of fairness was the sentence's underlying trigger, while, for the duellist, remaining fair kept the explicit letter of laws on murder at bay.

None of this means the trial could not have gone Cutan's way or that a different verdict in another case becomes incomprehensible. Mitigating circumstances were possible (for which see note 11) and also case-specific. It does mean, though, that no milder sentence would use the metaphors levelled at Cutan, the heavy artillery of the judge's sentence, which went beyond legal formula and precedent in conjuring an otherworldy beast. In doing so, it superimposed on the sentence a reminder of what society was, whose society it was, where its absolute edges lay and what it would cost to cross that line.

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Notes

1 A legal manual for guiding Upper Canada's magistrates (see note 5) defines *sacrilege* as robbery from a church of items consecrated to pious purposes and notes that the crime used to be punished by a death sentence without benefit of clergy. An 1833 revision of capital crimes, provincial statute 3W.4.c.4, no longer lists sacrilege, which from that time became punishable as any other common felony. This shift reflects a broader effort to limit capital offences after the number listed in British statute books had ballooned since the late 17th century, becoming both draconian in their letter and motley as a totality. For more on this period in Britain, see Richard Clark 2009. On the formative role of this British phase on American governance, see Steven Wilf 2010:105–164. On the application and adaptation of Blackstone's Commentaries to the context of Upper Canada, see Leith and Smith (1880).

2 This formulation occurs, for example, in Blackstone (n.d.: bk. 4, ch. 16, p. 224) and is reproduced verbatim in the definition of burglary used by Upper Canada's magistrates. For further discussion, see later in this article.

3 According to Blackstone, civil rights amount to curtailment of an individual's "wild and savage liberty" (n.d.: bk. 1, ch. 1, p. 121) when groups of people live together. If liberties were not checked for the sake of a greater public good, "there would be no security to individuals in any of the enjoyments of life" (121). This distinction rested, in turn, on an even more fundamental premise regarding dwellings in particular that "even the brute creation, to whom every thing else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds of the air, and the beasts of the field had caverns, the invasion of which they esteemed a very flagrant injustice; and would sacrifice their lives to preserve them" (bk. 2, ch. 1, p. 4).

4 In Upper Canada, as in Britain, Oyer and Terminer (a partial translation from French meaning "hear and determine") was the name of a commission granted to a judge, which empowered him to try all crimes, including the most serious. Such a judge would travel to different locations—four times per year in Upper Canada—bringing his commission to a local court which could then try the offences. Detroit, under British rule in Upper Canada's earliest years, was one such stop on this judge's circuit. General Gaol Delivery was a separate commission allowing a judge to try all the prisoners in a given gaol, and thus deliver the gaol from backlog, and it happened that Detroit, unlike many towns at the time, had a gaol. The full title of the court that tried Josiah Cutan's burglary case, examined in this article, simply meant that both of the above commissions were in force at once, in this case because Judge Powell held both. For a more detailed (though somewhat disjointed) account of Upper Canada's early court system and its antecedents, see William Riddell 1918. On the emergence of Ontario courts from the dawn of Upper Canada to the 1980s, see Margaret Banks 1983.

5 This manual, titled *Provincial Justice, or, the Magistrate's Manual*, compiled by William Keele, was a compendium of legal definitions and associated opinions relevant to common law in Upper Canada. Although published in 1835 and motivated by significant divergences between legal practices in Britain and Upper Canada by that time, the definition and prosecution of burglary remained unchanged. The present study thus benefits from Keele's detailed exploration of circumstances, opinions and references relevant to burglary.

6 Given that intention was not directly visible, the interpretive problem was how to infer it. This problem would have been particularly acute in a society keenly oriented toward observable conduct, as reflected in a growing profusion of conduct literature and, more fundamentally, a legal system that placed private activity explicitly beyond its purview (see Blackstone n.d.: bk. 1, ch. 1, p. 120). This issue deserves fuller treatment than the length of this article allows, but a possible corollary of emphasis on the observable might be particularly harsh judgment of intentions to subvert observation. One easily imagines burglary, a crime of intending an unseen felony in someone else's house at a time when all of society should be at repose, to be a particularly extreme subversion of observation.

7 The case of Josiah Cutan is the first burglary conviction noted in extant assize records from the Western District's new Court of Oyer and Terminer and General Gaol Delivery, which opened on September 3, 1792. The court introduced the bill against Cutan on September 6, conducted his trial and reached a verdict the next day and pronounced the sentence on September 10. While it is perhaps doubtful that no other burglary trial or conviction preceded Cutan's, which occurred more than eight months after Upper Canada's formation, the case nonetheless counts as a landmark. It was the first burglary case, and one of the earliest cases of any kind, heard by the new high criminal court having native jurisdiction in Upper Canada. This may have been sufficient reason to preserve the case in fuller detail than usual, especially given a system of common law that builds on precedent. The complete extant original criminal records of this court for the time under consideration can be found at Archives of Ontario, Criminal Assizes of the Court of Oyer and Terminer and General Gaol Delivery, 1792–1809.

8 Until the 1797 Act for the Better Regulating the Practice of Law (specifically article 5, which required practising court lawyers to pass the bar), most advocates and judges in Upper Canada's court system were not trained lawyers but received their legal appointments based on social standing. At the time of Cutan's trial there were but two trained lawyers in the entire Western District: William Dummer Powell, who presided in this court, and Walter Roe. In addition to signing each day's proceedings as clerk of the court, attributions in the trial suggest that Roe also acted as prosecuting attorney.

9 On the matter of what counts as "usually" and as the allowable extent of boarding elsewhere, William Keele (1835:85) adds that as long as the resident intends to return, occasional or temporary absence does not negate the status of a dwelling house. "But where a person had a country house at which he lived only a part of the year, and then quitted, with a considerable part of his furniture, with no intention of immediately returning, and during his absence the house was broken open and rifled—this was not held to be burglary" (85). Even keeping within mainstream British settler tradition and imagination, significant shades of grey separate these two kinds of absence, in part because the parameters of "temporary" and "immediately" are not explained. These shades proliferate when looking beyond the British mainstream, as imagined in a legal manual, to other notions of residence such as mobile dwellings, or what Regna Darnell (1998, 2004, 2011), pointing to a deep cultural history, identifies as nomadic habits that persist among Native urban dwellers. Understood in culturally relevant terms, that nomadism inflects its significant places, including dwellings, in ways that a model of "absence" is poorly suited to see.

10 *Benefit of clergy* originally referred to a privilege by which clergymen, insisting that secular courts had no jurisdiction, could be tried for certain crimes by the more lenient ecclesiastical courts instead. Over time this benefit transformed into more general leniency for certain first-time offenses. Especially heinous crimes, including burglary, never enjoyed this benefit. Clergy were not granted exemption from secular courts, and the later sense of leniency for first offenders did not apply. Upper Canada's 1833 statute 3W.4.c.4 abolished benefit of clergy, replacing it with a milder criminal code and a much-diminished list of capital offences, which still included burglary. For a general history of the benefit of clergy, see John Baker 2002 and John Briggs et al. 1996.

11 There is also little sense in early Oyer and Terminer court records of this time that slaves or other disenfranchised groups got slapped with more severe sentences, or that acquittals were less likely for them. Robin Winks (1997:50) concurs, noting that three years later, in Powell's court, a black slave was again convicted of burglary and sentenced to death but that Powell then appealed to the lieutenant-governor for a reduced sentence owing to the slave's tender age. Winks names further examples—two slaves of William Jarvis, the provincial secretary of Upper Canada, who stole gold and silver from his desk; and a black woman who killed her husband by stabbing him in the temple with a fork—where the consequence was not summary punishment but the process of a full and fair trial.

On the other hand, social disenfranchisement may have predisposed an individual against the law in ways that social entitlement would not. Existing court transcripts from Oyer and Terminer, unfortunately, do not usually indicate the social station of the accused. Riddell (1923:252) points out that while the laws of England did not dictate lesser legal rights to the slave, English law at that time did not recognize the slave as possessing rights other persons took as basic—the right to marry, rights as a parent, rights to property and, especially, the right to security and life. The deeper point, perhaps, is that everyday life for the slave did not unfold in a courtroom where rights got adjudicated but in formative everyday social and physical circumstances where rights and attitudes got practised, their consequences felt.

12 Blackstone (n.d.: bk. 2, ch. 1, p. 8) notes disagreement between those who saw first occupancy as itself the basis of property rights and those, including Locke, who insisted that occupancy was relevant only insofar as it consisted of labour. One notes that the government itself supported the latter view through land grants, a process especially relevant to establishing communities and populating the province during its early years. In each case, the government would weigh the applicant's capacity and ambition to improve the land, and, if favourable, grants were then given on condition that improvements occurred within a

specified time, whereupon the grantee could apply for permanent title. Failure to meet conditions of improvement meant the land would revert back to the government. On land settlement in Upper Canada more broadly, see William Norton 1974 and George Patterson 1921.

13 Although class restrictions applied to certain kinds of hunting (e.g., originally, beasts of the forest were the province of royalty alone), Emma Griffin (2007:32) observes that hunting more generally was not confined to the wealthy. A problem for the modern perspective is the scarcity of records concerning hunting practices among the lower classes, which skews modern impressions toward the wealthy, who were not just more widely literate but also motivated to write stories about themselves and empowered to write histories of the country.

14 Supporting this view of hunting as social stratification, though taking a broader view of animals, Edmund Leach (1954:182) and Clifford Geertz (1973:443–444) argue that humans build rituals around animals mostly to say something about themselves rather than the animals involved. It is worth stressing again that the organized, complex, class-stratifying practice of hunting as a compulsory, class-affirming art contrasts sharply with hunting among peasants, for whom the activity was surely more pragmatic, more focused on product than process. As John Halverson (1976:509) observes, not all hunting involved ritual.

15 Curiously, the court makes explicit though surely inadvertent reference to a hunt with the phrase "beasts of the forest," which was a formal category for the noblest among the three classes of game animal. Although the beasts of the forest, which included the wild boar, wolf and stag, were the most dangerous, nothing else about the comparison works in the judge's sentence. A reference to nobility, in particular, flies in the face of a burglary charge and the court's mission to find the accused socially irredeemable. This category of animal also confuses the court's critical reference to nocturnal predation—of the three major animals just named, only one, the wolf, is truly a predator, and only one, the wild boar, is actually nocturnal. One thus reads this phrase in Powell's sentence loosely, as intending to repeat the unchanged definition of burglary spanning the 70 years from Blackstone to Keele, which likens the burglar not to beasts of the forest but to "beasts of prey," who do their work when the rest of creation "are at rest; when sleep has disarmed the owner, and rendered his castle defenseless" (Blackstone n.d.: bk. 4, ch. 16, p. 224; Keele 1835:86).

16 The anonymous *British Code of Duel*, published in 1824, elaborates on the earlier *Code Duello* drawn up in Ireland in 1777, which became a template for duels throughout England and, with some variation, also in America. Compared to other formal statements of duelling practice, including Joseph Hamilton's *The Duelling Handbook* (1829; see Hamilton 2007) and, for practices in America, John Lyde Wilson's *The Code of Honor* (1858), the *British Code of Duel* offers both conciseness and an explanation for the behaviours and attitudes relevant to duelling. Wilson's book, while clear and detailed regarding procedure itself, says little about the reasoning and social pressures behind the code. Hamilton's work is longer, more anecdotal and broader in its scope, but it neither contradicts nor adds anything to the present argument, for which the *British Code of Duel* is therefore most elegantly suited. One particular matter of clarity in the *British Code of Duel* is its explicit, and explained, endorsement of duelling pistols over swords, which matches the practice as it achieved popularity and notoriety in Upper Canada.

17 On this, Keele (1835:387) states, "The Christian religion, according to high authority, is part and parcel of the law of England." The passage goes on to list various kinds of blasphemy and reproach of Christianity and associated punishments, which included heavy fines, loss of and exclusion from public office, loss of all goods and chattels and imprisonment ranging from years to life.

18 In practice, commitment to this particular notion of order entailed finding alternatives inferior. Apotheosizing the fixed dwelling and embedded notions of property created blind spots with regard to mobile dwellings, mobile residence patterns relevant to seasonal resource availability, and the social and cultural coherence that made sense of these. Sustained efforts at assimilation, eradication and removal of First Nations peoples to delimited, sedentary reserves testify to the extent and force of that devaluing.

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