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The Rape of Tess: Hardy, English Law, and the Case for Sexual Assault

WILLIAM A. DAVIS, JR.

THE precise nature of the assault upon Tess Durbeyfield's innocence has been debated by Hardy's readers for a century. Was Tess raped, or was she seduced, by Alec d'Urberville? H. M. Daleski writes that "what happens in the Chase is . . . so ambiguously presented as to invite the mutually contradictory readings" of rape and seduction.¹ Ellen Rooney believes that "the scene of sexual violence, Tess and the female subject all appear as radically unreadable figures."² Kristin Brady notes that "it is in the end impossible to ascertain precisely what happened during that September night on The Chase," and that "the debate has still not been resolved with perfect clarity."³ In a brief account of the "physical details" that Hardy added to and removed from the description of the assault in the "Fifth Edition" of 1892, Juliet Grindle and Simon Gatrell note that Hardy's changes "do not really help the reader to define for himself the nature of this consciously ambiguous happening; so much depends upon the degree of voluntary co-operation which we imagine Tess to

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¹ "Tess of the d'Urbervilles: Mastery and Abandon," *Essays in Criticism*, 30 (1980), 331.

² "A Little More than Persuading": Tess and the Subject of Sexual Violence," in *Rape and Representation*, ed. Lynn A. Higgins and Brenda R. Silver (New York: Columbia Univ. Press, 1991), p. 97.

³ "Tess and Alec: Rape or Seduction?" in *Thomas Hardy Annual*, No. 4, ed. Norman Page (Basingstoke: Macmillan, 1986), p. 131.

have offered.”⁴ Despite the legal implications of both seduction and rape, no one, to my knowledge, has examined the crucial rape/seduction passages of *Tess* from a legal perspective, specifically with reference to Victorian rape law and actual rape cases. The omission is all the more surprising when we remember that the author of the passages in question was a practicing justice of the peace during the time of the composition of *Tess*.⁵ A study of Hardy’s texts and their backgrounds reveals important connections to English criminal law concerning sexual assault. I would suggest that it is not “impossible,” as Brady suggests it is, to determine what happens that night in the Chase, and that the descriptive details of the scene do much to “define” the “happening” that ends Phase the First of *Tess*.

The inevitable encounter between Tess and Alec is foreshadowed and anticipated from the earliest chapters of Phase the First. Hardy employs symbols and symbolic actions (e.g., the colors red and white and the virgins’ dance) along with parallel scenes of penetration and violence (Alec’s feeding Tess strawberries and the stabbing death of Prince) to prepare the reader for the sexual encounter of Alec and Tess. Hardy begins his description of the actual encounter as carefully as he has led up to it and with equal deliberateness:

“Tess!” said d’Urberville.

There was no answer. The obscurity was now so great that he could see absolutely nothing but a pale nebulosity at his feet, which represented the white muslin figure he had left upon the dead leaves. Everything else was blackness alike. D’Urberville stooped; and heard a gentle regular breathing. He knelt, and bent lower, till her breath warmed his face, and in a moment his cheek was in contact with hers. She was sleeping soundly, and upon her eyelashes there lingered tears.⁶

⁴ Juliet Grindle and Simon Gatrell, “General Introduction,” in Thomas Hardy, *Tess of the d’Urbervilles*, ed. Grindle and Gatrell (Oxford: Clarendon Press, 1983), p. 45. Hereafter referred to in the text as “Introduction.”

⁵ See Edward C. Sampson, “Thomas Hardy—Justice of the Peace,” *Colby Library Quarterly*, 13 (1977), 263–74.

⁶ Thomas Hardy, *Tess of the d’Urbervilles*, ed. Juliet Grindle and Simon Gatrell, p. 102. All further references to *Tess* are to this edition, unless otherwise noted, and appear in the text.

Significantly, the assault upon Tess begins with an absence of verbal communication between Tess and Alec. Tess does not respond to Alec's address, and the narrator later adds that "silence ruled everywhere around" (p. 102). Moreover, Hardy begins the actual physical encounter between Tess and Alec with the explicit statement that Tess is asleep. The physical contact is at first gentle and caressing—"her breath warmed his face, and in a moment his cheek was in contact with hers"—and this contact is followed immediately with the statement that Tess "was sleeping soundly." We may assume, then, that Tess does not communicate with Alec because she is asleep. We may further assume that Alec knows that Tess is sleeping, for he hears her "gentle regular breathing" and receives no response to his direct address.

Subsequent descriptive details—the narrator mentions Tess's absent "guardian angel," the "coarse pattern" about to be traced upon Tess, "the possibility of a retribution lurking in the present catastrophe," and the certainty that Tess's "mailed ancestors rollicking home from a fray had dealt the same measure even more ruthlessly towards peasant girls of their time" (pp. 102–3)—all suggest the violent nature of Alec's assault. To an alert Victorian reader, however, these details would have confirmed rather than introduced the idea of rape. The rape of Tess actually begins with the passage that describes Tess's sleep and her lack of verbal response—the passage, in short, that establishes her lack of consent to Alec's advances.

English law in the nineteenth century defined rape as "the offence of having unlawful and carnal knowledge of a woman by force, and against her will."⁷ Mews's *Digest of English Case Law* further explains that "to constitute rape, it is not necessary that the connection with the woman should be had against her will; it is sufficient if it is without her consent."⁸ The law specifically addressed several situations in which it might be assumed that a

⁷ Nevill Geary, *The Law of Marriage and Family Relations: A Manual of Practical Law* (London: Adam and Charles Black, 1892), p. 480.

⁸ John Mews, ed., *The Digest of English Case Law, Containing the Reported Decisions of the Superior Courts: and a Selection from Those of the Irish Courts to the End of 1897*, 16 vols. (London: Sweet and Maxwell, 1898), IV, 1,548–49.

woman had not given or could not give consent. Among these is the situation of a woman who is asleep:

If the woman is asleep when the connection takes place, she is incapable of consent, and although no violence is used, the prisoner may be convicted of rape, if he knew that she was asleep.⁹

A review of Victorian case law shows that the courts held firmly to the idea that a sleeping or unconscious woman was incapable of consenting to a sexual relationship. *R. v. Ryan* (1846), for example, affirmed that “where a girl is in a state of utter unconsciousness, whether occasioned by the act of the prisoner, or otherwise, a person having connection with her during that time is guilty of a rape.”¹⁰ In *R. v. Mayers* (1872), Richard Mayers, the prisoner, based his defense on the argument that because the prosecutrix (his sister-in-law) did not resist his attempt at connection, he could not be found guilty of attempted rape. Justice Lush countered with an argument more firmly based in logic: “But if she was asleep it is against her will, and I shall rule that if he had, or attempted to have, connection with the woman while she was asleep he is guilty.”¹¹ *R. v. Young* (1878), an appeal case, affirmed the conviction of the prisoner, John Young, for having connection with a married woman while she was asleep (her husband and two children were asleep next to her): “the jury found that the prosecutrix did not consent before, after, or at the time of the prisoner’s having connection with her, [and] that it was against her will.” Five high-ranking justices, among them Chief Justice Coleridge, had little trouble deciding that the case was “clearly one of rape.”¹²

Victorian readers of the 1891 edition of *Tess* read a description of the assault scene containing specific details that would have further established the scene’s legal undertones. These details may be traced to Hardy’s research, much of which was legal in nature, during the decade leading up to the writing of

⁹ The Earl of Halsbury, et al., eds., *The Laws of England: Being a Complete Statement of the Whole Law of England*, 31 vols. (London: Butterworth and Co., 1907–17), IX, 612.

¹⁰ “*R. v. Ryan*” (1846), *Cox’s Criminal Law Cases*, 2 (1848), 115.

¹¹ “*R. v. Mayers*” (1872), *Cox’s Criminal Law Cases*, 12 (1875), 312.

¹² “*R. v. Young*” (1878), *Cox’s Criminal Law Cases*, 14 (1882), 115.

Tess. At some point in the early 1880s—the exact date cannot be determined—Hardy had recorded in his “Literary Notes III—Facts” commonplace book the case of *Futcher v. Futcher* (1881), a Chancery case concerning a husband’s fraudulent acquisition of his wife’s money on their wedding day. This entry is one of many concerning points of law and actual cases reported in newspapers and other sources and written down by Hardy. Hardy’s note entry on the Futcher case reads: “*Husband, to induce wife to marry without settlement insists on her drinking some liquid—ceremony of marriage gone through—she does not know what she is doing.*”¹³ Hardy’s source was probably the *Times*, which reported the case on 29 July 1881.¹⁴ What interested Hardy about the Futcher case was the husband’s application of spirits; other legal issues addressed in the report of the case did not find their way into Hardy’s note. Moreover, we may assume that Hardy made the above note on the case for possible *literary* use, as the notebook is entitled “Literary Notes.”

Likewise, several pages later in the same notebook Hardy summarizes a newspaper report of an assault case from 1826 that contains facts and details very similar to those found in the Chaseborough dance chapter of *Tess* (chapter 10):

Returned soldier—“Exeter Assizes.” Wm. Dodd—35—assaulting Sarah German. 21st July. Formerly a soldier in East Indies—from which he returned 6 weeks since. Acquired some property in India & has succeeded to some patrimony in this country. Was married the day after the offence, & was apprehended as he & his wife were leaving the Ch[urch]. Sarah G.—pretty girl, apparently innocent & artless, 15. Servant—Got leave from mistress to go to Moreton Hampstead fair—abt. 2 miles distant, her mother living close to the town of M. H., & she was to sleep at mother’s, & return to mistress at 7 in morning. At the fair many hours—with another young woman who afterw[ar]d left her. At the Bell Inn there was dancing—went into dancing room—about 2 in morning saw pris-

¹³ “Literary Notes III—Facts from Newspapers, Histories, Biographies, other chronicles (mainly Local),” in *The Original Manuscripts and Papers of Thomas Hardy* (East Ardsley, Yorkshire: EP Microform, 1975), reel 9, p. 19. This notebook entry and the one that follows are reproduced by permission of the Trustees of Miss E. A. Dugdale and the Thomas Hardy Memorial Collection Trustees.

¹⁴ See “Futcher v. Futcher,” London *Times*, 29 July 1881, p. 4c.

oner there—asked her in whisper to go with him. She declined also in whisper. Was coming away—prisoner followed. Made her drink from tumbler of spirits. He came out with her & s[ai]d she sh[oul]d not go to mothers [*sic*] but to her master's. Took her arm by force & led her in that direction. . . . Went on[war]d into fields. . . . Arrived at mistress's in morning. ("Literary Notes," pp. 41–42)

Possibly Hardy was influenced by his memory of this case when he came to write the dance scene in *Tess*. The parallels between the Assizes case and the novel are clear: each "innocent" woman attends a fair that continues late into the evening, there is a dancing room at each fair, each woman refuses the offer of an escort home, and each is ultimately led away from the fair by her persecutor. Thus the dance scene in *Tess* may owe something to Hardy's reading of this 1826 case during the 1880s. Hardy also records the fact that Dodd, like Mr. Futchter, forces the woman to drink spirits, presumably in order to counter her anticipated resistance.

In the 1891 edition of *Tess* Alec gives Tess a draught of a cordial from "a druggist's bottle" that he "held . . . to her mouth unawares. Tess sputtered and coughed, and gasping 'It will go on my pretty frock!' swallowed as he poured, to prevent the catastrophe she feared" (*Tess*, pp. 100–101n). Hardy removed all reference to the cordial ("spirits" in the manuscript) for the 1892 edition: "the effect," write Grindle and Gatrell, "was more to remove one of the evidences of Alec's premeditated evil intentions than to make Tess any less helpless" ("Introduction," p. 45). Alec's taking Tess "unawares" with a drug is not simply an evil intention—it is a criminal act. Halsbury's *The Laws of England* notes that "if a person by giving a woman liquor makes her intoxicated to such a degree as to be insensible, and then has connection with her, he may be convicted of rape, whether he gave her the liquor to cause insensibility or only to excite her" (IX, 612). This provision had been reiterated as recently as 1885 as part of the controversial Criminal Law Amendment Act of that year.¹⁵ Hardy could certainly have counted on his read-

¹⁵ The Criminal Law Amendment Act, 1885, 48 & 49 Vict. c. 69. See Part I, section 3.3.

ers' familiarity with the law in 1891, but he apparently preferred to tone down the criminal aspects of the assault after 1892. The effect was to make the assault in the Chase look less like rape.

Such laws and case rulings suggest that the courts would have interpreted Tess's situation as a case of rape. Why, then, does Hardy keep Tess away from an apparently sympathetic judicial system? (Only in the *Graphic* serial version of the novel do Tess and her mother consider, and then quickly dismiss, prosecution as an answer to the mock marriage arranged by Alec.)¹⁶ One explanation may be that Hardy wished to raise this very question in the minds of readers in order to remind them of the status of working-class women and their relation to the law. As Joan Perkin points out, "working-class women were almost wholly beyond the reach of the civil law." With their lack of resources and legal "know-how," women were effectively outside the scope of the law.¹⁷ The passage of the Criminal Law Amendment Act of 1885—entitled "An Act to make further provision for the Protection of Women and Girls"—suggests that the criminal law was similarly ineffective in helping women. Tess may simply not know how to proceed against Alec legally because she understands neither the law nor her place in it. Her lack of understanding is made explicit later in the book when her husband tells her, during a discussion of divorce, "You don't understand the law—you don't understand!" (p. 337). Tess is apparently as removed from the law as she is from her irresponsible "guardian angel." She cannot seek help from a legal system that she apparently knows nothing about.

Moreover, with the beginning of Phase the Second, Hardy replaces his earlier focus upon sexual assault with a new focus

¹⁶ Hardy changed the rape/seduction of the novel version to a tamer mock marriage for the *Graphic* serial version of 1891. In the serial version Mrs. Durbeyfield briefly entertains the thought of prosecuting Alec for his clever trick in making Tess think she has gone through the ceremony of marriage before a registrar (who turns out to be a friend of Alec's masquerading as a registrar). Mrs. Durbeyfield's statement, "But he can be prosecuted for this" (p. 115n)—"this" meaning mock marriage rather than rape—is, in fact, correct, and it further establishes Hardy's knowledge of Victorian law. See my "'But he can be prosecuted for this': Legal and Sociological Backgrounds of the Mock Marriage in Hardy's Serial *Tess*," *Colby Library Quarterly*, 25 (1989), 28–41.

¹⁷ See Perkin, *Women and Marriage in Nineteenth-Century England* (London: Routledge, 1989), p. 115.

on seduction and on Tess's complicity in a sexual relationship of several weeks' duration. Seduction, rather than rape, becomes the main foundation for the remainder of the plot. In his personal comments on the novel Hardy tended to emphasize the seduction rather than the sexual assault that precedes it. For example, in a letter written in 1891 to thank Thomas Macquoid for his praise of the serial *Tess*, Hardy refers to the seduction (but not the rape) of Tess in the forthcoming volume edition: "Clare's character [in the serial] suffers owing to a mock marriage having been substituted for the seduction pure & simple of the original MS.—which I did for the sake of the Young Girl. The true reading will be restored in the volumes."¹⁸ Thus, Hardy saw seduction as a major part of the "true reading" of *Tess*.

Seduction has mainly moral implications, while rape has mainly legal ones. Hardy, I believe, wanted Tess's sexuality and the matter of her purity to be considered in the minds of his readers rather than argued (with perhaps predictable results) in a fictional court of law.¹⁹ To have Tess's status as "pure" victim following the rape amplified in a court scene would perhaps settle the question of her purity too easily, and Hardy does not want that. Instead, he uses the expansiveness afforded by the novel form (rather than a single scene) to argue for a definition of female purity that includes Tess's sexual nature and her sexual responses to men. The sexual assault so carefully fore-

¹⁸ Thomas Hardy, letter to Thomas Macquoid, 29 Oct. 1891, in *The Collected Letters of Thomas Hardy*, ed. Richard Little Purdy and Michael Millgate, 7 vols. (Oxford: Clarendon Press, 1978–88), I, 245–46.

¹⁹ Peter J. Casagrande suggests that the "inexplicability" of the rape scene may be traced to Hardy's refusal to be constrained by "doctrines" and "norms." Casagrande's interpretation goes on to anticipate my own: "To explain why rather than to ask why would also enclose the entire issue in the accepted philosophical and theological doctrines of his times. But Hardy's originality in *Tess* lies precisely in his refusal to adopt constraining norms, whether artistic or theological. His creative courage rests in his determination to diverge from what had come before. He chooses not to judge Tess and her violators, for then he would be simply telling a moral tale" (see *Tess of the d'Urbervilles: Unorthodox Beauty* [New York: Twayne Publishers, 1992], p. 55). I would add that Hardy's keeping Tess out of the legal system following the rape enables him to lay the groundwork for a moral debate rather than a legal one, while the descriptions establish the fact that a sexual assault has indeed taken place. These descriptions and the subsequent allusions to seduction serve to open and guide—and complicate—the discussion of Tess's sexuality, whereas recourse to the legal system would, to borrow Casagrande's term, "enclose" it.

shadowed, described, and revised by Hardy all but disappears from the plot after Phase the First. Its implicit return occurs in Phase the Seventh, when Tess murders Alec with a knife. The murder and the weapon used complete the unfinished business of the earlier assault (Hardy suggests the validity of such a reading with the title “Fulfilment”). Violent penetration answers violent penetration, crime answers crime. Hardy brings the violent relationship of Tess and Alec to a “legal” conclusion with the execution of Tess.

Thus Hardy’s statement concerning “seduction pure & simple” is not necessarily inconsistent with an interpretation of rape if we think of the incident in the Chase as a rape that is closely followed by a second event, this one a seduction. One kind of mastery follows another. Hardy suggests the presence of these two kinds of mastery, and of this very sequence, in the narrator’s summary of Tess’s report to her mother in Phase the Second: “[Tess] had dreaded him, winced before him, succumbed to adroit advantages he took of her helplessness; *then*, temporarily blinded by his ardent manners, had been stirred to confused surrender awhile” (p. 117; emphasis added). Hardy is describing two stages—and very likely two events—in the relationship of Alec and Tess, with the all-important “then” signaling the end of one stage and the beginning of the next. In a passage that follows shortly after this one, one of the fieldworkers at Marlott speaks of this first event in words that strongly support an interpretation of rape while differentiating rape from seduction (“persuading”): “A little more than persuading had to do wi’ the coming o’ t [of Tess’s child], I reckon. There were they that heard a sobbing one night last year in The Chase; and it mid ha’ gone hard wi’ a certain party if folks had come along” (p. 127).

As I have suggested, Hardy’s writing (and rewriting) of the first of these events—the assault upon Tess in Phase the First—grew out of his knowledge of English rape law. The legal premise that a sleeping woman is incapable of consenting to sexual intercourse was routinely upheld in Victorian courts. A sleeping woman’s “purity”—purity in the sense that she cannot consent to a sexual relationship and her will cannot be known—is beyond question in the eyes of the law; therefore Hardy turns his attention from rape to seduction and to the more com-

plicated question of Tess's purity as an apparently consenting woman. The same law provides an answer to Alec's use of intoxicating liquor in the 1891 edition and in the manuscript, but, again, Alec's forcing Tess to drink against her will perhaps too easily establishes her status as "pure" victim. In the *Graphic* serial version Hardy alludes to other laws designed to protect women from men like Alec with Joan Durbeyfield's threat to prosecute Alec for arranging a sham marriage, but Hardy stops short of letting Joan's threat proceed to actual prosecution. Although Hardy revised the scenes describing the early relationship of Alec and Tess for different versions of the novel, he maintained an interest in the legal foundations of that relationship.

As a practicing justice of the peace, Hardy would have had some knowledge of these important laws and their history. To share Hardy's knowledge is to appreciate the foundation of the sexual relationship of Tess and Alec. If the references to sleep and the administering of spirits are instances of Hardy's use of his legal knowledge—and I think they are—then we must conclude that Hardy thought of the event in the Chase as a rape. Alec's brutal mastery of Tess through rape makes possible his subsequent mastery of her through seduction. Hardy wants the equation to read a particular way: Tess is seduced because she was raped. Thus Hardy must describe the rape in some way, even though in doing so he will lessen Tess's status as victim somewhat and thus postpone the discussion of her purity. So he removes the reference to intoxicating liquor. The remaining fact that Tess is asleep adds to the pattern of references to sexual assault begun in the novel's earliest chapters. In an otherwise perceptive reading of this pattern of references, Kristin Brady concludes that "the question of whether Tess was raped or seduced by Alec d'Urberville" may represent "reductive thinking about sex" and may, after all, be quite beside the point (pp. 144–45). It is difficult, however, to dismiss this pattern of rape followed by seduction, or Hardy's research into the law during the 1880s that is recorded in his notebooks, or his writing and re-writing of the scene over a period of years. His revisions to the scene modify rather than cancel the evidence for sexual assault, evidence that is subtly woven into the narrative and is crucial to our understanding of the scene. It is, moreover, evi-

dence upon which Victorian rape law was partly based and upon which convictions were upheld. An English court would have found much that is potentially criminal in Alec's assault upon the sleeping Tess. Hardy's readers can find in the rape of Tess the crucial event that prepares the way for her seduction and a central moment that establishes her purity, a purity that remains even after she is "stirred to confused surrender."

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