March 1993

Hardy and the "Deserted Wife" Question: The Failure of the Law in Tess of the d'Urbervilles

William A. Davis, Jr.

Follow this and additional works at: http://digitalcommons.colby.edu/cq

Recommended Citation
Colby Quarterly, Volume 29, no.1, March 1993, p. 5-19

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 administrator of Digital Commons @ Colby. For more information, please contact mfkelly@colby.edu.
Hardy and the “Deserted Wife” Question: The Failure of the Law in Tess of the d’Urbervilles

by WILLIAM A. DAVIS, JR.

ENGLISH LAW is often just under the surface of Thomas Hardy’s novels, and at other times it is in plain view. Scholars are beginning to learn how and why Hardy infused the law into his fiction, and their findings have opened up new perspectives on Hardy as a social novelist. In his groundbreaking article on Hardy’s career as a justice of the peace, Edward C. Sampson cites an interview with Hardy that was first published in the World for 17 February 1886 and reprinted on 18 February 1886 in the Dorset County Chronicle. The interviewer notes that Hardy “according to his own account . . . plays the part of Justice Silence with great assiduity, though admitting that the duties of office keep him in touch with some sterner facts of existence that are apt to be lost sight of in the dream-world of books” (qtd. in Sampson 264). Several recent studies have shown that Hardy in fact did not always lose sight of these “sterner facts of existence” but instead incorporated them into his novels in order to point up the shortcomings of specific English laws and to argue for their amendment. Tess of the d’Urbervilles, for example, contains Hardy’s allusions to The Criminal Law Amendment Act, 1885, a law designed to provide further protection to women against rape and indecent assault, and to the controversy (and illegality) of marriage with a deceased wife’s sister.¹ My purpose in the present essay is to point out the legal backgrounds of Angel Clare’s desertion of Tess by examining the statutory and case law of the 1880s concerning desertion, the maintenance of deserted wives, and the related issue of restitution of conjugal rights. Hardy was well aware of the desertion laws and was sympathetic to the situation of women and to what he referred to as the “nervous strain of living with a man when you know he can throw you over at any moment” (The Life of Thomas Hardy, 1840-1928 258). Hardy’s references to desertion and restitution in Tess were calculated, I believe, to expose some shortcomings of the law as it was applied to and interpreted in cases in court. Moreover, Hardy’s Victorian readers would have recognized the allusions to the law, and the intended meaning of those allusions, as readily as they recognized the place and meaning of Stonehenge at the end of the novel.

¹. On The Criminal Law Amendment Act, 1885 and the deceased wife’s sister marriage controversy, see the studies by Davis and Weissman, respectively. As Weissman points out, marriage between a man and his deceased wife’s sister became legal in 1907. For an overview of Hardy’s interest in the law, see Ore!.
HARDY SEEMS TO have intended that his readers speculate on the legal questions raised in *Tess of the d’Urbervilles*, and he was pleased on several occasions to respond to readers’ comments on how Tess’s case might have proceeded in the English courts. In his autobiography, *The Life of Thomas Hardy, 1840-1928*, for example, Hardy refers to several visits made in June 1890 to “the police courts, where just at this time he occasionally spent half an hour, being still compelled to get novel padding” (227). Later in the same passage he refers to what was apparently the last of a “series of visits to London entertainments and law-offices,” visits apparently made for the same purpose (227). Despite the ironic tone conveyed by Hardy’s choice of words (“novel padding”), the passage does suggest Hardy’s interest in and deliberate use of legal materials in *Tess* and, most likely, in *Jude the Obscure*.

Significantly, the connection between *Tess* and the law continued to interest Hardy even after the novel was published, and he seemed willing and even eager to comment on the accuracy of the novel’s use of legal backgrounds. On one occasion, for example, Hardy defended the execution sentence carried out at the end of *Tess*, a sentence that caused some discussion in the periodical press.\(^2\) While the public was still hoping three years after the novel’s publication that a more lenient sentence (and a new ending for the novel) might be written, Hardy stood by the sentence and defended its legal accuracy: “I believe it was Andrew Lang who first put about the idea that she would not have been hanged,” he told Jerome K. Jerome. “But a curious thing is that a Home Secretary informed me that he would have seen no reason for interfering with her sentence” (Letters 2. 62). On another occasion, Hardy noted quite confidently in a letter to businessman Walter Morrison that Angel Clare would not have been charged as an accessory to murder because he did not believe Tess’s story (Letters 1. 290).

Hardy was, understandably, less inclined to enter discussions of the legal and moral situations of readers who had read *Tess* and who wrote to Hardy for guidance. The *Life* records the fact that Hardy received “many” letters from “wives with a past like that of Tess, but who had not told their husbands . . . asking for his counsel” (244). Hardy declined to respond to their letters on the advice of his friend Sir Francis Jeune, “who had had abundant experience of the like things in the Divorce Court, where he presided” (244-45).\(^3\)

*Tess of the d’Urbervilles* thus had Victorian readers talking about the law and speculating on the accuracy of Hardy’s handling of legal matters. The list of legal

\(^2\) Andrew Lang, for example, wrote in the *New Review* for February 1892, “The conclusion of *Tess* is rather improbable in this age of halfpenny newspapers and appeals to the British public. The black flag would never have been hoisted, as in the final page” (qtd. in Lerner and Holmstrom 72). The magazine *To-Day* noted on 18 August 1894 that in view of a lenient sentence recently given to a man for stabbing his wife, “the last part of *Tess* will have to be rewritten, which many would welcome” (qtd. in Letters 2. 62n).

\(^3\) Hardy’s friend Sir Francis Jeune (1843-1905) succeeded Sir Charles Parker Butt (see note 13) as president of the probate, divorce and admiralty division in 1892 and held the position until 1905. Hardy met socially with Jeune throughout the 1890s and corresponded regularly with Jeune’s wife, Mary (see the *Life* 244, 246, 251, 260, 268, 285, 324, and *Letters*, Volumes 1 and 2).

http://digitalcommons.colby.edu/cq/vol29/iss1/3
issues raised in *Tess* includes sexual assault, murder, divorce, the transfer of property, marriage with relations, desertion, and the restitution of conjugal rights. While the first five issues take on temporary significance at important points in the novel, desertion and restitution remain key elements of plot and theme from midway until the return of Angel near the end. As we shall see, Hardy uses the issues of desertion and restitution to pose—and answer—the thesis question of the novel.

II

The novel’s most explicit reference to the law of desertion comes, ironically, from Alec d’Urberville in Phase the Sixth. Tess, having parted from Angel at a crossroads near Nuttleberry, is working on a farm and hoping for the return of her husband. In place of Angel, Alec appears with an offer of marriage and a license to make the offer legal. When he finds that Tess is married but living apart from her husband, he brings up the fact of Tess’s separation from Angel and Angel’s uncertain whereabouts in an attempt to persuade Tess to renew old acquaintances. And when he finally learns that Angel has not written to Tess since their separation, Alec exclaims, in typically mocking tones, “You are a deserted wife, my fair Tess!” (435). Alec’s reference to the legal classification of “deserted wife” would doubtless have reminded Victorian readers of the state of the laws of desertion and maintenance in 1891, laws that were then being tested and interpreted in the English courts. Desertion was a fact of marriage that Parliament and the judicial system faced—and tried to remedy—with regularity in the nineteenth century. As Joan Perkin points out in *Women and Marriage in Nineteenth-Century England*, “Among those who could not afford divorce proceedings, it was not uncommon for husbands simply to run away from unhappy marriages, so deserted wives were a sizeable group among the indigent poor. . .” (25-26). Alec’s statement in *Tess*, though legally questionable, thus introduces the timely and significant issue of desertion into the story and opens the way for a new look at the manner in which Tess and Angel separate and at the legal backgrounds against which Hardy describes their separation. The reference to desertion invites two questions in particular: First, is Tess a deserted wife in the legal sense of the term? And, second, why does Hardy raise the issue of desertion at this point in the story, and how do his purposes with regard to desertion tie in with his overall purpose in the novel?

Significantly, the desertion of Tess begins not with an argument or with Angel’s sudden departure but with an agreement to separate. Hardy’s narrator comments on the discussion of Angel and Tess, and this commentary is punctuated by references to legal procedures and to the language of the law. Prior to the actual parting, Tess’s speech is characterized by an almost self-negating

4. In the Graphic serial version of the novel, Alec writes a marriage by “special license” and in doing so breaks the law enacted in 1885 making the procurement of carnal knowledge by fraudulent means illegal. See the study by Davis for a description of the law and a survey of cases prosecuted under it, cases that Hardy was probably aware of.
acquiescence: "I have no wish opposed to yours," she tells Angel following her confession of her premarital experiences, thus leaving him free to decide her fate (338). While Angel is pondering what to do "for form's sake" (341), Tess struggles to say words that are clearly difficult for her to say: "I suppose—you are not going to live with me—long, are you Angel?" (342). Angel's reply is definite: "I cannot," he tells her (342). What happens next is especially significant (as we shall see later) in the context of the legal backgrounds of the scene. In a gesture that releases Angel from having to dispose of his fallen wife, Tess offers a solution to their predicament:

"I have thought over what you say," she remarked to him, moving her forefinger over the tablecloth, her other hand, which bore the ring that mocked them both, supporting her forehead. "It is quite true, all of it: it must be. You must go away from me."

"But what can you do?"

"I can go home."

Clare had not thought of that. "Are you sure?" he inquired.

"Quite sure. We ought to part: and we may as well get it past and done. . . ."

"And you would like to go home?" he asked.

"I want to leave you, and go home."

"Then it shall be so."

Though she did not look up at him she started. There was a difference between the proposition and the covenant, which she had felt only too quickly. (344-45)

The actual parting scene at the crossroads is equally difficult for Tess, but she again voices her agreement to what is clearly Angel's idea to separate:

"Now, let us understand each other," he said gently. "There is no anger between us, though there is that which I cannot endure at present. I will try to bring myself to endure it. I will let you know where I go to, as soon as I know myself. And if I can bring myself to bear it—if it is desirable, possible—I will come to you. But until I come to you it will be better that you should not try to come to me."

The severity of the decree seemed deadly to Tess: she saw his view of her clearly enough: he could regard her in no other light than that of one who had practised gross deceit upon him. Yet could a woman who had done even what she had done deserve all this? But she could contest the point with him no further. She simply repeated after him his own words.

"Until you come to me I must not try to come to you."

"Just so."

"May I write to you?"

"O yes—if you are ill, or want anything at all. I hope that will not be the case; so that it may happen that I write first to you."

"I agree to the conditions, Angel; because you know best what my punishment ought to be; only—only—don't make it more than I can bear!" (355)

Tess's final words convey her agreement as well as her misgiving and her true wish to remain with her husband. Significantly, the two passages also introduce the language of the law into the separation with such legal terms as "covenant," "decree," "contest the point," and "punishment." With the legal backgrounds of the scene subtly introduced, Hardy has his narrator step in in order to establish Tess’s position in relation to the law. The narrator notes that had Tess “been artful: had she made a scene, fainted, wept hysterically,” she might well have broken Angel’s resolve to leave her (355). The legal, as opposed to the strictly personal, significance of Tess’s reaction and her agreeing to Angel’s conditions are topics that I will address at some length later on. Two additional, and more
obvious, references to the law may be pointed out here. Specifically, Hardy twice relies on the language of the law to conclude the separation scene. In the first instance, Hardy’s narrator notes that Tess’s “mood of long-suffering made [Angel’s] way easy for him, and she herself was his best advocate” (355 emphasis added). As we shall see, agreeing to separate—in effect, “advocating” the other party’s idea to separate—was an absolute bar to prevailing in a desertion case brought to court. In the second instance, the narrator notes that “the many effective chords which she could have stirred by an appeal were left untouched” (355 emphasis added). Hardy invites his readers to think of Tess as an “advocate” voicing an “appeal,” but he has already condemned her case to failure by having her misplace her advocacy and leave her best arguments unspoken.

Hardy thus writes the separation scene using legal terminology to describe the characters and their actions. Hardy’s choice of words provides a suitable context for the more subtle legal issues implied in the scene. English law provides significant and interesting backgrounds to the situation of Tess and Angel and may be read as a parallel text to the facts of separation presented above. Hardy’s knowledge of the law of desertion and separation may also help to explain why he wrote of his characters’ involvement in separation issues the way he did. The main legal issues to address relevant to the above passages include the state of the law of desertion during the time of the composition of Tess, relevant case law, and Angel’s grounds for desertion. As a justice of the peace, Hardy would have had some practical knowledge of these issues and access to reported cases, contemporary statutes, and presiding justices in English courts.

On 25 June 1886, Parliament enacted legislation “to amend the Law relating to the Maintenance of Married Women who shall have been deserted by their Husbands” (49 & 50 Vict. c. 52). Known as The Married Women (Maintenance in case of Desertion) Act, 1886, this law made it possible for a deserted wife “to summon her husband before any two justices in petty sessions or any stipendiary magistrate” and to have the justices or magistrate order the husband to pay a “weekly sum not exceeding two pounds” for the support of the wife and any children. As Mary Lyndon Shanley points out in Feminism, Marriage, and the Law in Victorian England, 1850-1895, this statute did away with “the expensive and cumbersome procedure of requiring women to apply to the parish before the parish could sue their husbands for support,” and it further gave magistrates “the authority to order a husband to pay maintenance directly to the wife he had deserted” (175). This law, then, represented an attempt on the part of Parliament

5. Hardy’s knowledge of the desertion laws is further supported by a scene in Jude the Obscure in which Arabella counsels Sue Bridehead on the advantages of being legally married:

“Life with a man is more business-like after it [marriage], and money matters work better. And then, you see, if you have rows, and he turns you out of doors, you can get the law to protect you, which you can’t otherwise, unless he half runs you through with a knife, or cracks your noddle with a poker. And if he bolts away from you— I say it friendly, as woman to woman, for there’s never any knowing what a man med do—you’ll have the sticks o’ furniture, and won’t be looked upon as a thief.” (288-89)
to improve the lot of deserted wives by at least providing a legal procedure whereby such wives could be assured of financial support. The law stipulated, however, that a deserted wife must not engage in adultery, the penalty for which offence was the forfeiture of any allowance granted her by the court.

Thus the purpose of The Married Women (Maintenance in case of Desertion) Act, 1886 was to help deserted wives pay for food and other necessities as long as their husbands refused to cohabit with them, and as long as these wives refrained from adultery. Statutory law, however, was liable to interpretation by the courts, and, while the wording of the statute suggests that Tess Durbeyfield and other women like her might have applied for and received assistance from the courts, Victorian case law suggests otherwise. One case tried under this law, Pape v. Pape (1887), suggests that Tess’s agreeing to Angel’s idea to separate would have meant that no desertion had taken place, and that Tess would therefore have had no right to support under the statute.

The case before the court in Pape v. Pape concerned the husband’s refusal to continue support payments (ordered earlier by the justices at the Middlesborough petty sessions) to his wife under the statute because “the parties were living apart under an agreement for separation [and therefore] the appellant had not ‘deserted’ the respondent within the meaning” of the statute (77). The husband, in other words, was challenging the legality of the earlier ruling. The counsel for the husband argued that “Cohabitation having ceased by mutual consent it was impossible for the appellant [the husband] to ‘desert’ the respondent” (78). Counsel then cited other cases in which desertion had been defined. In Thompson v. Thompson (1858), for example, the judge ruled that desertion “must mean a wilful absenting himself by the husband; and that such absence and cessation of cohabitation must be in spite of the wish of the wife; she must not be a consenting party” (707). The court in The Queen v. The Cookham Union (1882), another case cited, also ruled that a wife who parts from her husband willingly cannot be said to have been deserted, and cited the Thompson case as its authority. Justice Stephen, who heard the Pape case, and with whom Hardy seems to have been familiar, stated in his ruling that “The respondent has not been deserted by her husband, and has no remedy under the statute” (79). The previous order authorizing weekly payments was accordingly “quashed,” and Mary Pape lost her right to the financial support awarded her earlier.
One difference worth noting between Tess’s “case” and the Pape case is that the Papes had “signed an agreement for separation” (77), while Tess and Angel merely agreed verbally to separate. The Papes’ agreement, as we have seen, meant that no desertion had taken place, and it would seem that Justice Stephen’s ruling was a sound one (the Papes were, after all, living apart under a signed agreement when Mary Pape introduced her petition under 49 & 50 Vict. c. 52).

It is clear, however, that a verbal agreement to separate could also render the statute inapplicable. As Thompson v. Thompson and The Queen v. The Cookham Union show, desertion could only be said to exist where the wife was not a “consenting party,” and where the desertion was “against her wish.” Tess, one will recall, tells Angel, “I have no wish opposed to yours” (338) and later affirms, in a letter to him, the justice (and here Hardy is being deliberately ironic) of Angel’s refusal to live with her: “The punishment you have measured out to me is deserved—I do know that—well deserved, and you are right and just to be angry with me” (458).

An English court would probably have treated Tess in much the same way it treated Mary Pape, ruling as did the Pape court, that an agreement to separate meant no remedy for the wife under the law. We may therefore see Tess as a “deserted wife” in all but the legal sense of the term, and we can readily see Hardy’s implied criticism of the law of desertion operating in Tess of the d’Urbervilles. By infusing the language of the law into the separation scene, Hardy quietly associates Tess with the legal system. At the same time, however, he places her outside of the ability of the desertion laws to help her. The factual (and, for Hardy’s Victorian readers, accessible) background of the scene includes the well-intended statute of 1886, now rendered inapplicable by Tess’s agreement, and contemporary court cases such as Pape v. Pape. Hardy notes that had Tess fought the separation, she might have persuaded Angel to forgive her and accept her. Hardy states this much, but what he implies is equally important. Specifically, had Tess “contest[ed] the point” with Angel or made a “scene,” she would have been able to plead her case in a court of law and win financial support, if nothing else (355). Instead, Tess is forced to work at Flintcomb-Ash, and her suffering there takes on new significance when viewed in the context of the legal

Stephen, also on the bench, were struggling young men the latter came to him and said a man was going to be hanged at the Old Bailey, jocularly remarking as an excuse for proposing to go and see it: “Who knows; we may be judges some day; and it will be well to have learnt how the last sentence of the law is carried out.” (240)

“Sir Charles” Cave was actually Sir William Lewis Cave (1832-1897), who heard The Queen v. The Cookham Union in 1882. Cave became a justice of the Queen’s Bench Division in 1881. Hardy gives Cave’s correct first initial in a letter to Walter Frith (Letters 1. 247) acknowledging the same dinner plans as those mentioned in the Life entry.

9. Victorian law did, however, say that desertion could arise in cases where a husband left by agreement for a specified time but failed to return after that time had elapsed (Basing v. Basing [1864]).

In an interesting case from 1890, Justice Butt (see note 13 below) ruled that a woman was not entitled to prevail in a petition for desertion because “there was no proof that the husband’s offers to live again with his wife were not bona fide” (Lodge v. Lodge 159). When Mrs. Lodge learned of Mr. Lodge’s adultery while living away from his family, she ceased replying to his letters and went to court, where the judge ruled against the desertion and granted instead a decree of judicial separation.

Pape v. Pape and Lodge v. Lodge, and other important probate and divorce cases as well, received coverage in The Times. For reference to this coverage, see the Works Cited page. Hardy could have assumed that his readers would have had some familiarity with the published accounts of these and other desertion cases.
system alluded to by Hardy in the separation scene.

Later in the novel, after she is relieved of one kind of suffering and introduced to another by Alec, Tess commits an action that again precludes her from gaining relief from the legal system. Only one other stipulation, in addition to agreeing to separate, prevented English women from receiving support under the 1886 statute, and that stipulation, as I have noted, was adultery (specifically, uncondoned adultery). Tess, legally speaking, commits adultery when she lives with Alec in Sandbourne, even though a sympathetic reader might argue that Tess really has very little choice but to submit to Alec (her alternative being a combination of poverty, hunger, and persecution from a variety of sources). Prior to 1896, however, English law held strictly to the practice of punishing adultery (whether necessary or not) with a refusal to grant, or an order to rescind, court-awarded financial support for women, as a brief survey of relevant cases will show.

In having Tess take up residence (perhaps one could even argue for a perverse kind of refuge) with Alec in Sandbourne, Hardy effectively eliminates all chances of Tess’s ever having any recourse to the courts for maintenance rights. Again, it is important to recognize that Hardy was writing not only about Tess Durbeyfield but about women in nineteenth-century England. English case law shows that a husband’s cruelty, even cruelty remarkably similar to Angel’s, did not bring about a judgment in a wife’s favor if the wife had committed adultery. 10

In Govier v. Hancock (1796), for example, the court held “that a husband was not bound to receive or support his wife after she had committed adultery, though he had before committed adultery himself, and turned her out of doors, without any imputation on her conduct” (726). In Culley v. Charman (1881), decided in part by Hardy’s acquaintance, Justice Hawkins, 11 the court ruled that “a husband is not bound at common law to maintain a wife who has been guilty of adultery, and who is living apart from him” (91). Williamson v. Williamson and Bates (1882) considered, among other issues, whether a husband’s refusal to cohabit with his wife could be said to have brought about the wife’s subsequent adultery, a situation very similar to that of Tess’s return to Alec. The court noted that the wife “got a living in the manner she had done before her marriage” after her husband refused to live with her (which is more or less the situation with Tess also), and that the refusal of the husband to live with his wife could not therefore be said “to have conduced to her adultery” (77). Adulterous women, in short, had no

10. For an interesting treatment, based on a study of English case law, of the changing judicial attitude toward matrimonial cruelty and of the husband’s supremacy in Victorian marriage, see Hammerton. Hammerton’s study also provides a brief overview of Victorian guide books written to encourage submissiveness in Victorian women.

11. Sir Henry Hawkins (1817-1907), Baron Brampton, who served as a judge on the Queen’s Bench Division from 1876 to 1898. Hawkins, who was a member of the defense in the famous Tichborne case in the early 1870s, was a respected and well-known judge. Hardy refers to Hawkins in the Life in an account of a dinner that took place in 1892:

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)

Lord Coleridge was Sir John Duke Coleridge (1820-1894), first Baron Coleridge, who became Chief Justice of the court of common pleas in 1873 and Chief Justice of the Queen’s Bench (“Chief Justice of England”) in 1880.
recourse to the courts for maintenance and were not likely to be able to prove to a court’s satisfaction that their adultery was a direct or an indirect result of their desertion. Tess, then, does not qualify for relief under the 1886 statute for two reasons: her agreeing to separate and her subsequent adultery. By living with Alec, she also provides the necessary grounds—adulterous intercourse—that Angel would need in order to initiate, and win, a petition for divorce. By the novel’s midpoint, and well before her murder of Alec, Tess is well outside of the law’s ability to help her.

If Hardy intended to air some of the problems associated with the desertion laws in *Tess* and point the way toward reform, he must have been greatly encouraged by the changes in the law that occurred with the passage of The Summary Jurisdiction (Married Women) Act, 1895. This act, which repealed the 1886 statute, and which became law in 1896, some four years after the publication of *Tess*, gave women considerable autonomy concerning their marriages by saying that they did not have to wait to be deserted by their husbands in order to receive protection and maintenance under the law. After 1896, a woman could, of her own volition, leave her husband, sue for maintenance, and win her case in court if she could prove her husband’s cruelty or failure to maintain her. Significantly, a woman’s subsequent adultery, if any occurred, became less important in the eyes of the court. As Shanley points out, after 1896, magistrates had the “discretion to make the award [maintenance] even if the wife had been adulterous” as a result of her husband’s misconduct or neglect (174). While it is interesting to speculate whether Hardy’s Tess would have prevailed in a petition brought to court under this statute—significantly, the statute effectively makes moot the point of her agreeing to separate and forgives her adultery with Alec—it is clear that many Victorian women did benefit from the new law. As Shanley points out, “Courts of summary jurisdiction granted more than eighty-seven thousand separation and maintenance orders during the ten years from 1897 to 1906,” the number attesting both to the new sense of “autonomy within marriage” felt by women at the turn of the century (175) and to the need for just such a remedy for bad marriages.

Hardy’s *Tess* thus put before the Victorian reading public the very issues of desertion, maintenance, adultery, and female autonomy that Parliament would later address in the 1895 statute. The suffering of Tess exposed the shortcomings of the 1886 law while dramatizing the plight of women whose situations did not exactly fit the standards prescribed by the law. If *Tess* did not in itself have a direct influence on the reform of the law, we may nevertheless count Hardy’s voice among the many voices calling for changes that did eventually take place. The English legal system did eventually take notice of the legal predicament of women like Hardy’s Tess, and it responded to that predicament with meaningful and corrective legislation and enforcement. While Tess herself was not helped

12. A husband in Victorian England could petition for divorce on the grounds of his wife’s adultery. Women, however, had to sue for adultery plus a compounding offense (bigamy, incest, bestiality, cruelty, rape, desertion, or sodomy). For a discussion of women and the divorce laws, see Shanley.
by the law of 1886, she may, through her example, have helped open the legal system to the thousands of women who sought and received assistance after 1896.

III

A second and related issue raised in the separation scene is the restitution of conjugal rights. Angel informs Tess that their separation must last until he is able to "endure" that which has come between them, specifically, her premarital sexual experience (355). He then tells her, "until I come to you it will be better that you should not try to come to me" (355). Hardy thus shows his readers where the control lies in this relationship, and Angel's control, combined with Tess's "mood of long-suffering" and her choice not to make a "scene" (355), explains why she does not go to the law. Hardy clearly shows that the next move belongs to Angel, and that restitution will only take place if and when he says it will. With the conditions for restitution in place, Hardy poses the thesis question of the novel: "Yet could a woman who had done even what she had done deserve all this?" (355). Hardy invites his readers to consider whether Angel's postponement of restitution is justified. The question also asks, with what is by now characteristic subtlety, whether Angel's "decree" is legal (355). Significantly, English law provides an answer to this question in two cases having to do with a husband's refusal to live with his "fallen" wife. The answer shows clearly that Angel, instead of Tess, is now outside the law but that Tess's "mood of long-suffering" and her obedience to Angel effectively cancel any advantage that the law might be ready to extend to her.

In Williamson v. Williamson and Bates (1882), for example, the court granted the husband's petition for divorce with a decree nisi, a temporary decree that was made permanent on motion at a later date, but also issued a short lecture to the husband on the subject of when it is appropriate to desert one's wife. According to the facts, two weeks after her marriage, Mrs. Williamson was "apprehended and subsequently convicted of theft and sentenced to six months' imprisonment," which she duly served. Following Mrs. Williamson's release from prison, the husband refused to live with his wife "owing to her misconduct" (76). At the trial, the court addressed the husband in these words:

THE PRESIDENT. The conviction and imprisonment of a husband or wife for an offense against the criminal law is no justification to the other party for refusing to live with him or her. However painful it may be for a respectable man to have a wife who has been convicted of felony, such conviction does not in this Court justify him deserting her. It sometimes happens that wives have husbands who have been convicted of infamous crimes, and yet those husbands are legally entitled to cohabitation with them. (76-77)

Here the law is on Tess's side, for if the court could admonish a husband for holding his wife's felony conviction against her, the same court would more than likely admonish Angel for deserting his wife because she committed a premarital indiscretion (especially if the court knew that Angel had committed the same "offense"). Of course, Tess's agreeing to separate might soften the court's
address to Angel to some degree, but the judiciary reprimanded husbands like Angel who held their wives to standards deemed unrealistically high.

Premarital indiscretion is a key issue addressed in Mason v. Mason (1889), a suit brought by Caroline Mason, “claiming a decree against her husband, Richard Mason, for restitution of conjugal rights” (304). The Mason case contains a number of interesting parallels to Tess’s situation. Caroline Mason, like Tess, wanted to return home to her husband after the two had parted, “at his request” (304), and her lawsuit may be seen as the legal equivalent of Tess’s pleading letter to Angel, cited earlier, asking Angel to let her come home to him. Caroline Mason, again like Tess, had given birth to a child fathered by another man (Caroline’s child, however, was born after her marriage to Richard Mason). When Richard Mason refused on several occasions to allow his wife to come home, Caroline Mason promised to “go to the law with you” (305), and did so, the result being the following letter from her solicitor to her husband:

Sir, I have been consulted by your wife, Mrs. Caroline Lydia Mason, and am instructed by her to inform you that, although you have recently refused her permission to reside with you, and denied her entrance to your house when she personally applied for it, she maintains her right to be received by you, about which right there can be no question. Inasmuch as she is entirely without means of support, it is not possible that such a state of things can be allowed to continue, and therefore it will be my duty, unless before Tuesday, the 2nd prox., you make satisfactory arrangements for her reception, to take such proceedings on her behalf as she may be advised to institute against you. (305)

Richard Mason did not answer this letter (just as Angel fails to answer Tess’s), but a second (and more threatening) letter finally brought the Masons to court, where Justice Butt ruled not only in Mrs. Mason’s favor for the restitution of conjugal rights but refused to hear evidence of Mrs. Mason’s “pre-marital incontinence” (305). The court was quite clear about what evidence was and was not relevant to the issue of Mrs. Mason’s return to her husband:

As to the point whether the child was conceived before wedlock, or, in other words, whether it is the child of the husband, I decline to receive any evidence, on the ground that it is immaterial to the question before me, it not being suggested that it was the result of any adulterous intercourse. Evidence as to the paternity of a child conceived before marriage is not relevant to this issue. (305)

In other words, Caroline Mason’s premarital affair with another man was declared irrelevant to the issue of her right to return to her husband. Mason v. Mason entered Victorian case law thus: “Evidence of pre-marital incontinence inadmissible as a defense to claim for restitution” (304).

Again, the law is in Tess’s favor, for the remarkably similar circumstances of her “case” and that of Mason v. Mason, which was argued while Hardy was working on Tess, suggest that an English court would have pronounced a decree in favor of Tess’s return to Angel, saying, in effect, that Tess does not deserve the treatment that she receives from Angel, and that Hardy alludes to in the separation scene. We have, then, two cases from the 1880s in which English
courts ruled that “fallen” women clearly did not deserve the treatment that they received from their husbands, and the relevance of these cases to Hardy’s novel is sufficiently clear. Stated briefly, Angel has no sufficient grounds for his desertion of Tess, as proven by these cases, and English law thus provides a firm answer to the question posed by Hardy. Tess’s “case” was tried at least twice in Victorian courts, and in both cases the courts failed to find just cause for desertion. English law shows that Tess does not “deserve all this” (Tess 355).

Williamson v. Williamson and Bates and Mason v. Mason would therefore seem to argue for the success of the law in late nineteenth-century England, at least in terms of the rights of mistreated women, and in many ways they do. It is important to recognize, however, as the Mason case so clearly reminds us, that Victorian women who had been deserted had to “go to the law”; the law, in other words, could not go to them. Tess, for example, offers Angel the option of divorcing her in a court of law, but Hardy never suggests that Tess entertains thoughts of going to the law for her own benefit. Significantly, Angel dismisses Tess’s offer and combines his dismissal with an insult, saying, “O Tess—you are too, too—childish—unformed—crude, I suppose! I don’t know what you are. You don’t understand the law—you don’t understand!” (336-37). Angel’s response captures the position of women in the legal system in Victorian England. As Joan Perkin notes in Women and Marriage in Nineteenth-Century England, “working-class women were almost wholly beyond the reach of the civil law” and had “neither the resources nor the know-how to appeal to the courts” (115). Not every woman could or would do what Caroline Mason did. Tess’s ignorance of the divorce law and her avoidance of the legal system are best understood in this historical context. Hardy’s question in the separation scene seems to ask, “Who will argue for Tess?” Victorian case law shows that solicitors and judges were helping women in the 1880s, but their ability to help depended on the women taking the all-important first step of entering the legal system. Tess, of course, is told to wait and do nothing—told, in effect, not to go to the law. She remains outside of the law’s ability to help her, and the results are devastating and final. Tess is limited by both her own “mood of long-suffering” and her acquiescence to Angel’s directive that he will (or will not) initiate any future reconciliation. In writing her letters to Angel, Tess goes as far as she is able and willing to go in order to salvage her marriage to the man she truly loves. She is, as Hardy reminds us, Angel’s “advocate” rather than her own, and this misplaced advocacy is best appreciated in the context of its historical and cultural validity. As a consequence of Tess and her culture being the way they are, the specter of untried avenues for potential help follows Tess throughout the novel.

IV

NEVERTHELESS, ALTHOUGH Tess does not go to the law, the law does eventually find her. By the novel’s end, the legal system views Tess not as a deserted wife or as a victim of an earlier sexual assault—two crimes that Tess would have had to bring to the system’s attention—but as a murderess. By killing Alec, Tess
finally (and most likely unintentionally) captures the attention of the legal system. As we have seen, Hardy intended that his readers reflect on Tess’s “case” in the light of contemporary law and judicial procedures. Hardy gave his readers much matter for reflection. On reaching the conclusion of the novel, one is tempted to ask whether the English judicial system might have been able to do something for Tess besides execute her. Hardy’s criticism of the legal system in the novel’s final paragraph has drawn the attention of readers for the past century, but most discussions tend to locate Hardy’s primary focus of attack on the machinations of the disembodied “President of the Immortals” rather than on the failings of the more mundane legal system (542). Readers are beginning to recognize, however, that the ironic phrase “‘Justice’ was done” applies, in its legal sense, equally to other moments in the novel when Tess’s suffering jars our sense of right and wrong (542). These moments typically involve not only a question addressed to moral philosophy but an even more immediate question that goes directly to the working of one or more specific English laws. The seduction of Tess in the Graphic serial version and the question of the legality of Angel’s possible marriage to Liza-Lu are two examples. The separation scene provides another such moment, and Hardy’s reference to the justice of the separation and its aftermath points equally to the moral and the legal implications of the scene.

*Tess of the d’Urbervilles* is thus in one sense a novel about a woman who does not understand the law. It is also fair to say, however, that *Tess* is a novel about a woman who, because she is a woman, and because she is the way she is, cannot and will not be helped by the law. Tess resembles many of her living counterparts in Victorian England in her ignorance of the law and in her position outside of the law’s ability to help her. As a justice of the peace, Hardy himself heard and read about cases having to do with the many things that can go wrong with relationships, and he was familiar with several of England’s justices of the high court who were deciding desertion cases in the 1880s. As we have seen, he was also well aware of what he called “the nervous strain of living with a man when you know he can throw you over at any moment” (*Life* 258). As a novelist and justice, Hardy was uniquely qualified to bring legal issues before the reading public. Hardy wanted his readers in 1891 to read the separation scene, be reminded of the 1886 desertion statute and the reports of cases published daily in the newspaper, and wonder why things do not turn out differently for Tess. In addition, Hardy gave his readers the complex version of the familiar desertion story by replacing the standard parting in anger with an agreement to separate and the complicating offense of adultery. He then kept his female protagonist away from the legal system that would have helped her on the one hand and rebuffed her on the other. Hardy knew that such complexity would get his readers talking, and that talking was the first step toward reform. The question asked in the separation scene was probably answered in various ways by many voices in 1891, but in 1895 Parliament provided an answer that was both definitive and at least partly corrective. Significantly, the official answer is the same as that which runs throughout the second half of *Tess of the d’Urbervilles*. 
The history of English law suggests that Tess would not have been considered a deserted wife but would have had a good chance of prevailing in a restitution case—if she had been able to take her case to court. By understanding the legal background of Tess’s separation from Angel, we can read the scene of their parting in the same context in which it was written by Hardy and read by Victorian readers. Moreover, we can begin to answer the question why Tess suffers in a society in which statutes and decrees proliferated, and in which suffering that was bad enough could eventually become the basis of a court case or the foundation for a new law. To Hardy the novelist, that suffering became the theme of a novel, and the novel, in turn, became a catalyst for commentary on the workings of the law in late nineteenth-century England. It remains so a century after its publication.

Works Cited

DAVIS, WILLIAM A., JR. “‘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.


Statutes Cited

The Criminal Law Amendment Act, 1885, 48 & 49 Vict. c. 69.
The Married Women (Maintenance in case of Desertion) Act, 1886, 49 & 50 Vict. c. 52.
The Summary Jurisdiction (Married Women) Act, 1895, 58 & 59 Vict. c. 39.
Cases Cited

BASING v. BASING. 164 English Reports 1375. 1864.
CULLEY v. CHARMAN. 7 Queen’s Bench Division 89. 1881.
GOVIER v. HANCOCK. 101 English Reports 726. 1796.
LODGE v. LODGE. 15 Probate Division 159. 1890.
MASON v. MASON. 61 Law Times 304. 1889.
PAPE v. PAPE. 20 Queen’s Bench Division 76. 1887.
The Queen v. THE COOKHAM UNION. 9 Queen’s Bench Division 522. 1882.
THOMPSON v. THOMPSON. 164 English Reports 706. 1858.
WILLIAMSON v. WILLIAMSON AND BATES. 7 Probate Division 76. 1882.