



March 1989

## **"But he can be prosecuted for this": Legal and Sociology Backgrounds of the Mock Marriage in Hardy's Serial Tess**

William A. Davis, Jr.

Follow this and additional works at: <https://digitalcommons.colby.edu/cq>

---

### **Recommended Citation**

Colby Library Quarterly, Volume 25, no.1, March 1989, p.28-41

This Article is brought to you for free and open access by Digital Commons @ Colby. It has been accepted for inclusion in Colby Quarterly by an authorized editor of Digital Commons @ Colby.

*"But he can be prosecuted for this":  
Legal and Sociological Backgrounds  
of the Mock Marriage  
in Hardy's Serial Tess*

by WILLIAM A. DAVIS, JR.

THE YEARS 1884–1894 represented for Thomas Hardy a decade of creativity and achievement unequaled by any other period in his career as a novelist. This decade saw the composition and publication of *The Mayor of Casterbridge*, *The Woodlanders*, and *Tess of the d'Urbervilles*, in addition to other lesser works, and the conception of *Jude the Obscure*. Now, thanks to two pioneering studies by Edward C. Sampson and Harold Orel, readers have access to the record of Hardy's other profession as justice of the peace for the borough of Dorchester (from 1884) and for the county of Dorset (from 1894). Although the careful attention given to Hardy's interest in the law made it necessary for both Sampson and Orel to limit their commentary on Hardy's fiction, their studies will doubtless serve as starting-points for new readings of the novels for some time to come. My subject is the fusion of Hardy's two interests – literature and the law – during the revision of *Tess of the d'Urbervilles* for serial publication.<sup>1</sup> My purpose is to apply some of the recently discovered materials on Hardy's interest in legal matters, together with relevant and (as far as the present context is concerned) as yet unexplored documents of nineteenth-century law, to a well known and very possibly misunderstood scene in *Tess*: the mock marriage that appeared in the 1 August 1891 issue of *The Graphic*. In the course of my discussion I will focus upon civil marriage in Victorian England and upon nineteenth-century statutes concerning the unlawful procurement of carnal knowledge. I hope to show that the mock marriage was not a carelessly or hurriedly adopted expedient borrowed from literary convention<sup>2</sup> and inserted merely to ensure the novel's serial publication (although it certainly helped in that cause). On the contrary, the "marriage" of Tess and Alec in *The Graphic* of 1891 was more than likely a product of Hardy's knowledge of the issues named above and his interest in criminal cases then before the Court of Appeal.

1. On the revision and serial publication of *Tess*, see the studies by Laird, Chase, Purdy, and Davis. Hardy's own account of the revisions is given in *The Life of Thomas Hardy*. See also the excellent introductory and textual apparatus contained in the Oxford edition of *Tess* (1983).

2. See Calder, 16 et passim, on the conventions of abduction and elopement in Romantic and Victorian fiction. Steven Marcus, in his explication/summary of a pornographic novel first published in 1828 and entitled *The Lustful Turk*, notes that the villain "arranges for a fake marriage performed by a fake English priest" and immediately thereafter effects the heroine's defloration (202). I have not been able to examine a copy of the novel, nor am I aware of any evidence suggesting that Hardy ever read or heard about it.

As such, the "marriage" was intended to awaken recognition in and convey significant meaning to a nineteenth-century audience well prepared for such a literary exercise.

What that audience read on 1 August was Tess's very brief account of a civil marriage that turns out to be no marriage at all:

"Well! — my dear Tess!" exclaimed her surprised mother, jumping up and kissing the girl. "How be ye? I didn't see you till you was in upon me! Have you come home to be married?"

"No, I have not come for that, mother."

"Then for a holiday?"

"Yes — for a holiday; for a long holiday," said Tess.

Her mother eyed her narrowly. "Come, you have not told me all," she said.

Then Tess told. "He made love to me, as you said he would do; and he asked me to marry him, also just as you declared he would. I never have liked him; but at last I agreed, knowing you'd be angry if I didn't. He said it must be private, even from you, on account of his mother; and by special licence; and foolish I agreed to that likewise, to get rid of his pestering. I drove with him to Melchester, and there in a private room I went through the form of marriage with him as before a registrar. A few weeks after, I found out that it was not the registrar's house we had gone to, as I had supposed, but the house of a friend of his, who had played the part of the registrar. I then came away from Trantridge instantly, though he wished me to stay; and here I am."

"But he can be prosecuted for this," said Joan.

"O, no — say nothing!" answered Tess. "It will do me more harm than leaving it alone."

Joan thought so too, "as it was all in their own family," and silence was accordingly determined on and kept. Moreover, she could not help asking herself if it might not be a legal marriage after all? Stranger things had been known. (136)

The first issues to address here are the civil marriage itself and Alec's machinations, which very likely reflect Hardy's knowledge of the intricacies of this form of marriage. One might begin by asking why Hardy has Alec fake a civil marriage before a "registrar" rather than a religious ceremony (Hardy could have had Alec's friend impersonate a priest or minister instead of a registrar). The answer is that Alec, to be at all worthy of his role as villain, would have chosen this form (if only for the purpose of faking it), knowing that it had for his purposes certain advantages over the religious form, and knowing that Tess would actually prefer civil marriage to a religious ceremony because of these advantages. Civil marriage, as Olive Anderson points out, was "both cheap . . . and entirely free from publicity" ("The Incidence of Civil Marriage," 65). This second characteristic would have had a special appeal for Hardy's Tess. It is very likely, therefore, that Hardy built the scene around civil marriage in part to make Tess's acquiescence seem as natural as possible and wholly in character.<sup>3</sup> It is important to note also that Tess would have been especially agreeable to a marriage by "special licence." With the passage of The Marriages Act, 1856, the "notice" for this type of marriage took the

3. Anderson also notes that civil marriage was a commonly accepted practice in nineteenth-century England. In 1884, for example, 10 percent of all marriages taking place in the Southeast of England were civil marriages. In the Southwest, again for 1884, 19 percent of all marriages were performed before a superintendent-registrar ("The Incidence of Civil Marriage," 55). Tess's participation in a civil marriage would have come as no surprise to Hardy's readers, and Tess herself, in agreeing to Alec's scheme, would not have been doing anything at all unusual for a woman of her age, position, and temperament.

form of an entry in the superintendent-registrar's marriage notice book, not the public display "in some conspicuous place" required for marriages solemnized without a license (19 & 20 Vict. c.119, §§ 4 & 5).<sup>4</sup> Moreover, marriage by special license after 1856 could be decided upon and solemnized in a period of a few days (19 & 20 Vict. c.119, § 9) as opposed to three weeks for marriages without a license (19 & 20 Vict. c.119, § 4). Church marriage, with the required publication of banns over a period of three weeks, often resulted in "three weeks' rowdiness and . . . cruel teasing" (Anderson, "The Incidence of Civil Marriage," 65) and would not, therefore, have appealed to Tess, whose aversion to teasing is dramatized at the beginning of the novel in the Marlott dance scene. Marriage by special license would have been a perfect lure to attract a shy young woman concerned with bringing matters to a close as quickly and as quietly as possible.

The privacy of the form and the fact that "preliminary publicity for a marriage could . . . be virtually eliminated" (Anderson, "The Incidence of Civil Marriage," 65) would have appealed to Alec as well. The success of Alec's scheme depended largely on no one's finding out that the required notice of intended marriage had not been filed with the superintendent-registrar of the district. Since "nobody went into the superintendent-registrar's office except on business" (Anderson, "The Incidence of Civil Marriage," 65), the completion of the plan would have been almost assured. Civil marriage, then, provided Alec with a convenient set of rules and practices waiting to be abused. For example, if Tess had questioned Alec about advising the officials in Marlott concerning their plans to marry by license, Alec might have responded that such advisement was not necessary. His answer would have been completely within the law (19 & 20 Vict. c.119, § 6). Similarly, if Tess had questioned Alec about the procedure for giving notice to the superintendent-registrar, Alec might have referred her to 19 & 20 Vict. c.119, § 2, which requires that only one of the parties initiate the procedure with a signed declaration stating that the way is clear for a legal marriage. In having Alec choose civil marriage over the religious form, Hardy brilliantly enhances Alec's position as the worst kind of villain: one who knows how to feign obedience to civil laws even while using and mocking them.

Hardy's readers, moreover, would have read Tess's account of the "marriage" and immediately been reminded that civil marriage had suffered a long history of abuse since its beginnings in 1837.<sup>5</sup> The "traditions of loose marriage, bigamy, recklessness and haste" associated with civil marriage at the Scottish border were regular topics of conversation by mid-century, and the situation there and in the north of England had

4. This statute, along with others relating to civil marriage, may be found in various compilations (for example, *Chitty's Statutes*) and in James T. Hammick, *The Acts Relating to the Registration of Births, Deaths, and Marriages*.

5. The statute that made civil marriage a reality in England was 6 & 7 Will. 4. c.85.

deteriorated sufficiently by 1856 to cause Parliament to pass legislation "requiring three weeks' residence for a marriage under Scots law to be valid" (Anderson, "The Incidence of Civil Marriage," 68–69). Moreover, the fact that parties in a civil marriage might not even know the registrar before whom they stood might well have encouraged attempts at fraud. In 1872, for example, one Edward Rea found himself in court explaining his earlier failure to identify himself properly (including the fact that he was married) to a registrar during a civil marriage ceremony.<sup>6</sup> Nevill Geary, in *The Law of Marriage and Family Relations: A Manual of Practical Law* (1892), provides an interesting account of a similar case that exposes some of the ways in which civil marriage procedures were abused:

a witness to a marriage was convicted for signing in a wrong name under the following facts: — One Wilcocks was engaged to be married to Sarah Ann Kinlock; but he, being a married man, had assumed the name of Richardson. The friends of Miss Kinlock, knowing little or nothing of Richardson, had insisted that some member of Richardson's family should be present at the marriage. Richardson made the acquaintance of the prisoner in a casual manner, in a train on the Great Northern Railway, and invited him as a guest to the wedding. On the prisoner's arrival on the morning the marriage was to be solemnised, Richardson told the prisoner that his brother had failed to be present, and asked him to personate his brother. This the prisoner, after some reluctance, agreed to, and, after the ceremony was concluded, signed his name in the parish register of marriages as "Geo. Richardson," there being also two other witnesses. Before the bride and bridegroom left, the prisoner admitted the deception he had practised, and the marriage was never consummated. Richardson, *alias* Wilcocks, was indicted and convicted for bigamy. The prisoner was convicted of making a false entry in a marriage register, notwithstanding that there was no proof of fraudulent intention, and sentenced to a month's imprisonment. (472)

Such breaches of the civil marriage laws and the ensuing statutes intended to prevent or punish them combine to form one part of the historical foundation of Alec's scheme. Hardy could have assumed his audience's familiarity with the state of civil marriage before 1891. Civil marriage, in short, provided Hardy with a documented history of abuses and a form of union that both Tess and Alec would have sought (for their very different reasons) before any other form. History and the personalities of Hardy's characters show us that civil marriage was an obvious and justifiable choice for Hardy at this stage in the revision of *Tess*.<sup>7</sup>

6. Legal cases listed in the Works Cited page are cited by name, volume number, reporter title, and page number.

7. Anderson comments on "one of the many subterranean shifts which accompanied the second stage of Britain's nineteenth-century modernization explosion: the entrenchment of registers and certificates as means of identifying the possessors of specific rights and duties, manifested here in greater esteem for legal marriage and a demand for 'marriage lines'" ("The Incidence of Civil Marriage," 86). Hardy's use of the mock marriage thus represents a joining of a convention of literary villainy and a modern sociological phenomenon. See also Floud and Thane's "Debate."

Also underlying Hardy's use of the mock marriage was his need to replace Tess's seduction at Trantridge (which would clearly have been unacceptable material for a family magazine) in the manuscript with something morally acceptable. Evelyn Hinz's argument points to an assumption about morals, marriages, and fiction that may well have occurred to Hardy and his readers: "We are accustomed to regard marriage as a social and legal institution with moral overtones or as a conjugal relationship which, if not always ratified by society, nevertheless takes place within a social frame of reference; hence, we are disposed to see it as a subject practically indigenous to the novel" (900).

As a final note to the present discussion of civil marriage, it seems worth pointing out that Sue and Jude also "fake" a civil marriage in *Jude the Obscure*. They travel to London with the intention of legally mar-

The history of false marriage and the unlawful procurement of girls and women for carnal knowledge in eighteenth- and nineteenth-century England is both interesting and (in legal works) well documented. I shall examine this history in two stages, treating first those cases brought to court before the passage of what is known as The Criminal Law Amendment Act, 1885, and then turning to cases tried after that date. As we shall see, a key issue contained in the mock marriage in the serial *Tess* is Joan Durbeyfield's fleeting threat of prosecution. By turning our attention away from the registrar's office to the courts, we may begin to make several important connections between English statutes, actual cases in criminal court before and during the time of the composition of *Tess*, and Hardy's probable knowledge of those statutes and cases.

Samuel Stone's *The Justices' Pocket Manual; or, Guide to the Ordinary Duties of a Justice of the Peace*, which Hardy owned (Sampson, 264), contains the following entry under the heading "Woman":

PROCURING DEFILEMENT. — Any person by false representation or fraudulent means, procuring any woman or child under the age of twenty-one, to have illicit carnal connection with a man, is guilty of a misdemeanor, and liable to impr. with labour for not exceeding two years, and the court may order costs as in felonies. (316–17)<sup>8</sup>

The principal duty of the justice in such a case would have been to gather the initial facts and then refer the case to a higher court for prosecution. Significantly, this passage from the manual defines the exact crime with which Alec and his friend would have been charged. (As we shall see, the laws against such actions were revised and strengthened considerably, though still not adequately, in 1885.) Moreover, one may begin to see how the connection between civil marriage and false representation might have formed in Hardy's mind. As defendants in court, Alec and his friend would not have found any comfort in the rehearsal of cases cited by the prosecution as precedents justifying conviction.

The most important of those cases tried before 1885 were (in chronological order) *R. v. Pierson and Others* (1737), *R. v. Delaval and Others* (1763), *R. v. Mary Anne Mears and Amelia Chalk* (1851), and *R. v. Simeon Howell and Mary Bentley* (1864).<sup>9</sup> The first two of these concerned members of the aristocracy conspiring to have illicit carnal connections with girls 16 or under. (As eighteenth-century cases, of course, *R. v. Pierson and Others* and *R. v. Delaval and Others* would not have come under 12 & 13 Vict. c.76 but under a similar statute: 4 & 5 Phil. & M. c.8 [1557].)

rying, but their fear of the institution of marriage prevents them from achieving their purpose. Nevertheless, they let people *think* they are married, and in doing so they rely on the anonymity provided by civil marriage.

8. This is Stone's paraphrase of statute 12 & 13 Vict. c.76 (1849). Stone's manual was updated annually. I have quoted from the 1851 edition. It is very likely that Hardy used more recent editions in order to stay current with the law.

9. I shall limit my discussion to the first three of these, *R. v. Simeon Howell and Mary Bentley* being fundamentally similar to *R. v. Mary Anne Mears and Amelia Chalk*.

In *R. v. Pierson*, the defendant, a member of the Tankerville family (the name suggests d'Urberville), conspired with another Tankerville, two clergymen, and several Tankerville servants to trick Mary Eads, a girl under the age of 16, into marrying him. Pierson, "in low circumstances" (412), arranged the marriage so that he could enjoy Mary Eads's personal estate, worth £10,000. A major issue in the case was Mary Eads's consent to the marriage, the defense arguing that no crime could have been committed given the plaintiff's consent. The court countered that "taking away a young woman under age, against the consent of her father, though it be without force, and with her own consent, is certainly punishable at common law" (412). An "information was accordingly granted against" all the defendants, clergy included (413).

*R. v. Delaval and Others* concerned the relationship of Ann Catley, 19, Sir Francis Delaval, and a man named Bates, a music teacher. Ann Catley had been apprenticed to Bates in order to learn music and make her living in that profession. At age 19, Ann met Sir Francis and ran off with him. Later, Sir Francis paid Bates £200 for Ann's release from the apprenticeship and then proceeded to contract with Ann's father, Bates, and an attorney named Fraine to keep Ann at his (Sir Francis's) house and arrange to have her taught music. A case was brought by Ann's father against the three other men "for a conspiracy to debauch his daughter under the forms of law" (234). In court, Ann's father proved to the court's satisfaction that the music instruction arrangement was "plainly calculated for the purpose of prostitution only" (251). An "information was made absolute against all three," and Sir Francis received an additional reprimand: "His only plea is a very poor one, that the woman tempted him, and he complied from his regard to her" (252).

The fact that Sir Francis brought Ann Catley to his house under false pretenses provides an interesting link to *Tess*, in which poultry-tending replaces music instruction as lure (Alec does, however, teach Tess how to whistle). One case not involving members of the aristocracy provides additional parallels to Hardy's novel. *R. v. Mears* charged Mary Anne Mears with conspiring under false pretenses to effect the ruin of Johanna Carroll, 15, by having her engage in prostitution. Johanna Carroll had been a servant but was out of work and had no place to live. Mary Anne Mears, claiming to have known Johanna's deceased parents, offered Johanna food and lodging and promised to help her find a position in service. What followed was not what was promised but Mears's repeated attempts to get Johanna to "go into the bedroom" with a man (425). The court considered a major issue the fact that Mears and her accomplice did not know Johanna Carroll's parents, as they had claimed. Although Johanna Carroll was spared the fate that Mears had planned for her, the Criminal Court of Appeal affirmed the conviction of Mears and her accomplice, noting that "a conspiracy to solicit prostitution, being against good morals and public decency, is . . . an indictable offence" (427).

Of significance in the Mears case is the defendant's claim to have known the plaintiff's parents, a claim stated solely for the purpose of eventually having Johanna Carroll engage in illicit carnal connections. Alec, of course, plays not only upon Tess's poverty but upon her belief that he has a legitimate connection to her family. These three cases, then, contain many of the main details of the mock marriage in *Tess*. Together they cover false pretenses, conspiracy among friends, the victim's consent, her family, her poverty, and her helplessness. Significantly, all three plaintiffs did not know they were being tricked until the schemes to debauch them were well under way. If any defense of Tess's inability to recognize deceit is needed, these three cases go a long way toward supplying that defense. They show real people being defrauded by clever schemes similar to the one Tess describes to her mother.

By mid-century, the number of cases having to do with the unlawful procurement of women was sufficient to convince British authorities that further steps needed to be taken to ensure the safety of women and young girls. Accordingly, Parliament enacted, in 1861, The Offences Against the Person Act (24 & 25 Vict. c.100). Under the subheading "Rape, Abduction, and Defilement of Women," this legislation addressed such crimes as rape, procuring the defilement of a girl under age, carnally knowing a girl under ten, carnally knowing a girl between ten and twelve, indecent assault, fraudulent abduction against the person's will from motives of lucre, forcible abduction with intent to marry or know carnally, and abduction of girls under age 16.<sup>10</sup> As far as I am able to discern, the primary effect of The Offences Against the Person Act was to establish new categories of offenses and penalties beyond those included in 12 and 13 Vict. c.76. The victim's age, moreover, assumed greater importance as a basis for penalties.

In 1885, Parliament enacted its most comprehensive legislation aimed at punishing the kinds of schemes concocted by Delaval, Pierson, Mears, and others. The stated purpose of The Criminal Law Amendment Act (48 & 49 Vict. c.69) was "to make further provision for the Protection of Women and Girls," and it did so by spelling out offenses and penalties in several categories and subcategories.<sup>11</sup> First researched in 1881 and 1882 and drafted in the House of Lords in 1883, the bill represented the efforts of those members of Parliament who "believed the people were calling for greater severity" of punishment for crimes against women (*The Times*, 1 August). Upon passage of the bill in August 1885 (two earlier attempts in 1883 and 1884 had failed to produce a law), Earl Fortescue referred to the

10. See 24 & 25 Vict. c.100, sections 48-55.

11. Despite the fact that The Criminal Law Amendment Act, 1885, provided greater protection than had ever been provided before, Justice Hawkins wrote in 1890 that it "requires much amendment" (R. v. Paul, 213). His statement may be owing to the fact that the conviction of Paul had to be "quashed" because the key evidence was found to be inadmissible. (See my summary of the case in the text.) The debates that took place during the drafting of the Act were long and complex and received extensive coverage in *The Times*. For references to this coverage, see the Works Cited page.



Lords who had supported it as “really pioneers” (*The Times*, 11 August). Since this statute and the cases prosecuted under it represent probable sources for Alec’s unlawful procurement of Tess, I shall examine both in some detail.

The majority of the cases prosecuted under The Criminal Law Amendment Act between 1885 and 1891 (when *Tess* was published) involved offenses indictable under one or, less frequently, two sections of the Act. Alec d’Urberville, as far as I am able to judge, would have faced indictment on either one of two counts covered by the Act. The applicable parts of the two sections read as follows:

§2. Any person who—

- (1) Procures or attempts to procure any girl or woman under twenty-one years of age, not being a common prostitute, or of known immoral character, to have unlawful carnal connection, either within or without the queen’s dominions, with any other person or persons . . . shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour. Provided that no person shall be convicted of any offence under this section upon the evidence of one witness, unless such witness be corroborated in some material particular by evidence implicating the accused.

§3. Any person who— . . .

- (2) By false pretences or false representation procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connection, either within or without the queen’s dominions . . . shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour. Provided that no person shall be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused.

Setting aside for the moment the question of the victim’s moral character and the need for corroborative evidence, one may find in the above sections the statutory answers to Alec’s clever manipulation of the civil marriage laws. Section three, covering “false pretences and false representation,” was largely the effort of Sir R. Cross, who argued for its inclusion (*The Times*, 1 August). Hardy seems to have had some acquaintance with Cross and heard him speak in Parliament (though on a different matter) in May 1886 (*Life*, 178). According to *The Times*, the original version of section three “was framed so as only to apply to cases like that of a sham marriage, in which the woman was quite innocent” (11 August). Members of the House of Commons inserted several changes, however, much to the dismay of several Lords. *The Times*, in paraphrasing one rather displeased legislator, wrote: “Under this clause, a woman who knew that she was about to consort unlawfully with a man might nevertheless afterwards prosecute him for having obtained her consent by false representations, such as the promise of a note or sovereign which should subsequently be shown to be bad” (11 August). Thus section three

was capable of a broad application, but it is interesting to note that it was originally conceived as a penalty for the very offense that Alec commits. Alec *could* have been prosecuted, and possibly convicted, as a number of real offenders were between 1885 and 1891; and his friend might have been prosecuted and convicted also, as many accomplices were.<sup>12</sup>

The actual cases prosecuted under this statute were *R. v. Webster* (11 December 1885), *R. v. Wealand* (26 April 1888), *R. v. Paul* (12 May–21 June 1890), and *R. v. Marsden* (14 May 1891).<sup>13</sup> A brief mention of the facts of each case will suffice. In *R. v. Webster*, the conviction of Rebecca Webster for allowing her daughter Eliza, age 14, to have sex with a man in her own home was affirmed under section six of the statute. In *R. v. Wealand*, the defendant was indicted under section four of the statute "for unlawfully and carnally knowing Eliza Wheal," who was five years old at the time. Wealand, however, was acquitted of that charge because Eliza's testimony was unsworn and therefore inadmissible. The jury in Wealand's first trial nevertheless found him guilty of indecent assault (section nine), and his conviction on this count was affirmed on appeal. *R. v. Paul* concerned the prosecution of William Paul for attempting to have sex with a girl under 13 years of age. In Paul's first trial, no evidence was found to support the most serious charge—attempting to have carnal knowledge (section four)—but the jury did find Paul guilty of indecent assault (section nine). On appeal, however, the court had to quash Paul's conviction because unsworn evidence was deemed inadmissible in cases of indecent assault. *R. v. Marsden* was considerably less complicated but remains noteworthy for the defendant's attempt to avoid prosecution by claiming that the absence of an "emission" meant that no crime had been committed. The appeals court disagreed with Marsden's theory and affirmed the first court's conviction.

Thus, some defendants were able to find weaknesses in The Criminal Law Amendment Act and, by exploiting those weaknesses, secure their freedom, and others were sentenced under the Act's various provisions. Significantly, all four cases reviewed above were argued in the Court of Appeal, and at least two of them were covered in *The Times*.<sup>14</sup> A closer look at the Court of Appeal provides evidence of a likely and significant connection between these cases, Thomas Hardy, and the revised version of *Tess*. *R. v. Webster*, *R. v. Wealand*, and *R. v. Paul* were argued before Chief Justice Coleridge and Justice Hawkins, and *R. v. Marsden* was argued before Chief Justice Coleridge. Hardy knew both justices, and in

12. Alec's friend, and possibly Alec himself, would have also faced charges under 6 & 7 Will. 4. c.85, § 39, which reads: "every person who after the said [first day of March] shall knowingly and wilfully solemnize any marriage in England, except by special license, in any other place than a church or chapel in which marriages may be solemnized according to the rites of the Church of England, or than the registered building or office specified in the notice and certificate as aforesaid, shall be guilty of felony."

13. *R. v. Henkers* (30 September 1886) is also relevant, but I shall pass over it in favor of cases more likely to have been known to Hardy.

14. These cases were *R. v. Wealand* (*The Times*, 23 April 1888, 5d) and *R. v. Webster* (*The Times*, 12 December 1885, 7c).

the *Life* he describes a dinner at which Hawkins and Coleridge told "stories":

*December 17.* At an interesting legal dinner at Sir Francis Jeune's. They were all men of law but myself — mostly judges. Their stories, so old and boring to one another, were all new to me, and I was delighted. Hawkins told me his experiences in the Tichborne case, and that it was by a mere chance that he was not on the other side. Lord Coleridge (the cross-examiner in the same case, with his famous, "Would you be surprised to hear?") was also anecdotic. (251)

This "legal dinner" took place in 1892, after the publication of *Tess*, but it was very likely typical of other, earlier meetings between Hardy and Coleridge, one of which occurred in 1884 at the Dorchester Assizes (*Life*, 167). In his account of that meeting, Hardy alludes to other encounters with legal men in a sentence that is less than flattering to such individuals: "*July 14. Assizes. Dorchester* — The Lord Chief Justice, eminent counsel, etc., reveal more of their weaknesses and vanities here in the country than in London." Both the 1892 and 1884 entries seem to refer to several meetings between Hardy and various "men of law," meetings not otherwise documented. These entries also show evidence of a close familiarity with those men. Hardy refers to Hawkins by last name rather than by title, and he is sufficiently intimate with Coleridge to know his "famous" preamble to legal stories, which "delighted" Hardy. It is very likely, therefore, that Hardy had occasion, between the passage of the Criminal Law Amendment Act in 1885 and the serialization of *Tess* in 1891, to discuss one or more of the cases decided by Hawkins and Coleridge with one or both justices.<sup>15</sup> It is also possible that the need for a Criminal Law Amendment Act in the first place (confirmed by the ensuing litigation) convinced Hardy to introduce the law into his story and thereby make a statement, based upon contemporary events, about the status of his revised heroine as victim.<sup>16</sup>

That "statement" has to do with the final detail of the mock marriage scene: Tess's refusal to entertain thoughts of prosecution because such an action would do her "more harm than leaving it alone." Hardy had, I

15. Sampson (263) was the first scholar to uncover the fact (recorded in the *Life*) that in 1890 Hardy visited the London "police courts, where just at this time he occasionally spent half an hour, being still compelled to get novel padding" (*Life*, 227). One wonders if the reference to being "compelled" alludes to aggravation over having to revise *Tess*. The passage then continues: "On the last day of the month [June 1890] he wound up his series of visits to London entertainments and law-offices with the remark, 'Am getting tired of investigating life at music-halls and police-courts' " (*Life*, 227). Hardy does not state that these visits involved Hawkins, Coleridge, or The Criminal Law Amendment Act. It is possible that they did.

Significantly, Hardy referred to the legal authority of Tess's sentence for murdering Alec shortly after the novel's publication. See *Letters* 1. 290 and 2. 62. In the first of these two letters, a response to Walter Morrison, Hardy sounds quite like a legal authority in discussing Angel Clare's culpability as accessory to murder: "The writer [Morrison] is in error. Not an accessory before, nor after — not having believed her story. If guilty of culpable negligence 3 months wd have been enough — & this wd have elapsed by time of execution — the time he had waited for trial being taken into account in sentence."

16. It seems worth noting at this point that the mock marriage did not appear in the American serial published in *Harper's Bazar* from 18 July to 26 December 1891. A possible reason for the absence of the marriage in America is the fact that The Criminal Law Amendment Act and the cases cited were current topics of conversation in England and could therefore be counted on for background there but not elsewhere.

believe, at least three reasons for not pursuing the issue of prosecution. First, the mock marriage was intended to perform its plot function and, while doing so, to refer to contemporary statutes and cases as authorities outside of but relevant to the story. The marriage was intended to conclude, not begin, a plot line. Second, as Jenni Calder reminds us in her study of relationships in Victorian fiction, "the female *must* be weaker than the male, whether the male is authorized lover or would-be seducer" (114). "[I]f," writes Calder, "the male were preying on an equal [i.e., one who would answer an offense with a prosecution] the whole effect would be lost" (114). Certainly *Tess* would have been an entirely different novel had prosecution been made an integral part of the plot.

A more fundamental reason for raising and then dropping (it is significant that the passage does both) the issue of prosecution lies in the status of the laws protecting women in 1891. The Criminal Law Amendment Act tried to make men and women equal, if only by stating that every offense committed by the male would be met with a penalty served on behalf of the female. The Act, however, had its share of shortcomings, some of which the cases tried under it reveal. Tess Durbeyfield, age 16 and some months (*Tess*, New Wessex Edition, 51), would have had to supply either a corroborating witness or corroborating material evidence, either of which would have been hard to find at Trantridge, in order to have her charges against Alec upheld in court. Her moral character, moreover, would have come under question (presumably by the defense), and, if my understanding of the Act is correct, she would have had to prove herself a decent person (i.e., not a prostitute). This provision, it seems to me, strikes at the very core of Hardy's story about "a Pure Woman." Thus the mock marriage contains not only an allusion to but, upon closer inspection, an indictment of this provision found in the relevant sections of the Act. Had Tess (or her mother) decided to prosecute, the Act designed to protect her would have provided little help, and her solitary testimony would not have been accepted by the court. In 1890, Justice Hawkins lamented that "the law created by the statute is in a very unsatisfactory state, and requires much amendment" (*R. v. Paul*, 213). The mock marriage scene in the serial version of *Tess* represents Hardy's way of saying much the same thing.<sup>17</sup>

It is important to remember that the mock marriage was, in the first place, a revision made necessary by the state of serial publication in the nineteenth century. Mrs. Grundy did not like to see seductions or "loose" women characters made the subjects of stories published in the pages of family magazines such as *The Graphic*. Hardy disagreed strongly with the Mrs. Grundys of his day and lamented the power they exercised over the

17. Orel's comment on the relationship between the actions of Hardy's characters and their author's knowledge of the law is relevant to Tess's refusal to pursue prosecution: "Hardy's knowledge of the ways in which courts operate was used to buttress the probability of actions taken by individual characters" (141). Weissman argues much the same point in her discussion of Tess's idea to have Angel marry Liza-Lu at the end of the novel.

press, but he changed his story anyway.<sup>18</sup> It would be wrong to assume, however, that he did so carelessly (the judicious choice of civil marriage suggests his careful approach to the scene), or that he would have let pass the opportunity afforded by the necessary revision to expose the inadequacies of the laws governing civil marriage and the protection of women. His experiences as a justice of the peace and his familiarity with the framers and enforcers of The Criminal Law Amendment Act prepared him for such an endeavor. The mock marriage scene, far from eclipsing or replacing the original conception of *Tess*, announces one of the novel's main themes—the plight of women in late nineteenth-century England—and points the finger of blame at the marriage and protection laws then current. When Tess says that standing up for her rights will do her “more harm than leaving it alone,” we may understand the statement to mean that the law was capable of doing all women more harm than good. Thus the mock marriage scene in *The Graphic* does not constitute simply a bowdlerized plot incident but rather an alternative dramatization of issues addressed more gradually in the published novel. Four years after the publication of *Tess*, Hardy would use the laws relating to women generally and the marriage laws specifically as the “tragic machinery” of *Jude the Obscure* (25). It is important to recognize that the same tragic machinery served as the foundation for the first published version of *Tess*, in which the brief conversation of a young girl and her mother moves well beyond its fictional boundaries in order to address the legal and social complexities facing women in late nineteenth-century England.

### Works Cited

- ANDERSON, OLIVE. “The Incidence of Civil Marriage in Victorian England and Wales.” *Past and Present*, 69 (1975), 50–87.
- . “The Incidence of Civil Marriage in Victorian England and Wales: A Rejoinder.” *Past and Present*, 84 (1979), 155–62.
- CALDER, JENNI. *Women and Marriage in Victorian Fiction*. New York: Oxford Univ. Press, 1976.
- CHASE, MARY ELLEN. *Thomas Hardy from Serial to Novel*. Minneapolis: Univ. of Minnesota Press, 1927.
- “The Criminal Law Amendment Bill.” *The Times* (London), 1 August 1885, p. 6, col. f; 4 August 1885, p. 4, col. f; 7 August 1885, p. 8, col. b; 8 August 1885, p. 7, col. d; 11 August 1885, p. 6, col. d.
- DAVIS, WILLIAM A., JR. “‘How shall I tell ’em’: Hardy’s ‘Literary Conscience’ and *Tess of the d’Urbervilles*.” *Collections*, 2 (1987), 45–63.

18. It is a well-known fact that Hardy was not pleased at having to revise *Tess* for serial publication. As I have tried to show, this fact does not mean that *The Graphic* version of the novel lacks significance or meaning, nor does it mean that Hardy did not try to include in the mock marriage issues important to the novel from its first conception. Hardy’s comments on the revised version of *Tess* are almost entirely negative. For Hardy’s thoughts on serial publication, see “Candour in English Fiction.”

- FLOUDD, RODERICK and PAT THANE. "Debate: The Incidence of Civil Marriage in Victorian England and Wales." *Past and Present*, 84 (1979), 146-54.
- GEARY, NEVILL. *The Law of Marriage and Family Relations: A Manual of Practical Law*. London: Adam and Charles Black, 1892.
- HAMMICK, JAMES. *The Acts Relating to the Registration of Births, Deaths, and Marriages, and the Duties of Registration Officers*. London: Shaw and Sons, 1875.
- HARDY, FLORENCE EMILY. *The Life of Thomas Hardy, 1840-1928*. London: Macmillan, 1962.
- HARDY, THOMAS. "Candour in English Fiction." *Thomas Hardy's Personal Writings*. Ed. Harold Orel. Lawrence: Univ. of Kansas Press, 1966, pp. 125-33.
- . *The Collected Letters of Thomas Hardy*. Ed. Richard Little Purdy and Michael Millgate. Oxford: Clarendon Press, 1978.
- . *Jude the Obscure*. New Wessex Edition. Ed. P. N. Furbank. London: Macmillan, 1974.
- . *Tess of the d'Urbervilles*. *The Graphic*, 4 July-26 December 1891.
- . *Tess of the d'Urbervilles*. *Harper's Bazar*, 18 July-26 December 1891.
- . *Tess of the d'Urbervilles*. New Wessex Edition. Ed. P. N. Furbank. London: Macmillan, 1974.
- . *Tess of the d'Urbervilles*. Ed. Simon Gatrell and Juliet Grindle. Oxford: Clarendon Press, 1983.
- HINZ, EVELYN. "Hierogamy versus Wedlock: Types of Marriage Plots and Their Relationship to Genres of Prose Fiction." *PMLA*, 91 (1976), 900-13.
- LAIRD, J. T. "New Light on the Evolution of *Tess of the d'Urbervilles*." *Review of English Studies*, 31 (1980), 414-35.
- . *The Shaping of "Tess of the d'Urbervilles"*. Oxford: Clarendon Press, 1975.
- MARCUS, STEVEN. *The Other Victorians: A Study of Sexuality and Pornography in Mid-Nineteenth-Century England*. New York: Norton, 1985.
- OREL, HAROLD. *The Unknown Thomas Hardy: Lesser-Known Aspects of Hardy's Life and Career*. Brighton, England: Harvester Press, Ltd., 1987.
- PURDY, RICHARD L. *Thomas Hardy: A Bibliographical Study*. London: Oxford Univ. Press, 1954.
- "Queen v. Wealand." *The Times* (London), 23 April 1888, p. 5, col. d.
- "Queen v. Webster." *The Times* (London), 12 December 1885, p. 7, col. c.
- SAMPSON, EDWARD C. "Thomas Hardy: Justice of the Peace." *Colby Library Quarterly*, 13 (1977), 263-74.
- STONE, SAMUEL. *The Justices' Pocket Manual; or, Guide to the Ordinary Duties of a Justice of the Peace*. 5th ed. London: Shaw and Sons, 1851.
- WEISSMAN, JUDITH. "The Deceased Wife's Sister Marriage Act and the Ending of *Tess of the d'Urbervilles*." *American Notes and Queries*, 14 (1976), 132-34.

### Statutes Cited

- An Act for the Punishment of such as shall take away Maydens that be Inheritors, 1557, 4 & 5 Phil. & M. c.8.
- An Act to Protect Women from fraudulent Practices for procuring their Defilement, 1849, 12 & 13 Vict. c.76.

WILLIAM A. DAVIS, JR.

41

The Criminal Law Amendment Act, 1885, 48 & 49 Vict. c.69.  
The Marriages Act, 1836, 6 & 7 Will. 4. c.85.  
The Marriages Act, 1856, 19 & 20 Vict. c.119.  
The Offences Against the Person Act, 1861, 24 & 25 Vict. c.100.

### *Cases Cited*

R. v. Delaval and Others (1763), 96 *English Reports*, 234-35, 251-52.  
R. v. Edward Rea (1872), 1 *Crown Cases Reserved*, 365-66.  
R. v. Henkers (1886), 16 *Cox's Criminal Law Cases*, 257-59.  
R. v. Marsden (1891), 2 *Queen's Bench Division*, 149-50.  
R. v. Mary Anne Mears and Amelia Chalk (1851), 4 *Cox's Criminal Law Cases*, 423-27.  
R. v. Paul (1890), 25 *Queen's Bench Division*, 202-13.  
R. v. Pierson (1737), 95 *English Reports*, 412-13.  
R. v. Simeon Howell and Mary Bentley (1864), 4 *Foster & Finlason's Reports*, 160-64.  
R. v. Wealand (1888), 20 *Queen's Bench Division*, 827-28.  
R. v. Webster (1885), 16 *Queen's Bench Division*, 134-37.