



MURDER AND MARRIAGE IN VIRGIL'S *AENEID*: WHAT THE EPIC TELLS US ABOUT LAW AND SOCIETY TODAY

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Virgil's *Aeneid* is a cornerstone of Western literature.¹ It develops storytelling techniques that are still important today, from foreshadowing² to starting *in medias res*.³ Above all, Virgil was skilled at preserving suspense,⁴ and he combined ambiguity with sharp social commentary.⁵ It is not surprising, therefore, that his epic keeps people guessing, even today, about the meaning of scenes in *The Aeneid* that raise two legal problems: the requirements of a ceremony that completes a marriage and the circumstances that amount to murder.⁶

The Aeneid, of course, is the story of the travels and battles of Aeneas, the leader of the defeated Trojan people, as he makes his way toward the founding of the Roman dynasty.⁷ *The Aeneid* is the Latin national epic. During his adventures, Aeneas fights battles, encounters monsters, and endures shipwrecks. He gets direction from various gods and goddesses, but he also receives blow after blow from others of the heavenly cast, particularly from the queen of the gods, Juno. He even finds time to visit Hades, in the underworld. In one chapter, Aeneas dallies with a beautiful African ruler, the powerful but sensitive Dido, and it is here that issues of marriage arise. The later chapters tell the story of his battles in Italy, including his killing of his archenemy Turnus, and it is there that he commits an act that could be called murder. In both instances, Virgil leaves the characterization of these legal outcomes for the reader to resolve, based on clashing arguments.

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1. See AVIAD KLEINBERG, *FLESH MADE WORDS: SAINTS' STORIES AND THE WESTERN IMAGINATION* 68 (Jane Marie Todd trans., 2008).

2. For an example, see DAVID CRUMP, *THE AENEID: VIRGIL'S GREATEST HITS* 117 (Crump trans., 2010) (foreshadowing of disaster for anti-hero Turnus, as a result of his killing of Aeneas's friend) [hereinafter *AENEID* (Crump trans.)].

3. For example, Virgil starts his story with Aeneas halfway through his journey, at Sicily. See *id.* at 2. He later retrieves the past, the fall of Troy, by having his hero narrate the story in chapter two. *Id.* at 13. Although Virgil refers to each of his chapters as a "book" (*liber*), the books are really chapters, and are called by that name here.

4. See, e.g., *infra* note 49 and accompanying text (describing passage in which Jupiter literally weighs the fates of two combatants by using a handheld scale; Virgil does not tell the result of this measurement so that the reader must find out).

5. See *infra* Parts I-II (illustrating ambiguity and commentary).

6. See *id.*

7. See *Aeneas*, *ENCYCLOPEDIA MYTHICA* (May 26, 1999) <http://www.pantheon.org/articles/a/aeneas.html>.



This article examines two legal problems that arise in *The Aeneid*. It looks at these problems through the lens of the law today, analyzing whether Aeneas would have been married to Queen Dido if the events had happened in contemporary America⁸ and whether Aeneas would be guilty of murder if he had killed his opponent Turnus today.⁹ The laws of America are different from those that Virgil's Roman readers knew, of course. The contracting of a marriage was different in its details,¹⁰ and the Romans did not have precisely the set of interlocking homicidal crimes that we find in America.¹¹ But the Roman law was not entirely different,¹² and Virgil wrote in a way that speaks to ambiguities in the legal principles that existed then and persist today. *The Aeneid* is timeless, and the legal dilemmas Virgil created are dilemmas under contemporary law, too.

Section I of the article analyzes the circumstances surrounding Aeneas and Dido's purported marriage. Section II considers whether the actions and events culminating in the death of Turnus amount to murder or to something else. A final section summarizes the author's conclusions, which include the observation that both issues are full of wonderful contradictions.

I. WOULD AENEAS HAVE BEEN MARRIED IF CONTEMPORARY AMERICAN LAW HAD APPLIED?

The Aeneid begins with a shipwreck, engineered by Juno to keep the Trojans from reaching Italy.¹³ Aeneas and his fellow survivors land their shaky craft in northern Africa, near Carthage. As it happens, the ruler of Carthage is the beautiful and powerful Queen Dido. Venus is Aeneas's mother (Virgil thought you were Roman and knew this), and she wants to protect the Trojan leader. She sends Cupid down to make Queen Dido fall in love with Aeneas. Even if she wanted to resist, Dido wouldn't stand a chance.

And Aeneas falls in love with Dido, too (or at least, he likes her; Virgil is unclear). Here is what happens when the two lovebirds depart on a fancy hunting trip together:

... The royal horse wore a hood
Of purple and gold, as he bit at his bridle and foamed.

8. See *infra* Part I.

9. See *infra* Part II.

10. A full ceremony sometimes featured elaborate steps, culminating in vows ("Ubi tu Gaius, ego Gaia"), but the verbal consent of the parties fulfilled legal requirements. See, e.g., SUSAN TREGGIARI, ROMAN MARRIAGE: LUSTI CONIUGES FROM THE TIME OF CICERO TO THE TIME OF ULPIAN (Claredon Paperbacks ed. 1993). In fact, common-law marriage, which still exists in some states, derives directly from Roman law. See *Common-Law Marriage*, THE FREE DICTIONARY, legal-dictionary.thefreedictionary.com/Common-Law+Marriage (last visited July 27, 2011).

11. Roman law changed substantially over the centuries, but in Virgil's time, the maxim describing murder probably was, "Si quis hominem liberum dolo sciens morti duit, paricida esto" ("If anyone with guile, and knowingly, inflicts death upon a freeman, let him be [considered as] a parricide."). The term "paricida" seems superficially similar to the word parricide but evidently meant murderer. See *Capital Punishment*, CATHOLIC ENCYCLOPEDIA, newadvent.org/cathen/12565a.htm (last visited July 27, 2011).

12. See *supra* notes 10-11.

13. The events narrated in this paragraph occur in chapter one of THE AENEID. See AENEID (Crump trans.), *supra* note 2, at 1-10.



At last, [Queen Dido] emerged, with her hair in a golden comb. . . .

Soon after, the Trojans appeared, and by far, the most
Heroic man, Aeneas, passed to the side
Of his soldiers to join his companion. The two would ride
Together. He looked like Apollo, the god of the sun,
When he visits the waking earth, as winter is done.¹⁴

And the wedding is not far behind. The struggle between Juno (who opposes Aeneas) and Venus (who helps him) is a persistent theme in the epic.¹⁵ Improbably, however, the two goddesses join forces when Juno suggests that the Trojan traveler and the queen should get married:

“Why can’t we both pursue a goal that we know
“Will bring us peace, by having a marriage agreed
“Between these two? You’ve already got what you need.
“Poor Dido burns so badly, her bones all bleed
“For love. So let’s just rule over Carthage, both
“Together, as equals. Let Dido speak the oath
“That will make her a servant wife to a Trojan king:
“She’ll give up Carthage, as dowry, to earn the ring.”¹⁶

Juno sends a violent storm that separates Aeneas and Dido from the rest of the hunting party. Inside a sheltering cave, Juno purports to marry them:

. . . But Dido and Aeneas found a cave.
Then Juno, the marriage goddess, promptly gave
A signal, acting with Primal Earth itself. The skies
Exploded with fire to seal the lovers’ eyes
In union, and nymphs sang out from the mountaintops.

That day was the cause of evil that never stops.
From then on, Dido’s reputation, to her,
Meant nothing. She showed her love with lustier
Openness than ever was proper. She even claimed
Her union was lawful, and using that pretext – the name
Of marriage – absolved herself of sin and blame.¹⁷

It is an impressive ceremony. The goddess of marriage, Juno,¹⁸ is making it happen. There are important guests, including Mother Earth, and even a chorus, made up of nymphs. But . . . is it

14. *Id.* at 40.

15. The struggle appears in chapter one, *see id.* at 2-4, 6, and persists until Jupiter orders it to stop in chapter ten. *See id.* at 113-14.

16. *Id.* at 39.

17. *Id.* at 41.

18. *Id.* at 37 & n. (identifying Juno as the goddess of marriage).



the right kind of ceremony to make Aeneas and Dido husband and wife? Would it be enough today?

In most jurisdictions, no, it would not. There is no marriage license, and that, unfortunately, is a requirement.¹⁹ An unwritten charter from the goddess of marriage probably would not be enough, because even a clergy-performed marriage needs a secular document in most places—but not everywhere. Some states still recognize common-law marriage.²⁰ This kind of union does not require any sort of permission from the Bureau of Vital Statistics. In Texas, for example, a common-law marriage is surprisingly informal in its three requirements. All that is necessary is that the husband and wife-to-be (1) hold themselves out publicly as married, (2) agree that they are married, and (3) cohabit.²¹ If Harry and Sally live together, tell their friends that they are married, and agree between themselves that they are married, . . . well, they are married. The Wild West is still with us.

An obvious problem, of course, is that these criteria are a perfect subject for he-said-she-said conflicts in later testimony. Furthermore, the criteria are malleable. How much “holding out” is enough? (Does the signature on a hotel register of Mr. and Mrs. John Jones suffice?)^{21a} Then, there is the question of agreement (can it be implied? or, can it be indicative mainly of plans for the future?),²² as well as cohabitation (a lovestruck week in Cancun is probably not enough, but who knows?)²³

To reduce the unpredictability that is built into these issues, Texas enables the happy couple to document their common-law marriage in the public records.²⁴ But it does not require this formality. As a result, the death of a millionaire sometimes produces late-breaking claims of common-law marriage from a paramour (or from a widow/widower, depending on one’s point of view), who would like a share of the putative community property.²⁵ Likewise, if one

19. “A ceremonial marriage [as opposed to a common-law marriage] is a marriage that comes into being through a formal process that involves compliance with statutory formalities, such as applying for a license” Peter Nicholas, *Common-Law Same-Sex Marriage*, 43 CONN. L. REV. 931, 933 (2011). Most states require these formalities. *Id.*

20. See John B. Crawley, *Is the Honeymoon Over for Common-Law Marriage?: A Consideration of the Continued Viability of the Common-Law Marriage Doctrine*, 29 CUMB. L. REV. 399, 400 n. 4, 403 n. 25 (1999) (identifying states that retain or recently have abolished common-law marriage; asserting that ten states retained the doctrine in 1999).

21. See *Crenshaw v. Kennedy Wire Rope & Sling Co.*, 327 S.W.3d 216, 222 (Tex. App. 2010).

21a. Probably not, at least in Texas. This element requires more than “occasional references” to each other as ‘wife’ or ‘husband.’ *Smith v. Deneve*, 285 S.W.3d 904, 910 (Tex. App. 2009).

22. Cf. *Canady v. Russell*, 138 S.W.3d 412, 414 (Tex. App. 2004) (future intent is insufficient).

23. One striking case involved inmates from two separate prisons, who could not show cohabitation (owing to their confinement) but alleged that they intended to cohabit in the future. *Id.* at 413 (common-law marriage rejected).

24. VERNON’S TEX. FAM. CODE ANN. § 2.401(a)(1) (Vernon 2005).

25. Cf. *Phillips v. The Dow Chemical Co.*, 186 S.W.3d 121, 128 (Tex. App. 2005) (alleged husband failed to prove common law marriage and could not inherit claim for wrongful death).



party wishes to move on from a relationship that no longer is desired, the other party may insist that only a divorce, with a lucrative property division, can put the couple asunder.²⁶

And so it is with Aeneas. His destiny is to found the Roman dynasty, and following one's destiny, in *The Aeneid*, is one's divinely ordained duty.²⁷ After the cave ceremony that featured Juno, Mother Earth, and the mountaintop nymphs, Aeneas settles into a role that looks powerfully like that of husband to Queen Dido. He even is dressed appropriately for the husband of a queen:

. . . Aeneas wore
Two gifts from Dido: one was a jeweled sword
That was studded with stars made of jasper; the other one
Was a purple robe she'd chosen, with striping done
In threads of gold. . . .²⁸

This purple-bordered garment is a badge of royalty.²⁹ Aeneas must have gained it through marriage to Dido. By wearing it, Aeneas creates evidence of holding himself out as married. And although he is too discreet to provide details, Virgil makes it clear that Aeneas is cohabiting with Dido.³⁰

What about the third element: an agreement to be married? Therein hangs the tale. Remember, Aeneas's destiny is to establish Rome. He has become distracted. One day, Jupiter looks down and is unhappy with Aeneas's avoidance of his duty. He dispatches Mercury to give the errant hero a pep talk.³¹ After a wonderful passage about the messenger-god's view of Atlas holding up the earth while he is flying down on his winged sandals, Virgil tells us that Mercury stands before Aeneas and scolds him like a naughty boy:

. . . Mercury spoke in his face:
"So here you are, in Carthage, locating space
"For new foundations, making a pretty town
"To please your 'wife'? Well, Jupiter sent me down –
"The King of the Gods, you remember?, who turns the sky
"And earth – from shining Mount Olympus, and why?
"To talk to you! It seems you've forgotten things,
"Such as Rome, where you'll be the father of kings!
"So Jupiter told me to drive his meaning home:
"What are you doing? And what do you hope to do,
"By resting in Carthage? We're ashamed of you."³²

26. See *Smith v. Deneve*, 285 S.W.3d 904, 909 (2009) (alleged husband sued alleged wife for divorce and to recover property; court agreed with alleged wife that no common-law marriage existed).

27. See *AENEID* (Crump trans.), *supra* note 2, at 33 (containing an explanation of this concept).

28. *Id.* at 43.

29. *Id.* at 43 & n.

30. See *id.* at 41.

31. *Id.* at 42.

32. *Id.* at 43.



With that, Mercury flies away, again with picturesque images.³³

After this experience, Aeneas literally finds religion. He wants to leave for Italy immediately, and he instructs his crews to prepare the Trojan ships.³⁴ But his departure is not going to be that easy. “[W]ho can ever fool his lover?,” Virgil aptly asks, and Dido of course finds out that she is about to be abandoned.³⁵ In rabid distress and anger, she confronts Aeneas:

“You hoped you’d be able to hide this ugly deed,
“You treacherous man, by acting with silence and speed,
“To leave the country? Without a thought of our love,
“Ignoring our marriage, performed by the gods above,
“And above all, heedless of Dido’s cruel fate,
“Since now I’ve got to die? So full of hate,
“Are you, to ready your fleet to sail in the deep
“Of winter . . . ?³⁶

But Aeneas sees it differently. He responds:

“As long as I have life and breath, you’ll go
“With me in memory. But here’s the absolute fact.
“I never planned to conceal my intent to retract
“My anchors and sail. Don’t even think it, at all.
“And don’t pretend that you can ever call
“Us ‘married,’ or think I agreed to any such thing.
“If Fate had allowed me to choose what the future would bring
“And handle my life myself, then I’d have stayed
“In Troy, where memories of family never fade
. . . But now, I’m told
“By the prophecies of Apollo, in terms that are cold
“And hard, to find my way to Italian shores. . . .

“Whenever the stars appear and the shadows of night
“Descend on the earth, whenever I quench the light
“To sleep, my father Anchises startles me awake
“With a terrible vision, and tells me how I break
“Away from my duty. I also think of my son,
“Ascanius, and how I’ve hurt him by what I’ve done:
“I’ve cheated him out of his fated kingdom at Rome.³⁷

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 43-44.

37. *Id.* at 44-45.



And there Virgil leaves the competing arguments about marriage, as incapable of definitive resolution today as he intended them to remain in his time.

Does Dido have the better of the marriage controversy? There was, after all, a ceremony, of which Aeneas must have been aware. His act of wearing the royal garment not only evidences a holding out to the public of marriage, but also corroborates the agreement that Dido asserts. But an advocate for Aeneas might ask, "Does he become married just because he wore a garment that supported his paramour in an endeavor important to her, the building of Carthage?" Dido doesn't refer to any specific words of commitment, and Aeneas denies that any agreement exists. Perhaps the most powerful piece of evidence against agreement (and against marriage) is that Dido and Aeneas have repeatedly discussed his destiny: to go to Italy and found Rome.³⁸ This duty has always meant that he would have to leave her.³⁹

The chapter ends badly for unlucky Dido. Soon after Aeneas's departure, she commits suicide, as she has concluded she must.⁴⁰ St. Augustine wrote that upon reading *The Aeneid*, he broke into tears about Dido's tragedy.⁴¹ And this is how Virgil deliberately leaves the legal issue: in equipoise, halfway between married and not. This article will offer a (shaky) resolution of the issue below, in its conclusion.

II. WOULD AENEAS HAVE BEEN GUILTY OF MURDER?

The latter six chapters of *The Aeneid* tell the story of the Trojans' landing near Rome and the battle for Italy.⁴² They also create a dilemma about the law of murder. Aeneas allies his troops with an Italian tribe headed by a younger man named Pallas, who wears an ornate sword belt.⁴³ But the enemy's foremost warrior, a swashbuckler named Turnus, subdues Pallas.⁴⁴ Then, while Aeneas's young friend is a helpless captive, Turnus unnecessarily kills Pallas. He then takes Pallas's sword belt as a trophy. Virgil emphatically alerts the reader to the lack of wisdom in this act:

In a moment of foolishness, Turnus bent and tore
From Pallas's body the belt that once he wore
To carry his sword, and wrapped the trophy, instead,
With its golden designs, on his own ribbed body and head.
*But the mind of man can never know of Fate,
Or see the events that will fall, at a future date!*
The time will come when Turnus, regretting his act,

38. See, e.g., *id.* at 27 (describing how Aeneas relates to Dido his destiny to make a difficult journey, and narrates the words of a prophet telling him about an omen that will tell him he has reached the site where Rome will arise).

39. As queen of Carthage, which she founded, Dido has her own duties.

40. See *id.* at 46-47.

41. SAINT AUGUSTINE, *THE CONFESSIONS OF ST. AUGUSTINE*, First Book 33 (Harvard Classics ed. 1909-14), available at bartleby.com/7.1.1.html.

42. AENEID (Crump trans.), *supra* note 2, at 79-127.

43. *Id.* at 95.

44. *Id.* at 117.



Will wish he could summon up Pallas's body intact,
And yearn to give this hated weapon-belt back.⁴⁵

The two armies spill quantities worthy of an epic of each other's blood.⁴⁶ Then, Aeneas and Turnus square off in a single combat that is arranged to end the violence, with each side agreeing to abide the outcome.⁴⁷ In a wonderful passage, Virgil describes a council of the gods in which Jupiter tells everyone in heaven, including his wife, to stop intervening to help their respective favored sides:

"I've got to be Father to all," said the King. "So now,
"Italians or Trojans – no matter who, or how
"They got here – are all to be treated the same; and Fate,
"Whatever it is, will determine whom fortunes await
"As victors today. The Italians may succeed
"In pressing their siege, if the Trojans improperly read
"The signs for their tactics; or Troy itself may prevail
"From Latin mistakes. But . . . , who shall succeed or fail?
"That question is left to fortune alone, today.
"Your Ruler commands you: Fate must find its way."⁴⁸

To emphasize the point, the poet tells us that Jupiter pulls out a hand-held scale, in which he weighs each warrior's destiny to determine the outcome.⁴⁹ Consistently with his taste for suspense, Virgil discloses nothing of what Jupiter learns from the measurement.

Turnus strikes first, while Aeneas is readying himself, with the equivalent of what we would call a sucker punch today.⁵⁰ Here, Virgil demonstrates his capacity for character development: show it, don't tell it, as a modern novelist would say. Turnus is not a nice man. The fight goes back and forth until Aeneas, who everyone knows is the more fearsome warrior, throws his lance into Turnus's leg and disables him.⁵¹ Turnus cannot defend himself any longer.

The wounded man reacts with an oration that gives reasons for sparing his life:
"I have no right, Aeneas, to ask forbearance,"
The fallen Turnus gasped. "The Fates give their clearance
"For you to end my life. So use the occasion.
"But . . . maybe, the misery felt in a father's situation,
"When death takes his son, can overcome your pride.
"And imagine, it could have been you, who died,
"And your father Anchises who grieved. So think of this:

45. *Id.*

46. *See id.* chs. 9-10.

47. *Id.* at 135-36, 139.

48. *Id.* at 114.

49. *Id.* at 141.

50. *Id.*

51. *Id.* at 142-43.



"My aging father will mourn my death the same,
"If you send him my lifeless body, spoiled and maimed.
"You've won, and you see my vanquished hands extended.
"Lavinia [the local princess] is yours, so let our hate be ended."⁵²

And Aeneas is persuaded. For a moment, he is ready to put his weapon aside. But then, Aeneas sees the trophy that Turnus is wearing:

Aeneas stayed his sword, and his hand was still.
His eyes looked down. He suspended his iron will
To consider Turnus's message. And then . . .
His glance, unhappily, *fell where it shouldn't have been.*

He saw what Turnus, high on his shoulder, wore:
A belt with familiar glittering gold at its core,
The belt that belonged to Pallas until he died.
And now, it was only a trophy: an emblem of pride
That Turnus had snatched on a whim, or a token that said
That he'd sent young Pallas down to the place of the dead.⁵³

Enraged by the sight, Aeneas kills the helpless Turnus:

Aeneas's eyes grew wide, with a fiery strain,
As they marked this booty, this signal of deadly pain,
This stolen monument. Fury blackened his brow.
"What, from me, can you ask for, Turnus, now?
"This emblem confesses your evil, your hatred, your blame.
"So let your blood give payment, in Pallas's name!"

Enraged, he buried his angry blade as he spoke,
In his enemy's heart. Then Turnus's breathing broke,
And his body dissolved with the coldness that dying men know.
He moaned, and his life retreated to darkness below.⁵⁴

And this is where *The Aeneid* abruptly ends, with the death of Turnus. It is a strange ending for a modern reader, but presumably it was a natural resolution for Virgil's contemporaries. The Romans all knew what came next: many centuries of their own ascendancy, as Aeneas's progeny.⁵⁵

Perhaps the Romans also thought that Aeneas had done the right thing, at least in context. The laws of war were much less developed and hardly recognized as uniform

52. *Id.* at 143.

53. *Id.*

54. *Id.* at 143-44.

55. *Id.* at 145 (explaining the ending).



internationally.⁵⁶ Today, it is clear that the summary execution of a prisoner is unlawful.⁵⁷ The killing of Turnus looks like a homicidal crime, and the law of combat does not provide a defense.

This conclusion, however, only leaves the question open. Would Aeneas be guilty of murder if he had killed Turnus in the same circumstances under contemporary law in America? Or would he be guilty only of a lesser offense? Is there a chance that he might assert a defense, so that he might not be guilty of any crime?

Even a deliberate killing can be justified by the law of self-defense. Aeneas's act may seem distant from this possibility – but perhaps it is not, and a defender today might well insist on this defensive theory. In most American jurisdictions, self-defense is available even if there is no real danger, because a reasonable apprehension of danger is enough.⁵⁸ The prosecution ordinarily bears the burden of disproving self-defense, and therefore, a reasonable doubt about whether Aeneas reasonably apprehended danger would be enough to acquit him.⁵⁹ Some jurisdictions insist that the jury view the possibility of danger from the “defendant's point of view,” in the defendant's own circumstances as he perceived them.⁶⁰ There usually is a higher threshold for a claim of self-defense with deadly force, which Aeneas has used, of course; but the threshold is crossed if the apprehension is of deadly force, which Turnus possessed (or could have possessed).⁶¹

Perhaps the greatest obstacle⁶² to a claim of self-defense is the requirement that the use of force be perceived as “immediately” necessary.⁶³ Turnus is disabled. He is pleading for mercy. And yet, a defensive blow that appears to be offensive is arguably justified when it is immediately necessary to avoid the danger. Imagine, for example, that the defender sees the opponent turning and running to reach for a weapon and shoots the opponent in the back to

56. Compare 2 Surah 191-93 (advising Muslims that they should only attack those who first attack them) with 20-21 Deuteronomy (instructing that adherent should first try to make peace with a city before besieging it, and then advising what to do with conquered persons and property). *Laws of War*, WIKIPEDIA, http://en.wikipedia.org/wiki/Laws_of_war#Early_sources_and_history (last visited July 27, 2011).

57. Cf. UNITED STATES ARMY, ARMY FIELD MANUAL, LAW OF WAR, 27-10 para. 266-67, 270-73 (protection from murder). LAW OF WAR DOCUMENTARY SUPPLEMENT, 311-12, available at http://www.loc.gov/rr/frd/Military_Law/pdf/law-of-war-documentary-supplement_2010.pdf.

58. See WAYNE R. LAFAVE, CRIMINAL LAW § 5.7(c) (2d ed. 1986) [hereinafter LAFAVE].

59. The defendant has the burden of producing “some” evidence of self-defense, which can be minimally persuasive. If the defendant does so, the prosecution then bears the burden to disprove the defense beyond a reasonable doubt. See, e.g., *Loun v. State*, 273 S.W.3d 406, 409 (Tex. App. 2008).

60. See, e.g., *Reed v. State*, 703 S.W.2d 380, 384 (Tex. Crim. App. 1985).

61. See LAFAVE, *supra* note 58, § 5.7(b).

62. There also is the retreat doctrine, which some states apply. A defender must retreat before using deadly force, if he can do so in safety. *Id.* § 5.7(f). This doctrine might preclude self-defense for Aeneas. It is not discussed as a major issue here, however, because the immediate necessity requirement covers it here. If a jury were to have a reasonable doubt whether danger was “immediate,” the retreat requirement for self-defense would probably also be resolved in Aeneas's favor.

63. See *id.* § 5.7(d).



save himself.⁶⁴ Aeneas's killing of Turnus may not seem comparable, and yet the circumstances that emerge from Virgil's poetry leave the question ambiguous. Testimony describing such a fast-moving scene would come across as similarly sketchy. And remember: Turnus started the fight with deception, with the equivalent of a sucker punch. Furthermore, since Aeneas's army won, presumably his countrymen would sit to judge him. The right jury might acquit Aeneas.

Which homicidal crime could be proved beyond a reasonable doubt if Aeneas's plea of self-defense were to be rejected? The answer varies significantly among jurisdictions. In states that follow the so-called Pennsylvania pattern,⁶⁵ the element of malice aforethought would be supplied by Aeneas's intent to kill.⁶⁶ The harder question would be the mushy concepts of premeditation and deliberation.⁶⁷ The oxymoronic idea behind this execrably vague standard⁶⁸ is that the law seems to require mature reflection, but premeditation can be "instantaneous."⁶⁹ As often is the case, the answer is like the result of a roulette wheel.⁷⁰ If the jury focuses on the concept of "pre"-meditation, it will find against first degree murder, but if it pays more attention to the "in an instant" aspect, it will convict of the higher crime. Second-degree murder is even more of a briar patch, requiring a "depraved heart."⁷¹ A jury that rejected self-defense probably would find either first- or second-degree murder, if we leave aside, for now, the question whether Aeneas's "sudden passion" reduces the grade of the crime.

In jurisdictions in which the homicidal offenses are defined according to the Model Penal Code ("MPC"), the analysis would be much simpler, the jury would have more understandable guidance, and distinguishing murder from other offenses would be more reliable.⁷² The MPC makes the basic definition of murder depend on either of two mental states: "purposefully" (which some states re-word as "intentionally") or "knowingly."⁷³ Purpose or intent is made clearer by a definition that translates it into a "conscious desire" to bring about the result, while knowingly is defined in terms of "reasonable certainty" that the result will occur.⁷⁴ Under a typical state formulation, then, a person commits murder if he or

64. See Cindy George, *Officer Cleared in Death of Armed Bicyclist*, HOUS. CHRONICLE, July 22, 2011, B1 col. 1, available at <http://www.chron.com/news/article/Officer-cleared-in-death-of-armed-bicyclist-1531317.php> (reporting grand jury no-bill in case in which evidence showed a gunshot entry wound in the back of decedent's head, but decedent's behavior raised self-defense issues among grand jurors). This pattern requires "malice aforethought" for murder, of which there are two grades.

65. See David Crump, "Murder, Pennsylvania Style": *Comparing Traditional American Homicide Law to the Statutes of Model Penal Code Jurisdictions*, 109 W. VA. L. REV. 257, 259, 262 (2007) [hereinafter Crump, Article on Murder].

66. See *id.* at 302, 307.

67. These are the requirements for first-degree murder. See *id.* at 263-64.

68. See *id.* at 289-91.

69. See *id.* at 290.

70. See *id.* at 291.

71. This vague metaphor includes unintentional murders. See *id.* at 305.

72. See *id.* at 294.

73. See *id.*

74. See *id.* n.168



she “intentionally or knowingly causes the death of an individual.”⁷⁵ There are no degrees of murder, so that the gradations of the Pennsylvania pattern, gradations that imply a precision that cannot be expected when the definitions are as vague as they are under that pattern, are not required. Furthermore, amorphous concepts such as malice aforethought, premeditation, deliberation, and depraved-heart malice are not part of the MPC pattern.⁷⁶

Under this MPC formulation, Aeneas is guilty of murder. His statements and actions make his intent unambiguous, and there can be little question that he knew he was killing Turnus. The analysis is straightforward. In fact, this clarity is a virtue of the MPC approach to homicide. All of this presupposes, however, that the jury cannot or does not return a verdict reflecting the “sudden passion” type of killing, or what is called voluntary manslaughter in most jurisdictions.⁷⁷

This latter crime, voluntary manslaughter, contains a number of elements. A typical formulation in states that do not adopt the MPC for voluntary manslaughter requires a sudden passion.⁷⁸ This element, in turn, must arise from an adequate cause.⁷⁹ The adequate cause usually must have arisen from the victim of the crime, so that a free-floating kind of anger cannot ameliorate the homicide of a random person.⁸⁰ Furthermore, the adequate cause is generally considered objectively, meaning that it must be sufficiently significant so that a person of “ordinary” or “average” temper would likely feel strong emotion.⁸¹ Finally, an element of immediacy usually is included, too, so that if the defendant had time to reflect before committing the homicide, no reduction from murder is available.⁸² Then, there is the MPC, which makes the required mental state more subjective and less-time dependent, and therefore easier to find.⁸³ Paradoxically, this feature means that the MPC, which defines murder more clearly than the other major pattern, leads to some odd results if it is applied according to its terms, and it has prompted some states that have adopted the MPC version of murder to reject its definition of the passion-killing reduction.⁸⁴

It is unclear how voluntary manslaughter, with this complex of factors, would apply to Aeneas’s killing of Turnus. One factor that is relatively easy to satisfy is that Aeneas acted under a sudden passion in the subjective sense. Likewise, a confrontation with an enemy combatant who has killed a close friend, when the friend was defenseless, would raise a high

75. See *id.* at 294.

76. See *id.*

77. See LAFAVE, *supra* note 58, §§ 7.10-7.11.

78. See Crump, Article on Murder, *supra* note 65, at 313.

79. See *id.*

80. See *id.*

81. See *id.* at 313-14.

82. See *id.* at 314.

83. The criterion is “extreme mental or emotional disturbance for which there is reasonable explanation or excuse.” *Id.* at 318. The reasonableness element, however, is to be “determined from the viewpoint of a person in the actor’s situation as he believes [it] to be,” making the standard relatively subjective. *Id.* n.318.

84. For example, literal application of the MPC standard could have reduced the offense of Sirhan Sirhan, who murdered presidential candidate Robert F. Kennedy for political reasons. Fortunately, California’s provision did not follow the MPC. See *id.* at 319.



degree of passion in an ordinary person, and it almost certainly would qualify as adequate cause. Turnus, the victim, is the one who killed the close friend, so this element is met as well. The most interesting question is whether Aeneas's killing of Turnus was done with sufficient immediacy to qualify for the closeness-in-time element. The death of Pallas occurred days before the homicide in question. Aeneas even went to Pallas's funeral in the interim.⁸⁵ He had time for his mind to settle.

But the facts raise a separate question. If the event that really gave rise to the sudden passion has occurred a long time before the homicide in question, can that sudden passion be rekindled by a reminder of the event, so that it qualifies for reduction of the grade of the homicide? This series of happenings describes Aeneas's actions. Few cases answer the question, because the usual voluntary manslaughter occurs in response to the major event, not to a reminder of it, and the decisions are inconsistent.⁸⁶ Virgil's story is fiction, put together to manufacture drama, and ambiguity is one of his techniques. This article will offer a possible resolution of the passion-killing questions below, in its conclusion.

At least one state dispenses with the crime of voluntary manslaughter altogether, although it retains the effect of the separate crime definition. The crime remains murder, but the maximum imprisonment is reduced from life for the higher crime to twenty years for a passion killing that qualifies.⁸⁷ The reduction is done at the sentencing hearing, according to findings made by the jury that are analogous to the requirements for voluntary manslaughter in other states.⁸⁸ In this jurisdiction, Aeneas would be guilty of murder, even if the jury were to decide that the killing reflected a sudden passion, but his sentence would be reduced in the same manner as it would in a state with the separate crime of voluntary manslaughter. One can argue that if the defendant has intentionally killed another person, the crime should be called murder, not labeled so that it sounds less than intentional. The sentence however, is lessened under qualifying passion circumstances, and this result too is arguably appropriate, because sentencing, not crime liability, is the place where mitigating motivations usually are taken into account.

CONCLUSION

Virgil is cynical about the law. He expresses his doubts about justice in several passages in *The Aeneid*. Probably the clearest example is to be found when Aeneas makes his journey to visit Hades, the underworld. Just outside, there are groups of festering souls that are prevented from entering into eternal rest because of the circumstances of their deaths. One of these groups is prisoners condemned to capital punishment by "depraved and dishonest" judges.⁸⁹ Today, although a significant percentage of people believe that there are some

85. AENEID (Crump trans.), *supra* note 2, at 123. The cases "have not always recognized" rekindled passion. LAFAVE, *supra* note 58, §§ 7.10(d), 7.10(e).

86. See, e.g., *State v. Gounagias*, 153 P. 9, 13-14 (Wash. 1915) (defendant was greeted by ridicule from coffee-house guests because of sexual offense committed long before upon him, while unconscious, by decedent; defendant then killed decedent; held, no reduction from first-degree murder).

87. TEX. PENAL CODE ANN. 19.02(d) (Vernon 2005).

88. *Id.*

89. AENEID (Crump trans.), *supra* note 2, at 69-70.



convicts wrongly sentenced to death, most of these skeptics probably do not attribute the cause to “depraved and dishonest” judges (as opposed to errors), and therefore, this passage shows the depth of Virgil's cynicism about the law.

But the poet's characterization of justice is, in fact, even worse than this. The wrongly-condemned souls face an underworld judge, who dispatches each one either to Tartar for eternal punishment or to Elysium for the rewards of innocence.⁹⁰ But Virgil's underworld judge does not make this decision alone. The poet describes the law of this strange process in these words:

. . . And next, there were souls condemned by judges depraved
And dishonest, of doubtful accusations, to die;
But now, they need no appeals, and no review.
A specter called Minos gives them all their due.
He calls his council to study every case
In silence, and spins his wheel of fortune to trace
Each indictment, freeing the just and dooming the rest.⁹¹

In other words, the judge, the specter whose name is Minos, relies partly upon an analogue of a jury (his “council”), but he also uses a game of chance (his “wheel of fortune”).

Virgil's message is that justice frequently develops arbitrarily. The path of the legal process, he believes, is prone to random results, like a roulette wheel. Thus, it is not surprising that Virgil deliberately leaves Aeneas's marriage in a state of uncertainty – and that he does the same when he describes his hero's killing of Turnus.

The poet skillfully leaves the first issue, the marriage issue, in a state of equipoise. Although there are grounds to believe that Aeneas and Dido's putative union might be valid today in jurisdictions that accept common-law marriage, there are equally weighty reasons to doubt that the legal requirements are met. Two of the requisites are relatively easy. Virgil strongly implies that the couple was cohabiting,⁹² and the holding out of the marriage to the public seems established by Aeneas's wearing of a royal garment that means he is the queen's spouse. But the third requirement, that of agreement, remains doubtful.

On the one hand, Aeneas's wearing of the kingly robe is not only evidence of holding out to the public; it also strongly implies his agreement to the marriage. On the other side, however, Dido cannot point to any words that might create an agreement, and an implied agreement requires an inference here that is probably weaker than an explicit exchange of words would be. Furthermore, both of the putative spouses have known all along that Aeneas would have to leave Dido. His destiny, his duty, is to travel to Italy, where Dido cannot go. In the end, if the issue must be resolved in spite of these colliding arguments, one perhaps can claim that the scales tilt slightly toward finding that there is no marriage. This conclusion can also be supported by an argument that is something of a *deus ex machina*. Jupiter has ordered

90. *Id.* at 70. As to Tartar and Elysium, *see id.* at 71.

91. *Id.* at 70.

92. *See, e.g., supra* note 17 and accompanying text.



Aeneas to leave immediately, and if we assume that Jupiter is not only omniscient but also just (as *The Aeneid* depicts him to be), he presumably would not separate the couple without having decided that there is no marriage.

The second question, of murder versus manslaughter, is just as ambiguous. The killing of Turnus took place days after the event triggering Aeneas's passion, which was Turnus's own killing of the defenseless Pallas. This length of time for cooling of the passions strongly suggests that the immediacy required for reduction of the grade of the homicide is absent. In fact, Aeneas's act of homicide was a response not to the killing of Pallas, but rather, to a reminder of that killing. The circumstances therefore raise a question to which contemporary law has not provided a solid answer: whether a reminder of an event giving rise to a rekindling of sudden passion can, itself, be an event that reduces the grade of the crime from murder to voluntary manslaughter. Perhaps the question can be stated differently: can a reminder of a passion-creating event become an independent cause of grade-reducing passion?

It appears, however, that the answer ought to be yes, and the crime here should be reduced to voluntary manslaughter. In the first place, Aeneas is in a war zone. He has just fought a battle that was intended to result in death, either his or his opponent's. His viewing of Pallas's sword-belt, taken as a trophy by Pallas's killer, is more than a reminder of a friend's death. It is the sight of an in-your-face taunt or brag, set up by circumstances amounting to murder and robbery. An ordinary person would be likely to react to the sword-belt with passion even after a time of reflection. Thus, even though time for reflection is usually a factor negating voluntary manslaughter, the source of passion in this case may not be only a rekindling of memory. It looks like a separate but still adequate satisfaction of the ordinary person test.

Therefore, as to the first issue, one might conclude that Aeneas was never validly married. And one can surmise, about the second issue, that Aeneas is not guilty of murder, although he may be liable for a lesser offense. But these conclusions are deeply uncertain, and it would be easy for an observer to reach the opposite decision about each issue. In fact, the same observer may go back and forth between judgments about both issues. This is the effect that Virgil intended, and he wrote skillfully to create a set of opposing but balanced inferences. His ability to set up this kind of ambiguity while telling a good story is one of the reasons for the importance of *The Aeneid* to the development of Western literature.

The dilemmas that Virgil creates also show us something about the aspirations of societies when they create laws, and this is a subject that fits the theme of this issue of the Journal. Aspirations are ungovernable impulses, and they sometimes move in opposite directions. For example, with respect to laws about marriage, a society is likely to want order and certainty on the one hand, but also to want to preserve the freedom of marital couples on the other. Order and certainty are served by rules requiring formal records and ceremony, but freedom is enhanced if the government stays out of the picture. Similarly, society may want a law of crimes that defines offenses rigorously, but society also aspires to a criminal system that recognizes normal human impulses, and again the two aspirations conflict, because



recognizing a law of excuses that understands human emotion is going to import a great deal of vagueness into the definition of crimes. Again, Virgil is the master of ambiguity, as he demonstrates the contradictions that often characterize societal aspirations about the law.