

# Rape and “Consent to Force”: Legal Doctrine and Social Context in Victorian Britain

A Thesis

Submitted to the Faculty of Graduate Studies and Research

in Partial Fulfillment of the Requirements

for a Degree of

Master of Laws

in the

College of Law

University of Saskatchewan

Saskatoon

by

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March 2007

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# Acknowledgments

I wish to thank Professor Beth Bilson, Professor Wanda Wieggers, my thesis supervisors, Professor Mark Carter, of the University of Saskatchewan College of Law, and Dr. Dawn Flood of University of Regina, for wise counsel. I would also like to thank Professor Paul Chartrand, Graduate Coordinator, who was very kind in helping me to finish my program. Great gratitude goes to Brian Buydens, my husband and personal computer guru, and my children Stephanie and Adrien, for patience and confidence-building. Special thanks also to Dr. Kim Stevenson, co-founder of the SOLON project at Nottingham Trent University in England, for her encouragement and research, and to all the marvelous women of the Association for Research on Mothering, from Dr. Andrea O'Riley, founder, to conference participants.

I dedicate this thesis to all of the women in my life involved with the task of responding to rapes, in whatever way.

# Abstract

This thesis is an exercise in the historical use of legal analysis. It illuminates the social construction of gender in an era of changing social mores, by relating rape doctrines to demographic, economic, social, and cultural changes. Changes in the rape law of early Industrial Britain (1800-1860) are examined as: 1). **results** of ideological changes since the eighteenth century; and 2). **causes** of the creation of Victorian sexual culture. The ideology of “Separate Spheres” for men and women led to a fearful sexual regime which prescribed chaperoning to ensure women’s chastity. Law made women’s avoidance of being alone outside, where they could become prey of strange men, a requirement for sexual respectability, because rape became more difficult to prove.

The 1817 rural Midlands murder case of *Rex versus Abraham Thornton* caused popular controversy because the judge said physical evidence of brutal sex was not inconsistent with consensual sex: the woman could have been “persuaded” by violence: reasonable doubt on the rape meant the accused was presumed to lack a motive to kill the deceased.

*Thornton* was influential on law and gender ideology. “Consent to force”—the idea that a woman could meaningfully consent to sex after violence—was extended in later rape cases. Secondly, even though the public reacted against Thornton’s acquittal, popular culture interpreted it to support “Stranger Danger”—that women risk rape by strangers while out alone, and should remain at home unless accompanied by trusted men. “Consent to Force” and “Stranger Danger” worked at different levels of the social hierarchy. But both served to extend Separate Spheres to working class women.

Law undermined traditional mores which had supported the North West European marriage system—late marriage, small age difference between brides and grooms, nuclear family households, and numerous adolescents working in others’ homes as servants, resulting in low rates of premarital births during long courtships. Young commoners had managed a sexual balancing act by engaging in sexual exploration while refraining from vaginal intercourse. Late marriage, very low illegitimacy, and high rates of prenuptial conceptions of first marital births, resulted from young couples engaging in sexual intercourse only when conditions for marriage were right. Young men had to marry pregnant sweethearts, because communities could identify putative fathers.

Industrialization threw the North West marriage system out of balance: young men became more mobile and able to evade forced marriage. It also became more difficult for young men, especially artisans, to achieve the status traditionally associated with marriage. This sexual crisis was exacerbated by upper class libertinism spreading

to commoner men. The *Thornton* case promoted libertinism among all men, to allow men of higher class to approach lower class women for prostitution.

The moral denigration of lower class women under rape law after *Thornton* was the flip side of the association of marriage with making wives consent to sex upon demand by their husbands, under Fraternal Patriarchy. Categorizing women as “bad girls” or “good girls” became central to rape law, yet illusory. Lower class women “persuadable” by force were subjected to similar constraints as wives: both were to think selflessly about fulfilling men’s “needs”. Bourgeois wives, like domestic servants, entered lifelong contracts to serve heads of households upon demand. Domestic torts based upon the property right of masters of households to service provided by wives and children, as well as servants, linked treatment of different classes of women.

But because lower class women were not marriageable to elite men, their premarital chastity was not considered as valuable. Working class women’s gender value was discounted; working class men were emasculated as potential heads of households, by economic instability interfering with marriage, the displacement of men’s authority over wives to their employers, and the *1834 New Poor Law*, which proposed removing wives and children from working class husbands and fathers when they went onto relief. De-gendering of lower class women and men was reflected in the difficulty that lower class men had in obtaining damages for domestic torts. Privileging of the bourgeois with respect to gender contributed to the failure of feminist and labour movements to cement a political alliance.

Industrial-era rape doctrines were ultimately applied to all women rape complainants, regardless of class status, and became the basis for the anti-victim rape laws which second wave feminists analyzed and opposed. Modern rape law still presents women with similar challenges, based upon rape myths like Stranger Danger.

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# INTRODUCTION TO THE HISTORY OF RAPE LAW

## A. THE HISTORICAL VALUE OF UPSIDE DOWN LAW

What can a person learn from reading an historical legal case which makes no sense? In May 1817, a young woman, Mary Ashford, drowned after a vicious beating, torn up by brutal sex. But the man who admitted having sex with her, Abraham Thornton, was not guilty of throwing her in the water, because a judge thought that she had probably consented to sex with him. She "consented after force".

This thesis will explain how rape law effected the lives of women in the half century after Ashford's death. I will link changes in rape law to changes in gender ideology about legitimate sex roles. The R. v. Thornton case of 1817<sup>1</sup> will be linked to special evidentiary rules for rape--extending into the early twentieth century, even up to the 1970s, when serious rape law reform began. Rape law will be linked to major issues in the lives of ordinary women.

This thesis argues that the rape law has failed to provide adequate access to justice for women with respect to an issue of central importance to them: bodily autonomy in the pursuit of sexual self-determination. It has failed because it does not enforce the rape law to a reasonable degree. Too many rape complaints are not acted upon, too many valid prosecutions fail, and the result is such widespread lack of trust that the courts still do not hear of most rapes, and too many men grow up with a reasonable expectation of legal impunity for intruding sexually on at least some women in some circumstances.

This thesis does not argue that all rape cases are true complaints, that all men are prone to rape, or all raped women are treated equally badly as rape victims--rather, the rape law has failed systematically because it has failed in too large a proportion of cases. That it has sometimes, sort of, served a minority of women when looked at from a very particular angle, is besides the point. Rape law has failed not against an unreasonable expectation of perfect enforcement, but in comparison to other serious crimes.

This thesis takes an interdisciplinary approach to the question of the performance of the rape law, because I am convinced that historical gender ideology lies behind its underperformance. The reasons why rape law adjudication reduces women's rights to security of the person and a reasonable measure of sexual liberty are historical.

To understand gender ideology, we have to consider it in detail: gender ideology is always a matter of specific cultural, economic, and political negotiations among specific groups of people during specific periods of time. Gender ideology is historical--which means it is complex and incorporates contradictory and ambivalent tendencies.

The work of describing gender ideology historically is not easy. But since law is highly beholden to general

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<sup>1</sup> Decided Aug. 8, 1817, (Warwick Summer Assizes). The best record of this case is the trial transcript and excerpts from supporting manuscripts in Sir John Hall, Bt. [Baronet] Notable British Trial Series book, The Trial of Abraham Thornton (1926), pp.63-180. For more detail about the case, please see the "Preface on the Thornton Case".

cultural trends in society, it will be worth it to embrace the complexity of history.

In this thesis, I will focus on one particular legal doctrine, "consent to force", and show how it related to a particular cultural ideal--the male breadwinner and female housekeeper family model, within the larger gender ideology of "Separate Spheres". "Separate Spheres" will be discussed in depth, but for now, suffice it to say it means a belief system that women should be secluded to the private sphere for their own good, which originated in the eighteenth century and flourished in the nineteenth century. Another aspect of the gender ideology, linking directly to the topic of rape, the "Stranger Danger" rape myth--the hypothesis that women are at most risk of rape from strange men in the outdoors, especially at night. This belief, originally stated in the early nineteenth century, is still commonly held--but I will show that it is a belief now known to be clearly false.

Given the means of a fear-provoking belief like Stranger Danger, and the goal of encouraging women to accept the limitations on their liberty implied by Separate Spheres, I will be arguing that the rape law did not fulfill the stated purpose set out in statutory prohibitions of rape--to punish and deter rapists. Rather, it fulfilled a different purpose instead: to frighten women into accepting dependence upon known men, through blood relations or marriage, by a promise of protection from rapists--and an implied threat that female nonconformity could be punished by rape, and that rape not legally validated and punished. Because rape law makes marriage seem safer to many women than remaining single, the real purpose of rape law is in fact not to punish men for ignoring women's statements of "No" to sex, but to panic women into saying "Yes" to sex--in marriage.

I will argue that a rather cynical manipulation of rape law, through "Consent to Force" and "Stranger Danger", to promote ends contradictory to what rape statutes appear to promise citizens, arose historically--and that it was used to deal with specific social issues important to the era in which it arose. Since the era in which it arose was the early nineteenth century, it should surprise no one that the rape law was manipulated to manage class conflict and, particularly, to control working class people. Control of workers was conflated with the need to control women--a need which also affected treatment of middle class women, although in a different way--and thus became expressed as a battle over working class women's proper roles in society. The battle can be followed by studying bad rape cases--rape cases obviously and often grossly oppressive to women--over time.

This thesis will show that bad case law can teach a lot. As Jean Piaget suggested in his work on the mental and moral development of children in the early twentieth century,<sup>2</sup> mistakes may illuminate how people--children or lawyers--think, if we ask why they make those particular kinds of mistakes. Thornton is one such illuminating mistake.

Mary Ashford was drowned in a pit,<sup>3</sup> with signs of sexual brutality: a lacerated vagina, and hand-shaped bruises on her upper arms. Near the pond, a man and a woman's shoeprints in a harrowed field showed they had been running and dodging side to side. There was a large pool of blood beneath a tree beside the field, and a trail of blood towards

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<sup>2</sup> See W. Huitt and J. Hummel, "Piaget's Theory of Cognitive Development", Educational Psychology Interactive, Retrived Oct. 2006 from <<http://chiron.valdosta.edu/whuitt/col/cogsys/piaget.html>>. In 1921, while marking IQ papers, Piaget became interested in the children's typical errors of logic.

<sup>3</sup> Hall, pp.6-7, 76 and 88.

the pit.<sup>4</sup> Ashford was known by many people to have spent the night walking with Thornton.<sup>5</sup> Thornton admitted to sex with her; he had blood on his groin, shirt and underclothes.<sup>6</sup> But he was acquitted. No explanation for Ashford's death was supported at the trial; the battery was dissociated from the cause of her death.<sup>7</sup>

In Thornton, the judge's summary for the jury introduced two crucial suppositions. One was that Ashford probably consented to sex,<sup>8</sup> after being chased and held down, though afterwards her blood soaked her dress so badly it had to be torn off her body.<sup>9</sup> This was based on the theory of "consent to force"--the idea that a woman can meaningfully consent after a man has been physically violent. The second supposition was that if she consented, then the defendant had no motive to kill, for he had no reason to fear a rape accusation.<sup>10</sup>

This is where the problem arises. Thornton's acquittal was ensured by a summary which, although it used the language of "beyond a reasonable doubt",<sup>11</sup> was not at all objective.<sup>12</sup> The Judge, Sir George Holroyd, openly said he

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<sup>4</sup> Anna Clark, Women's Silence, Men's Violence: Sexual Assault in England, 1770-1845 (1987), p.71, citing Hall, pp.78-9, reported "witnesses had seen footsteps, matching the shoes of Thornton and the victim, which seemed to show a man chasing a woman across a field. They saw the imprint of her body on the grass, marked by quantities of blood where her crotch had been, prints of a man's knees and toes beneath the prints of her legs, and on her body, heavy bruises on her arms in the shape of a man's hands." See also Clark, pp.114-5, her discussion of Holroyd's opinion of the violence as not contradicting the possibility of consent. Roy Porter, "Does Rape Have a History?", in Sylvana Tomaselli and Porter, ed., Rape (1986), pp.216-36, said Holroyd was even-handed on reasonable doubt (225-7). However, Porter did not report the blood in the field, only her bloodied genitals and clothing, p.226.

<sup>5</sup> Hall, pp.2-5 and 68-76.

<sup>6</sup> *Ibid.*, pp.11-2, 25-6 and 92-4. It was disputed whether Thornton admitted to sex before or after blood was found on him. The constable, Thomas Dales, who arrested Thornton, told his boss, Justice of the Peace William Bedford, that Thornton admitted having sex after the examination, and repeated this to the Inquest; but at trial he said Thornton volunteered the information before blood was found. Holroyd called it a sign of innocence that Thornton admitted to sex before the blood was found (pp.106-7).

<sup>7</sup> Generally, given a known sex partner of a dead woman, a defence will suggest another man was responsible for the killing, possibly after a second sex act. But in Thornton, no other man was theorized. Workmen fit Thornton's and Ashford's shoes into the footprints, Hall, pp.7-8, 10, 18-23, and 77-89. (Hall complained, pp.22-3, from the perspective of the 1920s, that they did not use the best scientific technique: they should have taken casts and compared shoes to them, not placed the shoes on top of the prints.) In any case, it made no difference, for the judge assumed sex happened after the chase, yet was consensual. Likewise, he said a lacerated vagina was the normal result of breaking the hymen of a virgin who was menstruating. *Ibid.*, pp. 12-3, 24-5, 98, 106-7, 109, and 111.

<sup>8</sup> *Ibid.*, pp.106-7 and 111.

<sup>9</sup> *Ibid.*, pp.24 and 90-1.

<sup>10</sup> *Ibid.*, pp.106-7.

<sup>11</sup> *Ibid.*, pp.105-6 and 112: "the evidence must be such as not to carry to the minds of the jury a reasonable doubt of his guilt"; "if they should have good reason to doubt his guilt, though they could not

believed the defence,<sup>13</sup> and his suppositions supplied missing links in the defence theory.<sup>14</sup> His charge to the jury was also methodologically suspect: he reconstructed the mental processes of a woman from whom there was no testimony--because she was dead--so the argument she consented had no evidentiary foundation. Telling the jury he believed certain disputed versions of the facts, he interfered with their role as triers of fact.

But the legal poverty of Holroyd's approach is not necessarily self-evident to non-legally-trained historians.<sup>15</sup> "Proof beyond a reasonable doubt" is authoritative rhetoric, creating a sense of reverence, even awe, for judges, and is easily misunderstood. Beyond a reasonable doubt does not mean disproving all possible but extremely improbable facts--frivolous or ridiculous possibilities.<sup>16</sup> It does not mean disproving unreasonable doubts.

Prosecutors do not have to prove criminal cases beyond what I call "The Monty Python's Life of Brian" standard--they do not have to show that a spaceship did not spirit a man away for a few minutes, get into an intergalactic battle, and, while the ship was being shot down, redeposit him on earth in another spot so he evaded imminent capture

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consider him blameless, that would be a ground of acquittal"; and "[i]f any fair and reasonable doubt arose in their minds as to his guilt, the prisoner was entitled to the benefit of those doubts."

<sup>12</sup> The Judge, Sir George Sowley Holroyd, did not summarize much prosecution evidence: the bruises on her arms; that there was a little blood on the dancing clothes she changed, but more on the working clothes she was found in; and that her working clothes were dirtied on the back.

<sup>13</sup> *Ibid.*, pp.106-7, Holroyd's charge set up the meaning of the timing of the sex; see p.111, he "inclined to the view that the connection had taken place" at the time the defence suggested, before Mary Ashford had gone to change her clothes at her friend Hannah Cox's mother, Mrs. Butler's home, and that this said showed she consented.

<sup>14</sup> Holroyd turned the defence's timeline into a narrative about lovers; otherwise the defence theory was merely that she had consented (without explaining the footprints or blood) and an alibi resting on being somewhere else soon after the time the death probably took place. *Ibid.*, the charge, pp.105-12, and the defence evidence, pp.99-104.

<sup>15</sup> For example, Porter, an exceptional historian but no lawyer, argued in "Rape" that historians ought to accept Holroyd's apologia for his analysis as based on "reasonable doubt", pp.225-7. However, other historians, particularly those practiced in legal history, are less prone to misunderstand law or to become overawed by the legal authority of judges.

<sup>16</sup> In R. v. Lifchus [1997] 3 S.C.R. 320 "proof beyond a reasonable doubt" was defined as "based on reason and common sense" but not falsifying "a far-fetched or frivolous doubt", or doubt "based on sympathy or prejudice". It is more than "probable or likely guilt", but also requires the trier of fact to keep in mind "that it is nearly impossible to prove anything with absolute certainty." See also R. v. Bisson [1998] 1 S.C.R. 306 and R. v. Starr [2000] 2 S.C.R. 144. In the U.S., juries are told: "Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things that we know with absolute certainty. And in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of all the evidence, you are firmly convinced of his guilt of the crime charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, then you must give the defendant the benefit of the doubt and find him not guilty." See U.S. v. Dority (U.S. Ct. App. 10th circuit, May 24, 2000) and People v. Johnson (Cal. Ct. App. 5th Dist. June 23, 2004).

by pursuers.<sup>17</sup> Beyond a reasonable doubt means allowing for normal and regular results of causes in everyday life,<sup>18</sup> using commonsense to gauge what is likely or probable beyond, say, about a 10% rate of probability for the contrary proposition.<sup>19</sup>

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<sup>17</sup> See Scene 13, "Brian and the Spaceship" in "The Life of Brian", 1979, produced by John Goldstone, directed by Terry Jones and starring the Monty Python troupe, available from <[www.mwscmp.com/movies/brian/brian.htm#script](http://www.mwscmp.com/movies/brian/brian.htm#script)>. This has been my favorite image of a non-reasonable doubt since my first year in Law School studying Criminal Law.

<sup>18</sup> Barbara Shapiro, Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence (1991), p.8, noted the proof beyond a reasonable doubt standard developed in the eighteenth century from an epistemological crisis caused by the failure of scholasticism. Beyond a reasonable doubt was an "intermediate level of knowledge, short of absolute certainty but above the level of mere opinion...made by an overlapping group of theologians and naturalists." Thus, truths were defended not by reference to "assertions of infallibility", but "based on evidence"; likewise, naturalists claimed truth could be gleaned from "natural phenomena which could be observed but could not be reduced to the kinds of logical, mathematical demonstrations that traditionally had been thought to yield unquestionable truths." On this basis, a "'reasonable man' will not require demonstration[s]...that 'exclude all Dubiosity, and compel assent,' but will accept moral and physical proofs that are the best that may be gained" (quoting Walter Charleton, Immortality of the Human Soul (1657, London), pp.186-80. Rene Descartes used similar language to explain "moral certainty" in Discourse on Method in 1637. Legal cases after about 1688 used the phrases: "if you believe on the evidence"; "if you believe what the witness swore"; and especially "if the evidence is sufficient to satisfy your conscience". The beyond a reasonable doubt standard coalesced on a foundation of Empiricism (pp.13-4). In the second half of the eighteenth century, the language of belief and conscience (which had always emphasized "rational judgment") became more secular and began to sound like our current legal language of "beyond a reasonable doubt". In this form, the language of reasonable doubt was carried forward into the legal treatise writers of the nineteenth century (pp.20-40).

<sup>19</sup> Common figures for reasonable doubt range between 85% to 99% certainty or conversely from 15% to 1% doubt. But any mathematical probability for legal reasonable doubt is a metaphor. John Locke associated proof with probabilities in An Essay Concerning Human Understanding (1690), but did not deliver a specific number (Shapiro, pp.8-10): judges should be "unbiased and impartial" and not "partisan advocates." See also pp.16-18: English Protestant clerics warned against the "over scrupulous conscience" insisting upon "mathematical certainty of demonstration": conscience should be satisfied "'upon the grounds of a convincing probability'" (quoting Jeremy Taylor, Ductor Dubitantum, or the Rule of Conscience in all her General Measures, Serving as a Great Instrument for the Determination of Cases of Conscience (1660, London), pp.3, 30, and 55). C.M. Koch and D.J. Devine, "Effects of Reasonable Doubt Definition and Inclusion of a Lesser Charge on Jury Verdicts", Law and Human Behavior, (Dec. 1999), pp.253-74, found that defining reasonable doubt as a probability and including lesser charges both increased convictions. It is wise to caution against using probabilities in a context of widespread mathematical illiteracy. See Helen Jones, "Beyond Reasonable Doubt", Plus Magazine, (Sept. 2002), accessed from <<http://plus.maths.org>>.: Sally Clark was sentenced to life in prison for murdering two sons, because of a misused statistic. Sir Roy Meadow, an English pediatrician, cited the Confidential Enquiry for Stillbirths in Infancy [CESI], based on data from 1993-6, that the random risk of an affluent, nonsmoking British family with a mother over 26 experiencing one Sudden Infant Death Syndrome baby death was one in 8,500 births. Therefore, Meadow told the jury that the risk of a mother experiencing two SIDS deaths was one in 8,500 squared, or one in 73 million. But this statistic only makes sense if the two baby deaths are random, not linked to a common underlying cause which might run in families. The CESI data itself showed the risk of a sibling dying of SIDS if a previous baby died of SIDS increased between 10 and 22

A legal background is useful to legal history, because a lawyer can pierce the authoritative rhetorical armour of legal judgments. Unless historians consider the special nature of legal documents and gain training and experience specific to legal practices, they may confront technical legal language with no more scepticism than any layperson to the law.

Legal judgment writers often claim to speak the truth; legal decisions are a form of apologia. Most historians readily pierce the arrogance of religious apologists of the past, but it takes a more specialized historical understanding to pierce the arrogance of past writers in a legal tradition. The law still claims a form of secular infallibility today in our modern liberal nation states. A sloppy historian, unused to legal arguments and genres, may not argue against a past judge's claim to respect reasonable doubt, when it is appropriate to deflate that particular adjudicator's claims. How do you call a judge's claim of reasonable doubt a hoax? How do you call a judge a liar? Thechutzpah of a lawyer is not required, but can be helpful.

On the other hand, whether lawyers actually use their legal training to dispute debatable judicial rulings from the past depends upon whether they are motivated to do so. Lawyers have training helpful to deflating claims of judicial infallibility, but as "insiders" to the legal system, they may pull their punches. When a lawyer agrees with a past decision, he or she may use the same exaggerated truth claims found in judgments. In those cases, an historian's view of the legal past may be more helpful.<sup>20</sup> What is needed for a project explaining the social causes and effects of bad case law is both a critical lawyerly attitude, and deep social historical understanding.

The (critical) lawyer may readily note that Holroyd decided disputed facts in favour of the defence,<sup>21</sup> and added dubious facts of his own.<sup>22</sup> When the historical record reveals that, after a ten hour trial,<sup>23</sup> the Thornton jury acquitted

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times, for the entire population of British families. Logically, if the first baby died from a genetic cause of SIDS, the chances of another with the same parents having the same disorder could be as high as one in two if the problem was related to a single dominant gene, or one in four if recessive. The Clark babies were well-cared for. Meadow's statistic was the only evidence of non-natural deaths. The Clark case was a real case of legal reasonable doubt, but the wrong statistic, misused, made doubt seem unreasonable. U.S. v. Walton 207 F. 3d 394 (4th Cir. 1998) 531 U.S. 865 (2000), held that no numerical probable doubt formula should be used, because any quantitative language was likely to confuse jurors.

<sup>20</sup> For example, see Peter Linebaugh, "(Marxist) Social History and (Conservative) Legal History", New York University Law Review (1985), pp.212-43, surpassing John Langbein's more lawyerly "Albion's Fatal Flaws", Past and Present, (1983), pp.86-120.

<sup>21</sup> Hall, pp.110-1, especially: "[T]he prisoner might have come down by the canal towing path, through the meadows...But then he must have gone the distance of three miles and a half from a quarter-past four o'clock, and all this pursuit, and the transactions which followed, must have taken place within the period of time within which he was afterwards seen. It would have taken up no inconsiderable space of time, including the running and the pursuit; and he [Holroyd] thought it could not be done in a quarter of an hour."

<sup>22</sup> *Ibid.*, pp.106-7: "If the connection took place against her consent, then a rape had been committed, and that would be ground for the guilty party to wish to get rid of her testimony. If there were no rape, and the intercourse took place with the consent of the deceased, whether that consent was obtained by great

in six minutes, without retiring from the courtroom,<sup>24</sup> such a lawyer may be less surprised and impressed than a generalist historian may be: such a rapid agreement evokes suspicion of misdirection to the legal mind, a judge playing tricks with the role of the jurors to decide what the true facts were in the case. But it might suggest a slam-dunk, undeniable case, or widespread social consensus, to a historian who has not spent the time or acquired the training to offset lay naivete about the power of judges in the courtroom.

In fact, nothing could be further from the truth than assuming that the easy acquittal in Thornton reflected the opinion of most of the people in the area about the case.<sup>25</sup> The rhetoric of reasonable doubt can be used to cover biased and partial analyses in law. It can be used to manipulate juries, and people need to be careful not to let it do the same to them.

A critical lawyer can be helpful to deal with Holroyd's rhetorical sleight of hand. Historians develop a great deal of general knowledge about their favourite eras; they are often deeply skeptical of high-flown claims to absolute knowledge, especially where the knowledge is "ahistorical"--claimed to hold true for all times, persons and places. But some historians have their own peculiar blindspots: They can be prey to a sort of fetishism of written documents.

If a document has a well-proven provenance in a favoured past, an historian may develop a sort of affection for its author. After all, documentary evidence of the past is by its very nature scarce. One may feel a sense of gratitude to the producers of such gems, when they provide a unique lens into the historian's period. Historians may be too lenient toward those past actors who wrote their stories down. Recorded judgments in legal cases obtain prominence for posterity over other versions of the facts in dispute.

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importunity or not, that would make it less likely that he should commit murder." This was the crucial direction. Then: "if they thought the connection took place previously to that time, then the deceased coming to Hannah Cox's, and making no complaint against the prisoner, would show that, if it had taken place before, that it had taken place by her consent." See also p.111.

<sup>23</sup> Ibid., p.29.

<sup>24</sup> Ibid., p.112. Holroyd asked the prosecution to open on a charge of rape; they declined to present evidence, so Holroyd directed an acquittal on the lesser charge. The Officer of the Court (unidentified) was described at the beginning of the trial as having "read over the indictment which consisted of two counts" (p.65). It was not directly stated that Thornton was charged with both murder and rape.

<sup>25</sup> See ephemera discussed by Clark, Women's Silence, and Hall, including: Rev. Luke Booker, A Moral Review of the Conduct and Case of Mary Ashford (1818, Dudley and Birmingham); The Affecting Case of Mary Ashford, a Beautiful Young Virgin, Who was Diabolically Ravished, Murdered, and Thrown into a Pit (1819: John Fairburn, London); and Anonymous, Horrible Rape and Murder!! The Affecting Case of Mary Ashford (1818, Birmingham). See the Preface, below: the trial so outraged the community that the pamphlet controversy was followed by decades of melodramas based upon the case, painting Thornton as a monster and Ashford as a virgin sacrifice, starting with G.L., "The Mysterious Murder or What's O'clock? A Melodrama in Three Acts Founded on a Tale Too True" (1817, Birmingham), and continued with the long-running "The Murdered Maid or the Clock Struck Four (1819, London), which was reworked and restaged for several decades. Those controversialists who supported Thornton and Holroyd's version of events were a definite minority.

But a lawyer, undaunted by the legal holiness of the source, may take a critical perspective to reading trial transcripts. It helps that lawyers are trained to take apart and exploit weaknesses in each other's arguments. Lawyers are prey to their own sorts of biases, but they are trained to deconstruct legal arguments. When motivated to avoid unthinking deference--in other words, when they want to argue a different side than that chosen by a judge--lawyers have skills to help them do this effectively. Where lawyers often have problems with writing legal history is in taking cases with important legal ratios out of their social contexts, and not acknowledging that cultural characteristics of the past are very different than now.

Overreaching by judges may have been common in the early nineteenth century, for judges were a socially elite group, and people had a tolerance for superiors telling inferiors their business. But deference to class was not legally supposed to determine jury decisions.<sup>26</sup>

Some historians argue that the rightfulness of past actions should be judged strictly by the norms of the time. But contextualizing legal actions in the past does not require such capitulation to moral systems which have often been overthrown for good reasons. The issue of historicizing actions, beliefs and events is more subtle than that. Appreciating that people thought differently in the past does not preclude judging that some historical actors' thinking was wrong.

Historians contextualize information in terms of the mentalities of that time, not our time. Bracketing current ideologies which touch on the past subject matter is regular procedure to correct for hindsight and what historians call "presentist bias".<sup>27</sup> But this does not mean we have to believe the ideas typical of the time were right, legal or moral. Historians have their own moral bottom lines. Sensitivity to the past does not mean we forgive everything, although it might mean not retrospectively berating individuals for not piercing the assumptions of their time.<sup>28</sup>

Some conservative historians hold it improper to morally condemn egregious past human rights abuses, if they

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<sup>26</sup> Shapiro, p.14, quoted Whig lawyers of the 1680s, Sir John Hawles, Judge Vaughn, and Henry Care: the "satisfied conscience" test required each juror consult his own conscience, and not rely on another's conclusions. To follow a judge on disputed facts was to misuse the God-given gift of inner judgment.

<sup>27</sup> Presentist bias assumes that people in the past were the same as we are now, that their loyalties anticipate our modern political allegiances, that their morals, values and motivations were the same. Herbert Butterfield's classic, The Whig Interpretation of History, (1931) criticized the theory that British politics from the twelfth century inexorably moved towards liberal democracy--he called it "staging historiographical narratives anachronistically so as to produce a ratification of the present" (Keith Sewell, "The 'Herbert Butterfield Problem' and Its Resolution", Journal of the History of Ideas (2003), pp.599-618 at 599). But presentism is difficult to wholly avoid: in The Englishman and His History (1944), Butterfield admitted that exposition of general themes necessitated imposing biases onto the past, but the past should not be selectively abridged for the purposes of making a "tendentious" argument (Sewell, pp.600-10).

<sup>28</sup> If a historian does not believe in the inferiority of Africans, for instance, she will dispute the rightfulness of the thinking of eighteenth century slave traders. But she will describe the nuances, development, and varieties of that racism in detail, as it operated in that time.

were supported by the worldview at that time.<sup>29</sup> But that position means that nearly every past injustice cannot be acknowledged and repaired, because justified by complex ideology.<sup>30</sup> Knowing how embedded in typical mindsets an historical wrong was, is not inconsistent with knowing it was also wrong.

Proof beyond a reasonable doubt in Thornton should not mean that the prosecution had to prove that a dead woman, who could not speak for herself, was not sexually perverse and excited by battery, or not struck by a fit of

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<sup>29</sup> For example, Canadian military historian Jack Granatstein argued against damages for Japanese Canadians for their internment from 1941-9. He attacked histories which focus on wrongs done by the Canadian state in Who Killed Canadian History? (1998), saying the "important parts" of Canadian World War II history were being eclipsed by "unimportant details". He defined white soldier's experiences as typical, and marginalized racial minorities and women. Japanese internment was defensible, in his Canada's War: The Politics of the MacKenzie King Government, 1939-1945 (1990), because of government anxiety after Pearl Harbour, and RCMP inability to quantify the threat of West Coast Japanese "fifth column" activity or espionage--they did not have Japanese translators to deal with Japanese reading materials. But this does not disprove racism, for why was the national police so isolated from that segment of the population?

<sup>30</sup> Historians have opposed damages for Canadian native residential school abuse survivors because school personnel had good intentions, and operated according to the values of their time--they sincerely believed they were saving souls. John Chalmers, "Missions and Schools in the Athabaska", Alberta History, (1983), pp.24-9, noted the schools were badly administered, staff "well-intentioned but untrained", but quoted without comment the administrators' defence of policy of isolating the children, because their families were "'pagan and...uncivilized'". Gary Taljit, "Good Intentions, Debatable Results: Catholic Missionaries and Indian Schooling in Hobbema, 1891-1914", Past Imperfect, (1992), pp.133-54, admitted but soft-pedaled problems: the schools used "ethnocentrism, paternalism, and strict discipline"--quaint words for child abuse and neglect.

But it takes courage to acknowledge past injustice openly. Jean Manore, Canadian Historical Review, (March 1, 1998), pp.130-1, critiqued Jim Miller's Shingwauk's Vision: A History of Native Residential Schools (1996) for claiming government underfunding was a factor in child neglect. Manore claimed Miller offended "professional objectivity" by "assigning blame", and questioned "how active historians should be in commenting on contemporary events...when such events could lead to court proceedings." He also found Miller "more balanced" than the Royal Commission on Aboriginal Peoples Report (1991-6), because "he also acknowledges the benefits some students feel they gained", thus going comparatively easy on the Canadian government. By contrast, Teresa L. McCarty reviewed Shingwauk for Ethnohistory, (Winter '98), pp.172-3, finding it "by no means an easy book to read", but applauded Miller's conclusion that the past imposes a "'duty...to ensure that it never happens again'" (quoting Shingwauk, p.436). These reviews reflect different theories of history.

Because of historic written justifications, persons who follow the tout comprendre, tout pardonner school often deny harmful actions were committed by those with high-minded ideals. Mary Jane Miller, "Where the Spirit Lives: An Influential and Contentious Television Drama about Residential Schools", American Review of Canadian Studies, (Apr. 1, 2001), pp.71-84, discussed critical reaction to the 1989 Keith Leckie film "Where the Spirit Lives": two American reviewers, John J. O'Connor in the New York Times (6 June 1990) and Rita Kempley, (The Washington Post, 27 Sept. 1990), disbelieved the film because of its "Dickensian anger". Kempley said Leckie characterized teachers as "a craven lot who cane, mock and/or sexually abuse their pupils, claiming it is 'God's work'. They might be the progeny of Dr. Mengele and the fine nuns who ran the show in *The Handmaid's Tale*." She denied abuse was routine. But most Aboriginal survivors of the schools found "Where the Spirit Lives" unrealistically gentle, with its nice teacher bucking the system, and the young heroine's successful escape back to her people: "What [Kempley] would have said about a representation that ended more realistically...one can only imagine." History often really was scarier than Margaret Atwood fiction.

sympathy for the sexual tension experienced by a man who was brutalizing her.<sup>31</sup> Proving that a murder victim was not the way she was depicted in a defence argument is almost impossible. Therefore, this is a place where consideration of the unreasonableness of a doubt should limit further enquiry about the motives of the victim. Just because an impossible question comes out of the mouth of a judge does not make it fair. An historical treatment of rape law should be sensitive to--indeed, scrupulously watch out for--impossible questions asked of complaining witnesses, and impossible proofs required of prosecutors.

Bias in the legal system often occurs in the form of unfair process, such as requiring unreasonable proofs. Furthermore, the more one learns rape law, the more one finds the same sorts of unfairness recurring to neutralize accusations. Courts always claim to detest rape, but most of the women who come before them are not found to be good enough to be real rape victims. Rape is bad, but this woman is to blame--she's promiscuous to the point of being indiscriminate in her partners, or she's totally crazy and wouldn't know what planet she was on, much less what happened in bed with a man. Read enough rape cases, and a person finds herself wandering in a make-believe land full of women like no one has ever seen in life. Rape law is one of the most robust sources of mythological archetypes left in a largely secularized world.

Most past criminal justice systems have been grossly oppressive to those labeled criminal; most historical narratives about criminal adjudication criticize the state.<sup>32</sup> But rape has never been like any other crime. Rapes have been the least reported, the least charged, the most likely to be diverted, and the least likely crimes to lead to conviction for a very long time.<sup>33</sup>

It is permissible to reconsider verdicts in legal cases--indeed, it is often required, because otherwise meaningful legal commentary is not possible. Even those lawyers most devoted to the rule of stare decisis, or deciding like cases alike and following precedents,<sup>34</sup> do not insist that every decision is correct because a lawful trier of fact decided it.<sup>35</sup>

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<sup>31</sup> Edward Holroyd, the judge's son, published Observations on the Case of Abraham Thornton, who was Tried at Warwick, 8th August, 1817, for the Murder of Mary Ashford, Showing the Danger of Pressing Presumptive Evidence Too Far (1819, London), and described Ashford attempting to get away, struggling and then "yielding...reluctantly" to "artifice, promises and oaths and urgent importunity" (p.24). The younger Holroyd's remarks expanded the judge's meaning in his remarks about Ashford consenting to "importunity" at the trial (Hall, pp.106-7).

<sup>32</sup> For example, Doug Hay, Peter Linebaugh, John Rule, E.P. Thompson and Cal Wenslow, Albion's Fatal Tree: Crime and Society in Eighteenth Century England (1975), Linebaugh, The London Hanged: Crime and Civil Society in the Eighteenth Century (1993), and E.P. Thompson, Whigs and Hunters: The Origins of the Black Act (1975).

<sup>33</sup> See John Beattie, Crime and the Courts in England, 1660-1800 (1986), an exhaustive quantitative study which shows that rape was unusual in its low charging, finding of a "true bill" by the Grand Juries, and conviction rates, and also that the rates of accusations were strikingly low compared to other offences.

<sup>34</sup> That is, legal positivists and formalists. Formalists believe that law is what the sovereign will commands; they emphasize statute law. Legal positivism is a theory that judges are "constrained decision makers who will base their decisions on precedent", producing a "mechanical jurisprudence because the

Stare decisis doesn't work that way. If it did no decisions would ever be overruled,<sup>36</sup> and no legal change would occur

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process by which judges reach decisions is highly structured" (Lee Epstein and Thomas Walker, "Positive Political Theory and the Study of U.S. Supreme Court Decision Making", New York City Law Review, (1996), pp.155-203 at 157-8). Positivism argued, since the mid-nineteenth century, that laws are "discoverable" social phenomena much like natural phenomena. Positivists value stare decisis, to constrain judges from deciding on the basis of private morality and to increase the predictability of the law. However, "wrongly decided" cases should be overruled: Peter Wesley-Smith, "Theories of Adjudication and the Status of Stare Decisis" in Laurence Goldstein, ed., Precedent in Law (1987), at p.87, said "Judges owe their fidelity, not to the pronouncements of predecessors but to the law...[T]hey are ultimately free to reject a precedent if they do not believe it represents the law." But this makes the source of legal change difficult to specify; some strict positivists adhere to the fiction of a transcendent body of law awaiting "discovery", but others find authority to overrule decisions in "reason, fairness or strong public acceptance...[and] considerations of societal justice" (Edgar Bodenheimer, "Cardozo's Views on Law and Adjudication Revisited", University of California Davis Law Review, (1988-9), pp.1095-1125 at 1114-5). Some point out that "stare decisis is not a rule of statute nor of common law, [so] it is simply a creature of judicial comity" (Hazel Carty, "Precedent and the Court of Appeal", Legal Studies (1980), pp.68-76 at p.76): a ruling by one judge rests on the approval of fellow judges. Ironically, positivism has been criticized for allowing judges to do what they like, and making the law unpredictable: Jessica Sage, "Authority of the Law--The Contribution of Secularized Legal Education", Florida State University Law Review (2003-4), pp.707-51 at 736 complained that "Legal positivism...permits legal principles to become manipulative tools for the judge...to advance his individual or personal sense of right and wrong..." An early American positivist, Gino Sperenza, approved of legal unpredictability caused by using principles to justify overruling precedents, as a means to avoid "stagnation" (see Thomas Green "Freedom and Criminal Responsibility in the Age of Pound", Michigan Law Review (1994-5), pp.1915-2054 at 1933, quoting Sperenza, "Natural Law Versus Statutory Law", Albany Law Journal (1899), p.400).

<sup>35</sup> The classic positivist, John Austin, demanded precedents be overruled when necessary, if the original judges did not "model their rules...to the growing exigencies of society" (M.B.W. Sinclair, "Statutory Reasoning", Drake Law Review, (1997-8), pp.299-383 at p.374 n.366, quoting Austin, Robert Campbell ed., Lectures on Jurisprudence 5th (1885), V.2, p.647). Roger Cotterrell noted that "the idea that accepted principles should outweigh judicial idiosyncracies is an old one...but...the 'duty of repeating errors' is a modern innovation"--because the idea that common law should form a "structure of stable rules...(even if by its nature it cannot be)" upholds a "cultural (rather than legally logical or authoritatively structured) unity and reflexivity of the common law" (Cotterrell, "The Rule of Law in Corporate Society", Modern Law Review (1988), pp.121-40 at 134). Attempts to make new law look like it fits precedents have been ridiculed for "resembling the activity of those social scientists who, given a scattering of data points, undertake to find a mathematical curve that fits them" (Nancy Weston, "The Metaphysics of Modern Tort Theory", Valparaiso University Law Review, (1993-4), pp.919-1007 at 960 n.74): positivists even massaged the decisions of the 1936-7 U.S. Supreme Court term, (which approved Roosevelt's New Deal legislation), to conform to precedents (see Epstein and Walker, "Positive Political Theory", pp.155-6). Other schools of legal theory--legal realism and critical legal studies--have described stare decisis as the most manipulative tool of legal reasoning, alluded to by judges who choose not to overrule, but claim they have no choice.

<sup>36</sup> The classic Canadian case, Edwards v. Canada (Attorney General) [1930] AC 124 (JCPC) p.136 at the Privy Council overruled precedents. It was settled law that "persons" would not include women unless expressly stated. Lord Sankey used the "living tree" doctrine: the constitution changes its meaning over time by a natural process prompted by changes in society: "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits." Stare decisis in its strictest form--that a judge must never disobey a binding precedent--only dated from the late nineteenth century (see Frederick Kempin, "Precedent and Stare Decisis", American Journal of Legal History, (1959), pp.28-54).

in fundamental doctrines, or areas of law where the issues have arisen before.<sup>37</sup> Yet doctrines shift all the time, sometimes without judges even noting that they have overturned precedents--without justifying why precedents were not followed.<sup>38</sup>

Thornton is not excused by stare decisis. The facts were not new to law--rape murders occur regularly--yet no previous decision was mentioned at trial. No wonder: using an assumption of consent to violent sex to negate the motive in a murder case was erratic reasoning. Holroyd's idea of sexual consent was not based on earlier cases: "Consent to force" cannot be assimilated with a rational construction of consent. Philosophically, consent does not make sense unless a person can decide not to agree.<sup>39</sup> If a person is forced, she or he has lost the power of acting on voluntary will.<sup>40</sup> Force cancels consent; unless one can decide to refuse the bargain and be free to leave, no legal bargain can be

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<sup>37</sup> A more realistic theory defines law as a practical art, not a science: "a grabbag of reasoning methods that includes deliberation, interpretation, reliance on authority, tacit knowledge, and much else besides" (John Murray, "Contract Theories and the Rise of Neoformalism", Fordham Law Review, (2002-3), pp.869-915 at 908). This "practical legal reasoning", does not require propositions to be "analytic or verifiable to have truth value". Practical legal reasoning was not in thrall to scientific rhetoric, but it was not irrational, "incorporat[ing] logic but...not...requir[ing] complete faith in the premises", "reject[ing] the foundationalist view that norms can be deduced from a single unifying principle" and "respect[ing] 'rules' but reject[ing] the formalist view that the 'correct' result can simply be deduced from the rules" (p.908). William Bradford, "'Another Such Victory and We Are Undone'", Tulsa Law Review (2004-5), pp.71-136 at 106, n.200, said practical adjudication is affected by "...the gravitational force of precedent" but "diminished...when the social policies advanced by those decisions are no longer justifiable on moral or ethical grounds". Changing circumstances lead to overruling precedents with "institutional regret", as described by Ronald Dworkin in "Hard Cases", Harvard Law Review, (1975), pp.1057-1109 at 1087-1101. See also Dworkin, Taking Rights Seriously (1978), pp.118-23.

<sup>38</sup> See Bruce MacFarlane, "The Historical Development of the Offence of Rape", in J. Wood and Richard Peck, eds., 100 Years of the Criminal Code of Canada (1993), also available from <[www.canadiancriminallaw.com/articles/abstracts/Hist\\_rape.htm](http://www.canadiancriminallaw.com/articles/abstracts/Hist_rape.htm)>, (pagination follows the electronic document): a requirement that rape victims prove rapists ejaculated appeared in the late eighteenth century, followed by rulings which went both ways; a statutory enactment in 1828 deemed ejaculation evidence not required, but within three years a case ruled that the legislature could not have meant to remove the ejaculation requirement. Then another ruling accepted the legislation. The ejaculation requirement is discussed further in Chapter Three. On the other hand, MacFarlane, pp.32-40, noted the marital exception to the rape law--that a man could not rape his own wife--stemmed from one passage in Sir Matthew Hale's History of the Pleas of the Crown, ([1678] 1736), p.629: "A community is not well served by laws that permit the abuse of one spouse by the other. How for three centuries that could have been sanctioned by common law courts on the basis of a paragraph in a textbook is almost beyond comprehension" (McFarlane, pp.39-40).

<sup>39</sup> See Carole Pateman, "Women and Consent", Political Theory (1980), pp.149-68 and The Sexual Contract (1988).

<sup>40</sup> Statutory law in force in Canada and in the U.K. now requires that sexual consent be voluntary, reflecting the person's own will. The Criminal Code of Canada, section 273.1 "Meaning of 'consent'", uses the term "the voluntary agreement of the complainant to engage in the sexual activity in question"; S.265 "Consent" defines four situations in which consent to any assault cannot be obtained (force to self or another, threat or fear of force to self or another, fraud, and the exercise of authority), and S.273.1 (2)

made.<sup>41</sup>

However, lots of rape cases still make no sense. Infuriating rape cases pounce on the legal scholar with the morning news at least once or twice a year. Yet the ruling in R. v. Thornton of 1817 is astonishingly absurd--it interprets a murdered woman as if she were as alien from ordinary human beings as the one-eyed, silver-skinned spaceship aliens who inexplicably intervene in "Life of Brian" to save the "lucky bastard" Brian.<sup>42</sup>

But just as it is important to deconstruct the fraudulent reasoning about outrageous rape cases in the current media, it is important to understand why a case like Thornton happened in the past--what it meant, how it reflected social reality--rather than just get angry. What can we learn from it about the people and time it was decided?

## B. WHY LAWYERS SHOULD PAY ATTENTION TO LEGAL HISTORY

Thornton recently obtained historical interest. It was a focus case in a larger analysis of rape law from 1780 to 1845 by feminist historian, Anna Clark. Clark's Women's Silence, Men's Violence<sup>43</sup> (1987) remains a useful resource, adding a crucial feminist component to the historical understanding of rape law in the burgeoning subfield of legal

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"Where no consent is obtained", specifies, inter alia, that no other person can express agreement for the complainant, and the complainant cannot be "incapable of consenting" during the activity. In the U.K., the Sexual Offences Act 2003, section 74 "Consent", uses the phrase "decides by choice" to describe the mental element which renders sexual behaviour immune to prosecution as a sexual offence between adults. In the U.S., each state has its own criminal jurisdiction, and some states define consent as based upon voluntary agreement while others do not.

<sup>41</sup> For an analysis of sexual assault law using the meaning of consent applied in contract law, see Lucinda Vandervort, "Mistake of Law and Sexual Assault", Canadian Journal of Women and the Law, (1987-8), pp.233-309.

<sup>42</sup> See the end of Scene 13, "The Life of Brian", when, as Brian is set down again on the Jerusalem street, a passer-by hisses, "Ooh, you lucky bastard" <[www.mwscmp.com/movies/brian/brian-13.htm](http://www.mwscmp.com/movies/brian/brian-13.htm)>.

<sup>43</sup> Clark, Women's Silence, Men's Violence (1987), pp.15-19: Clark sampled records from the Foundling Hospital, a London charitable institution for illegitimate children, which required women to "recount the circumstances of their seductions", finding 190 rapes by sampling one in three of the 1815-45 mother's petitions, totaling 18% of petitions. She also found 165 rape depositions from 1770 to 1829 in the North-east Circuit Assize records (Yorkshire, Cumberland, Westmoreland, Northumberland and Newcastle), including cases which never went to trial. She found another 160 1830-45 Yorkshire rape cases, in three newspapers, the Leeds Intelligencer, the Leeds Mercury and the (Chartist) Northern Star (Public Record Office, Chancery Lane, London). For London, Old Bailey transcripts from 1770-90 found 51 rape trials, and magistrates' minute books from 1780-96 and 1801-3 found 21 cases which did not go to trial. She found 191 indictments and recognizances for attempted rape in the Middlesex Sessions papers, with only name, occupation and conviction rates. After 1796, the Old Bailey stopped publishing transcripts of rape and sodomy; she found 238 London rapes by sampling three months of every year for the Sun from 1800-15, The Times from 1815-45 and every other year of the Weekly Dispatch from 1815-45.

history.<sup>44</sup> Clark did not stick as closely to Thornton, nor cover the same legal doctrines, but I substantially agree with her. This thesis respectfully builds on her work.

But for doctrinal analysis, and distinguishing popular beliefs related to rape law from rape law itself, a more fully realized legal perspective may be useful. Having a lawyer take up Thornton helps to answer predictable criticisms of feminist historiography of rape. It can speak back to the naive, non-lawyerly understanding of reasonable doubt which led an otherwise excellent historian, Roy Porter,<sup>45</sup> astray<sup>46</sup> into too much deference to Judge Holroyd, amounting to prostration to the elite position of the adjudicator.<sup>47</sup>

A critical lawyer can counter such a status-quo conservative account of legal authority.<sup>48</sup> Interdisciplinarity

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<sup>44</sup> For example, John Langbein's Torture and the Law of Proof (1977) and Prosecuting Crime in the Renaissance (1974); Beattie, Crime and the Courts; Hay et. al., Albion's Fatal Tree; Linebaugh, The London Hanged; and James Oldham, English Common Law in the Age of Mansfield (2004).

<sup>45</sup> Dying at 55 in March 2002, Porter was hailed in the British Medical Journal as "the greatest medical historian of his generation" ("Obituaries: Roy Porter", (March 16, 2003), available at <<http://bmj.bmjournals.com/cgi/content/full/324/7338/680>>.). Porter's work includes: The Making of the Science of Geology (1977); English Society in the Eighteenth Century (1982); Mind Forg'd Manacles: A History of Madness (1987); London: A Social History (1994); The Greatest Benefit to Mankind: A Medical History (1998); and The Enlightenment (2001). Among his edited works were The Ferment of Knowledge (1980)(with George S. Rousseau); The Anatomy of Madness (with W.F. Bynum and Michael Shepherd) (1985); Consumption and the World of Goods (with John Brewer) (1993); and The Facts of Life (with Lesley A. Hall) (1995). Extraordinarily prolific, Porter was entertaining and easy to read.

<sup>46</sup> Porter, "Rape", pp.226-9 violently critiqued Clark's earlier work on Thornton, and called Holroyd "even-handed on reasonable doubt". Porter's account is based heavily not only on the trial transcript, but Hall's 1920s legal analysis. See Preface, below, for problems with Hall's take on Thornton; see also Chapter Three, the twentieth century development of rape law as further deterioration of complainants' rights from the late nineteenth century. Porter also argued, pp.218-22, that rape incidence and rape fear were low in the eighteenth century because rapes were not discussed in elite women's journals and women did not avoid going about in public without male chaperones. This is sloppy history: Clark argued that rape fear increased, not in the eighteenth century, but beginning from Thornton in 1817.

<sup>47</sup> *Ibid.*, pp.218-22: Porter's attack had more to do with anti-feminist politics than history. He was even more derisive about American anti-rape feminists Susan Brownmiller and Susan Griffin (see discussion below in Chapter One) than of Clark. He suggested the U.S. was uniquely rape-prone, more than Britain; he assumed most rapes occurred during travel, were likely to be politically motivated, expressed lower class men's enmity against the elite (by analogy to racially motivated rape of white women by African-American men, a practice Porter believed explained most American rapes on the basis of Eldridge Cleaver's Soul on Ice (1968)), and could be disproved by the chivalry of eighteenth century highwaymen to women. Worse, he argued that rapes of working women by employers were not considered rape in the eighteenth century because they were unlikely to be taken to court, and that rape fear among women is naturally (ahistorically) expressed by women avoiding being outdoors alone and arranging to be protected by men at all times.

<sup>48</sup> There are historical ways to counter status quo conservative accounts of law as well. See especially Linebaugh's brilliant defence of Marxist critique of property law in early modern England, "(Marxist) Social History and (Conservative) Legal History", his response to John Langbein's myopic review of Albion's Fatal Tree, "Albion's Fatal Flaws".

between law and history requires negotiations about matters of emphasis, but this is a legal history, informed by internal legal analysis. The lawyer's side can aid in this project, if it is critical in focus.

Most modern mainstream legal theory is not geared to explain rape cases. Most of the theoretical power of formalism and positivism applies to questions of law--that is, the construction and interpretation of legal doctrines--when these are used, for example, to define the elements of a particular criminal offense. Positivism has little to say about how judges handle questions of fact.<sup>49</sup> Further, mainstream theories work best on issues of law which have received explicit attention from legislators.

Most strictly "legal" issues in sexual assault are trivial: For example, Do we consider action "x" to be sex? Usually this is obvious.<sup>50</sup> In the nineteenth century, when it was technical rape--vaginal penetration by a penis--that was at issue, not all "sexual assaults", this legal issue was even easier to decide.

In most nineteenth century rape cases the only live issue was whether the complainant actually consented, a question of fact. But consent is not an easy fact to find: What counts as evidence which the judge or the jury can use to infer the state of the complainant's mind about the sexual activity? These factual matters were not the sort of matters classically addressed by statutes, which only set out what acts were proscribed, not how to weigh evidence of facts like the complainant's intent.<sup>51</sup> Matters of fact about consent were judged on a case-by-case basis.

Lawyering strategy to defend rape charges became: How to show she consented? Judges responded by deciding what information could provide evidence of consent. Here the courts in the late eighteenth and early nineteenth century busied themselves with providing guidance to analyze rape--on the facts, not the law. Legislators were left

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<sup>49</sup> For example, that the type of intent or mens rea ("guilty mind") required to be guilty of manslaughter is recklessness or "wilful blindness", while the mens rea of murder is intention to kill, represents an issue of law, along with which legal tests should be applied to show intent; what the accused actually intended at the time of the killing is a matter of fact. When a criminal offence is adjudicated by a judge alone, the judge determines the law to be applied and also finds the facts; when a crime is judged by judge and jury, the judge determines the law to be applied, but the jury decides the facts. Appeals are ordinarily not allowed on issues of fact, but only issues of law.

<sup>50</sup> Usually we can tell that an act is "sexual" from the nature of the act, or the speech and demeanour of the assailant. This has occasionally been a live issue in Canadian law since the definition of sexual assault in the Criminal Code, in Section 271 (1), became any touching for a sexual purpose; see R. v. Taylor (1985) 44 C.R. (3d) 263 (Alta. C.A.), R. v. Ricketts (1985) 61 A.R. 175 (Alta. C.A.), R. v. Cook (1985) 46 C.R. (3d) 129 (B.C.C.A.), R. v. Chase (1987) 59 C.R. (3d) 193, R. v. Litchfield (1993) 25 C.R. (4th) 137 (S.C.C.), R. v. V. (K.B.) (1993) 82 C.C.C. (3d) 382 (S.C.C.), and R. v. Higginbottom (2001) 156 C.C.C. (3d) 178 (Ont. C.A.). The only really complicated issue of law in Canadian sexual assault cases now is the defence of "Mistaken but honest belief in consent"--that the accused honestly believed that the complainant consented to sex, even though she or he really did not consent to the sex. This defence was not often raised in the nineteenth century.

<sup>51</sup> Statutes addressed issues of evidence on consent in rape from 1828, but consent was not addressed in the way offences were defined by statutes before that point, for example in treatises like Hale's History of the Pleas of the Crown (1736[1678]).

playing catch-up: they tried to remove certain types of evidence which common law rules had allowed in the courts as proofs of consent in women who accused men of rape, because Parliament had to respond to public concern when evidentiary practices seriously impaired the ability to convict almost any man accused of rape.<sup>52</sup>

This history of rape law should be important to lawyers now: It created a social problem for the legal system, because by 1828 the public did not believe it could be trusted to convict on real accusations of rape. That is, the public did not believe the criminal law on this offense met the needs of women. This is a social problem that still exists today. But beyond the social problem revealed, the trajectory of legal history in this area presents a challenge to the mainstream legal theory which underlies most legal practice today. Thus legal history has something to offer every account of the law.

Acknowledging that laws do change over time--sometimes dramatically--legal history puts the lie to the idea that legal decisions had to go the way they did, that adjudicative power is strictly constrained, and no moral responsibility can be attached to an individual judge. No real legal history can be "positivist", pretending law results from the scientific application of rules authorized by the legislature: "History is a subversive discipline, and legal history is perhaps the most subversive of all."<sup>53</sup>

Legal history reveals that the law in the courts is far from determined by legislative action.<sup>54</sup> The Thornton era saw the first salvo in an ongoing legislative struggle to reign in common law evidentiary rules.<sup>55</sup> We still cannot declare a clear win for legislative reform.

In the 1810s, the factual issues in rape law were left to judges, who ruled according to their inner lights. These changed with gender ideology, virtually undisturbed by legislation. A judge, influenced by medical jurisprudence texts claiming expertise beyond their ability to deliver, might be influenced by a "quite distasteful myth", like the idea that any woman can avoid rape because "you cannot thread a moving needle."<sup>56</sup>

To mainstream positivists, legal authority requires that most issues before the courts be easily resolvable. The results of a case should be nearly certain. The law should be set out in published statutes, and made available so that

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<sup>52</sup> See MacFarlane, "Historical Development", pp.41-8; Clark, Women's Silence, pp.62-5; and Susan Edwards, Female Sexuality and the Law (1981), pp.23-31 and 49-50, discussing the beginnings of statutory regulation of evidentiary rules in rape law.

<sup>53</sup> George Dargo, [Review of The Judicial Power of the United States], American Journal of Legal History, (April 1989), pp.174-6 at 176.

<sup>54</sup> MacFarlane, p.48, commented on the 1828 *Offenses against the Person* provisions stipulating that ejaculation did not have to be proved to prove rape: "It was evident that a tension was starting to develop between the courts and the legislature. That tension continued well into the twentieth century and...continues even today."

<sup>55</sup> *Ibid.*, pp.48-66. See also Edwards, pp.49-50.

<sup>56</sup> *Ibid.*, p.20, reporting on an 1815 treatise called The Elements of Medical Jurisprudence, noted also in Edwards, Female Sexuality, p.126.

citizens can know it. Courts should be predictable.<sup>57</sup> Statutes should set out clear rules. All judges should do is find facts in the cases before them and apply the rules.<sup>58</sup>

If cases are easily resolved, then judges can simply apply the law to the facts, and do not create law: they refer to statutes to ascertain the right decision in a case.<sup>59</sup> Legislatures are authorized to define the will of the sovereign power, either by representing the whole citizenry (in modern liberal democratic systems) or the owners of all the property and representatives of the wealth in the nation (in eighteenth century representative theory in England).<sup>60</sup>

But when judges deal with complex factual issues, or difficult evidentiary problems, the legitimacy, predictability, coherence and consistency of the law is not guaranteed by reference to the legislature.<sup>61</sup> Even in the best of all possible legal systems, sometimes judges may deal with situations that legislatures did not foresee. How can judges rule on issues not provided for by statute, but still respect the rights of the legislature to shape the fundamental rules applied in society?

One of the most sophisticated positivists, H.L.A. Hart, in his 1961 classic, The Concept of Law,<sup>62</sup> described the law as a weaving together of rules. Where law was "settled"--where judges could reach decisions easily by reference to clear statutes--Hart claimed that law was working well, its authority, predictability and coherence not in dispute. But

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<sup>57</sup> Predictability was especially prized by positivist jurists influenced by Jeremy Bentham's Utilitarianism. See Gerald Postema, Bentham and the Common Law Tradition (1986), at pp.147-90.

<sup>58</sup> Duncan Kennedy, "Form and Substance in Private Law Adjudication", Harvard Law Review (June 1976), pp.1685-1778, at 1685, noted that liberal or positivist legal theories valued "rules", which clearly proscribed or required certain activities, over "standards", which set out the underlying purposes for the law but did not define the boundaries so clearly, because they allowed less judicial discretion, leaving judges to "only" find the facts. But Kennedy, a critical legal theorist, affirmed the value of standards because they made for a more purposive, honestly political, enquiry by judges. But another problem with the liberal theory of rules is that it suggests facts are simple matters. Facts in rape cases are slippery and attract biased reasoning. See Kim Scheppele, "'Just the Facts, Ma'am': Sexualized Violence, Evidentiary Habits, and the Revision of Truth", New York Law School Review (1992), pp.123-72, discussed in Chapter Three, below.

<sup>59</sup> For liberal positivism as a guarantee of the authority of the law, see Joseph Raz, The Authority of Law (1979); and Leslie Green, The Authority of the State (1988).

<sup>60</sup> The main English representative theory after the Glorious Revolution (1688) was "virtual representation". See David Eastwood, "Parliament and Locality", Parliamentary History (1998), pp.68-81; Dror Wahrman, "Virtual Representation", Past and Present (1992), pp.83-113; and Paul Langford, "Property and 'Virtual Representation'", Historical Journal, (1988), pp.83-115.

<sup>61</sup> This is known as the "indeterminacy thesis" by critical legal scholars who dispute the positivist vision of a legal system authorized by statute. See Ken Kress, "Legal Indeterminacy", California Law Review (1989), pp.283-447 at 284-5. Kress did not agree with the critical view of the extent of legal indeterminacy, or that this threatened law with illegitimacy, but he set out their main lines of argument.

<sup>62</sup> Hart, The Concept of Law (1961).

for each thread in the weaving, a "penumbra", like the woolly edges frizzing out from each strand in a textile, existed.<sup>63</sup> When a case fell away from the settled law, a judge would have to work to extend the law's fabric, to weave the new area back into the cloth of law. The right way to do this repair work was to utilize established principles and knowledge of social need, respecting the wishes of the sovereign will reflected in settled law, to create new law to fill the gap.<sup>64</sup>

Hart foresaw that judges would occasionally forge new rules in "unsettled" areas of the law, working on a sort of frontier. But the frontiers would be small, enclosed on all sides, and easily woven back in. Judges would not have to create new law very often.<sup>65</sup> Hart resonated with the self-image of many judges: most judges did not see their work in courtrooms as an expression of their own political wills. They felt their discretion was constrained.

But Hart's penumbra metaphor itself has come to seem fuzzy under the scrutiny of critical legal theorists. Roberto Unger suggested that the cloth of law did not resemble a nicely woven piece of Lancashire calico, with evenly spaced warps and woofs woven tightly under even pressure, creating a smooth finish that appears almost impenetrable, but a patchwork quilt.<sup>66</sup> Another image is a loosely knitted sweater, with gaping holes, regions where tight threads snarl around each other, and serious distortions where it has been pulled out of shape by violent misuse. Hart believed penumbra were easily tidied. But to critical theorists, the cloth of law had more "interstitial" areas than proper weaving; the bright threads of legislatively authorized decisions surrounded by fuzzy uncertainty looked more like a sea of uncertainty with rare and isolated islands of settled law.<sup>67</sup>

The critical approach did not merely emphasize the unsettled over the settled areas of law: it speculated on the causes of the sorry state of the garment of law.<sup>68</sup> The woven areas were parts of the law where a great number of lawyers had worked to persuade judges on how to interpret statutes or define new law; these areas reflected the interests of elites.<sup>69</sup> That these interests led to well-settled law and predictable court decisions was therefore less a sign of rationality

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<sup>63</sup> Hart, "Positivism and the Separation of Law and Morals", Harvard Law Review (Feb. 1958), pp.593-629 at 593 and 606-7.

<sup>64</sup> See the account of Hart's "soft" or liberal positivism, in Kress, pp.287-8.

<sup>65</sup> Hart, generally The Concept of Law and "Positivism and the Separation of Law and Morals". See also Kress, pp.296-7, for examples of "easy cases", including regulatory offences like speeding.

<sup>66</sup> See Unger, "The Critical Legal Studies Movement", Harvard Law Review (Jan. 1983), pp.561-676, at 571.

<sup>67</sup> Kress, p.288: The "penumbra of uncertain cases swallow up the core of formalistic rule application."

<sup>68</sup> For example, Duncan Kennedy, "Distributive and Paternalistic Motives in Contract and Tort Law", Maryland Law Review (1981-2), pp.563-658.

<sup>69</sup> See Duncan Kennedy, A Critique of Adjudication: Fin de Siecle (1997), at pp.1-5 and 115.

than of conservatism.<sup>70</sup> Well-woven areas included areas where there had been too many threads forced in, with the result that knots obscured the main threads of legal doctrine.<sup>71</sup> Knotty areas represented places where legal business had been concentrated for a long time. The ingeniousness of lawyers had stretched and manipulated legal doctrines in the service of often litigated interests, sometimes to the point where the original shape of the moral vision animating social concern was lost. Law can be spoiled by influential people twisting it to their ends too often.<sup>72</sup> Lawyers themselves work against the coherence of the law as a whole. The "interstitial" areas--not mere tiny spaces, easily filled in by weaving the penumbras of the threads already there, but gaping holes--represent areas of legal silence, where interests had not been sufficiently represented, sweated over, and argued.<sup>73</sup>

The tightness of the weave of the cloth of law shows where legal work has focused on certain rights. Thus, recent annotations of the *Criminal Code of Canada* reveal tightly woven explication of every possible facet of defenses against charges for offenses related to driving under the influence of alcohol.<sup>74</sup> The area has been litigated beyond what seems logically possible--more than warranted by intellectual interest in that law, based on its technical aspects. Many persons charged with drunk driving have had enough money, and been willing to spend it, to put legal minds to work. Thus, the state of the law at a given time reveals the history of legal preoccupations, which in turn illuminates the distribution of that aspect of social power which is based upon legal activity in a given society.

We cannot understand law unless we understand who was able to access the courts, and what interests got them there. In some cases, the legal interests of certain people are so often left out of court that their points of view become

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<sup>70</sup> For example, Andrew Altman, "Legal Realism, Critical Legal Studies and Dworkin", Philosophy and Public Affairs, V.15 #2 (1986), pp.205-35, argued that judges' presentation of their decisions as predetermined by precedents and statutory language support the status quo and forestall changes.

<sup>71</sup> Unger, "The Critical Legal Studies Movement", p.571: Incoherence resulted from the ad hoc nature of legal work, because of "[t]he many conflicts of interest and vision that lawmaking involves, fought out by countless minds and wills working at cross-purposes"; to expect such law to fit "the results of a coherent, richly developed normative theory" requires the guidance of "an immanent moral rationality".

<sup>72</sup> Mark Tushnet, "Following the Rules Laid Down", Harvard Law Review (Feb. 1983), pp.547-827. See also Toni Massaro, "Constitutional Law as Normal Science", Constitutional Commentary (2004), pp.547-91 at 585, where she complained about the incoherence and opacity to citizens (and even to lower courts) of U.S. Supreme Court Constitutional jurisprudence.

<sup>73</sup> Tushnet, "State Action, Social Welfare Rights, and the Judicial Role", Chicago Journal of International Law (2002), pp.435-54, at 435 and 449, argued courts could reduce legal incoherence if they forced legislators to provide reasonable programming to meet important interests not presently served.

<sup>74</sup> See Tremeeers 2007 Annotated Criminal Code of Canada (2006): for five separate drinking and driving related offences, the standard annotator lists 58 cases, 168 cases, 27 cases, and 120 cases, for a total of 363 "leading" cases, taking a total of 20 pages to discuss them in small print.

less understandable, or even completely unreadable, by legal personnel.<sup>75</sup> This has been the case for women in many different legal situations.<sup>76</sup>

In rape law, common law began with an analysis framed in terms of the interests of men as fathers or husbands of women whose reproductive potential was particularly valuable, because it would establish lines of descent to concentrated bundles of property. It meant to proscribe men who tried to gain title to land by abducting, raping, and marrying women who were heiresses to landed property.<sup>77</sup> Confusing doctrines grew up to allow a woman's kin to bring rape charges when the woman actually consented, to allow women to consent not only before the sex act but after it,<sup>78</sup> and to allow women to save men convicted of raping them from execution by agreeing to marry them, with the proviso

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<sup>75</sup> Some mainstream theorists argue legal indeterminacy is not a problem, because the rate at which appellate judges write dissenting opinions is very small (Kress, pp.324-6, noted figures from 4% to about 10% for various American courts at different times in the twentieth century). But this is beside the point. Judges may be unanimous, and produce decisions which are systemically biased. If Judges' biases support legislative policies, legally silenced groups may have illegitimate political expectations. For example, Thames river workers in Linebaugh's The London Hanged had different notions of payment for work: they thought they had a right to supplement inadequate wages by pilfering coffee, sugar and other bulk goods they unloaded from ships. But their behaviour met statutory definitions of theft, even if the employment context made them "perquisites". The unfairness existed, but it was imposed by Parliament and was not the legal system's fault. It is another matter if judicial bias leads to systematically misreading facts--such as the rape of women prostitutes. The rule, that no woman should be subjected to vaginal penetration without consent, is not in issue. What is in issue is the silencing of certain women's testimony, because judges believed whores never say "no".

<sup>76</sup> See Kate Auty, "Part IV Women as Outsiders to the Jury System", in Auty and Sandy Toussaint, eds., A Jury of Whose Peers? (2004), discussing the Robyn Kina case (unreported, QLDCCA 29 Nov. 1993). Counsel for an Australian Aborigine woman charged with murder failed to elicit information from her which would have provided a defence of self-defence--she had been chronically battered by the deceased, her male partner, had just discovered he had raped her niece, a child in her care, and had been threatened by him. See also Diana Eades, "Legal Recognition of Cultural Differences in Communication", Language and Communication, (July 1996), pp.215-27. In Kina, the problem was not just failure to present the Battered Woman Syndrome, but failure to encourage a woman to speak at all after she had confessed. Silence can also work the other way, to protect the marginalized from biased treatment in the courts. See Susan Glaspell, "A Jury of Her Peers", in Edward O'Brien, ed., The Best Short Stories of 1917 (1918): Neighbour ladies come to an Iowan farmhouse to pick up clothes for a woman taken into custody on suspicion of killing her husband; the sheriff and some men search for clues, while the women find the corpse of a pet bird, the only company of the isolated farmwife, its neck deliberately snapped. Women could not serve as formal jurors. But the women give the wife of the dead man the benefit of a defence of provocation by remaining silent. They hide the bird from the men.

<sup>77</sup> See Stephen Pistono, "Susan Brownmiller and the History of Rape", Women's Studies (1988), pp.265-76, which discussed the changes in rape law in the late thirteenth century through the *Statute of Westminster*, 1285.

<sup>78</sup> Consent after the fact is discussed in Hale, History of the Pleas of the Crown, pp.627-8, 631-2, and 637-8. Hale argued it should not be presumed that a woman who was abducted and raped showed her consent to the rape after the fact by remaining in the domicile of her abductor. He noted that she may not have freedom to leave or to make her real wishes known. In this respect, Hale advocated a pro-woman reform to seventeenth century rape law.

that the victim as well as the rapist would be disinherited.<sup>79</sup>

Later, rape doctrine changed to center on women's lack of consent to sex, not parental permission to marriage.<sup>80</sup> Judges responded with heightened concern about false accusations<sup>81</sup>--backed by professional gossip about cases based on the lies of young girls.<sup>82</sup> Consent analysis led to elaboration of evidentiary rules such as outcry,<sup>83</sup> immediate complaint,<sup>84</sup> the "against her will" phraseology to define lack of consent,<sup>85</sup> evidence of the complainant's resistance,<sup>86</sup> credibility tests based on victim character,<sup>87</sup> and ultimately corroboration and cautioning requirements.<sup>88</sup> It also led to the first statement of the marital rape exception, the refusal to charge husbands with rapes of wives.<sup>89</sup>

The law had been elaborated, but only in one direction: suspecting women are likely to lie, of dubious chastity, and unwilling to fulfill their "marital duties". The law entirely left out first person accounts of women's sexualities, including their common experiences of sexual coercion. To obtain these, courts would have had to at least provisionally accept women's testimony. This they were largely unwilling to do--unless women's rape stories served other purposes,

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<sup>79</sup> Ibid., p.627, reporting on the state of the law in the time of Bracton, during the reign of Henry III (early twelfth century before the Statute of Westminster).

<sup>80</sup> By the *Statute of Westminster*. See Pistono.

<sup>81</sup> Beginning with a famous remark by Hale, that rape is "an accusation easily to be made, hard to prove and harder yet to defend, tho' never so innocent", History of the Pleas of the Crown, p.635.

<sup>82</sup> Ibid.: the famous statement about the ease of false accusations of rape on p.635, occurs in the middle of a discussion of children's testimony and cases other magistrates told Hale about children's false allegations of rape, pp.634-6. Children's supposed propensity to lie was highlighted in the early twentieth century, backed up by psychiatric opinion, in John Henry Wigmore's various editions of A Treatise on the System of Evidence in Trials at Common Law (or On Evidence). See especially the editions from the 1940s on, such as the Chadbourn ed., Wigmore On Evidence (1970). Wigmore is discussed further in Chapter Three.

<sup>83</sup> MacFarlane, "The Historical Development", pp.51-2. See also Hale, History of the Pleas of the Crown, pp.632-3.

<sup>84</sup> Ibid., p.51.

<sup>85</sup> Ibid., pp.17-8 quoted seventeenth and eighteenth century treatise writers who added "against her will", including East, Coke, Hale, Hawkins, Blackstone, and Russell.

<sup>86</sup> Ibid., pp.17-28. How resistance requirements developed in the nineteenth century, through a line of consent to force cases following Thornton, will be discussed in Chapter Three.

<sup>87</sup> Ibid., pp.48-52, and Edwards, Female Sexuality, pp.49-50.

<sup>88</sup> See Wigmore, On Evidence (1905), subsection 2061, pp.2055-8 and Chadbourn, Wigmore on Evidence (1970), subsection 2061, pp.454-60, and 467-8.

<sup>89</sup> MacFarlane, pp.32-40.

such as reinforcing or contesting class dominance,<sup>90</sup> expressing racial demonization,<sup>91</sup> or acting out national enmities and ethnic hatreds, especially during war.<sup>92</sup>

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<sup>90</sup> For example, Adam Jones, "Gender and Genocide in Rwanda", Journal of Genocide Research (2002), pp.65-94, argued that the association of Tutsi women with a hated class-based oppression combined with sexualization of their distinctive features to unloose preexisting taboos against attacking women in the long history of Hutu-Tutsi violence during the genocidal massacres of 1994. This dynamic builds upon and reinforces the understanding of women as male property, despite intersections with class conflict. However, Jones also argued powerfully for understanding the primary motivation of the "genocidaires" as gender-based, murderous violence against Tutsi men, so that the rapes and murders of children and women lagged behind the initial and much more numerous killings of adult Tutsi men. Jones in fact called the genocide primarily a "gendercide" targetting men. Similar points can be made about other recent civil wars involving redistribution of territory, like the breakup of the former Yugoslavia. As terrible as rapes may be as weapons of war, they are not as lethal as the murderous violence directed at men of the same groups.

<sup>91</sup> Besides the well-known moral panics about rape of white women by African American men in the Southern U.S., there is a long history of rape propaganda associated with race throughout the world. For example, Sally Marks, "Black Watch on the Rhine: A Study in Propaganda, Prejudice and Prurience", European Studies Review (1983), pp.297-334, discussed the sympathy of European publics for German complaints about the use of African troops from colonies of France to enforce Rhineland demilitarization after W.W.I: fear about potential rapes of German women by the "savages" led the French to pull blacks out. The effects of rape propaganda combined with racial demonization can be profound, even where the supposed "racial" distinction is obscure: Peter Zarrow, "Historical Trauma: Anti-Manchuism and Memories of Atrocity in Late Qing China", History and Memory (2004), pp.67-107, argued that western "scientific racism" combined with widespread Han unhappiness over the decline of China in the early twentieth century to topple the Imperial Manchu throne--even though the Manchu dynasty's atrocities to pacify the countryside in the seventeenth century were primarily committed by Han who collaborated with the conquering dynasty. Despite the historical distance in this case, Zarrow found that "graphic details of massacres and rapes functioned to bring the seventeenth century into the present, making past history seem like personal memories" (p.72). Given the fantastical, irrational nature of racist rape propaganda, it is clear that it can not be expected to function to really control the sexual violence women experience from men, because it does not concern itself with the facts of the racial identity of real historical perpetrators.

<sup>92</sup> The use of rape accusations to demonize the enemy in war has an ancient history. High points of rape propaganda include British and French hysteria about German rapes of Belgian women in World War One. See Nicoletta F. Gullace, "Sexual Violence and Family Honor: British Propaganda and International Law during the First World War", American Historical Review, (1997), pp.714-47; Ruth Harris, "The 'Child of the Barbarian': Rape, Race and Nationalism in France During the First World War", Past and Present (1993), pp.170-206; and Susan Hoffman, "World War I: Atrocities", Mankind (1977), pp.43-6. But although this propaganda can change state policies--for example, the Belgian rape stories probably helped convince the Americans to join the Allies--it often does so in ways which harm the interests of women, even those most identified with the victimized ethnicity: it demonizes the children women may bear, promotes viewing women as "damaged goods" not suitable for marriage within the cultural group, and objectifies them as property of men from the in-group. Even in the context of feminist activism against military rapes, in reaction to the rapes of Bosnian Muslim and Croat women by Serb paramilitaries during the breakup of the former Yugoslavia in 1992, outrage sparked by rapes associated with "ethnic cleansing" reduces the victimized women to symbols of the group, which promotes the further use of rape because it enforces the link between sexual violence and humiliation of the enemy. See Silva Meznaric, "Gender as an Ethno-Marker: Rape, War and Identity Politics in the Former Yugoslavia", in Valerie Moghadam, ed., Identity Politics and Women: Cultural Reassertions and Feminism in International Perspective (1994), pp.76-97. In addition, the propaganda value of rape in war increases skepticism about women's testimony,

What the law wove in were men's fears, fantasies, jealousies and suspicions about the potential that women might betray the intimate trust central to sexual love relationships. Because their sexual services were their most socially valued capacities, women were still legal property of husbands, even after their fathers' lost absolute control over who they married.

### C. HISTORICAL CONTEXT AND SOCIAL REALITY

This thesis is not only a legal history, but a legal history--a thoroughly historical approach to law. It is not a list of cases describing how doctrine developed on a single point of law, or a "doctrinal history".<sup>93</sup> It interprets law as reflection and product of--and even active force upon--society and culture. History, with its appreciation of contexts, nuances of power, and dynamic flux, illuminates the stake of law in people's lives by linking it to social constellations of power.

This legal history moves our understanding of rape law from rules, to the effects of rules on women's lives. Widening the focus to the landscape around the law, it shows the real interests served by judges who decided what women's sexual pasts, dress, or bodily wounds meant in rape cases--because we know the playbill of people and ideas, and what political and ideological payoffs were up for grabs. History pulls our heads up out of the technicalities, and points to causal analysis of choices made by judges which shaped the common law.

For the "interstitial" areas of common law, we can never understand how even the best, most capable and most disinterested judge<sup>94</sup> would fill in the gaps, unless we know whose voices and what queries he<sup>95</sup> regularly heard and

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causing advocates to "legalize" raped women's testimony, rendering it into "evidence", rather than allowing women to control their stories and establish their own meaning in a therapeutic manner. A genre of horrific reportage grew out of the project of "making the case" that rape was used in Yugoslavia as a means of genocide; most documents compulsively recite horrific details in an almost pornographic manner, rather than enable the women to master the accounts of their own experience. See Rose Lindsey, "From Atrocity to Data: Historiographies of Rape in Former Yugoslavia and the Gendering of Genocide", Patterns of Prejudice, (Oct. 2002), pp.59-78. Lindsey identified "pornographization" with major sources on the Bosnian rapes, such as Helsinki Watch, War Crimes in Bosnia-Herzegovina (1992-3), Catharine MacKinnon, "Turning Rape into Pornography: Postmodern Genocide", Ms. (July/Aug. 1993) and Alexandra Stiglmyer, ed., Rape: The War against Women in Bosnia-Herzegovina (1994). The apparent validation of some women's rapes in nationalist contexts does not offset the underlying problem in rape law, the treatment of women as property of men--it merely glorifies certain victims as highly valuable ethnic property.

<sup>93</sup> Shapiro, pp.249-50: a "doctrinal" history remains internal to the field of law, although it may describe changes in law in general and not just cases on a specific point of law; Shapiro's history of beyond a reasonable doubt. She described her work as parallel to what historians of science call an "internal" history of science. My work is an "external" legal history of rape.

<sup>94</sup> Ronald Dworkin, in Law's Empire (1988), discussed the ideal judge, whom he referred to as Hercules. Hercules could find the "right" answer in almost all legal cases, because he had complete knowledge of all possible sources of law, and unlimited time to decide. Thus, he could make the law cohere

addressed. If an ideal judge mastered an entire body of law perfectly, and made the best sense of all the rules, principles, statutes and fact patterns in relation to each other, his work would still be limited by which voices were heard in legislatures and courts, how often, and on which issues.

Access to courts has not been evenly distributed. Worse, once in court, the lack of a framework of law that can comprehend underrepresented legal interests means that simply working harder to provide adequate legal representation to the unheard may not cure the disease. This is not the fault of the silenced voices, and working harder within the system will not resolve their exclusion, unless the system recognizes the need for fundamental change to the existing framework of legal doctrine, including evidentiary rules and legal procedures, with its systematic biases.<sup>96</sup>

No judiciary in any time has produced the ideal judge--and particularly not the socially homogenous lot on the benches of English courts in the eighteenth and nineteenth centuries.<sup>97</sup> The relative balance of power between social groups in conflict affected which legal interests were most protected by the law. The most crucial facts of a legal system are who matters and who does not, defined by cases brought by those most able to access the system--and how the facts of those cases are shaped and narrated in preparation for "legal" analysis. In the everyday working out of legal rights, nine-tenths of the battle is getting there and being heard.

In the nineteenth century, raped women were not heard. In fact, though they had not been heard well in the eighteenth century, they were increasingly silenced in the nineteenth. Nor did the turn into the twentieth century bring reprieve: things got even worse for a long time before it started to get better. Even now, the exclusion of women's sexualities and knowledge of rape has barely begun to be chipped away. The reason for the historical movement from bad to worse can be summed up as: the influence of rape myths.

This thesis is thus not concerned with all forms of bias which crept into the common law through the self-congratulatory, smug, myopic worldview of elite judges. While other forms of bias are important, this thesis concentrates on the effects of that myopia on women. This choice is justified because it is women who are most

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into a "seamless web". However, this ideal theory of judging does not address how certain possible issues in dispute come to be typical legal issues, while others do not come to court, or come in such small numbers that they do not become represented in the field of the legal cases upon which Hercules is capable of deciding "almost all" "rightly".

<sup>95</sup> I use the male pronoun for past judiciary because they all were actually male until late in the nineteenth century; even now, women are a minority in the world's judiciaries, far less than the half which would approximate their numbers in the general population. See Chapter Two, below.

<sup>96</sup> See the classic statement by Duncan Kennedy from "A Discussion on Critical Legal Studies at the Harvard Law School" (no date, no pub), p.10: "[T]hings that are rotten and unjust [are made to] look natural, inevitable, logical and inherently fair. So that if you are a loser, it's your own fault." Cited by John Van Doren and Patrick Bergin, "Critical Legal Studies", New England Law Review (1985-6), pp.291-304 at 293.

<sup>97</sup> See Norma Landau, ed., Law, Crime and English Society, 1660-1830 (2002) and John Beattie, Crime and the Courts.

vulnerable to (the legal system) insult added to (private violent) injury, having rape accusations used as occasions to publicly dissect their characters.

In addition to being a legal history, and a historical contextualization of law, this thesis is a feminist history. Feminist history addresses the often unasked questions of what was happening to the women of a time. It does not support the conservative model of history which defends past practices just because they were justified by the ideas of the time. In fact, feminist history, like working-class history or histories of the colonized, exposes us to other past ideas which did not justify the status quo generally accepted in the past, complicating the history of cultures of the past.

Feminist history does not defend the status quo of the past. But it is still history, concerned with understanding the past as it really was, and not as it reflects ideas of our time. One of the pleasures of feminist history is rediscovering subversive ideas under mainstream political historical narrative. Because we engage with resistant thinking that really existed in the past, we end up engaging with often previously unseen female historical agency.

What this means in terms of feminism is that we must approach women's lives with an awareness of how they conceptualized the feminist battle at that time. On some issues, their conclusions do not fit our current feminist political agendas. But there are some perennial concerns that were of concern then, and remain of concern now. Rape is one of them. In terms of rape, we can recognize the anger, pain, sense of violation, and bone-deep knowledge that what was done to them was not right. This knowledge of wrong was and remains a challenge to the bad law of rape. The voices of raped women from the past inspire feminist legal criticism just as voices of raped women now. Women's narratives about their experiences of rapes are still recognizable across the span of two centuries--they are just harder to find from that time.

We can take our own concerns with particular feminist issues of today back to the past, but we must understand that resistance to sexism did not always take the same forms. If we use good historical practices and contextualize their concerns with deep understanding of the forces to which they were opposed, we can recognize and sympathize with their battles, not just ask what they would have said about our issues.

In focusing on women, feminist history forces us to confront some ugly realities. This thesis reveals a lot of victimization--sometimes layers upon layers of it. But the intention of looking fearlessly at victimization is not to define women as always and everywhere victims, to suggest nothing but victimization awaits women now, or that men are implacable enemies. There are more than just victimized women in the pages to come--there are also women fighters, and male allies.

Good history always reveals that reality is complex, that some small action at least is always possible, and that neither gender nor oppressive power is natural. Good history can always reassure critical theorists with its ultimate message of contingency. At the very least, being able to write about past resistance to oppression shows that the story could not ultimately be repressed by historical silencing.

Feminist history judiciously applies a measure of "utopianism, the 'minimal' hopefulness that comes from

befriending the oppressed", to recover the voices of silenced women,<sup>98</sup> and to provide "a plaintiff immortality",<sup>99</sup> "rendering the oppressed person's articulations audible and powerful."<sup>100</sup> In any given historical period, "[f]ear of revolution silences complaints of injustice that only friends and advocates will hear, but it does not permanently erase them."<sup>101</sup> The practice of writing histories focused on non-"Great Men"<sup>102</sup> in itself helps to make up for historical injustices perpetrated upon the oppressed.

To address misogynist bias, I will move between discussing rape myths and the forces which created and spread them through the judiciary and into the society, and the worldviews of the women most subjected to rape myths: working class women. Among rape myths, I concentrate on one still influential to this day, "Stranger Danger", or the idea that women are most at risk of rape from strange men when out alone at night without "good men" chaperoning them. I will also discuss the viewpoints of working class men and bourgeois women, especially the "ladies" who organized the first feminist movements. But because "Stranger Danger" encouraged blaming raped women who traveled alone, sometimes in the dark, to and from workplaces outside their own homes, it was aimed especially at working class women.

The thesis will begin in Chapter One by explicating how Ashford would have viewed her own behaviour--walking with Thornton in the fields of the rural Midlands. I will show that her behaviour reflected a longstanding, stable pattern of courtship, amply demonstrated for England from the sixteenth through mid-eighteenth centuries, and probably existing several centuries before that. A demographic pattern common in North Western Europe featured late marriage of women (about ten years past puberty), to grooms about two years older, a high rate of adults never marrying, and very low rates of extramarital births.<sup>103</sup> It reflected and relied on folk sexual mores which allowed young unmarried adults

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<sup>98</sup> Laura Mandell, "The First Women (Psycho)analysts; or, The Friends of Feminist History", Modern Language Quarterly (March 2004), pp.69-92, at 72.

<sup>99</sup> Ibid., p.74, quoting Jerome Christensen, Lord Byron's Strength (1993) p.324 and his Romanticism at the End of History (2000), p.208 n.5.

<sup>100</sup> Ibid., p.71.

<sup>101</sup> Ibid., p.74.

<sup>102</sup> The "Great Man" theory of history, prominent in the late nineteenth century, explained history by reference to great leaders. See Thomas Carlyle, On Heroes, Hero-Worship and the Heroic in History ([1843] 1901). Max Weber theorized the effect of heroes on their followers, in "The Nature of Charismatic Authority and its Routinization" in his Theory of Social and Economic Organization ([1922] 1947).

<sup>103</sup> See Peter Laslett, The World We Have Lost--Further Explored, 3rd ed. (1983), pp.4-6, 22-4, 110-1 Table 11, 161 Figure 2; Louise Tilly, Joan Scott and Miriam Cohen, "Women's Work and European Fertility Patterns", originally Journal of Interdisciplinary History (1976), in Robert Rotberg and Theodore Rabb, Marriage and Fertility: Studies in Indisciplinary History (1980), pp.219-48; Peter Laslett, Family Life and Illicit Love in Earlier Generations (1977), pp.13-4, 26-7 Table 1.4, 38-9; Mary Hartman, The Household and the Making of History (2004), pp.34-69, 72-5; John Hajnal, "European Marriage Patterns in Perspective" in D.V. Glass and D.E.C. Eversley, eds., Population in History (1965).

to experiment with non reproductive sex, avoiding intercourse until marriage or a late stage of courtship, when the couples were certain to marry. That young people followed this pattern is shown by memoirs and popular sex manuals-- and by high rate of premarital conceptions, shown by large percentages of first births to married couples within eight months of the wedding.<sup>104</sup>

However, while this stable pattern remained the norm, signs of strain accompanied changes in the economy from the mid eighteenth century, when the ratio of illegitimate births rose substantially, marriage age fell by about two years, and the population began to grow exponentially. A "baby boom" between 1750 and 1850 changed the shape of England and the world.<sup>105</sup> The lives of the most impoverished section of the ordinary people became more disorganized. In addition, artisans experienced downward mobility, uncertainty, and disruption of traditional adult masculinity. Urbanization increased opportunities for upper class scoundrels to prey on the poor,<sup>106</sup> and for economically stressed poor young men to abandon pregnant sweethearts.<sup>107</sup>

Chapter Two will explore the development and implications of the gender ideology of "Separate Spheres", from origins early in the eighteenth century among the middle class, its spread up the class scale to the gentry in the late eighteenth century and the aristocracy by mid-nineteenth century,<sup>108</sup> and down the class scale to the poor in the early

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<sup>104</sup> Roy Porter and Lesley A. Hall, The Facts of Life (1995) pp.6, 8-9, 11, 15, 39-3, 51-2; Jean Louis Flandrin, "Repression and Change in the Sexual Life of Young People in Medieval and Early Modern Times", in Robert Wheaton and Tamara K. Hareven, eds., Family and Sexuality in French History (1980), pp.27-48; Tim Hitchcock, English Sexualities (1997), pp.29-39, 53.

<sup>105</sup> Laslett, Family Life, pp.104-5, 128-30; Hitchcock, pp.39-41; Tilly, Scott and Cohen, pp.235-7; P.E.H. Hair, "Bridal Pregnancies in Rural England in Earlier Centuries", Population Studies, (1966-7), pp.233-43;

<sup>106</sup> Clark, Women's Silence, pp.34-41, 90; Peter Brooks, The Melodramatic Imagination (1976); Fredric Jameson, The Political Unconscious (1981); R. Rene Branca, "Melodrama Convention and Rape", American Drama (2005), pp.32-45; Diane Long Hoeveler, "The Temple of Morality", European Romantic Review (2003), pp.49-63; Sally Ledger, "Chartist Aesthetics in the Mid-Nineteenth Century", Nineteenth Century Literature (2002), pp.31-63.

<sup>107</sup> Tilly, Scott and Cohen, pp.237-9; E.A. Wrigley, English Population History from Family Reconstruction, 1580-1837 (1997), p.219; Martin Wiener, "Alice Arden to Bill Sikes: Changing Nightmares of Intimate Violence in England, 1558-1869", Journal of British Studies (2001), pp.184-212 at p.203; George Boyer, An Economic History of the English Poor Law, 1750-1850 (1990), p.167; Laslett, Family Life, pp.126-30 and 160-2, Figure 2; John Gillis, For Better, For Worse (1985); Nicholas Roger, "Carnal Knowledge: Illegitimacy in Eighteenth Century Westminster", Journal of Social History (1989), pp.355-75 at 359-62; Anna Clark, The Struggle for the Breeches: Gender and the Making of the British Working Class (1995), pp.42 and 49; Michael Anderson, Family Life in Nineteenth Century Lancashire (1971), p.148; Tim Hitchcock, "Breeches and Barricades: Gender and Class in Nineteenth Century Britain and France", Radical History Review (1998), pp.175-80.

<sup>108</sup> See Mary Poovey, The Proper Lady and the Woman Writer: Ideology as Style (1984); Catharine Hall and Leonore Davidoff, Family Fortunes: Men and Women of the English Middle Class (1987); Carole Pateman, "Women and Consent", Political Theory (1980), pp.149-68 at 154; Ashley Tauchert, "Mary

nineteenth century.<sup>109</sup> Separate Spheres was especially influential among the skilled working classes which gained financially from industrialization. It was strongly related to the "Stranger Danger" rape myth: that women belonged in the home was vindicated by the idea that women who strayed out of their "own" sphere faced high risk of rape. Reaction to Thornton and "Consent to Force" spread Separate Spheres and Stranger Danger to workers in the 1820s and '30s; political leaders of the working class adopted a preference for wives to stay home.<sup>110</sup> But removing women from waged labour was still not possible for most working families.<sup>111</sup> So Stranger Danger scapegoated the poor who had no choice but to expose their women to traveling public streets to work to feed their families.

Bourgeois ideologists promoted a compromise between pulling working women out of the labour force altogether, and allowing them to earn wages: employment in private homes as domestic servants. Domestic service, already traditional work for women, expanded in the 1790s to become the most common employer of women to the First World War.<sup>112</sup> But working class people were less sanguine about domestic service: they recognized the threat of sexual harassment of servants by masters. "Dangerous strangers" in working class drama and literature became stereotyped as upper class villains--because cross-class sexual exploitation was particularly fearful to working class parents.<sup>113</sup>

The situation of the domestic servant sexually harassed by her master paralleled feminist political analysis of the situation of the bourgeois wife under Separate Spheres. The exclusion of women from the political rights of citizens, justified by the dependence and subordination of wives to husbands, was based on analysis of marriage as lifelong

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Wollstonecraft and Jane Austen: Rape and 'Love"', Women, (2003), pp.144-58 at 146 discussing Jean-Jacques Rousseau, Emile, or On Education (1992 [1762]), p.332; Marisa Linton, "Virtue Rewarded? Women and the Politics of Virtue", History of European Ideas (2000), pp.35-49 at 41-2; Brian Cowan, "What was Masculine about the Public Sphere?", History Workshop Journal (2001), pp.127-56 at 130; Philippe Aries, A History of Private Life (1989), p.9; and Hannah More, Strictures on the Modern System of Female Education ([1799] 1974).

<sup>109</sup> Anna Clark, The Struggle for the Breeches: Gender and the Making of the British Working Class (1995); Susan S.M. Edwards, Female Sexuality and the Law (1981), pp.24, 52-3, 83-8, and 96-9.

<sup>110</sup> Anna Clark, "The Rhetoric of Chartist Domesticity: Gender, Language and Class", Journal of British Studies (1992), pp.62-88 at 72, 74, 81-2, and Eric J. Hobsbawm, "Artisans and Labour Aristocracy", in Workers: Worlds of Labour (1984), pp.252-72.

<sup>111</sup> Katrina Honeyman, Women, Gender and Industrialization in England (2000), and Steven King, "Chance, Choice and Calculation in the Process of 'Getting Married'", International Review of Social History (1999), pp.69-76.

<sup>112</sup> Tilly, Scott and Cohen, pp.229-34; Laslett, Family Life, pp.32-45; Hartman, p.251. See also Honeyman, Women, Gender and Industrialization.

<sup>113</sup> Clark, Women's Silence, pp.35, 90-100, 113-4, 194-5; Clark, The Struggle, pp.194-5; and Porter, "Rape", pp.221, 226-8.

service.<sup>114</sup> Thus the importance of the marital exclusion to rape law development--and to middle class feminism in the second half of the nineteenth century.<sup>115</sup> The marital exclusion is the major link between nineteenth and twentieth century rape law, because it obfuscated the meaning of women's No to sex.<sup>116</sup>

Chapter Three will discuss the development of Consent to Force into extreme resistance standards and a special evidentiary regime for rape which hampered women's rape complaints, especially when their rapists were known to them. This legal development was justified by gender ideology which required wives to "domesticate" and "civilize" their husbands, and held women responsible for all male sexuality. These beliefs are related to currently held rape myths which are linked to men's propensity to commit rapes and women's lack of empathy for rape victims.<sup>117</sup> These rape myths remain common among criminal justice system personnel now.<sup>118</sup> Rape law still promotes sexual mores which privilege male sexuality, in marriage and the commercial sex trade, in stark contrast to the folk mores which upheld the

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<sup>114</sup> Carole Pateman, The Sexual Contract (1988); Sandra Holton, "Free Love and Victorian Feminism: The Divers Matrimonials of Elizabeth Wolstoneholme and Ben Elmy", Victorian Studies (1994), pp.199-222; and Stephanie Forward, "Attitudes to Marriage and Prostitution in the Writings of Olive Schreiner, Mona Caird, Sarah Grand and George Egerton", Women's History Review (1999), pp.653-80.

<sup>115</sup> Sheila Jeffreys, The Spinster and Her Enemies: Feminism and Sexuality (1985); Susan Kingsley Kent, Sex and Suffrage (1987); Margaret Jackson, The Real Facts of Life: Feminism and the Politics of Sexuality (1994); Laura Mayhall, "The Rhetorics of Slavery and Citizenship: Suffragist Discourse", Gender and History (2001), pp.481-97; Susan Margarey, The Politics of Passion: Sex and Suffrage (2001); Lee Holcombe, Wives and Property: Reform of the Married Women's Property Law (1983); Cheryl Jorgensen-Earp, "The Transfiguring Sword": The Just War of the women's Social and Political Union (1997); William Leach, True Love and Perfect Union: The Feminist Reform of Sex and Society (1980); and Emma Liggins, "Writing Against the 'Husband-Fiend': Syphilis and Male Sexual Vice", Women's Writing (2000), pp.175-95.

<sup>116</sup> Pateman, "Women and Consent", pp.151, 154-5, 161-2; Tauchert, p.147; and Christine M. Skolnik, "Wollstonecraft's Dislocation of the Masculine Sublime: A Vindication", Rhetorica (2003), pp.205-23.

<sup>117</sup> Susan Edwards, Female Sexuality and the Law; Traian Stoianovich, "Gender and Family: Myths, Models and Ideologies", The History Teacher, (1981), pp.67-117, especially 72, 94, 100; Kimberley Lonsway and Louise Fitzgerald, "Attitudinal Antecedents of Rape Myth Acceptance: A Theoretical and Empirical Reexamination", Journal of Personality and Social Psychology, (1995), pp.704-11; M.R. Burt, "Rape Myths and Acquaintance Rape", in A. Parrot and L. Bechhofer, eds., Acquaintance Rape: The Hidden Crime (1991), pp.26-40; Gillian Mason, Stephanie Riger, and Linda Foley, "The Impact of Past Sexual Experiences on Attributions of Responsibility for Rape", Journal of Interpersonal Violence, (2004), pp.1157-71; Patrick Chiroro, Gerd Bohner, G. Tendayi Viki, and Christopher Jarvis, "Rape Myth Acceptance and Rape Proclivity: Expected Dominance Versus Expected Arousal as Mediators", Journal of Interpersonal Violence; and G. Bohner, Christina Weisbrod, Paula Raymond, Alexandra Barzvi and Norbert Schwarz, "Salience of Rape Affects Self-Esteem: The Moderating Role of Gender and Rape Myth Acceptance", European Journal of Personality.

<sup>118</sup> Liz Kelly, Jo Lovett and Linda Regan, A Gap or a Chasm? Attrition in Reported Rape Cases, Home Office Research Study (2005); Kenneth Polk, "Rape Reform and Criminal Justice Processing", Crime and Delinquency (1985), pp.191-205; and Sarah Eschholz and Michael Vaughn, "Police Sexual Violence and Rape Myths", Journal of Criminal Justice (2001), pp.389-405.

North West European marriage pattern in preindustrial England.

Focussing on Thornton, I integrate a wide variety of disciplinary approaches: the social history of sex, especially among the lower classes in England, from the two centuries before 1817 up to the present day; the economics and political meaning of marriage among all classes from the eighteenth through nineteenth centuries; ideologies of gender by class from both female and male points of view; and present day psychological research on rape myths--with side trips into the cultural history of the novel and feminist legal theory.

I will show that doctrines flowing from Thornton reflect elite men's attempt to elicit, control, and manage a large supply of (legitimate and illegitimate) sexual services from women--while still, as fathers, ensuring the virginity of unmarried daughters, and, as husbands, the fidelity of wives. The main apparatus for this simultaneous pimping and repressing of female sexuality was socioeconomic class.<sup>119</sup> A major subtheme is therefore class formation and popular working class culture. Gender is the main theme of this thesis, but gender in nineteenth century England was thoroughly classed--just as, conversely, class was thoroughly gendered.

Because the focus is on law, this thesis will narrate elite efforts to control, manage, restrict, repress, and force--to metaphorically rape, in effect--women, particularly working class women. But this focus is not meant to suggest that such elite action was always, or even mostly, successful. The thesis will hint at means and locations of resistance, by women and by working class people. By no means are these glimpses of resistance comprehensive. The beauty, wisdom, humour and strength of women who survived rapes and other forms of oppression overflows my ability to narrate them. I recommend everyone who is interested in the positive history of women to seek more information out elsewhere.

Rape law, and rape occurrences, are horrific phenomena, but they are not all or even most of what happens now, or happened then, in the sexual, home, and working lives of women and men. Even when rape happens, the most interesting thing is what the woman does afterwards. The lives of our ancestors, like the lives of our friends, were full of healing, redemption, humour, endurance, and even prospering. The purpose of remembering victims and criticizing systems of victimization is to engender anger and further resistance, to foster creative change for the future. The purpose of remembering victims is not to be swamped in victimization, but to mobilize strength to lessen the future numbers of victims, and to heal those who have been already victimized. This is a feminist legal analysis, and a feminist history, and feminism is finally about hope.

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<sup>119</sup> However, for those readers more interested in the present than the past, it will be pointed out at various points (particularly in footnotes) that, along with class, other methods of sorting and classifying females can be used to deploy women to marriage or to prostitution or casual exploitative sexual use, including race, prior victimization, or disability.

# PREFACE: REX VERSUS ABRAHAM THORNTON

## A. INTRODUCTION: MUCH ADO ABOUT THE THORNTON CASE

In this preface, I will set out the facts of the adjudication of Abraham Thornton for the murder of Mary Ashford. I will show this case was determined by ideas about rape, the lesser charge Thornton faced. The judge vindicated Thornton's sexual behaviour, to confirm the normalcy of women consenting to sex with violent men. The legal vindication of violent sex was its legal legacy, massively influential during the next half century. We can even discern its continuing influence today.

In the body of this thesis, I will refer to the facts of Thornton, and the statements of the Judge, Sir George Sowley Holroyd,<sup>1</sup> as they relate to legal and popular thinking between 1817 and the 1870s on women's sexual consent. But the body of the thesis contextualizes Thornton to draw out its meaning, how it reflected cultural processes, and as a continuing influence on British culture after Thornton was decided. Therefore, it is important to have the facts laid out in a linear fashion for reference. And as this preface demonstrates, the facts of the Thornton case are remarkable. Thornton involved a plethora of forensic evidence and a horrific crime scene suited to our goriest contemporary thrillers and television. But it was not investigated with the modern forensic science now available.

However, despite its inherent fascination and influence on rape doctrine after it, R. v. Thornton was not reported in the legal reporters of the time.<sup>2</sup> The best record we have of the case is a volume published for the Notable British Trials series in 1926, John Hall's The Trial of Abraham Thornton. Luckily, Hall's volume contains a full trial transcript, as well as a lengthy discussion of the case from Inquest through an extraordinary appeal process which does not exist

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<sup>1</sup> See Hall, The Trial of Abraham Thornton, p.14 note 1, for Sir George Sowley Holroyd's biography. In 1817 he was 59, had been a member of the King's Bench for a year, and a lawyer for 30 years.

<sup>2</sup> The consolidated English Reports for the late eighteenth and early nineteenth centuries, reporting mostly Assizes cases, are not organized into topical categories. Most rape cases were in Nisi Prius volumes of the E.R.s, the terms at the Assizes most likely to deal with criminal matters; after the formation of the Department of Public Prosecutions, volumes of Crown Cases reported criminal matters.

in our law anymore,<sup>3</sup> and even copies of correspondence and other sources.<sup>4</sup>

However, Hall's account raises problems. Hall wrapped up the precious sources he edited with a reconstruction of the crime which agreed with Holroyd's, and even went beyond it in some respects. Hall's version was even more warped than Holroyd's.<sup>5</sup>

In using Hall to get at the clearest account of the facts of the case, I have had to unravel Hall's angry, arrogant prose and defence of Holroyd's honour against those in the 1810s who were disturbed by the judge's handling of Thornton. When I discuss the facts of the case, I will explain not only how Holroyd viewed them but also how Hall viewed them, and then argue for a different view from both. Like many other mistakes in law, Hall's mistakes are historically interesting, revealing that he was writing in a misogynist era of rape law even worse than Holroyd's.<sup>6</sup> But the degeneration of rape law in the twentieth century is a matter for a later section.<sup>7</sup>

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<sup>3</sup> This is the process of "Appeal of Murder". It stemmed from ancient Norman law and incorporated trial by combat. It allowed the closest relative of the deceased, believed to be killed by an accused who had been acquitted in a common law court, to be heard again. The Appeal of Murder brought after Thornton's acquittal was the last: the House of Lords abolished the process immediately after Thornton was again acquitted. That such an extraordinary process was used in Thornton is a sign of the extraordinary interest taken in the murder by community leaders, for the Ashford family had no money to fund it. Powerful people grasped at straws to try again to bring Thornton to justice, a sign of the intense horror Ashford's murder had aroused. The second last Appeal of Murder had been heard a generation before 1817 (Hall, pp.33-5).

<sup>4</sup> Hall, pp.115-80, contains seven Appendices, including Joseph Chitty's advice on the Appeal of Murder to William Bedford, Justice of the Peace for Birmingham, and John Yeend Bedford (the JP's nephew) as lawyer for Mary Ashford's next of kin, her brother William; correspondence from the Home Office about the jailhouse informant Omar Hall's statements about what Abraham Thornton told him; memorandum from the constable who arrested Thornton for the second proceeding; and an abbreviated transcript for the Appeal of Murder. In addition, his introduction, pp.1-60, referred to and quoted depositions from the Inquest.

<sup>5</sup> *Ibid.*, pp.24-5 and pp.105-12: For example, Holroyd downplayed the amount of blood found on the scene and on Ashford's clothing--not mentioning the blood on the working clothes in which she was drowned, only the much smaller amount on her dancing clothes (p.108). Hall developed a pathological vision of the normalcy of extreme haemorrhaging in menstruation, and the breaking of a virgin's hymen. Hall viewed women as monsters subject to a fantastical biology entirely different from men's. Where Holroyd showed callousness towards Ashford's physical suffering, Hall normalized it. See also Chapter One.

<sup>6</sup> That is, Hall was writing at the time of John Henry Wigmore, when not only had the view that women are likely to lie about rape taken hold, but been extended through the influence of Freudian psychiatry to suggest that women, and even little girls, were likely to sexually fantasize the demeaning and violent details of rape accounts. Thus, Wigmore in the 1940s (retained as late as the Chadbourn edition of Wigmore On Evidence, 1970, pp.736-7, 740-6) quoted psychiatrists who argued that girls as young as seven could be sexually excited by physical irritations like vaginal infections, and even live in a chronic state of sexual fantasizing as a result of previous, undoubted, sexual attacks.

<sup>7</sup> See Chapter Three, below.

There is no choice but to tussle with Hall to get at the facts of the crime and the legal process. His is the only game in town. Unless one wants to dig up the manuscripts for the county of Warwick for a place now part of the metropolitan county of West Midlands, one must get the transcript along with Hall's extremely lengthy and bossy introduction.<sup>8</sup>

Many important nineteenth century developments have to be documented from sources other than published legal reports. This is especially true of criminal law, for defence lawyers were still not common and most prosecutors were the individual victims: the English Reports hold many property, but few criminal, cases. The cases now consolidated in the early nineteenth century English Reports originated in fragmentary notes kept by individual lawyers; which ones got into the English Reports reflected personal interest of practitioners. Most cases in the English Reports cover practical, bread-and-butter issues of concern to private practitioners who had to earn their living from clients who could pay well. They were not collected for technical or jurisprudential interest.

The lack of an official report of Thornton is not a terrible loss: Nineteenth century English Reports case reports were very short and raise more questions than they answer, lacking basic information such as procedural information, or enough facts to make sense of the incident.<sup>9</sup> They do not list precedents they are applying or distinguishing, or for what reason. In any case, precedents were less determinative of judge's decisions.<sup>10</sup> Reports of legal cases represent, like much other historical evidence, a collection of flotsam and jetsom, a random and small sample far from true representativeness.

However, there is a wide and rich variety of colourful historical sources on Thornton. The case attracted a huge amount of public attention. The two most important historical analyses of Thornton<sup>11</sup> used pamphlets from a controversy caused by the case: Edward Holroyd's 1819 Observation upon the Case of Abraham Thornton who was tried at Warwick

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<sup>8</sup> The Introduction, at 60 pages, is longer than the trial transcript and just a few pages shorter than all seven appendices combined.

<sup>9</sup> See Anonymous, E.R. V.168, Crown Cases I, p.1045, originally 1 Lewin 293, a rape case from York in 1830, which not only does not identify the accused or accuseds, but does not identify whether the case involved consenting sex, followed by a rape by another man, or gang rape; it discusses prostitution, but does not tell the reader if the complainant was a prostitute. This case will be discussed more fully in Chapter two, below.

<sup>10</sup> See Edwards, Female Sexuality and the Law, p.68: Hodgson [1811-2] E.R. V.168 765 originally Russ. & Ry. 211 disallowed questions to a complainant in rape about her sexual activities before the act charged; it was not followed in Clarke [1817] E.R. V.171 at 633 originally 2 Stark. 241--decided by the same judge as Thornton, Sir George Holroyd--or by Barker [1829] E.R. V.172 558 originally 5 Cox C.C. 146, despite the judge in Barker querying whether Hodgson allowed him to let in the evidence.

<sup>11</sup> Anna Clark, Women's Silence and Men's Violence, discussed Thornton at length in the context of an extended study of rape cases from 1780 to 1845, and Roy Porter, "Does Rape have a History?" in Porter and Sylvana Tomaselli, eds., Rape. Porter wrote his account largely in answer to an earlier article of Clark's on the Thornton case.

August 8, 1817 for the Murder of Mary Ashford: Shewing the Danger of Pressing Presumptive Evidence too Far,<sup>12</sup> was very important because written by the son of the judge in Thornton; another legal writer also waded into the controversy.<sup>13</sup> There were many other pamphlets as well.<sup>14</sup> Important on the other side from Edward Holroyd was Rev. Luke Booker, A Moral Review of the Conduct and Case of Abraham Thornton (1818),<sup>15</sup> which also sparked further replies.<sup>16</sup>

Even a cursory look at the list of pamphlets reveals that contemporaries were deeply engaged in controversy about how and why Abraham Thornton was acquitted. Amongst this deeply politicized material, the most remarkable document was Edward Holroyd's, published to defend his father from public censure in 1819.<sup>17</sup> It has received the most

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<sup>12</sup> Roy Porter and Anna Clark both used this pamphlet; Porter gives the date as 1817 and Clark as 1819, and neither gives the publisher. Gary R. Dyer, "'Ivanhoe', Chivalry, and the Murder of Mary Ashford", Criticism V.47 #3 (Summer 1997), pp.383-408, gave the publisher and date: (1819: J. Mawman, London).

<sup>13</sup> [An Attorney at Law], An Investigation of the Case of Abraham Thornton...Being an Answer to a Work upon the Same Subject entitled 'Wager of Battle', Thornton and Mary Ashford, or an Antidote to Prejudice (1818), used by both Clark and Porter; Dyer provided the publication data: (1818: self published, London).

<sup>14</sup> Anonymous, Full Report of the Trial of Abraham Thornton for the Wilful Murder of Mary Ashford, noted without a publisher: (Birmingham,? 1817); John Cooper, A Report of the Proceedings against Abraham Thornton (1818, Warwick). These were noted only by Porter. Dyer, a literary specialist, also found [Anon.], Wager of Battle: Thornton and Mary Ashford: Or An Antidote to Prejudice (1818: S. Akerman, London), which sparked the response of An Attorney at Law. The Birmingham Public Library adds Fairburn's Edition of the Whole Proceedings on the Writ of Appeal of Murder in the Case of Abraham Thornton, and Horrible Rape and Murder!! The Affecting Case of Mary Ashford (1818). See <www.birmingham.gov.uk> webpage on "The Murder of Mary Ashford". The most detailed source on the case, John Hall, adds John Fairburn's The Affecting Case of Mary Ashford, a Beautiful Young Virgin, Who was Diabolically Ravished, Murdered, and Thrown into a Pit (London, 1817), no publisher, (Hall, p.181).

<sup>15</sup> Used by Porter, Clark and Dyer: (1818, Dudley and Birmingham).

<sup>16</sup> Dyer also noted A Friend to Justice, A Reply to the Remarks of the Rev. Luke Booker (1818: W. Suffield, Birmingham), [Anon.], Craven! Craven! The...Ancient English Law of Appeal or Challenge: By Virtue of Which Law Abraham Thornton Challenged to Combat the Heir of the Unfortunate Mary Ashford, etc. ([1818]: G. Smeeton, London), and E[dward] A[ugustus] Kendall, F.R.S. An Argument for Constructing Largely the Right of an Appellee of Murder to Insist on Trial by Battle: And Also for Abolishing Appeals (2nd edition), (1818: Baldwin, Cradocker and Joy, London).

<sup>17</sup> It is no doubt a sign of how heated the pamphlet war had become that the Judge's son decided two years after the event to explain Sir George Sowley Holroyd's approach to the evidence in the charge to the jury. Porter and Clark both misnamed the judge in the case as Edward Holroyd on the basis of this book. Hall, p.14, n.1, which identified Sir George, 1758-1831: special pleader 1779-87, barrister for Sir Francis Burdett (Radical MP for Westminster) against Speaker Abbot in 1811, and Judge of King's Bench, 1816-28. Hall described Sir George as "one of the ablest judges of his day", p.30; he noted Edward as his son on p.59. Sir George is in the Dictionary of National Biography. No other information was available on the author, Edward the son, but <<http://freepages.genealogy.rootsweb.com/~holroyd/>> identified a grandson of Sir George, also named Edward, as Senior Commissioner of the London Bankruptcy Court; the second

attention from historians, followed by Rev. Booker's Moral Review. These two pamphlets are good examples of both sides of the controversy.

However, the deepest cultural impact of the Thornton case was not delivered by the controversial pamphlets, but its rapid fictionalization in plays and melodramas: "The Mysterious Murder or What's the Clock, a melodrama in three acts founded on a tale too true" was already playing in Birmingham in late 1817 even while the second legal process in the case was still in progress in London, and was revived in 1819 as "The Murdered Maid or the Clock Struck Four",<sup>18</sup> other titles included a Warwick version of "The Murdered Maid: or, The Clock Struck Four!!! A Drama",<sup>19</sup> and William Barrymore's "Trial by Battle: or, Heaven Defend the Right: A Melo-Dramatic Spectacle in Two Acts", first performed at London's Royal Coburg Theater two weeks after Thornton finally went free on May 11, 1818.<sup>20</sup> The melodramas give the Thornton case a central role in the development of "fallen women" literature generally.<sup>21</sup>

Ballads about Ashford and Thornton were also quickly composed and sung on the streets, especially in the nearby city of Birmingham and the industrial Black Country,<sup>22</sup> their lyrics available for purchase. Most popular ephemera was positive towards Ashford and damned Thornton and the adjudication of the case. For example, a ballad published in Birmingham for a working class audience, "Mary Ashford's Tragedy", "celebrates her innocence" but concluded:

"Now all you young virgins that bloom'd as I bloom'd,  
Keep at home in your proper employ;  
Ne'er in dancing delight,  
Nor be out at night,

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Edward's son, variously named Sir Thomas Dundas or Sir Edward Dundas Holroyd, emigrated to Melbourne in 1859 and was a Judge of the Superior Court of Victoria in 1881, and is in the Dictionary of Australian Biography. The Holroyds were a wealthy landed family with holdings in Yorkshire. One branch became ennobled as Lords of Sheffield during the lifetime of John Baker Holroyd (1736-1821). On the other hand, other Holroyds came to Australia as convicts.

<sup>18</sup> Hall, p.42. Some people claimed it was written by Rev. Dr. Booker, but it was actually written by George Ludlam, the prompter at the Theatre Royal, Birmingham.

<sup>19</sup> See Dyer. Its protagonist was a guilty man who escaped punishment by bribing witnesses, but goes mad and kills himself. Written by S.N.E., publication data (1818: for the author, Warwick).

<sup>20</sup> Dyer, p.406. It was published in 1831 by J. Duncombe, London.

<sup>21</sup> See Dyer, and Martin Wiener, "Alice Arden to Bill Sikes: Changing Nightmares of Intimate Violence in England, 1558-1869", Journal of British Studies, V.40 (1990), pp.184-212, for explicit treatments of Thornton's role in influencing literature; the case can also be considered in light of such classics as George Eliot, Adam Bede (1859), Charles Dickens, Oliver Twist (1837-8), Elizabeth Gaskell, Ruth (1853), and Thomas Hardy, Tess of the D'Urbervilles (1891).

<sup>22</sup> This was the name for the region around Dudley, Staffordshire, the neighboring parish to Ashford's parish of Sutton Coldfield, nicknamed for its clouds of smoke from thousands of small forges for metalworking. See the webpage for the Black Country Society, <[www.blackcountryociety.co.uk/](http://www.blackcountryociety.co.uk/)>.

Nor in the fields roam,  
With a stranger from home,  
Lest you meet a fate as wretched as I."<sup>23</sup>

Broadsheets--short prose or poetry--were also sold on the streets, like the "Confession, though not the Dying Speech of Abraham Thornton, ca. 1817".<sup>24</sup>

The Midlands media also carried stories decrying the decision, picked up by London national papers.<sup>25</sup> Mary Ashford's tombstone, provided by the rector of Dudley, the same Rev. Dr. Luke Booker who wrote the pamphlet defending her reputation, became a cultural artifact promoting a vision of all women as virtuous but threatened by everpresent sexual danger:

As a warning to Female Virtue, and a humble monument to Female Chastity, this stone marks the grave of MARY ASHFORD who in the 20th year of her age having incautiously repaired to a Scene of Amusement without proper protection was brutally violated and murdered on the 27th May, 1817.<sup>26</sup>

## B. INTERPRETATIONS OF FACTS

Like precedents, many procedural rules we take for granted--such as juries deliberating privately, and judges excusing themselves from cases in which they have a conflict of interest--were not found in the early nineteenth century. Adjudicative practice was dependent on trial judges and much looser.

The Thornton case is interesting for defining a legal doctrine--"consent to force"--which was new and startling in 1817.<sup>27</sup> But the importance of this doctrine cannot be simply traced through notations in later cases which referred

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<sup>23</sup> Clark, Women's Silence, p.116, quoting "Mary Ashford's Tragedy", printed in Birmingham, no date, from the Nadden Collection, Cambridge University Library. Another similar one in "Elegy, written on the Murder of Mary Ashford" in the John Johnson Collection, Crime Section, box 12, Bodleian Library, Oxford University.

<sup>24</sup> Clark, Women's Silence, p.110, quoting Anonymous, "Confession", from the Nottingham City Library Broadsheet Collection.

<sup>25</sup> Hall, p.35, especially deplored the coverage of the Litchfield Mercury, based in Litchfield, Staffordshire, a nearby Cathedral city.

<sup>26</sup> Hall, p.80. It was followed by a poem: "Lovely and chaste as is the primrose pale/Rifled of virgin sweetness by the gale,/ Mary! the Wretch who thee remorseless slew/Avenging wrath, which sleeps not, will pursue,/For though the deed of blood be veiled in night/Will not the Judge of all the earth do right?/Fair blighted Flower! The Muse that weeps thy doom/Rears o'er thy sleeping Form this warning tomb."

<sup>27</sup> That is to say, no earlier statement has been discovered of it in the sample of decisions we have. It is not possible to state definitively that an earlier statement has not been missed. However, it is likely that the gender ideological framework was not present for "consent to force" much earlier than the 1810s. The defensive cultural reaction to "consent to force", Stranger Danger, responded to changes in women's work--especially women in factory and mine employment; this pattern of women's work had not yet occurred before the end of the Napoleonic Wars. Please see the discussion of social and economic changes in

to it as a precedent. The doctrine of "consent to force" was not even directly stated in Thornton: Holroyd did not distill it into a ratio which could be quoted directly in similar cases thereafter, as lawyers now expect. Rather, "consent to force" emerges as a corollary to several links in a chain of reasoning that applied to another legal issue, and a different offense in criminal law--mens rea and murder, rather than consent and rape.

Nevertheless, despite the absence of our present day markings of a legally influential case--a clearly stated ratio, clarifying earlier cases, thereafter regularly cited, the same sentence quoted by later judges--Thornton was legally important, for it obtained deep social and cultural influence.

The most detailed source about testimony in Thornton is Hall, but he was politically biased. Strangely, Hall was heavily invested in defending the Tory government of 1817 against a "cabal of radicals", which is how he thought of the people who reopened the case against Thornton through what was the old-fashioned process of an Appeal of Murder.<sup>28</sup> Why Hall, in 1926, defended the Tories of the 1810s against Radicals is hard to say--the Conservative Party changed substantially, even by the 1830s, from the post-Napoleonic War Tories of 1815-20. For whatever reason, Hall showed profound animus to early nineteenth century radicals. However, despite his highly coloured partisan lens, Hall presents some facts of which we can be fairly certain.

We know that Mary Ashford, a domestic servant from the village of Langley Heath near Birmingham in the industrial Midlands, attended a dance at a country pub near the village of Erdington on the evening of May 26, 1827, dancing especially with a bricklayer from Castle Bromwich a few miles away, Abraham Thornton.<sup>29</sup> She and her girlfriend, Hannah Cox, left the dance at about midnight with a young man named Carter accompanying Cox and Thornton accompanying Ashford. They separated, Cox going to her mother's home in Erdington (where Ashford had originally planned to stay the night), Carter going home, and Ashford and Thornton wandering around the fields together for several hours.<sup>30</sup> In the early morning, about 4 A.M., Ashford came to the house of Mrs. Butler, Hannah Cox's mother, and changed into her working clothes.<sup>31</sup> A couple of hours later, her body was dragged from a pit full of water on the way between Mrs. Butler's house and Ashford's workplace, her uncle's home in Langley.<sup>32</sup>

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Chapter One, and the discussion of cultural changes, especially gender ideology, in Chapter Two.

<sup>28</sup> See Hall, pp.35 and 39-40, descriptions of Justice Bedford and his associates who helped William Ashford fund the Appeal of Murder.

<sup>29</sup> Hall, pp.1-2.

<sup>30</sup> Ibid., pp.3-5, and 16-8.

<sup>31</sup> Ibid., pp.4 and 71, Hannah Cox at the Inquest and Trial.

<sup>32</sup> Ibid., pp.1 and 66.

The evidence of violent activity in the fields near the pit horrified the local people who viewed it:<sup>33</sup> steps in a plowed field running, dodging, then moving together to a spot beneath a tree in a hedge alongside a meadow adjoining the harrowed field;<sup>34</sup> the impression of a body with legs and arms spread wide, large amounts of blood at the middle and feet, and toes of a man's shoes impressed into the ground at the base;<sup>35</sup> a lengthy trail of blood almost the whole way from under the tree to the pond;<sup>36</sup> and considerable blood on Ashford's body and clothing, wounding to her vagina and bruises in the shape of a man's hands on both arms between elbow and shoulder.<sup>37</sup> The meaning seemed all too clear: Ashford had been raped with considerable force and then murdered by being thrown in the pit like a piece of garbage.

But though many people at the pub knew Abraham Thornton had shown great interest in Ashford, and others had seen him with her in the fields during the wee hours of May 27, Thornton raised a successful defence. His barristers argued that he had sex with Ashford, causing the lacerations to her vagina, and the copious bleeding beneath the tree, but with her consent:

The footmarks, the drops of blood and the imprint of the human figure by the hedge, to which so much importance was attached, might all have been produced before she went back to Erdington, for anything that was proved to the contrary. The girl might have met her death in divers ways which were consistent with the defendant's innocence.<sup>38</sup>

In this account, they had sex before Ashford went to Mrs. Butler's and changed clothes, then Ashford left Butler's to go to her employment, and ended up in the pit somehow without remeeting Thornton.

In support of this theory, Thornton's team said he was seen going home by a circuitous route from Erdington to his home in Castle Bromwich,<sup>39</sup> by a milkman and his wife milking cows, a servant, the son of a farmer, and a gentleman's gameskeeper.<sup>40</sup> They compared confusing records of the times a large number of witnesses recalled seeing

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<sup>33</sup> Ibid., pp.82-3, a large number of locals came to see the crime scene: William Lavell testified there were hundreds of additional footprints in the harrowed field, besides the original ones he had seen of the man and woman running at 7 AM, by the time he tracked the whole path around 1 PM. Joseph Bird, who helped Lavell test Ashford's and Thornton's shoes against prints, testified some 30 or 40 people had come by to look at the field by the early afternoon (pp.87-8). Bystanders would now never be allowed to view a crime scene so closely, but Lavell and Bird were just millworkers asked to help by the Magistrate, and had no power to keep people out.

<sup>34</sup> Ibid., pp.18-9.

<sup>35</sup> Ibid., pp.88-9, testimony of Mr. Webster, the millowner.

<sup>36</sup> Ibid., pp.76-7, and 81-2, testimony of Jackson and Lavell.

<sup>37</sup> Ibid., pp.90-1, trial testimony of Fanny Lavell and Mary Smith.

<sup>38</sup> Ibid., p.21, relating summary of defence argument at the Court of King's Bench, Jan. 1818.

<sup>39</sup> Ibid., pp.22 and 27.

<sup>40</sup> Ibid., pp.27-9.

Ashford or Thornton, based on timepieces of variable accuracy (as much as 41 minutes fast). The timepieces were all compared later against the watch of a factory owner, Mr. Webster, whose word that his watch was accurate was accepted.<sup>41</sup>

The defence assumed that all the faulty timepieces had been the same number of minutes out through the night and early morning, as they were later found to be compared to Webster's, and that the estimates of time it would take to walk various distances were also correct. Then they argued Ashford would have arrived at the pit only 20 minutes before Thornton was seen, between 1.5 to 2.24 miles away. So they argued that Thornton would not have had enough time to rape, kill and dispose of her, and then walk so far.<sup>42</sup> It was an extremely complicated alibi defence, based on comparing many different accounts of time subject to huge margins of error.<sup>43</sup>

But the Thornton alibi, the accounts of witnesses as to time, and complicated maps of different distances which may have been travelled by Ashford and Thornton, were not the biggest factual problems raised by the case. Underlying the defence argument was the contention that the blood could be explained by consensual sex with a virgin who was menstruating,<sup>44</sup> and that if Thornton had succeeded in having consensual sex with Ashford, he would not have had any reason to await her return from Mrs. Butler's and kill her on her way to work.<sup>45</sup> The real message of the case was that women were likely to agree to painful and damaging sex, and that men would have no reason for anger if women gave them sex.

If the central assumption about sexuality were not accepted, then even if the alibi witnesses were believed, and it was agreed that Thornton would not have had time to chase Ashford, have sex, dump her in the pond, and then get to where he was seen, it would have still been possible for the jury to conclude that the sex happened earlier, and she was killed later on her way home. Alternatively, they could have concluded that it was impossible for such wounding to occur from consensual sex, and discounted some of Thornton's witnesses, or some of the reports of time.

Central to the result of the trial was Holroyd's charge to the jury. Unlike modern judges, who present all the possible theories logically, but let the jury choose which are most likely to be correct, Holroyd told the jury that certain pieces of evidence were true, supporting the defence against the prosecution. He twice repeated the defence claim that Ashford consented: he asked them to consider if Thornton's claim that he "had done nothing without her consent" was true, and added that "if she were a consenting party, there was no intelligible reason why he should murder her." To determine her consent, he told them: "Whether the act took place before or after the deceased returned to Erdington was a question to which they must devote their most earnest attention" because "[i]t had a very important bearing upon the

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<sup>41</sup> Ibid., pp.72, 89-90, and 92.

<sup>42</sup> Ibid., pp.99-105.

<sup>43</sup> Ibid., pp.89-90, and 101-4.

<sup>44</sup> Ibid., pp.24-5 and 54.

<sup>45</sup> Ibid., pp.106-7.

probability of the prisoner's guilt." He did not refer to the prosecution evidence of battering at all as relating to the likelihood of her non-consent.<sup>46</sup>

Holroyd asserted that if sex happened before Ashford woke Hannah Cox and changed her clothes at Mrs. Butler's, it must not have been rape, because she did not complain to her friend about Thornton raping her. His theory, presented as true beyond question to the jury, thus rested on the assumption that raped women naturally immediately complain.<sup>47</sup> Within minutes, perhaps, of forced sex, Ashford should have been able to talk about it. Likewise, the defence made much of no one hearing her screams from the field, as proof that she consented.<sup>48</sup>

Most seriously, Holroyd concluded there was not enough time for Thornton to have done everything, and be seen by his witnesses--without leaving the jury the choice to believe or not believe Thornton's witnesses. He said prosecution evidence that there were no footmarks beside the trail of blood on the grass alongside the footpath was "of no importance", and did not mean a bleeding body had been carried along the path with blood dripping down from it.<sup>49</sup> He did not mention the marks on Ashford's arms.<sup>50</sup> Holroyd's charge ignored a considerable amount of evidence.

Holroyd only mentioned lacerations to the vagina, and a Birmingham surgeon, Mr. Freer, had testified at the trial they could have resulted from consensual sex,<sup>51</sup> though Freer had told the inquest it showed forced sex without consent.<sup>52</sup> The authority of an "expert" witness thus played a role, even though the expert changed his evidence.

Among the witnesses whose testimony Holroyd ignored in his charge was George Jackson, a metalworker from Birmingham who walked ten miles a day for work at Penn's Mill near Erdington.<sup>53</sup> He was the first to come on the crime scene. He found "a lake of blood" against a hedge under a tree forty yards from the pit, and a trail of blood thirty yards

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<sup>46</sup> Ibid., p.30.

<sup>47</sup> Ibid., p.107.

<sup>48</sup> Ibid., p.58. They also alleged there were not enough bruises to show she resisted.

<sup>49</sup> Ibid., p.31.

<sup>50</sup> Ibid., pp.24-5: Fanny Lavell, who lived in the closest cottage to the pit, was put in charge of the body. She and Mary Smith noted the bruising on the arms at the inquest and the trial, pp.90-1. Holroyd only referred to Smith's evidence for the evidence that the body was not cold at 10:30 AM, "from which circumstance it was probable that the act was committed so much the later in the morning" (p.110). He never mentioned the handprints on the arms.

<sup>51</sup> Ibid., p.98.

<sup>52</sup> Ibid., p.12, Freer's deposition from the Inquest.

<sup>53</sup> He was willing to travel so far because 1815-22 were the "worst years for the Ironworking industry" (David Cox, "Civil Unrest in the Black Country 1750-1837 (Part II: The Colliers March of 1816)", in the Blackcountryman, the journal of the Black Country Society, from <[www.blackcountryandsociety.co.uk/articles/b&briots2.htm](http://www.blackcountryandsociety.co.uk/articles/b&briots2.htm)>).

from the pit, "a couple of yards round, in a triangle...zig-zag, about two yards" and more blood on some grass.<sup>54</sup> Another worker at Penn's, William Lavell, who rented the closest cottage, said that the trail of blood extended for about fourteen yards.<sup>55</sup> That was a lot of blood.

Ashford's body was dragged out of the pond with a rake, and given to Fanny Lavell at the nearest cottage. When she and her friend Mary Smith undressed the body, there was so much blood that "she was obliged to tear off some of the clothes, so thickly encrusted were they with blood."<sup>56</sup> At the trial she said:

I found her clothes to be in a very bad state. The gown was very much stained behind. The gown was very dirty--blood and dirt. The shift had a rent up one side, the length of my hand.<sup>57</sup>

Ashford had been wearing a pink gown and a white petticoat, both completely crusted with blood, a chemise torn up from the bottom about six inches, and a red spencer with black stockings. These were her working clothes. Only the stockings did not seem to be bloody--when examined at court, "on the black worsted stockings a spot or two could be perceived, but they were so faint that no one could determine what had been the cause of them."<sup>58</sup>

The surgeon, Mr. Freer, testified to seeing the blood on the field, but made no comment about the amount. By the time he saw the body, it had already been washed on the "upper surface". He found "a great deal of blood" between the legs down to the calves, and "a quantity of coagulated blood" on "the parts of generation" which were "lacerated". The post-mortem happened two days later; he found more "coagulated blood" and decided "she had her menses upon her." He found water and duckweed in her stomach and declared she had drowned; he claimed he could tell that she had been a virgin because "[t]here were two lacerations of the parts of generation quite fresh" and

[t]he menses do not produce such blood as that. I had no doubt but the blood in the fields came from the lacerations I saw. Those lacerations were certainly produced by a foreign body passing through the vagina, and the natural supposition is that they proceeded from the sexual intercourse. There might have been laceration though the intercourse had taken place by consent. Menstruation, I should think, could not have come on from the act of coition. I think it came on in an unexpected moment. The exercise of dancing was likely to have accelerated the menses. There was an unusual quantity of blood.<sup>59</sup>

Freer sounded less than convinced that his explanation made sense of the amount of blood, though he did not want to conclude, as he had at the inquest, that such a loss of blood implied the use of force to penetrate Mary Ashford against

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<sup>54</sup> Hall, pp.6 and 76-7. Hall's introduction understated the trail as "drops of blood".

<sup>55</sup> Ibid., p.81.

<sup>56</sup> Ibid., p.24 and 90-1.

<sup>57</sup> Ibid., p.90.

<sup>58</sup> Ibid., pp.90-1, 1, and 24.

<sup>59</sup> Ibid., pp.97-8.

her will.<sup>60</sup> At the trial, he sounded confused--not even certain of the amount of flow likely for menstruation.

Although one would hope that a surgeon during post-mortem would be able to tell for sure, by looking at the uterus and ovaries if not the external genitals, whether a woman had been menstruating, we can't be sure that Freer's understanding of female anatomy was advanced enough for that. Even physicians at the time did not understand enough about ovulation to be able to tell if an egg had been released in the last cycle by viewing the ovaries.<sup>61</sup> Given coagulation after a passage of time, early nineteenth century medical men--especially surgeons who were semi-professionals--may not have been able to differentiate menstrual blood from blood from a wound. Even more uncertain was his evidence about how much blood would be expected from the defloration of a virgin.

There was no evidence from either the working clothes or the dancing clothes that Mary Ashford had been using rags to soak up a menstrual flow. Neither of the women who examined her corpse testified that she had been flowing,<sup>62</sup> and Hannah Cox told the inquest that Ashford did not tell her of "any complaint" when she changed into her working clothes.<sup>63</sup> Yet if she had started her period while dancing, and discovered it the next morning, she would probably have asked a good friend for some rags.

The attempt to explain away the amount of blood shed in the fields and on Ashford's clothing and body as a result of any combination of normal physiological processes other than violence jar modern sensibilities. Whatever one makes of the alternative theories for the amount of bleeding, or the possible motives and assumptions of those who raised them, the belief that a "lake of blood" could be produced by a woman naturally makes women out to be "naturally" pathological.<sup>64</sup>

The defence raised the theory that sex had occurred, by consent, and caused the blood on the ground beneath the tree and the trail partway to the pit, before Ashford changed into the blood-soaked outfit in which she was found.

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<sup>60</sup> Ibid., p.12.

<sup>61</sup> See Thomas Laqueur, Making Sex (1990), pp.8-9, 173, 175, 178, 182-6, and 211-5: For centuries it had been believed that women could only conceive if they reached orgasm, and after the seventeenth century discovery of ova, it was theorized that ovulation was caused by orgasm. Virgins who died and were dissected, revealing they had ovulated, were judged to have had lewd thoughts and committed "self abuse" (masturbation). It was not till the 1840s when a German Doctor, Theodor Von Bischoff, experimented on a dog, removing first one ovary after she went in heat and then killing her and examining the other ovary after heat had concluded, while carefully exposing her to a male dog but not allowing coition. This proved mammalian ovulation occurred without sex. However, the analogy of heat led to further erroneous conclusions: that female desire could cause ovulation; that women were likely to conceive during their periods; and that female sexuality was violent in nature, or excited by violence, pain, and damage as shown by bleeding. The true nature of the human female's cycle, including its fertile time and hormonal basis, was not discovered until the 1930s.

<sup>62</sup> Hall, pp.90-1.

<sup>63</sup> Ibid., p.16.

<sup>64</sup> See Laqueur, pp.157-63, 166-8, and 175-81.

Her dancing clothes showed only a few spots of blood on the petticoat and the white gown she had worn. There was no blood on the shirt, no tears, and no blood on the clean white spencer that went with her dancing outfit. But her white stockings had many spots of blood on them, all the way down to the ankles.<sup>65</sup>

Hall suggested her period explained the blood on the working gown, ignoring the dirt; he argued she had sex in the dancing gown that had only a few spots on it and no dirt. As for why the white stockings were much more bloody than the ones found on the corpse, he said "only one inference can be drawn from it":

When the deceased put on her black stockings at Mrs. Butler's, the effusion of blood must have ceased which had stained her white stockings. And what can have caused such a temporary effusion but the lacerations produced by an act of connection, which had taken place before she returned to Erdington and resumed her working clothes?<sup>66</sup>

Hall's scenario does not explain why there was no more blood leading from the pit to Mrs. Butler's. It also suggests that blood left a pool on the field, without causing any more than a few drops on the back of her skirt. Yet it is more likely that blood found on stockings but not a dress would be evidence of a long, slow flow which trickled down while the woman was in a standing position, not lying with a man on her. The indistinct stains on the black stockings might be explained because the stockings were thick enough not to be stiffened by blood and of a colour that did not show the stains; or they could have been removed before sex and then put back onto her body after she had died, when the bleeding stopped. Hall had no reason to state that his explanation was the only possible inference.

Hall's scenario does not solve the fundamental problem with the defence theory, which was the extensive blood loss. It is not consistent with consensual sex. It is also very unlikely that a woman who had bled that much would be able to walk to Mrs. Butler's house--about a mile and a half--and back.

Holroyd completely ignored the blood on the working clothes in his charge, but told the jury he believed the sex took place before Ashford went to Mrs. Butler's. His son's pamphlet was more explicit: Edward Holroyd suggested that the sex occurred while wearing the dancing outfit, and the blood on the working outfit represented menstruation only. On her way to work from Mrs. Butler's, he suggested that she noticed blood on her dancing shoes, and stopped at the edge of the pit to change into her boots, which were bundled up with the dancing clothes. At that point, she suddenly became faint--not while producing the lake of blood under the tree, but perhaps a half hour or more later--and fell in the water by accident.<sup>67</sup>

Hall did not think Edward Holroyd's explanation made sense--but not because there was no blood after the partial trail to the pit all the way to Mrs. Butler's and back. Hall found it strange for a woman to change shoes on the steep bank of a pit of "stagnant water", when a stile was nearby where she could prop each foot, or sit down, to do it. Rather, Hall suggested that she had stopped by the pond to wash her face (because her bonnet was off)--in the brackish

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<sup>65</sup> Hall, p.91.

<sup>66</sup> Ibid., pp.24-5.

<sup>67</sup> Ibid., p.59.

pond. Then she fainted and fell into the water.<sup>68</sup>

But both theories that Ashford fell in because of fainting from loss of blood are not consistent with the belief that that amount of blood loss was not surprising for defloration and menstruation. Workingwomen commonly experienced defloration and menstruation, but did not faint. The judge and the 1920s commentator wanted to have their cake and eat it too: on the one hand, ordinary female physiological processes produce huge flows of blood; on the other hand, when they need to argue that a woman could faint and conveniently fall into a pond by accident, the same blood can be used to argue that she must have passed out.

Edward Holroyd sought to explain away the horrific crime scene--the footprints seen by William Lavell of a man beginning to run when the woman's steps were eight yards away, both running towards the hedge for fifteen yards when the man caught up, continuing running for about 200 yards, around two edges of the field, with three places where steps were "dodging backwards and forwards", and about ten yards of walking steps before the last dodging steps,<sup>69</sup> the "lake of blood" and zig zag trail of blood two yards wide towards the water pit described by Jackson, which Lavell said began as a "regular run" of blood tapering to distinct drops,<sup>70</sup> and the blood encrusted gown in Fanny Lavell's account, which had to be torn away from the body. The phrase the younger Holroyd used for all this was:

...after some efforts to get away, and struggle and resistance at first, [she] yielded, a yielding obtained most probably reluctantly, and by artifice, promises and oaths, and urgent importunity, to which [by] her own extreme imprudence in remaining alone with a man...she was unfortunately exposed.<sup>71</sup>

According to the defence, she bled profusely, then got up, walked a mile and a half to her friend's mother's house, changed her clothes, walked back on her way to work, and ended up in the pit, because of faintness.

According to the prosecution, Thornton waited for her to return on her way back from Mrs. Butler's to Langley, and when she saw him, "she sought to elude him, but he caught her"; after he "threw her down and effected his purpose", he picked her up, carried her to the pit and threw her in.

That the connection took place after the deceased changed into her working clothes was scarcely open to doubt. If she gave herself to the prisoner before she went to Erdington, how came it that blood was discovered only on the grass by the pit, why was none found in the harrowed field or on any of the stiles which she must have crossed on her way to Mrs. Butler's?...[W]ould not her white spencer at least have shown signs of contact with the ground?<sup>72</sup>

Holroyd did not believe the treatment which caused non-lethal but greivous bodily harm to Ashford constituted

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<sup>68</sup> Ibid., pp.59-60.

<sup>69</sup> Ibid., pp.78-80.

<sup>70</sup> Ibid., pp.81-2.

<sup>71</sup> Holroyd, Observations, pp.24 and 87, quoted in Clark, Women's Silence, pp.114-5.

<sup>72</sup> Ibid., pp.15-6.

treatment to which a woman would probably not consent.<sup>73</sup> Rather, violence was consistent with female consent. Because "a woman" could be capable of consenting with such wounds, Holroyd decided there was reasonable doubt Mary Ashford actually consented.<sup>74</sup> But consent to a force great enough to leave a visible puddle of blood on the grass under the tree the next morning cannot be assimilated with a rational construction of consent.

Holroyd's construction of Ashford's consent rests on a belief that men are extraordinarily entitled to do whatever they wish in pursuit of their sexual pleasure, even if they tear and maim women in the process. Likewise, his method of analyzing the evidence from a silent corpse shows an extraordinary sense of entitlement, to reconstruct the mental processes of a woman from whom he could not receive testimony. Holroyd based his conclusion of no rape upon his ability to read the mind of a dead woman from a body which bore signs of violence. The adjudication of the case was not at all transparent--regardless of Hall's overheated rhetorical claims to the contrary, Holroyd's summing up did not represent the only way the case could have been treated.

### C. LEGAL BUSINESS AND DIRTY BUSINESS

The legal dispute did not end with the jury's acquittal in Warwick, Aug. 8, 1817. A group of gentlemen including Rev. Booker, rector of Dudley, led by Birmingham Magistrate, William Bedford, tried to get the case heard again. Bedford realized that an old procedure, the Appeal of Murder (legislated during the reigns of Plantagenet Edward III and Tudor Henry VII,<sup>75</sup> and last used in 1770),<sup>76</sup> would allow a civil suit against a person suspected of murder, regardless of a previous criminal acquittal. It disallowed the Crown's Prerogative of Mercy<sup>77</sup>--then commonly invoked to free convicts or transmute sentences to transportation or imprisonment.<sup>78</sup> If the Appeal of Murder was successful, Thornton would be executed.

The Appeal had to be brought by the "Heir-at-Law" of the victim--Mary Ashford's elder brother William, an

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<sup>73</sup> Edward Holroyd, Observations on the case, p.24, quoted in Clark, Women's Silence, p.114.

<sup>74</sup> See Roy Porter, "Rape", pp.225.

<sup>75</sup> *Ibid.*, pp.36, and 152-3, the argument of Joseph Chitty at the King's Bench for the demurrer against allowing Thornton to demand William Ashton meet him in a wager of battle. The statutes were 6 Edward III, c.9, and 3 *Henry VII, c.i.* Chitty was the foremost legal historian of the day, an expert on medieval causes of action.

<sup>76</sup> *Ibid.*, pp.32-4.

<sup>77</sup> *Ibid.*, p.34.

<sup>78</sup> See generally Linebaugh, The London Hanged and John Beatty, Crime and the Courts.

illiterate daylabourer "of poor physique and of timid disposition"<sup>79</sup>--within a year and a day of the criminal acquittal.<sup>80</sup> By 1817, it was an odd but not unheard of cause of action, not beyond the ken of a legally trained Justice of the Peace like Bedford, who was a solicitor.<sup>81</sup>

Within two weeks of the trial, The Times reported that the Thornton decision was to be attacked by "independent gentlemen in the neighborhood of Sutton Coldfield". Bedford and other gentry raised funds for William Ashford, so that "the oppressive cloud on the unappeased sense of public justice" could be removed.<sup>82</sup>

Bedford was a son-in-law and father of successive Anglican rectors for Sutton Coldfield--Ashford's clergymen. His nephew John Yeend Bedford became William Ashford's solicitor in the civil suit. Bedford excited Hall to diatribe: he jibed that Justice Bedford was known for "'tenacity of purpose and...sound commonsense'...but in this affair he seems to have shown more of the first, than of the second quality."<sup>83</sup>

Bedford was hardly a radical—he was connected with clergy of the established religion, which in the 1810s was undergoing revival, increasing piety among upper and middle classes.<sup>84</sup> Apart from Bedford, however, Hall found a few actual radicals promoting the Appeal of Murder. Another Ashford-backer was London Alderman Matthew Wood (later Lord Mayor, and the recipient of Queen Victoria's first new baronetcy). Hall called Wood's Independent Whig journal the "not too reputable organ of...the Westminster Radicals."<sup>85</sup> Hall also attacked Sir Richard Phillips--another fundraiser, owner of the London Monthly Magazine--for befriending the radicals Joseph Priestley, Henry "Orator" Hunt (the greatest organizer of common people in the provinces in the 1810s), and Samuel Bamford, Northern radical and self-educated son of handloom weavers.<sup>86</sup>

It would be historically interesting if the pro-Ashford cabal had really been "Radicals and Republicans", (as Hall called Phillips), but the politics of anti-Thornton feeling was not so simple: Rev. Booker was no radical. Interested

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<sup>79</sup> Hall, p.36.

<sup>80</sup> Ibid., p.33.

<sup>81</sup> Ibid., p.36. Most Justices of the Peace (for the countryside) or Magistrates (for urban centres) were gentry (landowners) and not legally trained at all.

<sup>82</sup> Ibid., p.35, quoting The Times, 25 Aug. 1817; Hall sneered that Bedford, "the leading spirit among the 'independent gentlemen'...was not a landowner, but a Birmingham solicitor."

<sup>83</sup> Ibid., pp.35-6.

<sup>84</sup> For the influence of Evangelicalism on gender ideology, and the rape law, see Chapter One below.

<sup>85</sup> Hall, p.35. Yet Holroyd himself was involved with the same Radicals when he defended the MP Sir Francis Burdett.

<sup>86</sup> Ibid., p.39.

in using Ashford as a warning to girls to not go out unchaperoned at night,<sup>87</sup> Booker as a Justice of the Peace attacked radicals for spreading "seditious materials" in the Black Country in 1816 during a colliers strike. He called them "designing demagogues scattering their noxious notions over the prurient minds of an unwary people."<sup>88</sup> He also led the local campaign against Parliamentary Reform in 1832.<sup>89</sup>

Likewise, Joseph Chitty, the originator of the series of legal treatises which still bear his name, was no wild-eyed radical. Yet he wrote Mr. Bedford an opinion on the possibility of an Appeal of Murder, and appeared for Ashford before the King's Bench, Nov. 1817 through April 1818.<sup>90</sup> Henry Crabb Robinson, the founder of the Athenaeum Club and University College London--Liberal but not a radical--attended the London proceedings, writing that "no one seemed to have any doubt of the prisoner's guilt, but he escaped owing to the unfitness of a profound real property lawyer [i.e. Holroyd] to manage a criminal trial."<sup>91</sup> The movement against the Thornton acquittal was politically diverse.

When the gentlemen brought the Appeal of Murder before the King's Bench on Nov. 5, 1817, Holroyd sat with Chief Justice Lord Ellenborough and two others, without recusing himself.<sup>92</sup> By Nov. 11, Justice Bedford heard rumours that Thornton might respond by challenging William Ashford to a "wager of battel"--a battle with clubs, beginning at dawn. If Thornton, short but stout,<sup>93</sup> could beat the "poor little knight" William Ashford, or remain standing till dusk, he would go free.<sup>94</sup> There was little doubt Thornton would win such a fight.

As feared, on Nov. 17, Thornton pleaded not guilty and declared himself "ready to defend the same with my

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<sup>87</sup> Clark, Women's Silence, p.114, quoting Booker, A Moral Review, p.26.

<sup>88</sup> See Cox, "Civil Unrest in the Black Country", from <[www.blackcountryociety.co.uk/articles/b&briots2.htm](http://www.blackcountryociety.co.uk/articles/b&briots2.htm)>, quoting George Barnsby, The Working Class Movement in the Black Country: 1750-1867 (1977: Integrated Publishing Services, Wolverhampton), p.6.

<sup>89</sup> See <[www.jpb.co.uk/booksoc/founders.htm](http://www.jpb.co.uk/booksoc/founders.htm)>, the website for the Dudley Book Society. Booker also composed the incendiary epitaph for Ashford's tombstone and wrote Tributes to the Dead: Consisting of more than two hundred Epitaphs, many of them original compositions, suitable for persons of all ages and circumstances (1830, London), ironically expressing the opinion that epitaphs "which excite emotions certainly quite the reverse of seriousness" were impious. After he "requested the different stone-masons always to let me see the form of inscription brought to them", to enable him to censor them, "[a] consequence ensued which I did not anticipate, namely, the task of providing epitaphs..." He was Rector of St. Thomas, Dudley, 1812-35 (and a founding member of the Dudley Book Society).

<sup>90</sup> Hall, pp.37 and 42.

<sup>91</sup> *Ibid.*, p.45, quoting Crabb Robinson, ed. Thomas Sadler Diary Reminiscences and Correspondence (1869), II, pp.68-70. Hall called this "singularly unfair" to Holroyd.

<sup>92</sup> *Ibid.*, pp.42-3 and 14.

<sup>93</sup> *Ibid.*, p.2.

<sup>94</sup> *Ibid.*, pp.43-4, quoting Bedford to his managing clerk, Mr. Yates.

body," throwing down a pair of ornamental sheepskin gloves (a "gauntlet"). This legal right of defendants had not been used since the reign of Charles I,<sup>95</sup> in the early seventeenth century. But it was still available. Ashford's team asked for more time,<sup>96</sup> and a complicated series of manouvers ensued. Finally on April 20 1818, the court decided Ashford had not shown a "violent presumption of guilt", the standard of proof to deny Thornton's his wager of battle. Ashford gave up.<sup>97</sup> On the day Thornton went free, the Attorney General brought a bill to Parliament to abolish both the civil action of Appeal of Murder and Wager of Battle. It passed in 1819.<sup>98</sup>

Ashford's defenders would no doubt have agreed with Gary Dyer, a literary critic: [t]he public was shocked to learn that English law still gave some defendants the right to demand that their guilt or innocence be decided by armed combat. Circumstantial evidence had long since convinced the nation that Thornton was guilty...When the court upheld Thornton's claim to combat, the case had to be dropped because William Ashton was physically unfit to fight him. In effect, Thornton was rescued by his own strength--which apparently had enabled him to rape and kill Mary Ashford in the first place.<sup>99</sup>

William Ashford's barrister, Mr. Clarke, complained that wager of battle meant "the person who has murdered the sister should be allowed to prove his innocence by seeking to murder the brother as well." Chief Justice Ellenborough retorted that Clarke's use of the word "murder" was incorrect because the right to wage battle would render it a lawful killing.<sup>100</sup>

During the Appeal of Murder, Holroyd's colleague on the King's Bench, Sir John Bayley, suggested Mary Ashford drowned herself,<sup>101</sup> out of remorse for her own "moral lapse".<sup>102</sup> He evidently believed female suicide not surprising after loss of virginity. An 1870 commentator, Walter Thornbury, suggested she killed herself out of "a dread of consequences, of shame and of discovery."<sup>103</sup> But this applied the trope of the fallen woman's suicide precipitately: the leap into the waters was supposed to come, not after loss of virginity, but after pregnancy.

That suicide was discussed so casually represented an extraordinary lack of concern for loss of human life. It was as if the bench was saying: "So she died. So what? She was ruined anyway. Maybe she did us a favour." This

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<sup>95</sup> Ibid., p.44.

<sup>96</sup> Ibid., pp.45-7.

<sup>97</sup> Ibid., pp.55.

<sup>98</sup> Ibid., p.56.

<sup>99</sup> See Dyer, p.386.

<sup>100</sup> Hall, p.46, Crabb Robinson's notation of Clarke's words.

<sup>101</sup> Ibid., p.161.

<sup>102</sup> Clark, Women's Silence, p.115.

<sup>103</sup> Hall, p.59, quoting Thornbury, Old Tales Retold (1870).

callousness was exaggerated by Hall, for he added hints that Ashford was not completely virtuous which were not there in Holroyd.<sup>104</sup> But Hall's logic must be carefully weighed. The tendency to blame raped women for provoking men to rape, linked ideologically to "consent to force", reached its apogee between the 1920s and 1960s.

"Consent to force" to Hall accorded with universal truths about how all women and all men behave sexually. It did not disturb Hall to describe consensual sex as chasing a woman, trying to catch hold of her three times while she tried to get away, holding her down with enough force to leave clear hand-shaped bruises on both arms, and penetrating her so hard her blood soaked her dress and petticoat and left a big puddle on the ground. It was simply "natural". Before a man can comprehend the idea of women's sexual autonomy, he has to understand that women have real feelings, that women's consent is more than giving up, and that women are just as human as men. Hall was not able to rise to that level of comprehension of the legal stakes of rape.

Consent to force was the linchpin in Holroyd's exoneration of Thornton for murder. Having dispensed with physical evidence of force by saying it did not matter "whether that consent was obtained by great importunity or not",<sup>105</sup> Holroyd dispensed with the possibility that Thornton had murdered her after consensual sex: the only possible motive to kill a woman was to avoid a rape accusation. Holroyd promoted an extremely narrow understanding of Thornton and Ashford's relationship. His analysis is striking for its absolute certainty and failure of imagination.

Holroyd's construction of the facts did not allow jurors to consider the possibility that Thornton committed manslaughter: that in effecting penetration with such force, he grievously wounded Ashford without intending to kill her, and then in a panic tossed her, either dead or unconscious and believing her to be dead, into the water, recklessly but without intent to kill. William Ashford's legal team turned up evidence during the Appeal of Murder which supported this theory--from a jailhouse informant. Omar Hall, a former Staffordshire banker convicted for stealing poultry, had shared a cell in Warwick with Thornton while he was awaiting trial, in June and July 1817. By November,

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<sup>104</sup> Ibid., pp.3-4: Ashford told Hannah Cox, when they parted at about midnight on the road from the Tyburn Inn to Erdington, that she would be going to sleep at her grandfather's house because it was closer to Langley Heath. Hall archly pointed out that this logic fell apart because Ashford would have to get her working clothes from Mrs. Butler's anyway. At trial, the defence called Ashford's grandfather to state that she had not gone there (p.104). Holroyd did not use this fact to suggest Ashford was up to no good (pp.107-8). Hall's introduction, however, concluded that "the question arises whether she had not determined, from the moment that she left the dance, to retain her freedom for the remainder of the night." He also contrasted Ashford to "prudent Hannah", who first told Mary that she wanted to go home about 11 p.m.: at country dances, men put down "an enormous quantity of beer" (p.3). Hall suggested anachronistically that going to the dance, drinking, and walking around late at night, were unacceptable for (respectable) women. See Chapter One, below, for discussion of the actual social mores for young women. Hall, p.17, also picked up on cross-examination of the prosecution witness John Hompidge (p.74), who said he saw the accused and a woman at the stile into the plowed field at 2:45 a.m., recognized Thornton, but could not see the woman's face; the defence cross-examined that she "held her head down as though she would not be known." Hall claimed Holroyd "tried to impress upon the jury the great importance of this man's testimony", but the charge did not discuss Ashford turning her head away. Instead, Holroyd treated her "premarital adventure" as no big deal.

<sup>105</sup> Ibid., p.107, Holroyd's charge.

Hall had been sentenced to transportation and was rotting in the notorious Hulks awaiting passage in the Thames estuary. He told his gaoler he had information about Thornton, and the Home Office contacted Bedford.<sup>106</sup>

A statement was taken from Omar Hall on board the Hulk Justicia, Nov. 29, 1817. Hall claimed Thornton told him that while he was having intercourse with Ashford, she became unconscious: "Thornton's first impression was that she had fainted that being a trick to which he knew from past experience that young women often resorted." But, after pouring water on her face, he decided she must be dead. In fact, Thornton believed the surgeon, who had already testified at the inquest that she had drowned, had perjured himself. Thornton also claimed that "Dales, the constable, was 'his friend' and had promised not to mention something which, if disclosed at the trial, would tell against him terribly." Omar Hall thought Dales was hiding an incriminating handkerchief which he had discovered on Thornton.<sup>107</sup>

Notwithstanding that he had seen manuscripts relating to Omar Hall, Sir John Hall, the 1920s legal writer, did not accept implications of a pro-Thornton conspiracy. Rather, he was so angry that Holroyd's reasoning had been questioned at all, that he suggested those against the verdict were engaged in conspiracy. Presumably he thought the prosecution conspiracy was politically motivated, but Hall's identification of anti-Thornton opinion with radicalism cannot be upheld.

Hall suspected the two local factory workers who matched Thornton's and Ashford's shoes against some of the prints in the harrowed field.<sup>108</sup> They neglected to check Thornton's shoes against a man's shoe print on the steep bank of the pit (which was turned sideways and looked like the weight had been on one side of the foot, as if the man had been about to heave a weight into the water). So Hall concluded darkly:

...[T]heir conduct throughout does suggest that they were so thoroughly imbued with the idea of the prisoner's guilt that they were readily disposed to ignore everything which seemed to conflict with their preconceived notions...Can it be doubted that they refrained from making the experiment, because they anticipated that it would yield a negative result?<sup>109</sup>

Hall noted William Lavell, one of the workers who checked the shoeprints, had danced with Ashford at the Tyburn Inn.<sup>110</sup> He hinted one of them was the real killer, and knew the print by the pond would not match.

Hall attacked the procedure used to check the shoes against the prints in the fallow field: with the hindsight of 1926, he insisted the proper scientific procedure was to take a mold of the print in situ, and compare the mold to the

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<sup>106</sup> Ibid., pp.47-8.

<sup>107</sup> Ibid., pp.49-50.

<sup>108</sup> Ibid., pp.6, 8, 10 and 12.

<sup>109</sup> Ibid., pp.22-3.

<sup>110</sup> Ibid., p.8.

shoe rather than to place the shoe in the track, where it could obscure the original impression in the ground.<sup>111</sup> Hall was right about the better forensic technique; but he was anachronistic in assuming it was evidence of conspiracy. Did it represent bad faith in a time before fingerprints and Sherlock Holmes? Given that most men in the region wore clogs or crudely made boots, not fancy dancing shoes like Thornton's,<sup>112</sup> the poor methodology did not make much difference: Thornton's shoeprints were quite distinct. Poorer science in Judge Holroyd's reasoning was not criticized by Hall.<sup>113</sup>

Similarly, Hall concluded that Justice Bedford had a personal grudge against Thornton reflecting community-wide prejudice,<sup>114</sup> but never explained why. He also suggested that Bedford persecuted the Birmingham Constable, Thomas Dales, who changed his testimony at the trial. Dales had been under Bedford's supervision as Magistrate in charge; Dales originally told Bedford, who had arrived at Thornton's interrogation after Dales, that Thornton did not confess to sex with Ashford until after Dales had examined him and found bloodstains on his shirt and the inside of his breeches. Then, at the trial, Dales claimed Thornton had told him he had sex with Ashford before he was asked to strip.<sup>115</sup> Thornton told Bedford only that he spent the night walking with her.<sup>116</sup>

Thornton was decided on a Friday. The next Monday, Bedford called a meeting of the Birmingham Police Office to investigate Dales for "gross misconduct". Bedford believed Dales perjured himself at trial; Dales was dismissed after an investigation of three months. Hall described this as unreasonable persecution.<sup>117</sup> Yet Hall, like Holroyd in the charge, made much of the exculpating effect of Thornton admitting to having sex before he was

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<sup>111</sup> Hall, p.22.

<sup>112</sup> Ibid., p.19.

<sup>113</sup> Ibid., p.110: Holroyd suggested that Mary Smith's evidence that the body was not yet cold at 10:30 promoted a later time for the death. Given that the different times suggested for the death were only about an hour apart, this was more unscientific than the method Lavell and Bird used to check shoeprints.

<sup>114</sup> Ibid., p.32.

<sup>115</sup> Ibid., pp.92-3. To the prosecutor, Serjeant Copley, on direct examination, Dales said: "I do not remember what I said to the prisoner when I took him into custody. We were all talking together for some time. I told him he was my prisoner..." He took Thornton upstairs to be examined, and found the blood: "I asked the prisoner how his clothes came to be in that state, and he said he had been concerned with the girl, by her own consent, but that he knew nothing about the murder." On cross-examination by the defence attorney, Mr. Reader, Dales affirmed that he had spent an hour with Thornton before Bedford got there. Then: "Did he confess to you that he had had a connection with the deceased before he was taken to be examined?/Yes, he did--I believe he did./Did any one hear it besides yourself?/I can hardly tell--I think not--I do not recollect that anybody was present at that time." When the prosecutor reexamined him, Dales again changed the story: "Did the prisoner tell you that he had had connection with the deceased before the magistrate came to Clarke's?/--I'm not quite sure whether he said so before or after." This was not convincing testimony.

<sup>116</sup> Ibid., p.11, Bedford at the inquest.

<sup>117</sup> Ibid., p.32: "Dales...was not long in feeling the effect of the general displeasure."

examined.<sup>118</sup>

Holroyd told the jury that the accused's action (in seducing Ashford) was "most reprehensible" but it was commendable that he "had never attempted to deny his relations with her."<sup>119</sup> Justice Bedford believed that Dales' testimony about when Thornton told him he had sex with Ashford was "in great measure" what "led to his acquittal", because "Mr. Justice Holroyd laid great stress" on it "in his Charge to the Jury".<sup>120</sup> Supposedly it showed Thornton's upright character that he freely confessed to "sexual sin" instead of being forced to admit it. Therefore, that Dales produced this exculpatory testimony unexpectedly in contradiction to what he had told the magistrate could suggest perjury. It certainly suggests insubordination to his employer.

However, the implication that admitting to sex with Ashford was exculpatory draws on assumptions about sexual morality which may not have been true of Thornton. Thornton may have been a libertine, convinced of his right to pursue women promiscuously.<sup>121</sup> He was reported to have boasted at the dance about having had sex with Mary Ashford's sister three times, and that he would have sex with Mary or die trying.<sup>122</sup> Maybe Thornton was boasting to Dales.

Omar Hall claimed Dales visited Thornton in gaol twice and had secret whispering conversations; he heard Dales say that he hoped Thornton kept his promise when he was free; Thornton told him he was going to pay Dales some money. Thornton also promised to pay Hall for writing a letter for him and smuggling it out to Dales, but had not paid him anything.<sup>123</sup>

Bedford might have believed Omar Hall, but they did not use his statement. Hall the criminal had been very harshly sentenced, even for those days, for minor theft; Hall the author concluded there were probably aggravating circumstances in the theft. The Home Office had to pardon convicts before their testimony could be received in court.<sup>124</sup> Other evidence had also turned up suggesting Dales had met with Thornton improperly, but not giving details of their

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<sup>118</sup> Ibid., pp.25-6, 32, and 111.

<sup>119</sup> Ibid., p.30.

<sup>120</sup> Ibid., pp.122-3, correspondence to Home Office head, Lord Sidmouth, about Omar Hall, prisoner on the Prison Hulk, Justicia, Nov. 4, 1817.

<sup>121</sup> Ibid., p.2: local gossip that Thornton fancied himself a Don Juan.

<sup>122</sup> Ibid., pp.2-3, 94-5, testimony of John Cooke; Chitty (p.161) referred to Cooke at King's Bench to argue for disallowing the wager of battle.

<sup>123</sup> Ibid., pp.49-50.

<sup>124</sup> Ibid., pp.48 and 50.

conversations; persistent rumours claimed Thornton had bribed not only Dales but alibi witnesses.<sup>125</sup>

If the jailhouse informant Omar Hall's statement was true, this throws light on Thornton's sexual attitudes. Thornton believed a woman fainting in his arms was a "trick": this implies that he had previously been physically brutal to the point of causing lovers to pass out. It also tells us that he viewed sex fundamentally as a contest--if it occurred, the woman had lost and the man had won. He certainly did not view sex as desirable to women. Perhaps he had never experienced a woman who was truly aroused. This set of attitudes will be discussed more fully later in Chapter One as part of the wider meaning of the Thornton case in terms of gender ideology.

#### D. SUMMARY: THE INFLUENCE OF THORNTON

The Thornton case, with its embedded doctrine of "consent to force" was the first in a long line of rape cases which discounted evidence of male violence against rape victims. These cases demanded evidence of increasing physical resistance from complainants, to prove they really had not consented.

In consent to force cases, we will see acquittals that occurred in truly atrocious circumstances. Victims held to "consent to force" included a five-year-old who was brutally battered, and her attacker seen with her with both their clothes disarranged,<sup>126</sup> and a woman thrown to the ground in a London park whose screams attracted a crowd before she fainted.<sup>127</sup> But as outrageous as the cases are, it is more important to understand the reasoning and its cultural meaning than to just get angry. The following chapters will establish social context (Chapter One), intellectual and cultural context (Chapter Two), and a feminist context (Chapter Three) for the meaning of consent to force.

I will show that the battle in Thornton between the theory of the prosecution and the theory of the defence represented a cultural battle over ideas about women's roles in society. In Thornton, we see the hardening of the lines of a conflict between proponents of domesticity for working class women, and libertinism--a predatory sexuality which treated women who were not ensconced in middle class homes into "fair game" for casual sexual exploitation.

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<sup>125</sup> *Ibid.*, pp.40-2, rumours of bribery in the region of Sutton Coldfield; pp.121-8, Bedford correspondence about reports of suspicious contact between Dale and Thornton.

<sup>126</sup> *R. v. Saker*, reported in The Times, 3. Aug. 1850.

<sup>127</sup> *R. v. Joseph Tidy*, reported in The Times, 25 Nov. 1876.

# CHAPTER ONE: COURTSHIP AND RAPE LAW: THE STRANGE HISTORY OF ABRAHAM THORNTON AND MARY ASHFORD

## A. INTRODUCTION: COURTSHIP AND MARRIAGE IN A TIME BEFORE "STRANGER DANGER"

On May 26, 1817, when Abraham Thornton and Mary Ashford met at a country dance at a pub in the Midlands near the industrializing city of Birmingham, and walked together in the fields, they were behaving in a traditional manner. Walking in the fields was one of the very few ways available to achieve a modicum of privacy in the crowded and heavily supervised rural world.<sup>1</sup> A young unmarried couple walking in the fields would have privacy to talk without being overheard but would be seen by casual passersby. Since they could expect to be seen, the girl would not expect serious breaches of the social norms--they would not "have sex".<sup>2</sup> When she and Thornton agreed to "walk out" together, it was reasonable for Ashford to suppose that he intended to "court" her--to get to know her in contemplation of marriage. That he was a man in about the same "station of life" was evidence for the serious longterm nature of his interest in her, for he was the right status for her to marry, and marriage was the most important institution in her society.

English people in the "long eighteenth century"<sup>3</sup> conceptualized their society as a "ranked", not classed, society.

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<sup>1</sup> Peter Laslett, The World We Have Lost (1983), pp.4, 11, 119, 155-9. See also Tilly, Scott and Cohen, "Women's Work and European Fertility Patterns" in Rotberg and Rabb, Marriage and Fertility (1980), at 227: women's needle trades, early industrial work, proto-industrial and domestic rural craftwork, involved close surveillance of women workers by employers. Robert Glen, Urban Workers in the Industrial Revolution (1983), pp.28-30, noted detailed surveillance of the poor in Stockport, Cheshire, a small Textile city, up to the 1830s. A large percentage of worker housing was owned by employers, who gave out tickets for Sunday schools and visited their workers' homes. Jobs could be lost due to poor housekeeping. "Industrial paternalism" was also cloying.

<sup>2</sup> The meaning of "having sex" was probably not what it is today. Porter and Hall, The Facts of Life (1995), pp.6, 8-9, 11 and 39, discussed Michel Foucault's denial, in The History of Sexuality (1980), of the Freudian chestnut that sexuality is "a timeless constant"; sexual identities have entirely changed since the Greeks. Sexual pleasures like mutual masturbation may have been normative for eighteenth century unmarried couples: the definition of sex as necessarily including intercourse was a nineteenth century development.

<sup>3</sup> The "long eighteenth century" expresses the sense that the period beginning either 1660 (the Restoration of the Monarchy) or 1688 (the "Glorious Revolution", the forced abdication of Catholic James

(continued...)

Society was a "great chain of being" containing all the people as one body--not three social classes in conflict. Society was a vertical hierarchy in infinitely graded ranks. In this great chain, a person's highest ambition would be the next highest rung from where he or she began.<sup>4</sup> But the language of ranks began to alternate with simpler descriptions of larger "sorts" of people: "the quality", "the middling sort", and "the poor". Society was "a graduated ladder of dominance and subordination."<sup>5</sup> Most ordinary folk accepted the elitism of their society. "[T]he larger outlines of power, station in life, political authority, appear[ed] to be as inevitable and irreversible as the earth and the sky." But submission did not mean endorsement: loyalty was a matter of outward seeming.<sup>6</sup> No doubt ordinary people's conformity masked resentment, but it also reflected the fact that compared to many other European countries, the status system did not weigh too heavily. "[T]he rulers of England showed...a surprising degree of licence to the turbulence of the crowd",<sup>7</sup> and

Vertical ties of patronage and subordination...were far from being...formally binding relationships in English society...They were flexible relationships which expressed particular accommodations to the realities of social and economic inequalities.<sup>8</sup>

As long as deference was paid in rituals of service to persons set in authority over the ordinary person, the system promised the hope of small improvements to one's status. Loyalty was expedient for most people near the bottom of the chain. The same point could be made about gender subordination in the period.

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<sup>3</sup>(...continued)

II in favour of his daughter Mary and son-in-law, William of Orange), to 1815, the end of the Napoleonic Wars, or the 1832 Reform Bill, embodied a core of essential characteristics, and thus should be treated as one period. For example, see: Frank O'Gorman, The Long Eighteenth Century (1997); David Womersley, Paddy Bullard and Abigail Williams, eds., "Cultures of Whiggism": New Essays on English Literature and Culture (2005); Jennie Batchelor and Cora Kaplan, eds., British Women's Writing in the Long Eighteenth Century (2005); and Felicity Nussbaum, The Limits of the Human: Fictions of Anomaly, Race and Gender (2003).

<sup>4</sup> Harold Perkins, The Origins of Modern English Society, (1969), pp.17-31, and 24-6: rank was a remnant of the feudal system. But unlike the feudal serf, who "could not escape his status except by flight", by the early modern period, ranks were no longer "exclusive status categories determined by birth"; England had a social system "tempered by an extraordinary degree of social mobility."

<sup>5</sup> Keith Wrightson, "The Social Order of Early Modern England", in The World We Have Gained, pp.177-202, at 190-3: Vivien Brodsky Elliott discussed the selection of marriage partners and apprenticeships for sons ("Marriage and Mobility in Pre-Industrial England", unpublished Ph.D. thesis, Cambridge, 1978), as a series of ladders of mobility, within "clusters of status and occupational groups", which provided limited movement upwards on the basis of patronage and clientage.

<sup>6</sup> EP Thompson, "Patricians and Plebs", pp.16-96 in Customs in Common (1993) at p.42. He also noted that deference did "not preclude...resentment or even surreptitious acts of protest or revenge" but did stop "affirmative rebellion..."

<sup>7</sup> Ibid., p.71.

<sup>8</sup> Wrightson, p.195.

Within this pushing, dynamic but highly stratified society, the institution of marriage provided means for small measures of mobility, while the institution of domestic service provided symbolic daily enactments of deference to social authority. Servants were considered part of employers' families.<sup>9</sup> Servants cemented social bonds between levels of society, expressed patronage ties, and provided opportunities for young commoners to meet potential mates. The commonness of servants in other people's homes was one of the four main characteristics of the "Western family pattern" (along with absence of coresident extended family kin, late age of mothers at first childbearing, and a small age gap between spouses).<sup>10</sup>

People expected to marry at close to the same social level as they had been born into. Commoners delayed marriage--into their mid twenties--until after a lengthy period working and saving capital. This was as true for women as men. Servants made a huge group of "sexually mature persons waiting to be married", working in other people's homes. Before 1800, even middle class parents sent children into service, (and received their children's Masters' children as servants, making service a "practice of exchanging adolescents between households"), and domestic service took in 35% males of 15-19 years, and 27% of females, 30% males of 20-24 years, 40% females, and 15% of both sexes between 25-9 years. Servants changed positions often, very few servants were married, and most domestic servants were required to leave employment when they married.<sup>11</sup> The result was that domestic service had a "courtship aspect...of great significance in traditional European social, emotional and sexual life...[S]ervants were in perpetual contact with their potential partners."<sup>12</sup>

Large sums of money and tracts of land were not involved in marriages of common people. The sine qua non of a commoner's marriage was to form a workable financial partnership based on the spouses' complementary skills and assets. Among commoners, a good "fit" between each spouse's skills was all that ensured subsistence for the family.<sup>13</sup>

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<sup>9</sup> R.C. Richardson, "Social Engineering in Early Modern England", *Clio*, (2004), pp.163-87 discussed all aspects of the familial relationships with servants, including the master leading daily worship and disciplining servants along with his own children for their moral edification, in the sixteenth and seventeenth centuries.

<sup>10</sup> Laslett, Family Life and Illicit Love in Earlier Generations (1977), pp.13-4. See also The World, pp.4-6 and 22-4, the incorporation of servants, apprentices and journeymen into family homes which were also economic enterprises.

<sup>11</sup> Laslett, Family Life, pp.32-45, Table 1.7 and Table 1.10.

<sup>12</sup> Ibid.

<sup>13</sup> Clark, The Struggle for the Breeches: Gender and the Making of the British Working Class (1995), pp.13-4, noted preindustrial commoner families could not get along without women working for pay, but cautioned: "Some historians, speculating that women's productive contribution allowed them to enjoy personal power...have nostalgically imagined the pre-industrial family as egalitarian. However...that system always subordinated women, who labored...out of necessity rather than as a means of improving their

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The quintessential "good marriage" among "ordinary people" in traditional society was a male weaver and a female spinner; thus the traditional word "spinster" still appears on marriage certificates meaning "a single woman".

Marriage in 1817 was the single most important economic institution, especially for people with insufficient capital for other engines of wealth creation and concentration, as in preindustrial society:

No single man...would usually take charge of the land, any more than a single man would often be found at the head of a workshop...Marriage, we must insist, and it is one of the rules which gave its character to the society of our ancestors, was the entry to full membership, in the enfolding countryside, as well as in the scattered urban centres.<sup>14</sup>

Marriage was normalized as a rite of passage and sign of a young person taking on adult economic status much more than it is today, at the beginning of the twenty-first century,<sup>15</sup> though to a lesser extent than many today believe was

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<sup>13</sup>(...continued)  
status." Further, p.64: "Plebeian marriage was often a business partnership,...[b]ut wives were not supposed to gain equal authority thereby."

<sup>14</sup> Laslett, The World, p.12. Mary Hartman, The Household and the Making of History (2004), argues that the late marriages of women in North West Europe, where Laslett's "Western marriage pattern" (especially "life cycle service" with young unmarried domestic servants co-residing, and a large proportion of never-marrying people) evolved by the mid-fifteenth century (pp.72-5), gave women more power and influence than societies where girls married soon after puberty to men 10 to 15 years older and went to live with their husbands' parents (pp.34-69). Because the wife was likely to be the only adult female, she was crucial to the household economy. Widowers in the West remarried much more quickly than in early marriage joint households, pp.66-7. The clearest evidence of increased status of women under late marriage regimes is the sex ratio of women to men: in early marriage societies today, greater neglect of daughters and female infanticide cause a deficit of women of marriageable age to men of marriageable age; the probable natural rate is 105 women to 100 men. But in China, South Asia, West Asia and North Africa, a deficit of about 11% amounts to 100 million less women than expected (Hartman, pp.42-6, citing Amratya Sen, "More than 100 Million Women are Missing", New York Review of Books, Dec. 28, 1990, pp.61-6.)

<sup>15</sup> The average age of first marriage in Canada in 2000 ([www.cbc.ca/background/marriage](http://www.cbc.ca/background/marriage), March 8, 2005) was 31.7 for women and 34.3 for men; in 2001, England and Wales, it was 28.4 (women) and 30.6 (men), see <[www.statistics.gov.uk/STATBASE](http://www.statistics.gov.uk/STATBASE)>. 27% of Canadians 18 to 34 in 2003 were married, 44% had never been married, and 22% cohabited without marriage: among all respondents, 32% had never married, see Reginald W. Bibby, "Future Families Project: A Survey of Canadian Hopes and Dreams", Vanier Institute 2004 at <[www.vifamily.ca/library/future/3.html](http://www.vifamily.ca/library/future/3.html)>. In New Zealand, median age at first marriage for men was nearly 29 in 1890, fell to just over 24 in 1970, and climbed back to almost 29 in 1998; for women in 1890, 25.5, just under 22 in 1970, and 27 in 1998, for first marriages; average ages for all NZ marriages were 33.8 (men) and 31.2 (women) in 1998; percent of men never married in NZ in 1996 were 35.6%, and 27.5% for women, see <[www.stats.govt.nz/quick-facts/people/marriage-divorce-family-legislation.htm](http://www.stats.govt.nz/quick-facts/people/marriage-divorce-family-legislation.htm)>.

From the sixteenth through eighteenth centuries in Britain, the age at marriage was lower than now, but high compared to puberty. The largest group of women (over 30%) married between 25 and 29. The average age of women at marriage was about 24 in the 1560s, 26 by the 1620s and 30s, 27 by about 1730, and then fell to 24 by 1800 (Laslett, The World, p.161, Figure 2; Family Life, pp.38-9 and 26-7, Table 1.4.). In the first half of the nineteenth century, the age of brides fell, but not below 22. The age of grooms was higher by only two years, much less than the age gap in non-Northern European areas, such as Japan in the

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traditional for the past.<sup>16</sup>

Because of the importance of marriage to the smooth running of the social system, there was nothing taboo or rebellious about taking part in courtship wherever one could squeeze it into a crowded world and a lengthy workday and workweek. Ordinary people expected young women to visit with and develop attachments to young men. If anyone had required them to be closely supervised as they did so, ordinary young women who did not warrant large investments of elders' time to arrange marriages, would not be able to find husbands. But luckily no one thought it necessary that they be accompanied by older kin at every opportunity to meet young men. It was enough that the whole community was around on the periphery. While the chastity of ordinary girls was important, traditional society was not obsessed with guaranteeing it before the wedding, when no land, money, or titles were involved.

Young women of the ordinary folk were sturdy workers. The prevailing custom in Northern Europe of sending adolescents and young adults into domestic service provided opportunities to meet potential mates. Year long domestic service contracts ensured that young women became accustomed to travelling about from position to position; they were not overprotected.<sup>17</sup> In this world, young women bargaining with young men over sex had a range of choices, gray areas in which to negotiate pleasures within a framework of economic rationality--not black and white, complete access or complete denial. There was no room for modest hothouse flowers to bloom in domestic obscurity, sharply delineated from public women available to all men. Elite legal doctrine had not imposed a classification system, placing young women into one of two sharply differentiated "types". In this context, going into the fields was no threat to Ashford's reputation.

Because of events unforeseen as Mary Ashford set off with Abraham Thornton, going into the fields would be reinterpreted in hindsight as a dangerous, risky, and morally dubious act, convicting her of recklessness, and in some

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<sup>15</sup>(...continued)

eighteenth century, pp.39-41 and Table 1.9. Hartman, pp.23-7, cited John Hajnal's insight in "European Marriage Patterns in Perspective", in D.V. Glass and D.E.C. Eversley, eds., Population in History (1965), pp.101-43: society must be very different "where a bride is usually a girl of 16 and one in which she is typically a woman of 24" (Hajnal, p.132).

<sup>16</sup> Laslett's first chapter in The World, "Misbeliefs about our Ancestors", starts (p.81) with the idea that everyone married in their teens, and girls were "Old Maids" if single past 16. The rate of never-marrying was high, especially during dearth or war. Hartman, p.21, estimated an average rate for preindustrial Europe between 1500-1800 of 20% nevermarried, compared to 5% of women or lower in early modern Eastern Europe never married, 2% in Japan in 1920, 1% in India in 1931, and never over 10% of the men failed to marry. Laslett found that when life expectancy was lowest in England, the proportion of women who never married rose: from 6% in the five years centered around 1571, to 24% around 1601, 18% around 1631, 25% around 1661, and 13% around 1691 (The World, pp.110-1, Table 11, based on E. A. Wrigley and R. S. Schofield, The Population History of England (1981), Tables A 3.1 and 7.28). Compare to modern Canadian and New Zealand levels of about 30%.

<sup>17</sup> Hartman, pp.56-7: from late Medieval times because of life cycle domestic service, young people had much more freedom to mix with others outside the family, compared to early marriage societies: "...life cycle service threw members of both sexes more on their own devices at tender ages."

eyes of moral turpitude worse than that of Thornton.<sup>18</sup> Because she was raped, her reputation was damaged. But this was after the case; her reputation would not have been damaged by her behaviour if she had not been victimized.

We are now accustomed to the idea that a raped woman's sexual reputation will suffer--that her behaviour, previous to the rape, will be put under a microscope and may be judged according to the most stringent standards of chastity and purity, whether those norms have any salience for her social milieu; that innocuous dress choices may be construed as suggestive;<sup>19</sup> that even nonconsensual sex forced upon her previously could be used to imply she was sexually voracious or deviant;<sup>20</sup> and that non-sexual aspects of her behaviour will be construed as sexual, risky and

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<sup>18</sup> James Fitzjames Stephen, Liberty, Equality, Fraternity (1874), pp.189, 194-7, 200-2, 205-6 and 209, equated the duty of women to resist sex, other than the "lawful demands" of their husbands, to the duty of men to defend the state by military force. Women should be grateful to the laws of matrimony: "Can any one doubt that the principles of monogamy...effectively controlled the most ardent passions of the strongest willed races..., or that the control so exercised was...eminently beneficial...to women?" (p.200). If marriage was dissolvable, and "women were expected to earn their living just like men", women would lose "anything like protection" from men, and "become men's slaves and drudges,...made to feel their weakness...Submission and protection are correlative. Withdraw the one and the other is lost, and force will assert itself..." (p.209). "Masculine" virtue was being "enterprising and...ambitious,...earnestly desirous to get what they want", and not "afraid of pain, both for themselves and others": "Strength...is life and manhood. To be less strong is to be less of a man" (p.199). He reconciled "Liberalism" with the class system and the new Imperialism of the 1870s against John Stuart Mill's radical Liberalism (Julia Stapleton, "James Fitzjames Stephen", Victorian Studies (Winter 1998), pp.243-61 at 244-7, 251). He also wrote legal treatises on evidence and criminal law, see W.M. Best, A Treatise on the Principles of Evidence [1849] and JF Stephen, A Digest of the Law of Evidence [1876] (1978), A History of the Criminal Law (1883) and A Digest of the Law of Criminal Procedure in Indictable Offenses ([1883] 2001).

<sup>19</sup> See R. v. Ewanchuk, (1998) 57 Alta. LR (3d) 325. At the Alberta Court of Appeal, Judge John McClung upheld a judge-made defense of "implied consent"--that the complainant, despite saying no three times, showed so little resistance or outward alarm that she "implied her consent"--because she had a baby, was living with a boyfriend, and "did not present herself to the accused in a bonnet and crinolines". She had worn shorts and a T-shirt.

<sup>20</sup> See R. v. Edmondson and R. v. Kindrat and Brown, decisions at the Sask. Court of Queen's Bench, 2003, factum of the Native Women's Association of Canada for the Court of Appeal, <[www.nwac-hq.org/EdmonstonNWACFactumFinalEnglish.pdf](http://www.nwac-hq.org/EdmonstonNWACFactumFinalEnglish.pdf)>, and Court of Appeal reasons, R. v. Edmondson 2005 SKCA 51. In the two linked cases, three young white men were charged with sexual assault of a 12-year-old Aboriginal girl, to whom they provided beer. Though under the age of consent, and intoxicated, Edmondson (who had confessed) was convicted but received 2 years house arrest, while Kindrat and Brown were acquitted, after a semen sample found on the girl's clothing was matched to her father. A pediatrician testified that young people who had been sexually abused could be "sexually unpredictable"; her testimony was twisted by defence lawyers to suggest that sexually abused children would probably be "sexually aggressive". The judge believed the underage girl was probably the initiator of sexual conduct. Media charged victim blaming of child abuse survivors and racism, see Canadian Press Newswire [hereinafter "CP"], "Lawyers for Sask Men Accused of Raping Girl Say She was Sexually Aggressive", June 23, 2003 (Saskatoon Star Phoenix) ["SP"]; Jason Warick, "Lawyer Contends Girl Led Men On", Regina Leader Post, June 24, 2003 p.B 3 ["LP"]; Warick, "Man Convicted of Sexually Assaulting a 12-year-old Avoids Jail Term", CP, Sept. 4, 2003; CP, "Protest over Acquittal of Sask Men Accused of Sexually Assaulting 12-year-old", July 10, 2003 (LP); Shauna Rempel, "Protesters Voice Outrage at Outcome of Rape Case", SP,

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suspicious.<sup>21</sup> Because of our placement in the rushing stream of the history of rape, it is difficult for us to fully appreciate

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<sup>20</sup>(...continued)  
Sept. 11, 2003, p.B 7.

The victim-blaming in Edmondson and Kindrat and Brown was the result of a growing trend to treat child sexual abuse victims as persons of dubious character. Although Canadian law requires previous sexual activity of complainants to be vetted through a voir dire process according to set criteria before allowing admission, under Criminal Code Sections 276, and 276.1 through 276.5, this does not apply to evidence of previous sexual assaults. See R. v. B. (O.) (1995) 45 C.R. (4th) 68 (N.S.C.A.). The tendency to see child victims of sexual abuse as ruined or "fallen"--afterwards corrupted, licentious, oversexed, even sexually abusive--thus is given free reign. Where a case arises in a locality where a racialized minority has been heavily sexualized and exploited in an underaged sex trade, the result can be impunity for elite white men to abuse certain young people; in the "Melfort rape case" the complainant was linked to the child sex trade in Sask. on the basis of race, without evidence of prostitution. See Murray Mandryk, "Race Issues Terrify Politicians", SP, Sept. 12, 2004; Aaron Fox (Regina criminal defence lawyer), "Sex Assault Judge Can't Respond to Criticism", Letters, LP, p.B 10; Sharon Whiting, "Wrong to Discount Role of 12-year-old", Letters, SP, Sept. 22, 2003 p.A 8.

<sup>21</sup> Especially drinking. See Claire Dyer and Steven Morris, "Rape Case Student 'Conscious'", The Guardian, Fri. Nov. 25, 2005, reporting the dismissal of the case against Ruairi Dougal at Aberystwyth University, U.K.: his victim admitted under cross examination that she couldn't confirm she never said yes when he had sex with her in the corridor of her residence hall, because she couldn't remember everything while she was extremely drunk. Mr. Justice Roderick Evans "directed the jury to deliver a verdict of not guilty 'even if you don't agree'"; he ignored the definition of consent in the Sexual Offences Act 2003 which requires a person to "agree by choice". See also Kate Foster, "Women Told 'Drink Less' to Avoid Rape", The Scotsman, Sun. 11 June, 2006, reporting comments by the Assistant Chief Constable for Lothian and Borders, Neil Richardson. Jennifer Pozner, "Columnist Dishes Dangerous Logic About Rape", Women's E News, April 26, 2006, available at <[www.womensnews.org/](http://www.womensnews.org/)> countered Naomi Riley's "Ladies, You Should Know Better", Wall Street Journal, April 14: Riley called grad student Imette St. Guillen "'moronic'" when her rapist/murderer, Darryl Littlejohn, a bouncer, was linked by DNA to a prior sexual assault; St. Guillen was "'last seen in a bar, alone and drinking at 3 a.m. on the Lower East Side of Manhattan'", sparking "'more than a few of us...[to] thin[k] that a 24-year-old woman should know better.'" Pozner responded: "It's hard to imagine that many intelligent adults would look at that brutal rape and homicide and think, 'Wow, what a stupid dead girl.'" Instead, Pozner asked how a sexually violent man with 7 prior felony convictions obtained employment to protect bar clients (see <[www.immettelaws.com/](http://www.immettelaws.com/)>): "The moral of [Riley's] story: Women who go to bars in the city ask for rape...College students who get plastered ask for rape. And men who rape? It's not worth holding them accountable for their behavior."

The negative effect of drinking on credibility is compounded by racial prejudice. Teresa Nahanee, "Sexual Assault on Inuit Females", in Julian Roberts and Renate Mohr, Confronting Sexual Assault (1994), pp.192-204, discussed 1980s cases where drunk Inuit male accuseds had sexual assault sentences mitigated for alcoholism, but Inuit female complainants who were drunk, or passed out, were held to consent to any man indiscriminately. In R. v. Esau (1997) 116 C.C.C. (3d) 289, the majority of the Supreme Court of Canada (all the male judges, Claire L'Heureux-Dube and Beverley McLachlin dissenting) said an Aboriginal man should have been allowed to raise a Mistaken Belief in Consent defence, even though he deliberately got the complainant, his second cousin, drunk. In R. v. Malcolm (2000) 35 C.R. (5th) 365 (Man. C.A.), the complainant was in her bed asleep on New Year's morning, when the accused, a friend of her common-law husband, emboldened by two New Year's Eve kisses from the complainant, came into her bed and began intercourse from behind her back. The complainant began to wake, said "I love you, Moisha" (her husband's name), then looked and, realizing who was there, threw him out, and phoned the police. The trial judge did not refer to the requirement under Crim. Code S.273.2 (b) "Where Belief in Consent Not a Defence" of an "air of reality" to the mistaken belief. Rather, he relied on a discrepancy

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the time that Mary Ashford lived in, before the Thornton case began to change things: a time which lacked a discourse blaming a working class raped woman for going outdoors at night unchaperoned. Truly we are confronted with a "world we have lost".<sup>22</sup> We are so accustomed to powerful social norms against women walking alone at night, that we cannot understand how normal it was for Mary Ashford to trust Abraham Thornton not to impose upon her sexually.

But it has been thirty years since Susan Brownmiller penned the adage, "Rape has a history" in her groundbreaking analysis of rape as a tool for the political subjugation of women, Against Our Will,<sup>23</sup> and although Brownmiller's particular outline of that history is sadly lacking in detail and subtlety, the phrase remains a clarion call to practice a deeper, more scholarly, critical and feminist approach to women's experiences of sexual coercion in past times. While Brownmiller's history may be faulty, her call to approach rape in an historical way is not.

Brownmiller erred in describing the history of rape as a mostly constant, unchanging deployment of a male technology for the oppression of females. She indulged in speculative pre-history about the "discovery" that the penis (naturally, by its design, and the complementary physical design of the vagina)<sup>24</sup> was an effective weapon against a woman. Collapsing the history of rape down to the statement that "When men discovered that they could rape, they

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<sup>21</sup>(...continued)

between the complainant and accused as to the time he arrived at the party--she said just before midnight, and he said 4 a.m.--to ask himself "If the complainant was mistaken about that fact...could her ability to clearly recall other events be similarly affected?" (p.39). The Court of Appeal overturned: "After a night of partying and drinking, without any invitation to do so, the accused entered the complainant's bedroom while she was sleeping, knowing that she was married to a close friend. He did not engage in any conversation with her...Surely in such a situation the court must be satisfied that the accused took reasonable steps to ascertain that the complainant was consenting" (p.46). The real issue is whether a judge believes a drunken Aboriginal woman might welcome another man penetrating her, while asleep in her marital bed, in the absence of her spouse/his friend; the trial judge thought this so likely he did not require Malcolm to engage her in conversation first.

<sup>22</sup> cf. the title of Peter Laslett's classic book about a pre-modern, pre-industrial world, The World We have Lost.

<sup>23</sup> Brownmiller, Against Our Will: Men, Women and Rape (1975), p.3.

<sup>24</sup> Ibid., pp.3-4. Brownmiller noted the differences between human and ape--upright stance, lack of visible changes in human female genitals when fertile, lack of estrus or "heat". She concluded that "[w]hat it all boils down to is that the human male can rape", due to his "structural capacity to rape" and the human female's "corresponding structural vulnerability"--an "accident of biology, an accommodation requiring the locking together of two separate parts, penis and vagina." She does not account for sexual violations involving penises and non-vaginal receptacles, particularly mouths and anuses; she does not account for sexual violations involving no penis, a flacid penis, objects, or sexual stimulation of the victim by hand or mouth. Given the variety of real world sexual assaults, males can be raped as well as females, and females too can rape, victims of any gender. That rape/sexual assault is much more commonly perpetrated by males than females, suggests that male socialization, psychology or physiology could be implicated in some way. But Brownmiller's analysis is too superficial and biologically reductive.

proceeded to do it",<sup>25</sup> Brownmiller imagined that a "primitive woman" in that "violent landscape" would have resisted physically:

...[S]ome woman somewhere had a prescient vision of her right to her own physical integrity, and in my mind's eye I can picture her fighting like hell to preserve it...[I]t might have been she, and not some man, who picked up the first stone and hurled it. How surprised he must have been, and what an unexpected battle must have taken place. Fleet of foot and spirited, she would have kicked, bitten, pushed and run...<sup>26</sup>

Like the famous last line of Brownmiller's introduction, which defines rape as "nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear",<sup>27</sup> Brownmiller's static vision of the first violently resisting rape victim's heroic struggle against powerful male physiology, is more an artifact to be explained historically than an historical analysis. Brownmiller's vision of the victim's resistance to the utmost is not a liberating vision of feminist possibilities or a heroic feminist history; it is a normative standard for raped women's behaviour. Brownmiller grafted onto a feminist analysis of rape a norm which was originally crafted by patriarchal law, in a specific historical process at a particular time.

The outcome of Mary Ashford's "date" with Abraham Thornton was not predetermined. She had no reason to believe that Thornton would expect her to have sex--and especially not full vaginal intercourse which risked pregnancy, the kind of sex subject to the greatest community interest in a time of economic scarcity and religious restraint.<sup>28</sup> As a daughter of the common people, Mary Ashford was not taught to act differently than she did. Going off into the fields with a young man was not considered wrongful.

## B. FROM "THE WORLD WE HAVE LOST" TO INDUSTRIAL COURTSHIP

To understand Thornton and Ashford, normal courtship rituals are the logical place to start. Given the long period of time between puberty and marriage, with young people residing away from home, meeting other young people, courtships would not be hurried affairs. Ashford would expect nothing more than general flirtation on a first "date" with Thornton.

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<sup>25</sup> Ibid., p.4.

<sup>26</sup> Ibid., pp.4-5.

<sup>27</sup> Ibid., p.8.

<sup>28</sup> Hartman, p.62, discussed "bundling" and other "socially sanctioned sessions of petting and fondling" as typical for North West Europe, citing French historian Jean Louis Flandrin's famous description of "manual, oral, and bodily games" in, "Repression and Change in the Sexual Life of Young People", in Robert Wheaton and Tamara K. Hareven, eds., Family and Sexuality in French History (1980), pp.27-48 at 36.

It is extremely unlikely that Thornton, on a first date, would promise to marry. But even if he had, and Ashford believed him, folk mores would not support full vaginal intercourse. Folk beliefs allowed intercourse when the couple became serious, or engaged.<sup>29</sup> Some sexual contact might occur earlier--especially the man manipulating the woman's genitals, recommended as "the surest way of wooing"<sup>30</sup>--but not intercourse.<sup>31</sup> The cornerstone of folk sexuality was to ensure that no babies would be conceived before a marriage had become likely.

A popular sex manual, called "Aristotle's Master-piece", circulated among ordinary people, sometimes as engagement gifts, sometimes among boys in the apprenticeship system,<sup>32</sup> throughout the eighteenth century and nineteenth centuries. A series of editions allow historians to see an evolution in sexual culture.<sup>33</sup>

The earliest "Aristotle's" recommended avoiding intercourse but tacitly legitimated other pleasures in courtship. The genitals were shown and described, including the clitoris, and its function was equated to the penis.<sup>34</sup> Ostensibly addressing reproduction in marriage, the "Aristotle's" were pronatalist and taught young men to defer to female sexuality,

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<sup>29</sup> Porter and Hall, p.15; pp.40-3, eighteenth century editions of "Aristotle's Master-Piece", a popular sex manual, reinforced this norm, by defining sex--not defensively and didactically, but matter-of-factly--as being for reproduction.

<sup>30</sup> See Tim Hitchcock, English Sexualities (1997), pp.24, 29-37, discussed John Cannon, "Memoirs of the Birth, Education, Life and Death of: Mr John Cannon. Sometime Officer of the Excise and Writing Master at Mere Glastonbury and West Lydford in the County of Somerset", (1743), Somerset Record Office MS DD/SAS C/1193/4, in a chapter titled "'The Surest Way of Wooing'". Cannon, lower middling class, discovered masturbation as an apprentice from an older boy; masturbated to "Aristotle's Master-piece"; and courted four different young women before he married, kissing, petting and "handling" three of them (the other one, his wife, he may have lied about, since she was identifiable at the time he was writing his memoirs); yet he only had procreative sex with one of them, a servant. She was the only one to whom he did not make promises to marry, and he disrespected her, (calling her "Lais" in Latin, for "whore"); yet he began with her too by touching her genitals. On p.39, Hitchcock suggested the demographic transition implied an increase in premarital penetrative sex, but "what it replaced was highly rewarding non-penetrative sex" before marriage.

<sup>31</sup> Clark, Women's Silence, p.26, quoted an eighteenth century ballad from Newcastle about the lustful dairymaid Molly, who loved to be manually stimulated by her beaux and reciprocated for them with her strong milking hands: "...For all her [Molly's mother's] advice, I care not a fig/For young men shall play with my hairy wig.../My snatch is my own, the ground is the King's./It is free for a young man that brings a good thing./Let him be ever so strong or ever so stout,/I'll warrant I'll make him quickly give out."

<sup>32</sup> Porter and Hall, p.7; Hitchcock, pp.28-9.

<sup>33</sup> Porter and Hall, pp.36-9, noted the earliest first appeared in 1684, and among scores of eighteenth century editions, there were three basic versions, overlapping in their circulation. But a fourth version, published in the nineteenth century and imitated in its tone by even more editions, in America as well as the UK, was considerably different: less pleasure-promoting and mentioning, for the first time, fearful consequences from non-marital sex for young men.

<sup>34</sup> *Ibid.*, p.52.

because conception was more likely and the child would be more healthy if the female had pleasure.<sup>35</sup> There was no double standard or "macho" attitude to male sexual privileges.<sup>36</sup> Full vaginal intercourse was not promoted in courtship, not even in a sex manual like "Aristotle's".

The mid-eighteenth century saw the beginning of medical concern with the "sin of Onanism", by which they meant both masturbation and coitus interruptus.<sup>37</sup> But this may reveal more anxiety by a rising middling group over a practice which was known to occur, then popular acceptance of the prohibition. Pronatalism did not preclude attempts at contraception or abortion, since although people generally wanted babies, they also wanted some control over their timing.<sup>38</sup> If penetrative sex occurred, later in courtship when marriage was contemplated, coitus interruptus was probably the most common response,<sup>39</sup> and if ejaculation within the vagina accidentally occurred, both men and women expected that conception would simply be followed by an earlier marriage.<sup>40</sup>

Early "Aristotle's" expected a large degree of male self-control, leading Roy Porter to comment: European males of earlier centuries [were]...enculturated into different sexual expectations...to accept...late marriage with its deferred sexual gratification, without...finding outlets in rape...We would do well to put into historical perspective today's assumption that sex is sovereign...as a biological drive and...the key to personality...[I]t is dangerous to universalize...from our late twentieth century perspective in which we have sex on the brain and before our eyes as never before...Sexuality may thus be (as Michel Foucault argued) a modern invention; and we must beware of projecting backwards today's platitudes about needs and gratifications back on to the past...Envisage a culture enforcing strong sexual taboos...; a community where adults strictly police the young...; an economy dominated by backbreaking toil; a physiology characterized by malnutrition, debility and illness; envisage all this, and the profile of sexual demands and practices may appear very different.<sup>41</sup>

Porter was arguing against the different, but complementary, anachronisms of Susan Brownmiller, who argued that rape had always occurred at a high rate, and Edward Shorter, physician-cum-historian, who argued that high rates of rape must have occurred when sexual repression was imposed on the young, creating "frustration...and pent-up energies often found

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<sup>35</sup> Ibid., pp.42-4.

<sup>36</sup> Ibid., pp.51-2.

<sup>37</sup> Hitchcock, pp.53-6.

<sup>38</sup> See Ibid., p.54, discussing Angus McLaren's arguments in Reproductive Rituals (1984).

<sup>39</sup> Ibid., p.53.

<sup>40</sup> Ibid., pp.32-5. One of the Somerset Exciseman John Cannon's sweethearts, an 18-year-old girl he was tutoring, asked for a promise to marry when he began to fondle her, and later told him she regretted his self-control (after "Lais" got pregnant and unsuccessfully demanded that Cannon marry her): never having penetrated the schoolgirl, he did not get her pregnant, and she regretted that marriage never transpired.

<sup>41</sup> Porter, "Rape", pp.219-20.

release in rape..."<sup>42</sup> Porter called Shorter's model an "ultra-mechanistic behavioural model" and "'hydraulic' reductionism".<sup>43</sup> Neither Brownmiller nor Shorter can explain the pro-social tone of eighteenth century editions of "Aristotle's Master-Piece".

The flexible, practical, and responsible approach to sex of the early editions of "Aristotle's Master-Piece"--serious couples progressing slowly from manual sex to intercourse with coitus interruptus, on the understanding that "mistakes" would lead to earlier marriage--is still practised in some regions of the world. In economies of scarcity, especially housing, where most people know each other's business, and mechanical contraception is unavailable or morally unacceptable, this is a highly functional ethic for people on the edge of subsistence.

The early editions of "Aristotle" fit well the North West European late marriage system. Demography underscores the message of the sex manuals, that recreational sex was carefully limited. Avoiding childbirth before marriage was crucial. Until about 1750 it was accomplished nearly all the time--illegitimacy ran around 2-4% of births.<sup>44</sup> A woman schooled in folk sexual culture would have no reason to fear a young man chatting her up in a field; she would expect limited foreplay for the purposes of deciding whether they might be happy together longterm.

But late marriage with higher bastardy--a model to which English demography began to change, when illegitimacy rose after 1750<sup>45</sup>--implies women treated not as economic partners, but as "disposable". It suggests young men considered only short term interests and abandoned pregnant sweethearts.<sup>46</sup> Yet for approximately fifty years into the increase in illegitimacy, until about 1800, "Aristotle's Master-piece" continued to present the same cautious and female-deferential ethic. By the time of Ashford, the folk ethic had been shaken in practice for a couple of generations, but only recently had there been any ideology, addressed to labouring men, which justified leaving pregnant single women in the lurch.

The stability of English demography which is so striking when historians look back at the quantitative evidence

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<sup>42</sup> Edward Shorter, "On Writing the History of Rape", Signs, V.3 (1977), pp.471-82.

<sup>43</sup> Porter, "Rape", p.219.

<sup>44</sup> Laslett, Family Life, pp.104-5.

<sup>45</sup> Ibid.

<sup>46</sup> There is reason to believe that most of the increase in illegitimacy occurred because of the increased breakdown of working class relationships in which marriage had been intended. For example, Clark, Women's Silence, p.83ff, noted that most unwed mothers who went to the London Foundling Hospital between 1815 and 1845 claimed they were impregnated by men near their own class rank; 10-25% said they had been forced. Rape was more likely for the minority who said they had been impregnated by men of higher class (p.80). Some bastards were conceived on lower class women by men of higher rank. But John Gillis, "Servants, Sexual Relations, and the Risk of Illegitimacy in London, 1801-1900", Feminist Studies (1979), pp.142-73 at 146 noted that servants, at higher risk of getting pregnant before marriage, were still mostly impregnated by men of their own class.

from records of baptisms, weddings, and funerals, reflecting millions of ordinary lives from the sixteenth through the eighteenth centuries, is only one side of the story. By the second half of the eighteenth century, many different types of historical evidence show the beginnings of changes which proved to be massive. The change to industrialism was so huge that it took people a couple of generations to come to terms with it. The time of Mary Ashford was still experienced as a period of bewildering novelty--even though the 1810s were already past the most crucial economic change, "take-off", the point at which resources poured into industrial production more than replaced the loss of agricultural production caused by moving inputs out of the agricultural sector.<sup>47</sup>

Technological innovations driving new forms of industrial production occurred mostly between the 1730s and the 1780s.<sup>48</sup> These would never have occurred had there not been an "agricultural revolution" in the first half of the eighteenth century--new technology, crops, and modes of production applied to a lucky period of good weather, which produced bumper crops and freed pools of cash accumulating among upper class landowners for investment in manufacturing.<sup>49</sup>

In terms of social and intellectual life, ripples of upwelling change began to disturb the large tranquil pool of traditional English life at different times to different groups of people. Literary history, which since the development of the novel form in the early eighteenth century overlapped the history of a middle class viewpoint,<sup>50</sup> reflects the first

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<sup>47</sup> W.W. Rostow, The Stages of Economic Life (1960); H.J. Habakkuk and P. Deane, "The Take-Off in Britain", in W.W. Rostow, The Economics of Take-Off into Sustained Growth (1963); and Roderick Floud and D. McCloskey, eds., The Economic History of Britain 2d ed. (1994). Peter Mathias, The First Industrial Nation (2003), p.2, defined the Industrial Revolution as "a fundamental redeployment of resources away from agriculture."

<sup>48</sup> See David Landes, The Unbound Prometheus: Technological Change and Industrial Development (1969); Peter Stearns, The Industrial Revolution in World History (1998); Neil Tonge, Industrialization and Society (2002); Mathias; T.S. Ashton, Iron and Steel in the Industrial Revolution (1924); Mary Rose, ed., The Lancashire Cotton Industry (1996); and John Rule, "Manufacturing and Commerce" in Harry Dickinson, ed., A Companion to Eighteenth Century Britain (2002), pp.127-40.

<sup>49</sup> Mark Overton, Agricultural Revolution in England (1996); B.A. Holderness and Michael Turner, eds., Land, Labour and Agriculture (1991); Tonge. See W.D. Rubinstein, Capitalism, Culture and Decline in Britain (1993) and Richard Price, British Society 1680-1880 (1999) for the argument that the accumulation of moneys and rise in investment was the most important factor in producing the Industrial Revolution, not the technological innovations in leading industries.

<sup>50</sup> See Nancy Armstrong, How Novels Think (2005); Armstrong and Leonard Tennenhouse, The Imaginary Puritan (1992); and Armstrong, "Writing Women and the Making of the Modern Middle Class", in Amanda Gilroy and W.M. Verhoeven, eds., Epistolary Histories (2000), pp.29-50. Virginia Woolf famously pointed out: "towards the end of the eighteenth century a change came about which, if I were rewriting history, I should describe more fully and think of greater importance than the Crusades and the Wars of the Roses. The middle class woman began to write..." (A Room of One's Own in Michele Barrett, ed., A Room of One's Own and Three Guineas ([1929] 1993), pp.60-1). This work is part of Woolf's rewriting to revalue women's history.

changes in ideas about gender, especially women's roles.<sup>51</sup> Gender ideology began to change first in the middle classes. Then it affected the upper classes and the ordinary people, the former from the last quarter of the eighteenth century, and the latter from the 1810s to 1830s.<sup>52</sup> The last period was also when changing labour practices, and spatial concentration of groups of labourers through urbanization, accumulated to such an extent that class relations became fraught with tension.<sup>53</sup>

The largest change of all, a huge increase in the birth rate and massive population growth, from 1750, was the quietest change from the point of view of people's experiences. George Chalmers, a civil servant and scientist, estimated that the population of England in 1786 had actually gone down by more than 50% since the estimate of 5.5 million made by Gregory King in 1696. He was radically wrong: the population had almost doubled by 1781 and was poised to increase by another half by 1821, topping 11 million.<sup>54</sup> Even Rev. Thomas Robert Malthus, who began his career serving

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<sup>51</sup> Armstrong, Desire and Domestic Fiction (1987) pointed out the obsession with the morality and moralizing capacity of the middle class woman represented in fiction from the early 18th century, especially in Samuel Richardson's novels. See also Armstrong and Tennenhouse, eds., The Ideology of Conduct (1987); Vivien Jones, ed., Women and Literature in Britain (2000); Paula Backscheider, ed., Revising Women (2000); Robert W. Jones, Gender and the Formation of Taste (1998); and Wendy S. Jones, Consensual Fictions (2005).

<sup>52</sup> Lawrence Stone, The Family, Sex and Marriage (1977), pp.123-220, 320-405, 527-46, 643-7, 651-5, for the middle and upper classes, and Bridget Hill, Women, Work and Sexual Politics (1994), Paul Johnson and Stephen Nicholas, "Health and Welfare of Women in the United Kingdom", in Richard Steckel, Health and Welfare During Industrialization (1997), and Clark, The Struggle, pp.179-272, for working class people.

<sup>53</sup> See Asa Briggs, Iron Bridge to Crystal Palace (1979); Pamela Pilbeam, "From Orders to Classes", pp.101-25 and John Roberts, "Revolution from Above and Below" in T.C.W. Blanning, ed. History of Modern Europe (2000); Jane Humphries, "Standard of Living, Quality of Life", pp.287-309 and Shani D'Cruze, "The Family", pp.253-72, in Chris Williams, ed. A Companion to Nineteenth Century Britain (2004); E.J. Hobsbawm, Industry and Empire (1999); John Belchem, Industrialization and the Working Class (1991); James A. Jaffe, Striking a Bargain: Work and Industrial Relations (2000); Roderick Floud and Bernard Harris, "Health, Height and Welfare", pp.127-60, and Paul Johnson and Stephen Nicholas, "Health and Welfare of Women", pp.201-50 in Richard Steckel, Health and Welfare During Industrialization (1997); and E.P. Thompson, The Making of the English Working Class.

<sup>54</sup> Gregory King estimated the British population in the year of the Glorious Revolution, 1688, at 5,500,520 persons in his "Natural and Political Observations and Conclusions Upon the State and Condition of England", which he wrote in 1696. It is now published in George Burnett, ed., Two Tracts by Gregory King (1936). See also D.V. Glass "Gregory King's Estimate of the Population", Population Studies (1950), pp.338-74. King was actually not trying to estimate the population directly, but accounting for the amount of wealth added to the nation by persons in 30 different ranks of life. The 2,725,000 Commoners included 150,000 Common Seamen, 1,275,000 Labourers/Outservants (daily wage labourers who did not coreside with their masters, mostly in agriculture), 1,300,000 Cottagers/Paupers (from small renters with a little land to work for food to the completely propertyless, recipients of poor law relief), 70,000 Common Soldiers and 30,000 Vagrants. He did not include the 240,000 Artisans/Tradesmen among the Commoners; he considered many Commoners "Persons diminishing the wealth of the nation." George Chalmers, An

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as a curate baptizing the flood of babies in a rural parish from 1797, and wrote the Essay on the Principle of Population which claimed that food production tended to increase arithmetically but human population to increase geometrically (that is, exponentially), did not realize that England's population was exploding.<sup>55</sup> But, like gender ideology changes at this time of transition, demographic change both reflected and caused profound social changes by the early nineteenth century.

Emphasis on female sexuality, and explicit mention of the clitoris, disappeared from the editions of "Aristotle's Master-Piece" published in the nineteenth century.<sup>56</sup> Sex began to be equated with full intercourse.<sup>57</sup> Folk mores had allowed sexual intimacy without intercourse to protect the community from uncontrolled reproduction. But as the social flux of industrialization, and especially urbanization, grew, "all plebeian men...faced a choice between a responsible and

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<sup>54</sup>(...continued)

Estimate of the Comparative Strength of Britain (1786), drastically reduced the population estimate to 2,092,078--not in ignorance of King's estimate, because he wrote a biography of King. Radical reformer William Cobbett singled Chalmers out for special ridicule in his 1826 Letter XVI of A History of the Protestant Reformation in England, (see <[www.exclassics.com/protref/prot15.htm](http://www.exclassics.com/protref/prot15.htm)>) for so underestimating the population. The actual population at the end of the seventeenth century was just under 5 million (1681, 4,930,000 and 1691, 4,931,000), and at the end of the eighteenth century, it was over 7 million and growing rapidly by rates of at least .9% a year (1781: 7,042,000, 1791: 7,740,000, and 1801: 8,664,000), according to Wrigley and Schofield, Population History of England, table A3.1, pp.528-9. By 1811, the population was almost 10 million (9,886,000) and by 1821, 11,492,000.

<sup>55</sup> Patricia James, Population Malthus (1979) discussed not only his famous books, but his working life as an Anglican priest. Malthus' and George Chalmers' mistake was common among scholars who looked at the English population in the second half of the eighteenth century: as D.V. Glass explained in Numbering the People (1973), Continental thinkers experienced real population decreases (due to epidemics, famines, wars, and migrations); they influenced British scholars' estimates. See also E. Higgs, A Clearer Sense of the Census (1996): From the 1750s, the idea of population decline was popularized by conservative defenders of agricultural interests; Malthus, not easily classified as a conservative, as a Physiocrat believed real wealth depended on the land and agriculture was more important because it produced food. Claiming the population had declined since the Glorious Revolution was a way to criticize the Whig aristocracy; even Cobbett, part radical and part conservative, had sympathy for this basic view despite making fun of Chalmers.

<sup>56</sup> Clark, Women's Silence, p.87.

<sup>57</sup> Hitchcock, pp.39-41, discussing the evidence that the switch to more penetrative models of sex among plebeian people began in the late eighteenth century in London. While not all the evidence is in yet as to when and how, by the 1820s the switch appears widely around the country: bourgeois culture became more intrusively influential on plebeians. London was the location of great social mixing of males from different classes, and a large market of underground cross-class sexuality through lower class prostitutes serving the Quality. A large proportion of its plebeians were involved in aspects of production for the luxury markets associated with the London social Season and with Parliament: London was likely to precede other regions in any cultural shift based on imitation of higher classes.

a misogynist ethos."<sup>58</sup>

The main alternative to folk tradition, "libertinism", started to appear in "Aristotle's Master-piece" at the turn of the century. This represented a popularization of a century-old strain of high culture, for libertinism had begun in reaction to puritanism at the notoriously licentious Restoration Court of Charles II in 1660. Libertinism expressed the anger of its origins--revolt against moral tyranny of Puritan clerics during the English Civil War--more than a truly liberatory enjoyment of sexuality. Libertinism had always been more aggressive and misogynistic than erotic.<sup>59</sup>

The nineteenth century "Aristotle's" combined scare-mongering about sex outside marriage, especially frequenting prostitutes, with descriptions of the woman as an enemy whose resistance had to be overcome, suggesting only full intercourse with ejaculation would do when a man was aroused.<sup>60</sup> This popular libertinism followed changes in the elite discourse of medicine which redefined "real sex" as only potentially procreative vaginal penetration and ejaculation;<sup>61</sup> it also followed, by about thirty years, an 1781 rape case which required raped women to testify not only to penetration but ejaculation.<sup>62</sup> Artisans, especially in London where they rubbed shoulders with the elite, increasingly participated in a "libertine" culture which treated "maidenheads" (hymens of virgins) as trophies of war to be "collected".<sup>63</sup>

Traditionally, apprentice artisans had socialized in pubs with workshop mates. Fear of "unruly" apprentices

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<sup>58</sup> Clark, The Struggle, p.60.

<sup>59</sup> Porter and Hall, p.18.

<sup>60</sup> Clark, Women's Silence, p.85, contrasted a 1771 edition which described a woman controlling the man's penis like a "pilot" navigating a boat, and an 1812 version which described sex as a man overcoming the woman's resistance. Thomas Laqueur, Making Sex, pp.52-3 and 55, noted that Medieval and Renaissance medical writers in the Galenic tradition had described "excess of semen" as causing men--and women too, who were thought to "emit" seed--to fall prey to "unnatural practices" (homosexuality and masturbation). By the late eighteenth century, panic over masturbation reached such a peak that ejaculation through intercourse was prescribed by some medical men to prevent "Onanism". The nineteenth century sexual radical Richard Carlile's Every Woman's Book, or What is Love Containing Most Important Instructions for the Prudent Regulation of the Principle of Love and the Number of the Family (1828), the first popularizing tract on birth control, condemned masturbation, homosexuality, and prostitution, promoting contracepted intercourse with ejaculation (Laqueur, pp.228-9).

<sup>61</sup> Ibid., pp.227-30: medical panic over masturbation made it seem medically necessary to relieve "excess semen" through intercourse.

<sup>62</sup> Clark, Women's Silence, p.61.

<sup>63</sup> Clark, The Struggle, pp.34-41, especially p.40, the rough libertine side of plebeian subculture rose in the Metropolis; see also pp.69-70, songs celebrated bachelor life and advocated abandoning pregnant sweethearts to avoid the strife of married life: the 1802 "Advice to Sailors" (British Library, Davison Collection, 11606.aa.23, #19) advised "'there's scolding and fighting, while we're delighting/Our selves with our freedom, while you have this strife.'"

was common; most eighteenth century commentators believed the cause was living separately from their masters (although Adam Smith, emphasizing individualism, said living with masters degrading).<sup>64</sup> Some rowdiness and "wenching" (patronizing prostitutes) was accepted in apprentices.<sup>65</sup> But this was not how they were supposed to treat young girls and women of respectable families of their own rank.

Libertinism was probably never accepted by most young workingmen, despite the ubiquitous British tendency to ape their "betters". It did not suit long term working class interests. Before industrialization, the products of female hands had always been absolutely necessary to the survival of working families; this economic situation persisted until at least 1850,<sup>66</sup> especially for the lowest segments of the working class. Libertinism was a bachelor ethic, and working class bachelors did not live well. It did not suit workingmen committed to seeing progeny survive. But it appealed to men too desperate to consider anything beyond their own survival, especially during early manhood.

Libertinism was not an ethic supported by communities, or that commoner families would teach to their daughters. Its appearance, in editions of "Aristotle's Master-Piece" and other popular cultural media in the early nineteenth century,<sup>67</sup> represented an unraveling of labouring communities: some young men were pulling away from communal solidarity, refusing to behave in ways that had long served the best interests of the class.

The contrast between libertinism and folk sexuality was epitomized in Thornton in the testimony of one of the

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<sup>64</sup> Geoffrey Pearson, Hooligan: A History of Respectable Fears (1983), noted fears of "unruly" apprentices. Adam Smith's attack on "indoor" apprenticeship in The Wealth of Nations (1776), diverged from the majority, who thought living away from masters bad for morality. The old system of apprenticeship was abolished in 1814.

<sup>65</sup> Clark, The Struggle, pp.33, noted artisans celebrating "with ribald songs and crude rituals"; pp.56-8, "Cock-and-Hen" clubs hired prostitutes for public sex with one or more apprentices; anecdotal evidence of artisans' heightened proclivity to rape was borne out in Glasgow Police Court records between 1813-24, with a rate of sexual assaults roughly twice their percentage in the occupied population for skilled trades (while textile workers, labourers and servants had rates lower than representation in the population). But apprentices and journeymen also joined respectable book clubs (p.32). Douglas A. Reid, "Interpreting the Festival Calendar: Wakes and Fairs as Carnivals", pp.125-53 in Robert Storch, Popular Culture and Custom (1982), at p. 132: a Free Debating Society of "apprentices and mechanics" in the Midlands in 1774 resolved that "'Prayer to God for the Renewal of the Heart is the most likely Means to prevent...the Increase of Criminal Offenses'" (quoting John Money, Experience and Identity (1977) pp.114-5). Artisans may have become more morally serious in the early nineteenth century: Francis Place, Mary Thale, ed., The Autobiography of Francis Place (1972), pp.114-5, noted that morals of journeyman improved, and drunkenness waned, since his youth in the 1780s.

<sup>66</sup> Clark, The Struggle, Katrina Honeyman, Women, Gender and Industrialization (2000), Deborah Valenze, The First Industrial Woman (1995), and Bridget Hill.

<sup>67</sup> Clark, The Struggle, pp.66-72, surveyed comic ballads, poems and caricatures from the early nineteenth century advocating that workingmen (often artisans, especially shoemakers) use verbal cruelty and violence to keep their wives from trying to be Master of the house; for example, on p.63, a ballad writer, David Love, of Nottingham, was unashamed to write autobiographically in 1828 about chastising his wife.

prosecution witnesses. After Ashford and Thornton left the dance at midnight on May 26, 1817, they were seen by John Hompidge sitting on a stile in the field talking. Hompidge had been "visiting" alone in the parlour downstairs at his fiancée's father's house, while her father slept upstairs, at three in the morning. No one spoke ill of him or his sweetheart.<sup>68</sup>

But in the trial and controversy, no one referenced the obvious frame of reference: that Ashford and Thornton were seeking the limited privacy normal to their circle. No one argued that it was alright for Ashford to go alone with Thornton. Yet this revision of expectations for working class girls occurred without anyone making a point of it. A change in conceptualizing female working-class courtship behaviour took place, but so "naturally" that it was not remarked upon as change. Even though the courtship behaviour of other young people, the witnesses, was not attacked, no one defended Ashford's choices.

The violence Mary Ashford underwent separated her from her peers. The difference between Hompidge and his fiancée, and Thornton and Ashford, was the behaviour of the men. Yet it was the woman, the victim of a dishonourable male, who was cast out from the moral universe of her peers. In Thornton, law supported a male sexual ethic against the traditions of the common people, and burdened ordinary young women with the job of managing alone a newly selfish male attitude demanding full intercourse at an early stage of courtship.

### C. LAW AND RAPE MYTHS: THORNTON AND RESISTANCE

The legal process in Thornton mediated change in popular social mores by assigning particular meanings to behaviour. Law crafted an heroic resistance standard for rape victims beginning with the adjudication of Abraham Thornton. Legal elaboration of the resistance standard was completed in about fifty years, and the norm lived in the common law for another eighty years; it was still part of the common culture during second wave feminism in the 1970s. Brownmiller's proud, rights-claiming woman as "warrior Queen" is evidence that the cultural history of this norm continues into our recent past.

Brownmiller's image of the strenuous resistance which proved that a raped woman was cognizant of her right to physical integrity is an artifact of the Industrial Revolution's gender anxieties, which Victorians elaborated into a fully-fledged coercive gender ideology. These aspects of her "history" are as false as her controversial remark about "all men" is alienating, unfair to most men, and obscures the institutionalized nature of male dominance.

The factual world of rape today is not made up of heroically resisting women any more than a penis is necessary to commit sexual assault.<sup>69</sup> Likewise, the factual world of Mary Ashford's rape was not about biting, kicking, pushing

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<sup>68</sup> Clark, Woman's Silence, p.113, noted this from Hompidge's testimony in Hall.

<sup>69</sup> Sexual assault in Canadian law is a variety of assault defined in the *Criminal Code of Canada* by *Section 265* as "appl[ying] force intentionally" without consent". *Section 271 "Sexual Assault"* merely addresses sentencing. The child sexual offenses, *Sections 151* and *152*, add to the simple definition of the

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and running away. Ashford's world of rape was nevertheless different from ours today. Both Ashford's and our own lived experiences of rape are more sordid, painful, humiliating and emotionally complex than fantasies of female resistance allow or can comprehend.

In the final analysis, it does not matter to raped women whether extreme resistance standards are elaborated by law or by other women seeking heroines. These standards make it necessary for women to first prove they are "good enough" before they can be believed about rape. Requiring extreme resistance by women amounts to excusing men for using force or intimidation, turning the requirement that women not consent into a requirement that they exert themselves to prove the sex was "against their will". Extreme resistance standards uphold a double standard of morality. Raped women are not served by them.<sup>70</sup>

Unrealistic beliefs about why men rape, or how women respond to rape, are impediments to humane processing of rape. Rape myths distort the treatment of a common crime. Rape myths are "descriptive or prescriptive beliefs about rape (i.e. about its causes, context, consequences, perpetrators, victims and their interaction) that serve to deny, trivialize or justify sexual violence exerted by men against women."<sup>71</sup> They are not just misrepresentations, but biased beliefs which stop us holding male perpetrators to account, and attack female victims for crimes perpetrated against them. Rape myths skew perception to defend men and hurt women. Rape myths are based on victim-blaming.<sup>72</sup>

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<sup>69</sup>(...continued)

Sexual Assault law the stipulation that, in cases involving touching a young person (151), or asking the young person to touch sexually (152), that the touching be "for a sexual purpose". But the touch may be "directly or indirectly, with a part of the body or with an object", to "any part of the body of a person under fourteen years" (151) or, in the case of 152, when one "invites, counsels or incites" a young person "to touch, directly or indirectly, with a part of the body or with an object", the body of any person, including "the body of the person who so invites", and the young person's own body. So Canadian law depends on the purpose of the touch, determined by the context of the offense, not on touching by a penis of a vagina, anus or mouth.

<sup>70</sup> I first read Brownmiller in fall 1987, when I volunteered at a crisis pregnancy service. The sister of a pregnant Aboriginal 14-year-old girl phoned me. Her pregnancy was discovered by the family when the high school contacted them about the girl's truancy. She had missed school for an month. She was afraid of school because she had been raped at a freshie-senior party--held down by seniors while a recent graduate penetrated her. I agreed to talk to the girl and her mother, and went to the bookstore to look for a book to bring her. I read Brownmiller's introduction, skimmed descriptions of armies raping civilian women, and put it down as unhelpful. What could orgiastic, gory descriptions offer a girl to reassure her it was not her fault and offer hope?

<sup>71</sup> Gerd Bohner, Vergewaltigungsmythen [Rape Myths] (1998), p.14, translated and quoted by Dominic Abrams, G. Tendayi Viki, Barbara Masser and Bohner, "Perceptions of Stranger and Acquaintance Rape: The Role of Benevolent and Hostile Sexism", Journal of Personality and Social Psychology (2003), pp.111-25 at 111.

<sup>72</sup> See William Ryan, Blaming the Victim (1976): sympathy for problems faced by a group morphs into defining the group by the problems, then asserting they cannot be ameliorated because the problems are inherent in the people, and the people are too flawed to change.

For example, in historical writing about the Thornton case, one reading of the facts of the case was skewed against the memory of Mary Ashford. This reading came from a surprising direction: the distinguished historian, Roy Porter--whose work on "Aristotle's Master-Piece" supports a sympathetic understanding of Ashford's actions--defended how Judge Holroyd handled the case. Porter argued that Ashford knew what Thornton wanted and not only consented, but planned to consent, to some random man, even before she met Thornton--before she went out to the dance:

Consider the facts. Mary Ashford, a servant, chose to attend a late-night dance at what seems to have been a disreputable club, without male accompaniment...She then chose to leave at midnight in the company of a man she had only just met. Three hours later she was seen with him, apparently quite contentedly, in the fields. She then parted from him (possibly after having sex) to make her own way home. What sign is there here...that the morality of the times had created a crushing sense of modesty?<sup>73</sup>

Porter, arguing Holroyd's summing up on reasonable doubt was sound,<sup>74</sup> suggested Ashford expected full intercourse, heedless of the risks of pregnancy without a known suitor who could be pressured to legitimate the child. His scolding tone suggests that danger was natural to her environment, which she must have known; instead of problematizing the existence of such danger to young women, Porter held Ashford responsible for managing danger poorly. Poor management--going about unchaperoned--implied she really consented. In other words, Ashford should have viewed herself the way that a libertine would see her, as a disposable commodity, and required her to prove her worth by managing herself as commodity responsibly.

But Porter based this unlikely characterization of Mary Ashford on a representation of the space she entered that night for which there was no evidence. Furthermore, he assigned the status of a disreputable place to the first place she went to--the Inn where a dance attracted many young people--rather than the space that most people now would view as especially dangerous, the fields.

Porter's analysis--based on Ashford seeming happy with Thornton in the fields,<sup>75</sup> and happy when she changed

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<sup>73</sup> Ibid., pp.228-9.

<sup>74</sup> Ibid., p.227, Porter summarized Hall's account: "At the conclusion of the trial, the evidence against Thornton was weighed up at length (and it seems with considerable even-handedness) by Mr. Justice Holroyd in his summing up from the bench." This is hard to reconcile with Hall, pp.105-12: Holroyd's charge did not even mention the bruises on her arms and the "lake of blood" under the tree. If this is supposed to be a fair summing up, it reflects a notion of fairness unknown to the present practice of law. In addition, no judge should have stated which versions of debatable facts he believed to be true. The syllogisms Holroyd set up to determine the facts are extremely questionable, especially: no rape if no outcry; and no murder if no rape. It is no wonder many commentators at the time claimed that Holroyd directed the jury to acquit.

<sup>75</sup> But see Hall, p.73: Hompidge actually did not say that Ashford seemed happy when he saw her in the fields, as Porter suggested with the phrase "apparently very contentedly". Hompidge did not comment on her emotional state. He said: "I did not know who the woman was. I did not see her face. She held her head down so that I could not see it." The defence tried to suggest that Ashford was ashamed of herself--to

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her clothes at Mrs. Butler's<sup>76</sup>--would work against most modern women's allegations of date rape. For he suggested that a woman happily socializing, dancing (and possibly drinking) in the vicinity of men consents to any of them who approaches her later. Nothing is more likely to change a woman's state of mind abruptly than an unwanted sexual advance. Just because a woman is apparently happy does not mean she wants to have sex.<sup>77</sup>

Anna Clark described the event as a "country dance at a nearby pub".<sup>78</sup> Most pubs were neighbourly institutions, even family oriented, serving women as much as men.<sup>79</sup> Porter gave no good reason to distrust that description. Rural Warwickshire was an unlikely place for a "club"--a word which at that time meant an elite, usually metropolitan, private member venue.<sup>80</sup> Neither Ashford nor Thornton had the status for a recreational drinking society

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<sup>75</sup>(...continued)

set up an argument that if she appeared unhappy or abashed, that would also mean sexual consent because it suggested guilt. In cross-examination, Hompidge was asked: "She evidently appeared to you as though she would not be known, and she held her head down?" To this leading question, he answered "Yes." The prosecution then re-examined to clear up that Hompidge had left Mr. Reynolds' house when Reynolds was already in bed asleep, and that Hompidge had been courting Reynolds' daughter.

<sup>76</sup> Ibid., p.71, Hannah Cox testified that when Ashford stopped to change her clothes: "I did not perceive any agitation or confusion on her part. Neither her person nor her dress was disordered, so far as I saw. She appeared to be very calm and in very good spirits."

<sup>77</sup> Porter's assumption that a happy woman in a social venue is receptive to sex, from any man who offers, has been studied in psychological research. See A. Abbey, "Misperceptions of Friendly Behavior as Sexual Interest", Psychology of Women Quarterly (1987), pp.173-94, and C.B. Johnson, M.S. Stockdale and P.E. Saal, "Persistence of Men's Misperceptions of Friendly Cues", Psychology of Women Quarterly (1991), pp.463-75. These reports correlate the belief that cues like smiling imply receptiveness, to high levels on rape myth acceptance scales. It also correlates with high rape proclivity: the tendency for men to say they would consider forcing sex on women if they knew they would not be punished. That simple cues of general friendliness might be misperceived has terrible implications, because women are socialized to behave in a friendly manner to men. It has even worse implications for women who are socially constrained to behave in a servile and obedient manner, as ordinary women were to elite men in the early nineteenth century.

<sup>78</sup> Clark, Women's Silence, p.113.

<sup>79</sup> Clark, The Struggle, p.29: The Select Committee on Drunkenness, 1834, paid investigators to count customers of fourteen London pubs. Males were 66% of clients in one pub, but averaged only slightly over 50% in most pubs, bearing out the 1794 complaint of Patrick Colquhoun, reforming magistrate, that London labouring families spent all their free time in pubs. Easy access to the public life of the neighborhood ended for workingwomen by about 1850, due to middle class scrutiny like that of Colquhoun and the Select Committee.

<sup>80</sup> Clubs, as places, were private gentlemen's establishments for accommodation and dinners, mostly in London, see A. Lejeune, The Gentlemen's Clubs of London (1979), T.C.W. Blanning, The Culture of Power and the Power of Culture (2002), Michael Brander, The Georgian Gentleman (1973), and Murray Venetia, High Society (1998), not "night clubs" or singles bars. In the countryside, gentry congregated at

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of that sort.

Porter constructed Ashford as a loose woman because she went without a male chaperone, and assumed she therefore intended to consent to anyone who picked her up. No doubt young people congregated at the Tyburn Inn to see and be seen, hopeful of finding romantic partners. Does that mean that young women accepted they would have to provide vaginal intercourse or be battered?

Beyond the issue of what sort of place the pub was, there is a deeper question: why should individual women's consent be read off the reputation of certain places?<sup>81</sup> Even if the Tyburn Inn attracted prostitutes (which is extremely doubtful), does that mean that every woman there must accept treatment as a prostitute?

Even for a prostitute, does accepting offers of sex for money from many men mean that a woman must have consented to a particular man at a particular time? Do we assume that men who go looking for commercial sex want sex with any prostitute they see? Does a potential for a sexual liaison to begin at a place where young people congregate mean that no person there would refuse any other person there? Does any sexual activity mean that a place--or a woman--becomes "dirty"? Porter does not explain why Ashford's master would have consented to letting her go to a disreputable venue.<sup>82</sup> Her master's permission speaks to the Tyburn's respectability.

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<sup>80</sup>(...continued)

private country houses. As organizations, clubs and associations were very common--people clubbed together for educational, political, commercial, and scientific purposes, attracting upper middle, middling or artisanal people, more rarely gentry, and rarely commoners. These were not disreputable; they were almost all single sex associations, meeting for "convivial conversation"--drinking and eating, but not dancing--in back rooms at pubs. See Peter Clark, British Clubs and Societies (2002), Neil McKendrick, John Brewer and J.H. Plumb, eds, The Birth of a Consumer Society (1982), Robert Scholfield, The Lunar Society of Birmingham (1963), and Jenny Uglow, The Lunar Men (2003). Sex-linked clubs, like the Hell-Fire Club, see Daniel Pratt Mannix, The Hell Fire Club (1959), met at private country homes and used mistresses of the same social level or hired prostitutes.

Working class associations in 1817 were secretive: since repression of the London Corresponding Society, an Jacobin group, and the *Combination Acts* of 1800 which made "combination in restraint of trade" illegal, organizations for working people met quietly to not attract attention, in single sex "Friendly Societies" in pubs--tacit labour unions hiding behind health and burial insurance schemes; they had strict rules for members, including temperance and (for women) chastity, see Geoffrey Finlayson, Citizen, State and Social Welfare (1994), Simon Cordery, British Friendly Societies (2003), Mary Ann Clawson, Constructing Brotherhood (1989), P.H.J.H. Gosden, The Friendly Societies in England (1961) and Self-Help (1973), and Eric Hopkins, Working Class Self Help (1995). Friendly societies would not hold dances. So we are left with the most innocent explanation, a community organized dance, for the Tyburn Inn's entertainment.

<sup>81</sup> A classic example of feminist critique of space-based--and profession-based (prostitution-based)--character and consent analysis of raped women is Sherene Razack, "Race, Space and Prostitution", Canadian Journal of Women and the Law (1998), pp.338-79, an article about the investigation and adjudication of the murder of Pamela George, an Aboriginal prostitute, by two young sons of the Saskatchewan establishment, Alec Ternowesky and Stephen Cummerfield, who were sentenced leniently because George's value was discounted.

<sup>82</sup> Porter, "Rape", p.228.

Porter participated, at a remove of 170 years, in typical Victorian victim blaming of Ashford, assuming the rape myth of Stranger Danger--that women assume a risk of rape whenever they encounter strange men, especially outdoors alone at night, unless accompanied by good men--follows naturally from the "bare facts". A woman who is afraid, who does not want to be raped, naturally takes a chaperone everywhere; a woman without a chaperone naturally is a bad woman who cannot be raped and will consent to anyone.<sup>83</sup> Rather than disprove that modesty limited sex in 1817, Porter proved he was influenced by "crushing modesty" in 1987, because he could not imagine a young woman looking for love on terms which were not dishonourable.

Porter left no room in his "facts" for a young woman to just get to know a young man. Yet this is most likely exactly what Ashford expected, according to the ordinary mores of her place, time, and class. Porter argued ordinary men limited sexual activities to protect labouring women and communities from illegitimacy. Why then not grant Ashford the reciprocal boon of expecting such consideration?

To question Ashford's honour, when her elders approved an event with the trappings of ordinary courtship, involves intellectual dishonesty. But rape sparks misogyny. This has been the case since at least 1817 when Thornton was decided. Requiring extra proof of innocence from Ashford sent a message to all young women, for any of them might come up for scrutiny. Porter's analytical bias is exactly like the trickery that the law of rape began, at this time, with this case, to play on women.

Thornton's defenders in the pamphlet controversy suggested that "Ashford's 'imprudent' actions excused his admitted violence", because "it was women's responsibility to defend themselves against uncontrollable male passion."<sup>84</sup> Imprudence was not simply unwise, but a justification for violence. Victim blaming justified a resistance standard because female responsibility to resist male sexuality was total. The legal process in Thornton became the occasion for

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<sup>83</sup> Ibid., pp.218, 221-2 attacked Susan Griffin's remark that "'I have never been free of the fear of rape'" from "The Politics of Rape", Ramparts magazine, 1971, and Rape: The Power of Consciousness (1979). In an argument strong in derision but weak in logic, he compared modern American fear of rape to eighteenth century Englishwomen, using past women's mobility as evidence they were not afraid of rape, and for a low rate of rape. He assumed fear of rape is naturally leads to women limiting their mobility, and that level of fear directly reflects risk of rape. Porter exposed a degree of class bias surprising for a British social historian. He assumed that lack of discussion of rape in elite women's journals showed lack of rape risk for all, and associated rape risk with gentlewomen's exposure to lower class males, sneering at Griffin: "Despite all the situations when women must have been exposed to sexual assault (being left 'unprotected' with servants or labourers, travelling alone or only in female company, staying in unlocked rooms at inns, etc.) there seems little evidence that women such as Celia Fiennes, who rode the length and breadth of England side-saddle for pleasure, went in Griffin-type dread of being raped" (p.221). Rape must have been rare because, while Black Panther Eldridge Cleaver "notoriously urged raping of white women as a tactic in the black struggle" (p.218), "the highwaymen, or even the footpads, of late Stuart or Georgian England do not seem to have anticipated Eldridge Cleaver in avenging themselves on the polite and propertied by raping their victims..." (p.222). Disproving political rapes by lower class men on ladies while travelling says nothing about real eighteenth century rape; Stranger Danger does not even define rape risk now. Porter's only discussion of rapes of eighteenth century workingwomen, p.221, claimed that acts we would consider rape by employers were not rape because they did not lead to charges.

<sup>84</sup> Clark, Women's Silence, pp.114-5.

publishing literature shot through with rape myths, particularly Stranger Danger.

There are many different ways to delineate rape myths. But Canadian criminal law since 1993 has distinguished two central rape myths as beliefs which judges are required by statute to remove from their deliberation: *Section 276, subsection 1* of the *Criminal Code of Canada* stipulates that

evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or (b) is less worthy of belief.

It is a good thing that such beliefs are no longer supposed to be legally valid; however in the larger view it is shameful that spelling out and proscribing the two myths ever became legally necessary.

The preoccupation with complainant's prior sexual experience such a clause was designed to combat, reflects a long history of judging women's personal value and reputation for telling the truth on the basis of sexual history.<sup>85</sup> The sources of this devaluation of women lie in the nineteenth century: after Thornton, women gained the reputation of lying by being out alone at night or around males. The same year that Ashford was killed, 1817, R. v. Clarke<sup>86</sup> held that general questions about the complainant's reputation for chastity could be admitted to establish the credibility of her statement about the rape and her probable character for honesty, but not questions about specific unrelated sexual acts. By 1829, even specific unrelated sexual acts were ruled admissible to test rape complainants' credibility.<sup>87</sup>

If we take the *Criminal Code's* two myths as indicative of the core components of rape myths in general, an

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<sup>85</sup> Edwards, *Female Sexuality and the Law*, pp.58-60: characterizations of working class women's sexuality (from early in the 1800s) as unnaturally licentious were generalized to all women after about 1900. Case law increasingly demanded that judges warn juries of the dangers of convicting without corroboration of women's complaints of rape. The duty to warn appeared in UK Statutory law in the *Sexual Offences Act* of 1956. From the early nineteenth century, "unchaste" complainants were asked about sexual experiences, criminal records, psychiatric records, former workhouse or House of Correction incarceration, if they worked alongside men, whether they went to pubs, drank beer, even if they talked to men. In 1962, G.D. Nokes, *An Introduction to Evidence* (1962), pp.145-51 noted that "it is impossible to set up a defense of consent without imputing immorality to the prosecutrix." The breadth of chastity-related questioning in the last days before reform spanned drinking, living arrangements and contraception (Edwards, pp.69-70): "During the twentieth century,...the courtroom inquisition has accelerated" (p.59). See also Wigmore, Chadbourn ed., *On Evidence* (1970), pp.736-48 (reprinted from earlier editions written by Wigmore in the 1940s): all female complainants in sex offenses should be examined by a psychiatrist about "social history and mental makeup", because even little girls of 7 were likely to lie about sex, because mental disorders caused them to desire sex, to fantasize, and to be unable to differentiate real contact from their fantasies.

<sup>86</sup> E.R. V.171 at 633, originally 2 Stark. 241. Holroyd was the one to decide this case.

<sup>87</sup> *Ibid.*, p.68. Clarke partially varied Hodgson, [1811-2], E.R. V.168 at 765, originally Russ. & Ry. 211, when Baron Wood upheld the old rule that a complainant in rape was never compellable on sexual activity other than the act charged. In R. v. Barker, ([1829]), E.R. V.172 at 558 (originally 5 Cox C.C. at 146), despite expressing doubt as to whether Hodgson allowed him to do so, the Judge admitted specific evidence of prior acts of unchastity (Edwards, p.51).

interesting duality emerges: rape myths not only deny the reality of many women's complaints of sexual assault as unfounded in reality, but also deny that rapes of some women would actually matter--that those women deserve protection from rape: "...rape myths include the notion...that some women incite or deserve to be raped due to certain behavioral characteristics or actions."<sup>88</sup> What we understand now as a legal right of women as humans, not to have their control over their bodies disrupted by sexual contact to which they have not consented and do not desire for themselves, turns out not to be a right, but a privilege, to be granted only if women are worthy of protection.

But one of women's most basic demands of law is that it deter physical violation.<sup>89</sup> To deny women protection under the law is to promote their dehumanization, which in turn promotes their abuse in society:

Dehumanization of the victim is a universal characteristic that allows the offender to carry out cruelty towards others...Unfortunately, society does not discourage or sanction the dehumanization of entire groups of people.<sup>90</sup>

Legal doctrines which deny this fundamental demand can alienate women from the polity: sexual assault is so common that "the fear and constant reality of sexual assault affects how women...define their relationship with the larger society."<sup>91</sup>

Human rights had not developed in the early nineteenth century as far as they have today, yet their growth had started, and protection from rape as an invasion of their bodies is fundamental to women. Nineteenth century feminists organized around the fundamental desire for security of the person by mid-century,<sup>92</sup> although their resistance was

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<sup>88</sup> Gillian Schultz, "Pornography and Rape: Establishing a Correlation", unpublished paper, available from Norma Buydens, p.10, discussing material from Diana Russell, Dangerous Relationships: Pornography, Misogyny and Rape (1998), p.134,

<sup>89</sup> Stephen Pistono, "Susan Brownmiller and the History of Rape", p.266.

<sup>90</sup> Schultz, p.9.

<sup>91</sup> Claire L'Heureux Dube, J., dissent in Seaboyer [1991] 2 S.C.R. 577, at p.649.

<sup>92</sup> For example, the anti-Contagious Diseases Acts campaigns, under Josephine Butler, attacked registration and forced examinations of prostitutes for venereal diseases. After repeal, they encouraged men to pledge premarital chastity, in England and elsewhere. See Annemieke van Derenth and Francisca de Haan, The Rise of Caring Power (1999), Trevor Fisher, "Josephine Butler: Feminism's Neglected Pioneer" in Gordon Marsden, ed., Victorian Values (1998), and Glen Petrie, A Singular Iniquity (1971). They combined typical Victorian fear of sexuality, with dislike of legal double standards: the CD Acts did not provide procedural justice to suspected prostitutes, and did not require medical examination of buyers in prostitution. See Judith Walkowitz, "Male Vice and Female Virtue: Feminism and the Politics of Prostitution", History Workshop Journal (1983), pp.79-92; Lucy Bland, Banishing the Beast: Feminism and Sexuality (1995); Sheila Jeffries, The Spinster and Her Enemies (1985); Lesley Hall, "Hauling Down the Double Standard", Gender and History (2004), pp.36-56; Jennifer Somerville, Feminism and the Family (2000); E. Bristow, Vice and Vigilance (1977); Paula Bartley, Prostitution (1999); and Jane Rendall, "Recovering Lost Political Cultures", in Sylvia Paletschek and Bianka Pietrow-Enker, eds., Women's

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undermined by the shame rape law imposed on all women: discussion of rape was "not focused on the violence, but the sex"; as "women's status as human beings declines,...their status as sexual beings escalates."<sup>93</sup> At the same time that society, and the statutory rape law, promoted the idea that women were naturally asexual and virtuous,<sup>94</sup> common law judges elaborated protections for males accused of rape, on the premise that women who complained of rape were prone to lie, or were unchaste, precipitated the sex, and were to blame for sexual sin:<sup>95</sup>

And so, in rape especially, we are left with a complex and often very confusing legal picture. Whilst women were considered by statute to be quite incapable of committing a sexual offence, as victims of sexual assault they have been seen as "precipitating" or in some way contributing to its commission.<sup>96</sup>

I agree with Brownmiller that rape has a political meaning and a role to play in the structural subordination of women. But it is an empirical matter for historical analysis whether rape always serves the same purpose--terrorizing women into obeying a Patriarchal, male interest-serving set of gendered sexual norms--in all times. More to the point, even if male benefit through rape as terror is assumed, it is by no means clear that rape always serves that purpose in the same way. Certainly sexual norms can and have changed.

In the history of ideas about rape which begins with Mary Ashford and Abraham Thornton, and continues into our own time, one of the ways that rape terrorized women of the "industrial rape era" has a short history. Stranger Danger, the rape myth which threatens extreme danger of rape to women who go alone on the streets or outdoors in the dark--and that they will be blamed if raped outside the home--was an invention of the same era which gave us the steam locomotive. Rape was not used to keep women indoors in the private domestic realm, or chaperoned by male relatives in public, up to the late eighteenth century,<sup>97</sup> or even during the Napoleonic Wars (1792-1815): "[T]he fear of sexual

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<sup>92</sup>(...continued)  
Emancipation Movements (2004), pp.33-52.

<sup>93</sup> Schultz, p.7.

<sup>94</sup> Edwards, Female Sexuality, pp.23-31: women were held incapable of sexual crimes, though they could be accessories.

<sup>95</sup> Ibid., p.49.

<sup>96</sup> Ibid., p.50.

<sup>97</sup> Porter, "Rape", pp.221-2. Porter's reasoning was dubious, for he was arguing that rape was not a common problem, because it was not a source of fear in the eighteenth century--as opposed to now, when he falsely assumed that "Nowadays much rape takes place on the road", and that modern rapists rape their social enemies' women. He is right that fear of rape was not used to keep women indoors in the eighteenth century. But this does not mean what he claimed it does.

violence was rarely used to keep women out of public space."<sup>98</sup> Not that rape law before Thornton was fair to women or that eighteenth century women faced much lower risk of experiencing rapes, but elements of rape ideology changed.

The policing of women through the rape myth of Stranger Danger was not only a gendered attack, but because it operated by defining some women as not worthy of protection, it was also classed. Lower class status was central to the depiction of "bad girls" as improper candidates for legal vindication.<sup>99</sup> Having safe men available to chaperone was a class privilege unavailable to women who had to travel to and from and during their work, especially in darkness. If appearance outdoors was proxy for a young woman's character, being from the labouring class would mean that she was judged of bad character even if she complied with strict moral codes in every detail. When the value of a girl was equated with the likelihood of her having an attentive, protective family watching over her chastity, her value as a woman reduced to nil, as her class status declined.

What sexualizing the meaning of labouring women's presence in public spaces did was to force them into a position where their bodies would be read as sexual objects no matter how they behaved: "Rather than being perceived as victims, women are...relegated to the ranks of sexual spectacles for the purpose of exploitation and entertainment."<sup>100</sup> Europe has been described by historians as a "predatory cultur[e]";<sup>101</sup> women and labourers had been subject to exploitation for at least a millenium. But after Thornton, working women were more strongly identified as prey, and therefore that they should take extraordinary precautions was "natural".

Furthermore, as Porter's analysis showed, these women's internal mental consent to sex could be assumed no matter what they really thought, said or did. The effect of promoting this attitude to women through rape myths was to increase predatory attitudes to women labourers. The harshness of Porter's recapitulation of the "facts" of Ashford's last night is based on the arrogance of the elite Judge Holroyd, who assumed that he could read the consent of a woman from nothing more than her presence outside in the dark with a man. So what were the real facts and what did the law do with them?

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<sup>98</sup> Clark, Women's Silence, pp.44-5 and 117: Renwick Williams, "The Monster", serially attacked and wounded women in 1791 in London, but did not spark a move to seclude women, even in the context of anxiety caused by the French Revolution: "the fear of sexual violence was rarely used to keep women out of public space."

<sup>99</sup> Edwards, Female Sexuality, pp.53-9, noted that nineteenth century working class women were stereotyped as prostitutes, adulteresses, incestuous, likely to spread venereal disease while men were not, capable of inciting sexual desire in men, bastard bearing, aborting, and infanticidal; reputation for promiscuity could lose them a job or prevent one from being offered; vagrancy law grew up on the assumption that a workingwoman alone at night without a chaperone was a prostitute; theft convictions, a stay as a pauper in a workhouse, and drinking were all used to suggest a workingwoman was not chaste.

<sup>100</sup> Schultz, p.6, discussing material from Catherine MacKinnon, Women's Lives, Men's Laws (2005: The Belknap Press, Boston, MA), p.350.

<sup>101</sup> Traian Stoianovich, "Gender and Family", The History Teacher (1981), pp.67-117, at 69.

## D. STATUS, RANK, CLASS, AND GENDER: SEX AND THE REGENCY DOMESTIC SERVANT

Mary Ashford was found in a pond around daybreak, at 6:30 A.M., two hours after the last passerby saw her walking away from Erdington.<sup>102</sup> It was clear that she had been horribly sexually battered before death. Her limbs had been restrained, and there was internal damage to her vagina.<sup>103</sup> Though possible to argue that her death was unrelated to her sexual battery,<sup>104</sup> it was extremely unlikely that she could have been murdered by another man, another lover or not, other than Thornton, who admitted he had sex with her,<sup>105</sup> in the small window of time.

Thornton's acquittal did not rest on theories about another assailant: Judge Holroyd speculated Thornton had no motive to kill Ashford, because there was no evidence that she did not consent to sex. Holroyd directed the jury to acquit Thornton, without any explanation of Ashford's drowning at all.<sup>106</sup> This is a most unsatisfactory assessment of the evidence. The most reasonable explanation is that Ashford died because of an ongoing course of violence, beginning with rape and culminating in murder.

In order to be fairer than the court was to the silent corpse of Mary Ashford, we have to bracket our current gender ideas. Courtship in the 1810s required that two young people be of "suitable social rank" to marry. The most important question to contemporaries was status. Who were these two young people?

Abraham Thornton was a bricklayer. He had a skilled trade with reasonable prospects for steady work, not only because houses always need to be built, but because the population of England was exploding in the 1810s. However, a bricklayer was not so highly or unusually skilled to earn more than an adequate income for a labouring family. He

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<sup>102</sup> Hall, pp.75-6, testimony of Thomas Broadhurst and George Jackson.

<sup>103</sup> Clark, Women's Silence, p.71.

<sup>104</sup> *Ibid.*, p.115, suggested that Holroyd hinted that Ashford drowned herself, out of remorse over "giving up" her virginity to Thornton. See also Hall, pp.59-60, discussing Edward Holroyd's Observations, p.87, and Hall's own theory, and pp.161 and 179: during the Appeal of Murder hearing, Bayley, J. interrupted Chitty's discussion of the standard of proof needed to disallow Wager by Battel: "There is nothing stated in the counterplea from whence a necessary inference arises of her having been thrown into the pit; what is there to shew that she might not have thrown herself in, or have tumbled in?" Then Holroyd spoke up to support the accidental fall theory: "There is no allegation...nor is there any circumstance stated, inconsistent with the idea that she might have accidentally fallen into the pit through giddiness and loss of blood."

<sup>105</sup> See Clark, Women's Silence, p.71 and Porter, "Rape", p.226.

<sup>106</sup> Edward Holroyd, Observations. The place of publication is given as London; Clark gives 1819 for the date of the pamphlet, and Porter, 1817. Hall's date agrees with Clark; all three failed to give a publisher.

would not have been among the highest income-earners of the labouring people.<sup>107</sup>

Mary Ashford was a nineteen-year-old servant, working in the most common field of employment for young women,<sup>108</sup> and probably made only a pittance beyond her board and room.<sup>109</sup> But from her wages, she could save a dowry. From adolescence through mid-twenties was "a period of maximum productive capacity without responsibility...during which saving would be easy."<sup>110</sup>

"Life cycle" domestic service--short term from about 10 through adolescence, without continuing longterm as an adult--was a very widespread experience. It had a huge impact on the economy. Its main macroeconomic benefits were keeping young people from reproducing for ten years past puberty, and the creation of numerous small pools of capital for young couples at marriage. Such capital tended to encourage young people to plan out their economic activities.<sup>111</sup>

Preindustrial British society was strongly "ordered" and cohesive in its moral standards. Before industrialization, the system was remarkable for its stability, achieved by practical reasoning and failsafe mechanisms. Communities ensured that most of each new generation was channeled into prosocial traditional social structures, including marriage. But the system was not carved in stone and could be stressed, and finally it broke down.

To understand Thornton, we need to know the social status not only of accused and victim, but the real decision-

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<sup>107</sup> Robert Glen noted construction workers were strongly affected by building booms; during industrialization, the North and Midlands experienced housing booms, which increased demand for all building trades, and increased the transience of labour. Hatting, shoemaking and tailoring had the most well-developed "tramping" systems for journeymen, p.23. 1811-21 was the period of greatest housing shortages in industrializing areas (p.25); in Stockport, Cheshire, bricklayers rented the second-best workers' housing, (two-up, two-down with privies shared among three to five cottages, rent from 6 to 7 pounds per annum) with hatters and joiners. Better placed artisans paid 8 pounds for the same size of cottage with private privies; the most highly skilled rented homes worth ten pounds per annum, and were enfranchised in 1832 when the *First Reform Bill* enfranchised the middle-class (p.28).

<sup>108</sup> Tilly, Scott and Cohen, pp.229-34: domestic service was the most common employment of women in Europe, from the 1840s through the eve of WWI. Laslett, Family Life, pp.32-45 noted that servants were "the largest single occupation group...up to the early 1900s." From the sixteenth through early nineteenth century, from 9 to 25% of the population were servants at any point in time.

<sup>109</sup> Laslett, The World, p.1, began discussing the family economy of preindustrial England by setting out the costs London bakers claimed they paid out in wages and fees, in an application to City authorities for a rise in the price of bread in 1619: they claimed to spend as much in food for a journeyman as in his wages, and almost five times as much to feed each maid as her wages; including clothing and incidentals with wages, it cost four times her wages to keep the maid in room and board.

<sup>110</sup> John Hajnal, "European Marriage Patterns in Perspective", p.132, suggested that the increased demand, especially for household goods like dishes, beyond subsistence-level consumables, might have sparked the European "take-off" into industrial production in the mid to late eighteenth century.

<sup>111</sup> Hartman, pp.23, 232-5.

makers. The judiciary of the central Superior Courts (King's Bench, Common Pleas and Exchequer), legally trained gentlemen Barristers, were the group from which the Commissioners of Assize were drawn. The Commissioners adjudicated regional Assizes. Justices of the Peace, mostly gentry landowners, presided over county-level Quarter Sessions in the countryside.<sup>112</sup>

Less well-trained but politically connected, JPs at the Quarter Sessions consolidated gentry rule in the countryside, encouraging deference to the upper classes.<sup>113</sup> By the early nineteenth century, unpaid lay Magistrates, (JPs and Borough Magistrates), heard a majority of jury cases.<sup>114</sup> JPs ran local government, combining "judiciary and intendancy" in one set of hands,<sup>115</sup> decided wages and conditions of apprentices<sup>116</sup> and poor law eligibility.<sup>117</sup> In rural parishes, the locally born had a right to "settlement" under the Old *Elizabethan Poor Law*--a right to be sustained out of "poor rates".<sup>118</sup> Poor law eligibility was crucial to the survival of single women with children. Although economic power was shifting from agriculture to industry, landed interests remained in control of public policy, in the legislature and courts, until at least the mid-nineteenth century.<sup>119</sup>

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<sup>112</sup> Brian Abel-Smith and Robert Stevens, Lawyers and the Courts (1967), pp.10-1; Douglas Hay, "Dread of the Crown Office: The English Magistracy" in Norma Landau, ed., Law, Crime and English Society (2002), pp.19-45 at 21. The Borough Session Magistrates, who held the Commission of the Peace positions in urban centres, were Master tradesmen and merchants from whom the Mayors and Aldermen would also be drawn. They were less socially elite JPs than the county JPs but still very powerful men.

<sup>113</sup> Lancien, p.33.

<sup>114</sup> Hay, "Dread of the Crown Office", p.20, discusses the makeup of judicial personnel in a typical Midlands county, Staffordshire. In London, Stipendiary (paid) Magistrates began the move away from laymen's control of the lower orders of justice for the criminal courts, the most crowded courts in the land. This was still a very distant prospect for the rest of the country, however.

<sup>115</sup> Norma Landau, "Introduction", in Landau, ed., Law, Crime and English Society, p.10, based on S. Hindle, The State and Social Change (2000), p.30 and Chap. 1.

<sup>116</sup> Joanna Innes, "Origins of the Factory Acts: The Health and Morals of Apprentices Act, 1802", in Landau, ed., pp.230-55 at 231.

<sup>117</sup> Norma Landau, "Introduction" in Landau, pp.10-1.

<sup>118</sup> See William Holdsworth, A History of English Law (1938), pp.151 and 156; K.Laybourn, The Evolution of British Social Policy (1995); and Derek Fraser, The Evolution of the Welfare State (1973).

<sup>119</sup> Lloyd-Jones and Lewis; Betty Kemp, "Reflections on the Repeal of the Corn Laws", Victorian Studies, V.5 #3 (1962), pp.189-204; Spall.

JPs were gentry, beholden only to other gentry.<sup>120</sup> Rural juries, farmers and tradesmen,<sup>121</sup> were the "middling sort",<sup>122</sup> not the elite, but met a property qualification.<sup>123</sup> In England, farmers rented large parcels of land from the gentry. Called "Yeomanry", they were substantially declining (numerically and in terms of political power). They were a conservative, backward looking force,<sup>124</sup> but they were not "common": *Magna Carta* notwithstanding, jurors were rarely "peers" of criminal defendants. Artisans who became Masters could be jurors in towns. But over the eighteenth century, most artisans fell from "middling"<sup>125</sup> to "working class" by the 1830s and '40s.<sup>126</sup> A few prospered and became upper middle class<sup>127</sup>--eligible for the Borough Magistracy, the urban equivalent of JPs.<sup>128</sup> A handful founded mercantile

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<sup>120</sup> Hay, "Dread of the Crown Office", at pp.21 and 34-7, examined gentry politics within the Commission of the Peace; John Gough, a J.P. for Staffordshire in the Midlands in the 1780s, became the most appealed J.P. of the period, because he did not allow fellow gentry to hunt over his own land. The Great bankrolled appeals of Gough's decisions against modest defendants, to get back at him for breaches of "class etiquette".

<sup>121</sup> P.J.R. King, "'Illiterate Plebians, Easily Mised': Jury Composition", in..., and Douglas Hay, "The Class Composition of Palladium of Liberty: Trial Jurors", in...

<sup>122</sup> Margaret Hunt, The Middling Sort (1996), p.23, identifies the "middling" as a less broad social category than Perkins, p.24-6, who included smaller artisans and suggested the "middling" were more numerous than "the poor". She suggests this 20% of the population, substantial shopkeepers, manufactureres, artisans and tradespeople with the capital to be "independent", lower-level professionals, and civil servants, played a crucial role in industrialization. They took "risks that most middle-class people today would view as unacceptable"; financial decisions rested on patronage, and the all-important characteristic of "creditability" or "creditworthiness".

<sup>123</sup> Barbara Shapiro, "Religion and the Law", in Landau, ed., pp.185-207 at 192-3.

<sup>124</sup> See J.A. Banks, "The Social Structure in Nineteenth Century England" in R. Lawton, ed., The Census and Social Structure (1978), pp.179-223; A. Howkins, Reshaping Rural England (1991); T.L. Crosby, English Farmers and the Politics of Protection (1977); and Pamela Horn, The Rural World (1980).

<sup>125</sup> See Perkins, p.25-6, and Hunt, p.23, for two similar but different definitions of the "middling", differing on how many artisans to include, and the definition of what it meant to be "independent"--to run one's own affairs.

<sup>126</sup> Hobsbawm, Labouring Men; EP Thompson, The Making of the English Working Class.

<sup>127</sup> Artisans who became wealthy were those who diversified and had unusual business acumen. A classic example was the Westminster political organizer, Francis Place, "the Radical Tailor of Charing Cross", who had apprenticed as leather breeches maker, but left that declining trade to become a master "bespoke" (or highest quality) tailor. See Dudley Miles, Francis Place, and Mary Thrale, ed., The Autobiography of Francis Place.

<sup>128</sup> Hay, "Dread of the Crown Office", p.20.

fortunes large enough to tempt the landed with their daughters.

Artisans were positioned in the middle, employing or working alongside workers,<sup>129</sup> and retailing quality items to aristocrats and bourgeois customers. Given high literacy,<sup>130</sup> they articulated their anger at their economic circumstances, contrasted to wasteful extravagance of rich clients. They were a locus for the birth and dissemination of radical political ideas.<sup>131</sup>

Eighteenth century society was a "system operated by the justices...based on the idea of universal obligations, the common law duty to maintain the King's peace, carried into administration...[which] depended upon a conception of a settled, perfect and unchanging order."<sup>132</sup> The "hegemonic style" was enacted through administration of justice by magistrates, on public occasions from executions to processions into the Assizes.<sup>133</sup>

Deference was a "set, customary outlook",<sup>134</sup> which restrained insubordination and encouraged obedience: "Cultural hegemony...induces...a state of mind in which the established structure of authority and modes of exploitation appear to be in the very course of nature."<sup>135</sup> It may have been playacting, not going very deep, but:

...[R]ulers and crowd needed each other,...perform[ing] theatre and countertheatre in each other's auditorium...[B]oth parties...were, in some degree, the prisoners of each other.<sup>136</sup>

The rule of the gentry was occasionally terrifying to individuals made examples of the law's vengeance,<sup>137</sup> but most of

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<sup>129</sup> See Miles on Francis Place; Rule, Albion's People, pp.108-11, portrayed the striving for respectable lifestyles which made up artisanal culture between the 1780s and 1820s.

<sup>130</sup> Hunt, p.85, noted that her "Middling Sort" of women--including the higher level of artisans' wives and female artisans such as needle workers, shopkeepers, midwives, and schoolteachers--achieved literacy rates of 70 to 100% by 1780. This compares to general female literacy rates of 1% in 1500 and 40% in 1800. For artisanal men, see Geoffrey Crossick, An Artisan Elite in Victorian Society (1978)

<sup>131</sup> See: John Foster, Class Struggle and The Industrial Revolution (1974); Hobsbawm, Primitive Rebels (1959); Belchem, Popular Radicalism; and especially Joseph Baylen and Norbert Gossman, eds., Biographical Dictionary of Modern British Radicals (1979).

<sup>132</sup> Abel-Smith and Stevens, p.13 n.1 quoting J.S. Watson, The Reign of George III (1960), p.45.

<sup>133</sup> EP Thompson, "Patricians and Plebs", pp.44-7.

<sup>134</sup> Laslett, The World, p.214.

<sup>135</sup> EP Thompson, "Patricians and Plebs", p.42.

<sup>136</sup> *Ibid.*, p.71.

<sup>137</sup> EP Thompson, The Making, p.737: "The integument of power, in the countryside or in the corporate  
(continued...)

the time it weighed lightly:

Grossly unequal as this relationship was, the gentry ...needed some kind of support from the poor, and the poor sensed that they were needed...[T]hey were not altogether the losers. They maintained their traditional culture...<sup>138</sup>

But the system could not disguise a chasm between the "Quality" and people who worked with their hands to earn a living. It was almost a racial divide.<sup>139</sup> By the 1810s, the divide bristled with hostility: "Magistrates rode through thronged neighbourhoods a few hundred yards from their seats, and found themselves received like hostile aliens."<sup>140</sup> Marriage across the divide seemed almost obscene, like fantastical scientific fables about orangutans dressing like humans and marrying women.<sup>141</sup>

In the context of extreme social stratification, labourers' dreams of family progress in wealth took different

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<sup>137</sup>(...continued)

town, was composed of deference and fear. If riots or strikes were, from time to time, inevitable, there must still be enough of these two requisites for insubordination to be cowed as soon as an example was made of the ring leaders."

<sup>138</sup> Ibid., pp.95-6.

<sup>139</sup> See E.P. Thompson, "Patricians and Plebs", pp.56-7: Henry Fielding in An Enquiry into the Causes of the Late Increase of Robbers (1757) in Complete Works, V.12, p.114 ([1870] 1967: Bell and Daldy, London) noted that patricians and plebs, "so far from looking on each other as brethren in the Christian language, they seem scarce to regard each other as of the same species."

<sup>140</sup> EP Thompson, The Making, p.531; increasing social distance explains why the post-war government felt the need to use spies to collect information--a strategy which, through agent provocateurs, made for more political violence than if they had left the workers alone.

<sup>141</sup> Orangutans were seen as the closest species to human beings, suspected of interbreeding, and often depicted in eighteenth century engravings as wearing clothes and even reading (Harriet Ritvo, "Animal Consciousness", American Zoologist, (2000), pp.847-52). Bestialization of lower class women could spark upper class perversions: Leonore Davidoff, "Class and Gender in Victorian England", in Judith Newton, Mary Ryan and Judith Walkowitz, Sex and Class in Women's History (1983), pp.16-71, discussed the disturbing liaison between Hannah Cullwick and lawyer A.J. Munby, a possibly unconsummated dominance and submission love affair of several decades duration which culminated in a secret marriage. Workingwomen were "hands", while bourgeois women were the "heart" of a body/home/society analogy; workingwomen were more degraded than workingmen because in domestic service the dealt with bodily waste and dirt (p.19). Hannah rubbed her face in the dirt and kissed the doormat while Munby watched, wore a lock and chain to which he had the key, bathed and kissed his feet and licked his boots, and was photographed as a naked black slave in a loincloth, a drudge, a serving maid, a lady, an angel, and a gentleman (p.44-5, 48-9, 51-2). Davidoff (p.29) quoted Freud's "On the Universal Tendency to Debasement in the Sphere of Love" from On Sexuality (1977), pp.251-4: cross-class liasons fulfilled "the need for a debased object since the 'sexual act is seen as something degrading which defiles and pollutes not only the body.'" When they finally married, Hannah received a small cottage in her home county, Shropshire, where she lived more separately from Munby than when she had been employed in London at his Inn of Court; the relationship all but broke down (pp.57-8).

forms from bourgeois dreams of marrying up. The poor would have liked to see their children improve their lot, but they expected it to happen by increasing skills, good work habits, frugality, good fortune, good weather and low food prices, not marrying up the social ladder.

A girl's domestic service was a testimonial to good character; it could be seen as preparation for being a housewife, but that argument was complicated by class issues. Middle class people thought domestic service delightfully feminine; labourers were not so sanguine. A few workers agreed domestic service allowed a girl to develop "housewifely" skills,<sup>142</sup> but most did not: working class position reduced the degree to which domestic service was idealized as excellent labour for women.

In the eighteenth century, domestic service was less idealized than in the nineteenth century. The "life cycle" aspect was more pronounced, and more young people spent time as servants, boys as well as girls, so it was less gendered; even middle class parents sent children out to serve,<sup>143</sup> and few servants were past their mid-twenties. Keeping an ordinary labourer's house was a less complex and ideologically important task than it would become in the next century--labouring families had less "stuff" in their homes,<sup>144</sup> and standards of housekeeping were rudimentary, more easily met in less time<sup>145</sup> than they later became, as middle class surveillance increased and working class people began to apply more middle class housekeeping standards to themselves.<sup>146</sup>

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<sup>142</sup> [Thomas Wright], Some Habits and Customs of the Working Classes ([1867] 1967), bragged about workingwomen who had served in "great houses" and later cooked feasts for their families. Wright came late in the process of "embourgeoisement". Chartism, the organized suffrage movement of the 1830s and '40s which sought "manhood suffrage" to empower the working class, was an earlier agent of domesticization: Robert Blakey, in The Political Pilgrim's Progress for the Northern Liberator (Newcastle, 1839), p.5, declaimed: "I see no reason why working men, whose labor creates every necessity and luxury of life, should be denied the pleasures and comforts of home." Other Chartists attacked women working outside the home for depriving workingmen of "'virtuous wives' skilled in housewifery", emasculating them by forcing them to do some housework and childcare themselves, in journals such as The Poor Man's Guardian and Repealers Friend (1843) and MacDouall's Chartist Journal and Trades Advocate, 18 Sept. 1841, p.196. See Clark, The Struggle, p.229.

<sup>143</sup> Stone, The Family, Sex, and Marriage, pp.107-9.

<sup>144</sup> McKendrick, Brewer and Plumb, The Birth of a Consumer Society; Brewer and Porter, eds., Consumption and the World of Goods.

<sup>145</sup> Clark, The Struggle, p.65, quoted the Report on Handloom Weavers of 1840 (Parliamentary Papers, V.23, p.261) that a man would desire a Spitalfields silk weaver dressed in finery as a mate because he would "'consider the earnings which she can make at her loom as far more advantageous to him than all she could gain or save by the use of a needle, or could benefit him by cooking dinners which his wages do not enable him to buy.'" Yet, housework did cut into the amount married women could produce in handloom weaving in the home, so that by 1840, they received an average of 50% of what unmarried women made, on piece rates (p.127).

<sup>146</sup> *Ibid.*, pp.229, 237-8, 257-9: Chartism promoted higher standards of working class housekeeping, as  
(continued...)

In the nineteenth century, middle class idealization of women's domestic work influenced the working class. Workers began to assimilate gender standards for women that were more like those of the bourgeois. But workers also increasingly disliked dependence on their betters; this provided a contradictory ideological pressure to definitions of service as feminine, leading them, like bourgeois parents--who, by 1800, no longer accepted domestic service as fit for their children--to prefer other forms of labour for their daughters than domestic service.<sup>147</sup> Elaborate deference was required longer in domestic service than other forms of labour: a middle-aged woman servant lamented in 1873 that

I went out to service too soon--before I really understood the meaning of it--and at the Charity School i was taught to curtsy to the ladies and gentlemen and it seem'd to come natural to me to think them entirely over the lower class and if it was our place to bow and be at their bidding and I've never got out o' that feeling somehow.<sup>148</sup>

But there were not enough other jobs for their daughters, so working class parents often swallowed their pride.

By the 1840s and '50s, keeping wives and daughters home became a common workingmen's aspiration. But workingmen had a harder time keeping daughters out of paid work than wives.<sup>149</sup> Stranger Danger was a source of fear, because aspirations to keep daughters away from strange men were unreachable. Twenty five years earlier, no one would have aspired to keep a daughter like Mary Ashford out of the job market. Thornton would not have been feared by a labouring father, because he was an appropriate marriage partner, the same status in the rigid system of Regency England.

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<sup>146</sup>(...continued)

part of sentimentalizing working class family life and making them "respectable" in bourgeois eyes. But not all bourgeois commentators on working class life looked at lower standards of housekeeping as a serious problem for the poor: Elizabeth Gaskell, the Manchester "Condition of England" novelist, suggested squalor was not such a bad thing; Natalka Freeland, "The Politics of Dirt in Mary Barton and Ruth", Studies in English Literature (2002), pp.799-818, noted not only that Gaskell allowed her working class women to explain how impossible keeping things clean would be, in their neighborhoods and with the work schedules they had to keep (p.802) but associated dirt with honest work and cleanliness with vice, prostitution, and dissembling (pp.806-7); even the middle class Margaret in Gaskell's North and South, realized that the working class Thorntons, whose home was unusually clean, reflected moral stiffness and lack of comfort (pp.807-8), undermining the typical bourgeois attitude that physical cleanliness reflected moral cleanliness (pp.808-10).

<sup>147</sup> EP Thompson, The Making, p.231: Starving handloom weavers looked down on domestic servants and called them "flunkeys". See also "Patricians and Plebs", p.38, quoting Daniel Defoe, The Great Law of Subordination Consider'd (1725), p.97, for early evidence of the independent attitude. Defoe's Edmund, a cloth worker, corrected a JP for calling his employer his "Master": "'Not my Master, and't please your Worship, I hope I am my own Master.'"

<sup>148</sup> Davidoff, "Class and Gender", at p.38, quoting Hannah Cullwick, The Diary of Her Life as a Servant in the Temple, Sept. 1873. The small letter "i" was Hannah's own; her capitalization mistake was perhaps significant as a reflection of her own opinion of herself.

<sup>149</sup> Honeyman, Women, Gender and Industrialization.

The Regency era, 1811 to 1820,<sup>150</sup> was the period when the intermittent descent of George III into bouts of madness became so extreme that the throne passed permanently to his son as Regent. But the Regent did not perform the theatre of rule with finesse. Rather than bringing relief from the stress of the 1790s French Revolutionary ferment, the Regency worsened social divisions:

The accident of the Regency, the character of the Prince Regent, and the militarization of high society produced by two decades of war led to a new and almost unprecedented era of aristocratic debauchery...The significance of aristocratic excess was...that it...creat[ed] new targets for criticisms...<sup>151</sup>

Sexual misbehavior symbolized the failure of the aristocracy: "Sex and sexual satire" had already served "as tools for unmasking corruption in high places and supporting carnivalesque alternatives",<sup>152</sup> especially during the French Revolution in France.<sup>153</sup> Now in England harsh epithets and gross caricatures depicted the elite as disgraceful nudes,<sup>154</sup>

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<sup>150</sup> A wider meaning of the term "Regency" based upon social mores rather than the occupant of the throne would extend the period to 1800 to 1830. The Prince Regent reigned as George IV from 1820 to 1830. See "Note on the Regency", page before introduction, in Albert Borowitz, The Thurtell-Hunt Murder Case (1987) and Donald Low, Thieves' Kitchen (1982). From the point of view of gender ideology, this period can be viewed as "pre-Victorian" or "proto-Victorian": major features of new ideology about women's roles began to grow, spread and come to fruition.

<sup>151</sup> Porter and Hall, p.126.

<sup>152</sup> Ibid., p.127.

<sup>153</sup> Criticism of the monarchy included vicious pornography illustrating Marie Antoinette's supposed love affairs with both sexes (Lynn Hunt, The Family Romance of the French Revolution (1992), pp.90-9). Clark, The Struggle, p.148, noted the misogyny of the association of luxury with a "foppish" and "effeminate" aristocracy.

<sup>154</sup> For example, see James Gillray's 1792 "Sin, Death and the Devil", which depicted the Prime Minister William Pitt the Younger, wearing a crown, as Death, and his enemy the Chancellor Thurlow as the Devil, with the Queen, "a Devilish hag, half serpent, her breasts withered", as Sin protecting the nude emaciated Devil (available at <[www.relewis.com/Sindeath.html](http://www.relewis.com/Sindeath.html)>). Gillray's 1795 "Presages of the Millenium" again showed an emaciated nude Pitt, this time as Death, riding a white horse representing the Hanoverian dynasty, with a pygmy imp with a crown behind him kissing his buttocks and holding a charter reading "Ich diene", the dynastic motto; they crush the Whigs under Charles James Fox, other political opponents, and the common people, depicted (after Edmund Burke's swinish multitude) as pigs (available at [www.fitzmuseum.cam.ac.uk/pharos/collection\\_pages/18th\\_pages/](http://www.fitzmuseum.cam.ac.uk/pharos/collection_pages/18th_pages/)>). Gillray's best zinger was probably the 1792 "A Voluptuary under the Horrors of Digestion", depicting the Prince of Wales as grossly fat, reclining while recovering from his dinner, with his coat of arms a crossed knife and fork, (available at the National Portrait Gallery site, <[www.npg.org.uk/live/arccari5.asp](http://www.npg.org.uk/live/arccari5.asp)>). EP Thompson, "Rough Music", pp.467-538 in Customs in Common, noted at pp.481-2 and 493-5, that "charivaris" or "rough music"--traditional mocking rituals involving singing crude songs and banging pots and pans, or even making a victim ride a "skimmington", "hobby-horse" or "stang" (a plank of wood, or a donkey or horse backward) out of town, usually used against women who beat husbands or old men who married young brides--began to be used more often against gentry and Churchmen in the late eighteenth century.

a Jacobin claimed that the rich

pillage and ravage their fellow citizens to support themselves in the most shameful debauchery...[indulging] inordinate and desolating passions, that reduce them in the eyes of the honest and virtuous man, far below the level of the beasts of the field.<sup>155</sup>

Even at the end of the nineteenth century, working class prejudice against the sexual decadence of the upper class continued to be expressed in public denunciations, because "working class people are more faithful to their wives than are t'nobs."<sup>156</sup>

Building on "the ideological break with paternalism...in the 1790s",<sup>157</sup> the social order was crumbling. The deference which had been central to social peace was breaking down in the 1810s:

...[T]he relations of reciprocity snapped...[T]he gentry lost their self-assured cultural hegemony. It suddenly appeared that the world was not...bounded at every point by their rules and overwatched by their power.<sup>158</sup>

The Prince Regent himself was the best example of aristocratic moral failure. Dissolute, gluttonous, licentious--he was the symbol of the failure of the "Quality" to provide moral leadership. Machine-breakers, followers of "General Ludd" smashing stocking knitting frames in Nottinghamshire and machine looms for woolens in Yorkshire in 1812, wrote viciously of the Regent to incite comrades to attack the property of gentry: a letter complained

...that as long as that blackguard drunken whoreing fellow called Prince Regent and his servants have anything to do with government that nothing but distress will befall us there [their] foot-stooles...[Y]ou are mad [made] of the same stuff as Gorg Guelphs Juner and corn and wine are sent for you as well as him.<sup>159</sup>

A Scottish preacher was prosecuted for comparing the Prince Regent to Belshazzar, the decadent King of Babylon--and acquitted.<sup>160</sup>

Elites tried to continue to awe the people with public spectacles of wealth, but imperfectly concealed offenses

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<sup>155</sup> Clark, p.148, quoting William Hodgson, Commonwealth of Reason (London, 1995), p.19.

<sup>156</sup> EP Thompson, "Rough Music", pp.522-3, quoting an ancient Yorkshireman in 1971, informant to Kathleen Bumstead, about "Riding the Stang" in the late nineteenth century.

<sup>157</sup> EP Thompson, "Patricians and Plebs", p.86.

<sup>158</sup> *Ibid.*, pp.95-6.

<sup>159</sup> EP Thompson, The Making, p.658, quoting a Luddite letter from Nottingham to HJuddersfield, 1st May 1812.

<sup>160</sup> Clark, The Struggle, reported the trial of Rev. Neil Douglas; see Lord Henry Cockburn, An Examination of the Trials for Sedition Which Have Hitherto Occurred in Scotland ([1888] 1970), V.2, pp.192-203.

against sexual morality.<sup>161</sup> The Prince Regent was "described in the same terms used for fictional aristocratic libertines",<sup>162</sup> when he succeeded to the throne in 1820, his attempts to divorce his long-estranged wife, Caroline, for adultery raised howls of popular outrage, especially among lower classes, because his adulteries were so much worse than hers. "Queen Caroline" was cast into the role of a "gothic-romantic" heroine--a type popularized in the Jacobin school of far-Left novelists of the 1790s, which developed into the innocent heroine ravished by an aristocratic rake of popular melodrama.<sup>163</sup> An engraving depicted George IV with his huge belly beating Caroline and making her nose bleed while a grotesquely huge breasted mistress looks on, under the title, "A R---L [ROYAL] Example! Or a Westminster Blackguard Illusing His Wife".<sup>164</sup>

By the 1810s, landed gentlemen no longer felt responsible for the welfare of "their" poor people in the neighborhood. The oligarchy was becoming more openly "predatory".<sup>165</sup> "Noblesse oblige" was passing from active and lazy consciences alike. Shifting proportions of national wealth generated by agriculture and manufacturing led the wealthiest people in England, formerly interested in land, to move into financing industrial enterprises.<sup>166</sup> They left their neighborliness behind with the deferential poor who tilled the soil.

The gentry, the traditional political leaders in the countryside, faced declining fortunes, surpassed by the top upper middle class industrial entrepreneurs.<sup>167</sup> This had paradoxical effects. On the one hand, there was increasing social

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<sup>161</sup> See Laslett, "Introduction: The History of the Family", in Laslett and Richard Wall, eds., Household and Family in Past Time (1972), p.63. Monogamy was the ideal of early modern English society, but it was not always practiced; the most conspicuous departures from living according to the ideal were among the elite.

<sup>162</sup> Clark, The Struggle, p.169, discussing [Anonymous], The Secret Memoirs of a Prince: Or, A Peep Behind the Scenes (1816, London).

<sup>163</sup> Clark, The Struggle, p.169. The Jacobin school of novelists including Mary Wollstonecraft, the great liberal feminist, and Thomas Holcraft, a martyr for free speech in one of the first political trials of the 1790s.

<sup>164</sup> *Ibid.*, p.168, reproducing the engraving from Treasury Solicitors, 116/326 Public Record Office, Chancery Lane.

<sup>165</sup> Lancien, p.35, noting the rising importance of monetary calculations to the gentry.

<sup>166</sup> Roger Lloyd-Jones and M.J. Lewis, "The Long Wave and Turning Points in British Industrial Capitalism", Journal of European Economic History (2000), pp.359-401, notes that by 1896, agriculture produced only 8% of the national income. Yet, politically landed interests were still firmly in control of government from the end of the Napoleonic Wars to the repeal of the protectionist Corn Laws.

<sup>167</sup> Lawrence Stone, The Crisis of the Aristocracy (1965), noted the nobility began to face problems competing socially and financially--especially in marriage portions to get their daughters married to titled heirs--from the late sixteenth through mid-seventeenth century. The financial problems of the aristocracy

(continued...)

mobility within the expanding middle classes, and economic power moved to upper middle-class manufacturers and traders.<sup>168</sup> Flows of money from the "nouveau riche" back into the traditional ruling circles was managed mostly through marriage: rich heiresses of the upper middle class married scions of old but relatively impoverished landed families.<sup>169</sup> Financial reality created more ladders of mobility for daughters of the "vulgar" commercial and industrial moneyed classes, but it did not erase the deeply embedded sense that marrying out of one's class was wrong.<sup>170</sup> Rather, it problematized and

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<sup>167</sup>(...continued)

contributed to the English Civil War in the 1640s. After some improvement in the early eighteenth century, their problems recurred in the late eighteenth century. See pp.11-2, 156-63, 192-4, 337-9, 355-63, and 571: the land market heated up from 1588 through 1641, and land passed to lawyers, court officials and great London merchants; the largest manor houses went to non-titled commoners; the aristocracy lost property in absolute terms, while the gross national income increased, so their relative loss was even greater. Aristocratic families whose fortunes improved were those who drained fens in Essex and East Anglia (throwing commoners off the land and into London slums), bought monastic lands in the metropolis from the Crown to develop the West End and the East End, or married heiresses--from the merchant families as well as gentry or aristocratic houses (pp.164-9, 617-9, 621, 627-32, 638-41, 646-7, and 653). At the same time, aristocratic lifestyles became more expensive; keeping up with the Joneses led to debt, encouraged by the legalization of usury, the drop in interest rates and increased merchant funds in the City for lending (pp.183-6).

<sup>168</sup> R.S. Neale, Writing Marxist History (1985), pp.47-51, said the Glorious Revolution of 1688 structurally increased the wealth of the upper middle classes as it impoverished the landed interest through the creation of a national debt above 200 million pounds by the end of the eighteenth century. Most of the debt was caused by military adventures. 35% of this debt was financed by the land tax, amounting, according to Gregory King (in his 1697 National and Political Observation on the Population of England and Wales) to 15% of the annual national income. By 1722, the debt was 53 million pounds, greater than gross national product; by 1750, 79 million pounds. The gentry complained, but the dominant political elite of large landowners associated with the Whigs, the party in power for most of the century, had capital enough to speculate with financiers of the national debt. The Industrial Revolution was sparked by the creation of forms of liquid, non-land wealth--money looking for things to invest in.

<sup>169</sup> See Perkins, p.23; Lawrence Stone, The Family, Sex and Marriage, pp.277-8, discussed complaints about men marrying for fortune to women marrying for titles in the 1740s--William Hogarth produced his "Marriage a la Mode" prints in 1745 (from the earl and merchant haggling, through the husband's adultery and wife's extravagances, the husband's syphilis and the wife's adultery, to the husband's duel with her lover and the wife's suicide at the lover's execution, leaving only a syphilitic daughter to mourn). See also Stone, The Crisis of the Aristocracy: By the time of the early Stuarts "the wealth of the London merchants was dwarfing that of all but the richest peers and officials" (p.571); pp.617-8, and 621-47, daughters could no longer be placed in nunneries, and more children were surviving, leading to a higher proportion of noble daughters to male heirs, (the only suitable partners, since younger sons were treated as surplus and given little money); competition for heirs to titles led to marriage portions climbing to the equivalent of at least a year's income. Sir William Temple complained in 1770 that "'within less than fifty years the first noble families were married into the City [the financial and merchant centre in London] for downright money, and thereby introduced...this public grievance which has since ruined so many estates...giving great portions to daughters'" (p.647, quoting Temple, Works, iii, p.61).

<sup>170</sup> See Stone, The Crisis of the Aristocracy, p.618, about criticism of men of title marrying heiresses of mercantile fortunes: "When contemporaries grumbled...they were not thinking back to an age when parents

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eroticized the idea of cross-class sexual liaisons for the middle class.

The traditional purpose of elite marriage was to consolidate the lineage's property. Avoiding common blood was also important. But in the eighteenth century, love became more important to marriage,<sup>171</sup> adding to tension over "commercial" marriages to obtain the wealth of trade for landed lineages.<sup>172</sup> In the eighteenth century, some radicals suggested there was more virtue among "vulgar" wives and daughters-in-law of middle class origins, than husbands of noble blood.<sup>173</sup> Morality, contextualized in marriage and families, became seen as a female bourgeois forte, but at the same

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<sup>170</sup>(...continued)

were more concerned with moral virtue, but to one when the preservations of class distinctions took precedence over the quest for optimal financial benefits."

<sup>171</sup> Stone, The Family, Sex and Marriage, pp.221-69, 320-73, noting that Puritan theologians began to develop ideals of companionate marriage as early as the 1630s, when the ideal was countered by the idea of "strict wifely subjection and obedience" (p.320), but by the turn of the seventeenth to eighteenth century, the bourgeois were taking it seriously. By the last quarter of the eighteenth century, the landed--especially the non-noble gentry, not the aristocrats--began to take companionate marriage more seriously.

<sup>172</sup> The feminist critique of economically forced and commercially motivated marriages began by the late seventeenth century. Mary Astell, writing from 1694, said in Some Reflections Upon Marriage ([1700] 1970), p.188, that a woman "has no Reason to be fond of being a Wife, or to reckon it a Piece of Preferment when she is taken to be a Man's Upper-Servant", echoed in 1703 by Lady Chudleigh's couplet from "To the Ladies" (in A. Goreau, ed. The Whole Duty of a Woman (1985), p.273): "Wife and servant are the same,/But only differ in the name". See Pateman, The Sexual Contract, p.125. Daniel Defoe's Roxana ([1724] 1972: Penguin Books, Harmondsworth), p.187, complained that "the Marriage-Contract was, in short, nothing but giving up Liberty, Estate, Authority, and every-thing, to the Man, and the Woman was indeed a meer Woman ever after, that is to say a Slave" (Pateman, The Sexual Contract, p.120). See also Ingrid Tague, "Love, Honor and Obedience", The Journal of British Studies (2001), pp.76-106, at 76-7, quoting Lady Mary Worley Montagu. The critique took off after 1850: Emma Liggins, "Her Mercenary Spirit: Women, Money and Marriage", Women's Writing (2004), pp.73-88; Katie Holmes, "'Spinsters Indispensable': Feminists, Single Women and the Critique of Marriage", Australian Historical Studies (1998), pp.68-91; Stephanie Forward, "Attitudes to Marriage and Prostitution", Women's History Review (1999), pp.53-80; Ann Heilman, "Mona Caird (1854-1932): Wild Woman, New Woman", Women's History Review (1996), pp.67-95; and Maureen Montgomery, "Gilded Prostitution": Status, Money and Transatlantic Marriages (1989). A suffragette, Cicely Hamilton, wrote a play entitled Marriage as a Trade ([1909] 1981); see Harriet Blodgett, "Cicely Hamilton, Independent Feminist", Frontiers (1990), pp.99-104.

<sup>173</sup> Armstrong, Desire and Domestic Fiction, pp.19-20: the project of creating a "domestic woman" with special moral qualities, began about 1690, accelerated through the eighteenth century and was used by the bourgeois to criticize the working class by the 1830s. Conduct book writers set out to educate women of "numerous aspiring social groups" (gentry and upper-middle class) to be ideal wives, suitable for men of higher origin than themselves, to produce a woman "whose value resided chiefly in her femaleness,...who possessed psychological depth rather than a physically attractive surface..." This bourgeois bride was more feminine than "the aristocratic woman...[who] displayed idle sensuality instead of constant vigilance and selfless concern for the well-being of others." Self-denial and discipline over desire and consumption was true femininity (pp.88-90). Samuel Richardson's novel Pamela; Or, Virtue Rewarded. In a Series of Familiar Letters from a Beautiful Young Damsel to Her Parents... (1741) asserted the power of a servant (of bourgeois status) to resist attempted rape by her aristocratic master, Mr. B.--and caused him to fall in

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time, a whiff of prostitution attached to middle class brides who were so clearly "sold" for status and connections.

The Regency era was the setting of Jane Austen's witty, claustrophobic, exquisitely detailed miniatures of romance<sup>174</sup> kept strictly within the confines of the "proper" and the "fitting". Her intense focus on the details of how people of Quality managed their daughters' marriages, balancing the claims of financial practicality and emotional life, was not a diversion from the important business of fighting the Napoleonic wars,<sup>175</sup> but a window into the complex social and emotional implications of the most crucial financial transactions of the nation.<sup>176</sup>

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<sup>173</sup>(...continued)

love, court and marry her, and turn the authority to run his household over to her. Armstrong argued (pp.29-30, 97-8, and 97-134) that the history of the novel provided empowerment of women to "gain superiority over men in moral terms"; by casting the ideal marriage as a Richardsonian cross-class union of morally confused aristocratic man, with a bourgeois woman who can impose frugality and order on his licentious household, the novel allowed "[c]ompeting class interests...[to be] represented as a struggle between the sexes that can be completely resolved in terms of the sexual contract" (p.49). However, "Pamela's moral authority leaves the old categories untouched when determining the status of the male..." As Mr. B. stated: "...[A] man ennobles the woman he takes, be she who she will; and adopts her into his own rank...; but a woman, though ever so nobly born, debases herself by a mean marriage, and descends..."; the "principle of hypergamy...cuts the female off from the political power that might inhere in her by birth and...enables the family to achieve higher status through her, should she marry into a higher social position" (p.131). In other words, females have power to change status for themselves and their offspring, not the status of males in the public realm; the bourgeois woman's moral power was restricted to the household.

<sup>174</sup> Aileen Douglas, "Austen's Enclave", The Journal of Romantic Culture and Criticism (1999), pp.147-60, stated: Austen's novels have often been read as confining and cage-like. Clifford Siskind, in "Jane Austen and the Engendering of Disciplinarity" in Devoney Looser, ed., Jane Austen and the Discourses of Feminism (1995), pp.51-67, called them "narrow but deep."

<sup>175</sup> See Isobel Armstrong, "'Conservative' Jane Austen?" in Stephen Regan, ed., The Nineteenth Century Novel (2001), pp.170-7. Alasdair MacIntyre, After Virtue (1981), identified Austen as the "last great Aristotlean" for her absolute morality. Feminists find more radical politics in Austen: Marilyn Butler, Jane Austen and the War of Ideas (1975); Mary Evans, Jane Austen and the State (1987), p.2; Claudia Johnson, Jane Austen (1988) and "Women, Politics and the Novel", in Regan, pp.178-92; and Janet Todd "Jane Austen, Politics and Sensibility", in Susan Sellers, Linda Hutcheon, and Paul Perron, eds., Feminist Criticism (1991), pp.71-87.170-7

<sup>176</sup> Stone, The Crisis of the Aristocracy, pp.157, 162, 175-7, 192-4, 337, and 627: the best way out of financial straits for the aristocracy was marriage to non-noble heiresses, of gentry or even merchant stock. Marriage to merchant heiresses was also a way for non-noble men to acquire enough capitol to become important to the Crown, and thus to see the next generation elevated to the peerage. So the impoverished and the ambitious were most likely to contract cross-class marriages (p.630). The practice caused psychological distress, however: because heiresses had to be girls with no surviving brothers, many nobles were superstitious (before the mechanism of sex determination was known) that intermarrying with heiresses too often in a lineage caused the line to die out (p.167).

The impression of moral bankruptcy among elites<sup>177</sup> became more politically important as social relations with ordinary people became fraught with tension. During the 1810s, they began treating poor neighbours as "hands" or "factors of production".<sup>178</sup> Welfare of local people no longer entered into the calculation, and in the context of the sexual excesses of a libertine court, these class tensions were thoroughly gendered and sexualized.

All three young people, Ashford, Cox and Thornton, would now be called "working class"--but were likely called "labourers" or "common people" in 1817. Their coming of age and prime of life was the time when the idea of a "working class" developed.<sup>179</sup> They also experienced stressed sex, gender and family norms.

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<sup>177</sup> Ibid., pp.163-4, 183, 185-6, 337-8, 355, 600-5, 622-3, 631-2, and 653: the financial crisis dated back to the 1580s, shown by more frequent marriage to non-noble heiresses, fen drainage, increasing social competition with gentry and merchants (p.163, a peer noted in 1628 that "the House of Commons could buy up the Lords thrice over, despite the recent doubling of lay peers"), conspicuous consumption, new levels of debt, increased fawning at the Court in hopes of sinecures or economic monopolies, trading in the marriage prospects of Wards of the Crown (heirs and heiresses who inherited before age 21), marrying widows for their jointures (in land, usually one-third of the deceased husband's estate if children, one-half if childless, and in personal estate--the bulk of mercantile fortunes--even higher proportions), and even abduction of heiresses (usually merchant's daughters). A father of a groom could obtain money by marrying his son off to an heiress, and spend it on conspicuous consumption; only the prospect of her jointure should the groom predecease threatened liability for repayment (pp.175-7). High society centralized around London and the court, so the temptation to make a great show and deceive others about one's solvency rose. Unscrupulous noblemen were prone to what Edward Waterhouse called in 1665 "one of the greatest mistakes and mischiefs of our age", the "dis-esteem of wives, and...conceit that any thing, if woman, serves for a wife, if she have but money" (p.616). This process continued through the 1890s agricultural depression, exacerbated in the first decade of the twentieth century by "a decline in aristocratic morals under the leadership of a pleasure-loving king" (pp.14-5), just as under James I, Charles I (pp.631-2), the Restoration debauchery of Charles II, and the Regency and reign of George IV. For more than 300 years, the moral authority of the aristocracy was shaken because "[t]hat there was something very squalid about these barter agreements of money for title was generally recognized" (p.631).

<sup>178</sup> Pearson, pp.168-9, notes that James Kay-Shuttleworth, in The Moral and Physical Condition of the Working Classes (1832) and Henry Worsley (op. cit.) in 1853, complained of the newly depersonalized attitude of industrial employers to their workers.

<sup>179</sup> See Glen, pp.1-14, for an overview of histories of the formation of a "working class": Lenin dated it between 1832 and 1848; Eric Hobsbawm identified the 1840s as the crucial period in his earliest writings, like Primitive Rebels (1959) and Labouring Men (1964). Asa Briggs, in Chartist Studies (1959) and The Making of Modern England (1959) and George Rude in The Crowd in History (1964) and (with Hobsbawm) Captain Swing (1969), emphasized uneven geographical and temporal development. Later, Hobsbawm and E.P. Thompson agreed on 1815-1848, especially after 1830 (see Hobsbawm, Worlds of Labour (1984) and EP Thompson, The Making). Harold Perkin suggested 1815-1820 (The Origin of Modern English Society); John Foster called 1815-1830 a time of concerted political action by some trades, but real class formation dated to 1832-1848 (see Class Struggle and the Industrial Revolution (1974)). Gareth Stedman Jones and D.S. Gadian reemphasized geographical unevenness and sporadic activity (see Jones, Languages of Class (1983) and Gadian, "Class Consciousness in Oldham", Historical Journal (1978), pp.161-72). Some sense of group identity, albeit not cohesive militancy, emerged by the 1820s. Thompson, The Making, pp.216-7, and 781, emphasized linguistic change from "labourers" or "common people" (late eighteenth century) to "working class" (mid-nineteenth century), in reaction to English state

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As a bricklayer, a semi-skilled artisan, a journeyman like Abraham Thornton would be expected to think of marriage, in anticipation of becoming a master. As skill increased, work should become secure, and the artisan should establish a "household".<sup>180</sup> But journeymen faced such straitened circumstances that they could not become masters and meet the expectations for adult men. Artisanal masculinity was in crisis: masters failed to repay journeymen for their "extended period of deference and dependency",<sup>181</sup> patriarchy did not deliver on promises to young men.<sup>182</sup> Men like Thornton were in limbo. Adult masculine identity was systematically challenged. In terms of traditional ideas, men like Thornton became acutely disabled for attaining success.

In the late eighteenth century, especially in London, artisans began to step more tentatively into manhood: irregular common-law unions increased.<sup>183</sup> This also happened on the Continent.<sup>184</sup> But by the early nineteenth century, increasing religiosity<sup>185</sup> limited even this form of family formation. Around 1800, many denominations began "supervising

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<sup>179</sup>(...continued)

repression impeding political reforms until the First Reform Bill gave the middle class the franchise in 1832. In some ways, the middle class, using the spectre of political action by "the working class" to terrorize the gentry into strategic concession in 1832, created working class identity.

<sup>180</sup> Clark, The Struggle, pp. 13-6. Artisans did not face problems of technology, but the growth of a mass, cheap market for goods lessened the need for highly skilled labour to make quality goods. Employers also subdivided tasks so cheaper labour could be used, undermining the apprenticeship system.

<sup>181</sup> Maxine Berg, "Workers and Machinery" in Rule, Albion's People, pp.52-73, noted at p.59 that the crisis in the structured upward mobility of artisanal life led to increasing journeyman anger against masters, seen as aloof. Rev. Joseph Tucker, Instructions for Travellers (1757), pp.23-4, called the relations between clothiers and textile journeymen in the West Country akin to "Planters and slaves".

<sup>182</sup> Hartman, pp.262-3.

<sup>183</sup> Clark, The Struggle, p.43.

<sup>184</sup> Tilly, Scott and Cohen, p.236, noted common law marriages or "free unions" on the Continent increased, especially in cities where young migrants were far from families who would have forced marriage promises to be fulfilled.

<sup>185</sup> Elie Halevy, The History of the English People (1924) ended his first volume: "Methodism was the antidote to Jacobinism". British society, the most changed by industrialism was the most resistant to revolution, because of religiosity among working people. The thesis is still supported--if broadened to include more sects than Methodism. Methodists reached 200,000 by 1820, plus a further one million Methodist-influenced, (Norman Gash, Aristocracy and People (1979), p. 64), so they were not numerous enough for the impact Halevy attributed to them. See Gerald Olsen, ed, Religion and Revolution in Early-Industrial England (1990); David Hempton, Methodism and Politics (1984); Bernard Semmel, ed., The Birth of Methodism (1971); Elissa Harkin, "The Halevy Thesis", Church History (1975), pp.47-56; and Gertrude Himmelfarb, The Roads to Modernity (2004), Chapters 4 through 6. Even the early Marxist historians, J.L. and Barbara Hammond, in The Town Labourer (1917) and The Skilled Labourer (1920)

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the morals of the members, spurred by the example of the Methodists."<sup>186</sup> Legitimate sex became less affordable as Evangelism expanded into a virtual "national faith".<sup>187</sup>

The gender system of artisanal families fell out of balance.<sup>188</sup> Journeymen felt forced to choose either to remain at the irresponsible apprentice stage of life, or to set up more financially insecure households, in which the wife's wages became more important. With traditional masculinity under stress, and women's economic contributions becoming more crucial, domestic violence became more obvious in popular culture, and probably more common in reality: wives were attacked as threats to manhood through the idiom of a "Struggle for the Breeches"--a dispute over who would be the ultimate authority in the family, and "wear the pants".<sup>189</sup>

After peace in 1815, demobilization increased competition for work. But the end of the trade embargo did not lower food prices--landed interests passed "Corn Laws" to keep cheap grain out of Britain.<sup>190</sup> Hardship and starvation resulted. Political agitation was put down with the same repression the Tories had shown sympathizers with the French

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<sup>185</sup> (...continued)

acknowledged the role of religion. E.J. Hobsbawm, in Labouring Men (1964), extended Halevy, suggesting that while Methodism promoted conservatism, it also trained folk in organizing, and aided the Labour movement.

The effect of religious revival on gender moves beyond Methodism, and into Anglican Evangelical Revival. Anglican piety claimed more middle class adherents, but produced more gender ideology: if family was to reform public morality, women must teach morals and religion at home. See Catharine Hall, "the Early Formation of Victorian Domestic Ideology" in Charles Foster, An Errand of Mercy (1960); Boyd Hilton, The Age of Atonement (1988); Richard Follett, Evangelicalism, Penal Theory and the Politics of Criminal Law Reform (2001); and Schlossberg, The Silent Revolution.

<sup>186</sup> Semmel, The Methodist Revolution (1973), pp.171-2.

<sup>187</sup> Harkin, p.55.

<sup>188</sup> Clark, The Struggle, pp.67-71, quoted blood-curdling ballads and poems from the early nineteenth century, describing marital strife as a struggle for power, and often advocating wife-bearing. For example, radical weaver Alexander Wilson sold 100,000 copies of "Watty and Meg, or the Wife Reformed": "See you, Mungo, when she'll clash [gossip] on/Wi' her everlasting clack [scolding]/Whyles I've had my nieve [fist], in passion,/Liftet up for to break her back!" (in Tom Leonard, ed., Radical Renfrew (1990), pp.9, 26). "A Fool's Advice to Henpeck'd Husbands" of 1800 in Manchester (Manchester Public Library, Ballad Collection, p.346), advised men: "When your wife for scolding finds pretences, oh/Take the handle of a broom,/Not much thicker than your thumb,/And thwack till you bring her to her senses, oh."

<sup>189</sup> cf the title of Clark, The Struggle for the Breeches.

<sup>190</sup> See Anna Gambles, Protection and Politics (1999); J.H. Wordie, ed., Agriculture and Politics in England (2000); Wendy Hinde, "The Corn Laws", Modern History Review (1998), pp...; and Richard Spall, "Landlordism and Liberty", Journal of Libertarian Studies (1987), pp.213-36.

Revolution.<sup>191</sup> Some historians describe the time as one of virtual chaos.<sup>192</sup>

The massive 1750-1850 population boom was mostly produced by people marrying younger and producing more marital children. But illegitimacy also climbed, since tradition required supervision of courting couples to prevent premarital conceptions from becoming illegitimate births. Community elders had to know which young men were seeing girls at the time of conception, in order for the courtship system to work. But journeymen, like Thornton, were travelling more for work. Mobility away from kin undermined supervision; young women followed the tradition of sex after becoming engaged, but "traditional pressures on young men to marry were no longer working."<sup>193</sup> Girls' expectations were still clear. But that workingmen could fulfill them was becoming more doubtful. As Mary Tilly, Joan Scott and Miriam Cohen put it:

Most expected to get married, but...propertylessness, poverty, large-scale geographical mobility, occupational instability, and the absence of traditional social protection...prevented the fulfillment of this expectation...Was it a search for sexual fulfillment that prompted young women to become 'engaged' to young men and then sleep with them...? Not at all...[P]remarital sexual relationships were...an expression of the traditional wish to marry...<sup>194</sup>

Given wage rates, living in a family unit was the most reasonable choice.<sup>195</sup> Marriage was still best for economic stability. The traditional pattern had included a substantial percentage of first born children born less than nine months after marriage.<sup>196</sup> Increased illegitimacy meant communities could no longer force men to marry pregnant girls:

The absence of traditional constraints...increased women's vulnerability. Lack of money or a lost job, the opportunity for work in a distant city, all kept men from fulfilling their promises, and the women's

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<sup>191</sup> Trowbridge Ford, "English Criminal Law Reform", Durham University Journal (1984), pp.205-16; T.A. Jackson, Trials of British Freedom (1945); and Reginald White, Waterloo to Peterloo (1957).

<sup>192</sup> Halevy suggested this in The History of the English People--this is the reason he focussed on the date 1815. However, HZkin, pp.51-2, noted that economic factors even in 1815, when most English people probably agreed with Halevy, were already creating the foundation for the prosperous society of 1852.

<sup>193</sup> Martin Wiener, "Alice Arden to Bill Sikes", at p.203, citing Wrigley, English Population History, p.219, and George Boyer, An Economic History of the English Poor Law, p.167.

<sup>194</sup> Tilly, et.al., pp.235-7.

<sup>195</sup> Ibid., p.235: "The logical move for a single girl far from her family would be to find a husband with whom she might re-establish a family economy. Yet another pressure was the desire to escape the confines of domestic service..."

<sup>196</sup> Laslett, Family Life, pp.128-30: from 10% to 55% of births were conceived outside marriage between the sixteenth and nineteenth centuries, when babies born within eight months of marriage were added to illegitimate births. P.E.H. Hair, "Bridal Pregnancies in Rural England", pp.233-43, found rates of prenuptial pregnancy of 16.5% in the seventeenth century, rising to 43.4% from 1750-1836.

families were nowhere at hand to enforce them.<sup>197</sup>

Premarital sex did not change; what changed was that marriages were not occurring.<sup>198</sup> But illegitimacy became understood by Victorians as a pitiable result of male victimization of "helpless women", without expecting men to behave honourably.<sup>199</sup> The weakening of "controls on men in courtship" led "young women, their parents, and persons in authority...[to] come to see men as more dangerous to women than hitherto and male willfulness as a growing threat to social order..."<sup>200</sup>

Industrial gender ideology did not emanate directly from economics; it represented mental processes by which people tried to understand and manage change. Ideas which put pressure on the traditional system of courtship originated from higher up the class structure. The tragedies of domestic violence, illegitimacy, infanticide and abandonment resulted from a mismatch between old ideas and new realities. Increased bourgeois attention to ordinary people by middle class people also increased the pressure.

Middle class gender ideology developing since the early eighteenth century, moved from promotion of "modesty" for women to recommending, by the 1790s, that women not mix in public at all. This later development, called "Separate Spheres", began to be turned against the lower classes after 1832, as middle class people tried to rebuild the moral authority of an elite which they had newly joined. Separate Spheres also helped assuage bourgeois industrial guilt, justifying the increasingly dehumanizing treatment of labourers by finding fault with the lower class as a whole, and especially with lower class women.

The targetting of working women by Separate Spheres reflected disproportionate bourgeois fears about women's factory work<sup>201</sup>--that it intensified female sexuality, and endangered fertility and maternity. Sensationalized middle-class

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<sup>197</sup> Tilly et.al., p.237.

<sup>198</sup> Ibid., pp.235-7, noted Laslett and Wrigley's work on "illegitimacy-prone families" (Family Life, pp.147-59), but this did not account for most illegitimacy. The majority of unwed mothers contributed one child to the illegitimacy boom: "The women who bore illegitimate children were not pursuing sexual pleasure, as Shorter would have us believe...", arguing against Edward Shorter in "Illegitimacy, Sexual Revolution and Change", Journal of Interdisciplinary History, (1971), pp.237-72, and "Emancipation, Birth Control and Fertility", American Historical Review (1973), pp.605-40.

<sup>199</sup> Wiener, p.201, noted Christine Krueger, "Literary Defences and Medical Prosecutions: Representing Infanticide", Victorian Studies (1996-7), pp.271-94: the same period as the population boom saw increasing reference to "natural innocence and melodramatic seduction" to explain infanticide--and save infanticidal mothers from the noose.

<sup>200</sup> Ibid., p.203.

<sup>201</sup> Factory work remained a minority experience for women. Tilly, Scott and Cohen, pp.230-2, noted that factory work for women did not make up for loss of traditional women's work, especially in agriculture. When cotton spinning was mechanized, women lost work in textiles that had usually taken place at home

(continued...)

discourses made room for some working class commentators to complain of risks of sexual exploitation of women factory workers by employers.<sup>202</sup> But working people did not therefore prefer domestic service to factory work for their daughters. They knew that higher class men sexually exploited women servants.<sup>203</sup>

The working classes broadly accepted the ideal of Separate Spheres, but for far less idealistic reasons than the bourgeois: they believed their women could be at risk from strange men, but they knew they were at risk from higher class men. Some eighteenth century gentlemen had been idealized as "heroic rapists" for forcing sex on servants: Colonel Francis Charteris, "the Rape-master General", claimed he was going to get "a patent for ravishing where he pleased" so no woman could bring him to court, and was pardoned by the King in 1730 after being convicted of raping his maid Ann Bond; Frederick Calvert, Lord Baltimore, was another exalted rapist of ordinary women.<sup>204</sup> More humble men, middle class heads of households with servants, also claimed a sort of right to sex with their servants--in 1772, after Sarah Bishop, a 16-year-old maid, told her mistress that the master, George Carter, a publican, had raped her, he told his wife he "always served all his servants so the night they came into the house"; William Hodge openly bragged to all his neighbours in London about raping his teenaged servingmaid.<sup>205</sup> Thus, while servants were probably mostly raped by men of their own

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<sup>201</sup>(...continued)

as byemployment; they did not gain many factory jobs in textiles until power looms brought them to cotton factories as weavers in the 1820s.

<sup>202</sup> Clark, Women's Silence, pp.91, 93-5. Sara Horrell and Jane Humphries, "'The Exploitation of Little Children'", Explorations in Economic History (1995), pp.485-516, at 487-8, noted middle class people did not disapprove of work for prepubescent children in factories for sexual reasons--rather, they portrayed it as too physically hard for younger children, pp.485-6. But post-pubertal girls' work in factories was so associated with sexual exploitation that they considered such work categorically against "propriety" for nubile girls.

<sup>203</sup> Servants were more likely to bear illegitimate children, see Tilly et.al., pp.232-4 and Figure 1. Stone, The Family, Sex and Marriage, p.642, associated this with isolated work bearing more risks of sexual exploitation when the woman's family ties were attenuated, and the weakening of plebeian community life. A mundane example of the dailyness of sexual harassment of servants is related to cleaning steps to houses. Davidoff, "Class and Gender", pp.44, 46: many servants heard sexual comments while kneeling to scrub front stoops, because it revealed their legs and petticoats, and left them "open to the stares of passersby, the whistles and importunings of men and boys"; Hannah Cullwick noted in her diary for Feb. 1872 that to scrub in the street "wants nerve" because it made her feel "despised and degraded." Munby made this a special sexual fantasy ritual for them and photographed Hannah from the back scrubbing steps.

<sup>204</sup> Clark, Women's Silence, p.35.

<sup>205</sup> *Ibid.*, p.41, citing Old Bailey Session Papers, 1772-3, p.147 (George Carter) and 1786, pp.1271-4 (William Hodge).

class, like other workingwomen,<sup>206</sup> it makes sense that Chartist Peter Bussey, from Bradford, would declaim, in the late 1830s:

There is a set of young boobies in the country, connected with the aristocracy...who are regular plunderers of the people; they seek your blood, but you are useful in labouring for them. This brood is on the increase, and they are in the habit of seducing the daughters of poor men.<sup>207</sup>

Melodramas about "virtuous maidens victimized by heartless [aristocratic] libertines" became common and popular.<sup>208</sup>

Working class parents deeply suspected bourgeois employers of any kind--factory or domestic--of insufficient respect for the chastity of their girls, as they nurtured bitterness against employers and the "employers' law".<sup>209</sup> They were aware of constraints on the voluntariness of workingwomen's sexual consent:<sup>210</sup> they knew economic pressures could coerce a servant to consent to sex with her employer. On the other hand, political condemnation of lack of class loyalty

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<sup>206</sup> Ibid., pp.34-41, paralleling the pattern of class origins of putative fathers of bastards, pp.77-83. See also Gillis, "Servants, Sexual Relations and the Risk of Illegitimacy". Intra-group rape is still the norm.

<sup>207</sup> Ibid., p.90, quoting Bussey from an undated newspaper clipping in the Francis Place Collection, V.56, circa 1834-44, British Library. Bussey painted this picture for working class audiences, even though aristocratic seduction had nothing to do with the subject of his talk, the horrors of the 1834 Poor Law.

<sup>208</sup> Ibid., noting Black-eyed Susan (1829) and The Artizan's Daughter (1845).

<sup>209</sup> EP Thompson, Whigs and Hunters, p.21: Everyone accepted that the law existed to preserve property in the eighteenth century. The Making, p.221: By the nineteenth century, workers connected the gentry and industry interests, so that "A Journeyman Cotton Spinner" wrote in the Black Dwarf, 30 Sept. 1818, of the unfairness of taking workplace disputes to the courts: "If the workman would not submit he must summon his employer before a magistrate; the whole of the acting magistrates in that district...being gentlemen who have sprung from the same source with the master cotton spinners." Employers did not attend personally but sent overseers; the court's decisions were foregone conclusions in favour of employers.

<sup>210</sup> See Pateman, The Sexual Contract, pp.144-53: working people experienced employment contracts as expressions of necessity impelling acceptance of subordination; they were not impressed with what political economists called "free" contracts for labour. Much of the law that governed their work remained Master-Servant law dating from the Elizabethan Statute of Artificers, until the 1875 Employer and Workman Act established formal equality between the parties. Blackstone and Lord Mansfield in the eighteenth century admitted it was difficult to differentiate the worker from the servant or the slave; working people understood the employment contract as an abandonment of liberty. Being an employee, even after 1875, meant following orders; the 1875 Act confirmed the employers' right of command. The labourer did not exchange a commodity he owned, but agreed to obey an employer under armies of "spies and bosses"; he sold a right of command over himself. Given this understanding, workingmen would never see a servant's sexual consent to her master as voluntary: "Modern marriage and employment are contractual, but that does not mean that, substantively, all resemblance to older forms of (unfree) status have vanished. Contract is the specifically modern means of creating relationships of subordination" (Pateman, p.118). Working class commentators did not attack the sexual reputations of factory girls like middle class commentators, although Chartists attacked factory lasses as poor housekeepers, see Clark, The Struggle, pp.257-9.

could combine with personal jealousy to create bitterness against working class women involved with upper class men.

Domestic service caused more "family breakup" than life in factory families. As factories expanded, domestic service concentrated among children of agricultural labourers. Agricultural labourers' children left home as early as 10, while in towns, factory work enabled adolescents to live at home till they married.<sup>211</sup> In addition, with wage rates higher in the cities and military than the countryside, countrymen posed the greatest threat to pregnant sweethearts.<sup>212</sup> Urban boys with their kin nearby did not enjoy the same anonymity in town.

"Factory lasses" did unskilled or semiskilled work without opportunity for advancement. They were increasingly expected to quit at marriage or childbirth. Textile factories increasingly enabled father and older children to work together, while the mother worked part time or stayed home.<sup>213</sup> This arrangement won bosses more deference from workingmen in the factories.<sup>214</sup>

By about 1850, all "respectable classes" idealized the full time housewife as a symbol of the husband's ability to provide.<sup>215</sup> Separate Spheres ideology had won considerable working class ideological support. But practice lagged behind. The economic need for wives to work was still high; in 1851, 25% of all married women were still in paid employment.<sup>216</sup>

Despite Victorian bourgeois fears, more working families were dislocated by traditional work for women, while factories allowed older children to live at home and women to be homemakers. Studies of Victorian prostitution also show that it was concentrated away from industrial areas (in ports and pleasure centres with middle and upper class tourism).

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<sup>211</sup> Horrell and Humphries, at p.498-502: the average age of children at home went down in mining and industrial households from 1815 to the 1840s, representing a high tide for their children's domestic service between ages 10-19. After that, the average ages of children in industrial families rose above that in families of agricultural labourers, especially for girls: girls were more likely to go into service than boys, and it was in textile towns that they had the best prospects of factory work. In families of agricultural labourers, the majority of older children, especially girls, continued to leave home between 10 and 19 for service.

<sup>212</sup> Wiener, p.203, citing George Boyer, An Economic History of the English Poor Law, p.167.

<sup>213</sup> Eric Hobsbawm, "The Aristocracy of Labour Reconsidered", pp.227-51 in Workers: Worlds of Labour (1984), at pp.234-7, and 240. Not only did male mule spinners obtain the advantage of reinforcing their status of heads of their households by hiring their own children or kin's children to be their assistants, "piecers", but they also used their patriarchal authority to reenforce their exalted position as "skilled" workers over the piecers--although the distinction in skill was illusory.

<sup>214</sup> Lancien, pp.36-8: factory workers appreciated family hiring to strengthen paternal authority over the young; like rural people with squires, once given the vote in 1867, they tended to vote as the factory owner did, especially in "company towns". See also, David Moore, The Politics of Deference (1976).

<sup>215</sup> Pateman, p.130.

<sup>216</sup> *Ibid.*, p.130, relying upon H. Land, "The Family Wage", Feminist Review, V.6, (1980), p.61.

Prostitution was rare in hardware, cotton, linen, woolen and worsted centres, where skilled workingmen were regularly employed, and workingwomen had the best prospects for relatively well-paid, semiskilled work. Most men known to be suffering from syphilis and related diseases were unskilled working class, followed by middle and upper class men, especially professionals, and skilled workingmen were least likely to be infected.<sup>217</sup>

Factories were not an oasis for women: They created logistical problems for mothers in paid work; it was easier previously to combine childrearing with work at home in agriculture, a home-workshop, or byemployment in "outworking" crafts.<sup>218</sup> It was under industrialization that the male breadwinner-female homemaker family became common. What many today consider the "traditional" family was actually "approximated for only a relatively short time in the early industrial era" and "lasted as the dominant household type for barely a century."<sup>219</sup> Yet, that it takes historical detective work to uncover this fact shows the strength of the idea that husbands provide and protect, while wives serve and obey;<sup>220</sup> men's identities now remain based on waged work, as in the industrial era.

Thus bourgeois gender ideology spread to workingmen a preference to keep wives and mothers out of the paid labour force outside of the home. Middle class writers<sup>221</sup> blamed both youthful crime and adult male drunkenness among the working class on the "diversion" of women from the home to work for pay--believing, without a factual foundation, that traditional workingwomen had been full-time housewives before industrialization. But workingmen did not agree that the value of housewives meant domestic service was a good job for their daughters.

In the context of class relations from the 1810s, rape law exerted less uni-directional pressure on working class women than middle class women: the interests of families of labouring women ran directly counter to the sexual interests of employing men. Men who could not forego wives' and daughters' wages were sceptical of the rape law--they saw it as excusing the sexual subordination of employed women to employers.

Preindustrial commoners had always policed their children sexually; the "poor" were not sexually transgressive,<sup>222</sup>

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<sup>217</sup> Judith Walkowitz, Prostitution and Victorian Society (1980), pp.21-2.

<sup>218</sup> See generally, Katrina Honeyman, Women, Gender and Industrialization.

<sup>219</sup> Hartman, pp.170-1.

<sup>220</sup> Pateman, p.130.

<sup>221</sup> See Pearson, p.165, citing Micaiah Hill, Juvenile Delinquency, 1853 (Smith, Elder and Co.), T. Beggs, An Inquiry into the Extent and Causes of Juvenile Depravity, 1849 (Gilpin) and H. Worsley, Juvenile Depravity, 1849 (Gilpin).

<sup>222</sup> Hartman, pp.62-6 and 90-6: sexual repression was a common and self-imposed discipline that both sexes began to practice in late Medieval times, because of the economic benefits of delaying marriage. Its roots were patterns of landholding, household formation, and work before marriage as domestic servants. Because adolescent girls' work in service benefitted their natal families, other means of protecting young

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as they are often (unfairly) constructed to be. The preindustrial pattern was the effect of strong social mores:

We can observe strict and efficient social control here, a discipline which did serve to ensure social survival...This should not surprise us if we recognize...that a force which is capable of keeping people from marrying must also be capable of preventing them from procreating outside marriage.<sup>223</sup>

This was how the ratio of illegitimate to legitimate births remained extremely low and stable for most of the sixteenth through eighteenth centuries. It rose about 1750, to fall again from 1850. Even during the blip, illegitimacy remained remarkably low by modern twentieth and twenty-first century standards, never exceeding 10%<sup>224</sup>--extraordinarily low for a society with no reliable means of contraception other than coitus interruptus.<sup>225</sup> The rise in illegitimacy between 1750-1850 did not represent an adaptation to later marriage or lower rates of nuptiality: the illegitimacy ratio almost perfectly paralleled a rise in total fertility caused by decreasing age at marriage and higher nuptiality. What happened was a massive increase in births of all kinds.

Preindustrial social discipline did not prevent all conceptions occurring before the formation of a new household: the large percentage of first-born marital children baptized within eight months of the marriage ceremony represented hasty, possibly economically premature and stressful creations of households. In early modern England, at least 10%, sometimes as many as 50-55% of births, were conceived outside marriage. Most of the time, combining bastards with early first marital births accounted for between 20 and 40% of births. Domestic servants were most vulnerable: they were more

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<sup>222</sup>(...continued)

women from sexual risk--other than sequestering them once fertile and marrying them off as early as possible--had to be found. Rape began to be punished by manorial courts. The illegitimacy ratio is too simplistically taken as a proxy for "sexual nonconformity" (non-marital sexuality): see Laslett, Family Life, pp.106-7, criticizing Shorter, who argued that rising rates of illegitimacy represented "sexual revolution" in "Illegitimacy, Sexual Revolution and Social Change", The Making of the Modern Family (1975), and "Emancipation, Birth Control and Fertility".

<sup>223</sup> Laslett, Family Life, pp.160-2 and Figure 2. Laslett was arguing against Shorter's assumptions (in "Female Emancipation, Birth Control and Fertility"), that sexual desires are naturally high and uncontrollable among men. See also Family Life, pp.126-8: E.A. Wrigley's reconstruction of families in Colyton, Devon showed that the highest completed family size and highest illegitimacy ratios went together (in the period 1770-1837), as did the lowest completed family size and lowest illegitimacy (in 1649-1719). Pre-nuptial pregnancy also followed this pattern, raising the total pre-marital conception rate up as high as 38.5%, pp.128-30, Table 3.3.

<sup>224</sup> See Laslett, Family Life, pp.104-5: illegitimacy in traditional England ranged from about 2 to 10% of births before the 1960s. The illegitimacy ratio began rising in 1750, and continued to 1850, reaching national averages of almost 7% before dropping below 4% by 1900, spiking to near 6% during World War II, returning to 5% in the 1950s, until the post-1965 sexual revolution era. See Figure 3.1, p.113. See also Laslett, The World, p.159, Table 13.

<sup>225</sup> Angus McLaren, A History of Contraception (1990), discussed traditional methods of birth control with their relative success rates compared to modern methods which began to spread in the mid-nineteenth century in England, and a few decades earlier in France.

likely to bear bastards, and to marry while pregnant.<sup>226</sup>

A strong desire to marry fuelled both the earlier marriages and the increased illegitimacy, among women who courted longterm sweethearts as usual but had become more vulnerable to abandonment during pregnancy, because of greater mobility of young men.<sup>227</sup> This reflected economic change, not uncontrolled sexuality, as can be seen in what happened to regional variations in bastardy.

Before industrialization, illegitimacy was highest in the West, then the North West (Cheshire and Lancashire), the South, the North, and lowest in the East (East Anglia and Essex) and Middle region. But at the height of the illegitimacy boom in the 1840s, the positions of regions switched. The North West, the most industrialized region, started out high, but rose less than the rest: industrialization reduced illegitimacy. In the East, puritanical and far more rural, low illegitimacy was replaced by such heightened illegitimacy that Essex, Suffolk and Norfolk reached first or second position among regions by the 1840s.<sup>228</sup> Areas of relative poverty experienced the most illegitimacy. East Anglia was the best agricultural region in Britain; when agriculture provided stable wages and employment, its illegitimacy was low. But when agriculture declined and industry improved, the rocky, hilly areas of the North West--where swift streams provided cheap power for mills--radically improved its standings. Warwickshire around Birmingham, Ashford's region, combined industry and agriculture; it had been, and remained, in the middle of illegitimacy statistics.

Common people distrusted the idea that romance could lift their children out of the situation they were born in; plebeian culture warned silly young girls not to be swayed by promises of marriage from wealthier men. Commoner girls led astray by promises of marriage from corrupt noblemen became one of the most common tropes of nineteenth century literature.<sup>229</sup> Fear that a wealthy man would use false promises of marriage to prey upon a gullible young workinggirl was

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<sup>226</sup> Laslett, The World, pp.7 and 179.

<sup>227</sup> Tilly et.al., pp.232-4 and Figure 1.

<sup>228</sup> Laslett, Family Life, pp.107, 147-59.

<sup>229</sup> George Eliot's Adam Bede (1859) painstakingly relates the "fall" of the beautiful dairymaid, Hetty Sorrel. See Josephine McDonagh, "Child-Murder Narratives in George Eliot's Embedded Histories", Nineteenth Century Literature (2001), pp.228-59; Amy Murphy, "The Awful Facts": Figurations of the Worker, Dissertation University of Arizona, June 1999. Elizabeth Gaskell included a "fallen woman", Esther, the main character's aunt, in her first novel, Mary Barton (1848), and made the fallen woman the main character in Ruth in 1853, when she also dared to make Ruth's "fallenness" something she could disguise, because it did not fundamentally corrupt her character. See Sara Malton, "Illicit Inscriptions: Reframing Forgery in Elizabeth Gaskell's Ruth", Victorian Literature and Culture (2005), pp.187-202; and Lisa Surridge, "Working Class Masculinities in Mary Barton", Victorian Literature and Culture (2000), pp.341-43. Less well-known now, but one of the best selling early nineteenth century novels, Amelia Alderson Opie's The Father and Daughter of 1801 claimed the fall of the daughter drove the father insane. See Opie, The Father and Daughter with Dangers of Coquetry, eds. Shelley King and John Pierce, ([1801 and 1790] 2003). The working class girl led astray by a nobleman's promises of marriage also appeared in literature about Mary Ashford, as Thornton the bricklayer became "Thornville", an aristocratic cad. See

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common. Unlike middle class cross-class romance, working class literature made cross-class sex a personal disaster with lifelong effects, not erotic fantasy.<sup>230</sup>

In the 1810s, premarital pregnancy still attracted spirited community defence of the old morality which insisted that an unmarried mother's sweetheart take responsibility and marry the girl he got pregnant. For example, in Scotland, where economic difficulties were especially acute, a ballad of circa 1800, "Jenny Nettles", quoted Jenny's admonishment of her faithless lover Robin Rattle:

Score out the blame,  
And shun the shame,  
And without mair debate o't  
Take home your wain [wee one],  
Make Jenny fain [glad]  
The leel and leesome gate o't [loyal and loveable way of it].<sup>231</sup>

Robert Burns accepted premarital and extramarital sex, but demanded responsible behaviour if pregnancy occurred. Denouncing the traditional Scottish "kirk sessions" (strict religious courts imposing penalties for breaches of Christian morality), in 1786 he "praised 'The Fornicator's Court' of the pub, where neighbors repudiated men who seduced women and then left them pregnant or tried to procure abortions."<sup>232</sup> Where failures to avoid conception occurred, workingmen and women were still expected to face the consequences together. The morality had not changed among the elders of plebeian communities; only the ability to enforce it had withered away.

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<sup>229</sup>(...continued)

Clark, Women's Silence, pp.90-2, 112 and 114.

<sup>230</sup> This was the dominant theme of melodrama, the most popular genre consumed by working class theatregoers and readers in nineteenth century England. See R. Branca, "Melodrama Convention and Rape", American Drama (2005), pp.32-45: evil aristocratic men served male audience members as "embod[iments] of their sexual drives" which they were able to disown when the hero overcame the villain; workingmen "did not like to believe their own actions were motivated by sexual desire" (pp.35-6). Diane Hoeveler, "The Temple of Morality", European Romantic Review, (2003), pp.49-63, was more optimistic about the sincerity of melodrama, discussing the political meaning brought to a French revolutionary genre by the Jacobin Thomas Holcroft, who allowed lower class women, even servants, to morally denounce the evil patriarch, as in his "Tale of Mystery" (pp.58-9). Peter Brooks, The Melodramatic Imagination (1976), p.25, defined melodrama's "Manichean moral vision,...[which] pits absolute innocence against absolute evil and resolves the conflict by vindicating the persecuted heroine in a remarkable, public, spectacular homage to virtue"; see also his "Melodrama, Body, Revolution", pp.11-24, in Jacky Bratton, Jim Cook, and Christine Gledhill, eds., Melodrama, Picture, Scream (1994); and Fredric Jameson, The Political Unconscious (1981). The same political engagement is true of Ernest Jones' Chartist melodramas in the early 1850s, although he was more likely to make the evil seducer a bourgeois industrialist than an aristocrat, see Sally Ledger, "Chartist Aesthetics in the Mid-Nineteenth Century", Nineteenth Century Literature (2002), pp.31-63.

<sup>231</sup> Clark, The Struggle, p.47, quoting "Jenny Nettles" from The Wonderful Age (Glasgow, no date), chapbook of songs.

<sup>232</sup> *Ibid.*, quoting Robert Burns, The Fornicator's Court (Mauchline, 1786).

This is not to say that all young commoner men acknowledged the moral claims of the old system of courtship; some probably did not any longer, just as there were some who did not live up to the old morality. But those workingmen who did not acknowledge the ethics of Burns' "Fornicator's Court" were disputing old plebeian morality not with a new version, but with the ethics of men of higher class status--men who had long behaved irresponsibly towards bastards born of plebeian women. In London, some young plebeian lads fell in with the "Fancy", a dangerously socially-mixed group of men, including "swells" from the upper classes and out of work horse servants or unemployed lads trying to win a living by their wits and their fists. They dressed "flash", and pursued illegal pleasures like boxing and gambling, which were associated with card sharpening, fixing fights, and similar swindles. The Fancy were distrusted for their tendency to ignore customary barriers separating the social orders.<sup>233</sup>

The Fancy were an extension of the larger phenomenon of "libertines", like Sir John Wilkes and Sir Francis Dashwood, an aristocratic rake who started the "Hell Fire Club".<sup>234</sup> Wilkes is better known now as a Parliamentary Radical who promoted the rights of electors; as MP for the county of Middlesex (including Westminster, location of Parliament and artisans who served gentlemen who came to London) from the 1760s, he represented one of the largest and most humble electorates in England. He lost the right to sit in the House for blasphemous and seditious articles, then promoted the idea of a parliamentary opposition, and the importance of representation.<sup>235</sup> More ordinary men too combined radical politics with more earthy business endeavours, such as publishing obscene materials along with political sedition.<sup>236</sup> They produced a male subculture, just as pornography was a product for a male audience.

Wilkes' wild young gentlemen were libertines who counted how many maidenheads they took.<sup>237</sup> Their sexual ethic created asymmetrical relationships, between higher class pleasure-seekers, and lower class service providers

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<sup>233</sup> Borowitz, pp.6-12.

<sup>234</sup> Actually called the Friars of St. Francis of Wycombe, the Monks of Medmenham or the Order of Knights of West Wycombe, this fun-loving group of Dashwood's friends, established about 1749, were reputed to hold a combination of Black Masses, pagan rites, drunken Bacchanalian festivities, and sexual orgies involving great aristocratic ladies, London "dollymops" (prostitutes), or both. See Mannix, The Hell Fire Club, Betty Kemp, Sir Francis Dashwood (1967), Peter Cryle and Lisa O'Connell, eds., Libertine Enlightenment (2004), especially Simon During, "Taking Liberties", pp.17-33, and Raymond Postgate, "That Devil Wilkes" (1930).

<sup>235</sup> For this more political side of Wilkes, see George Rude, Wilkes and Liberty (1962), and Peter Thomas, John Wilkes, A Friend to Liberty (1996).

<sup>236</sup> Because of its similarly legally dodgy nature, pornography and politically radical material tended to be printed by the same people. See Iain MacCalman, Radical Underworld (1988). Both bridged workingmen who produced the materials, and higher class libertines.

<sup>237</sup> Clark, Women's Silence, pp.33-42.

motivated by money.<sup>238</sup> Freedom for one represented submission of the other to the necessity of earning a living.

Prostitution increased in industrial England, reversing the trend to low prostitution which began in the late fifteenth century.<sup>239</sup> Like prostitutes, poor men among the Fancy served the grosser appetites of the "Quality" in the social mixing that occurred in London, due to geographical proximity of rich and poor. But in the fun and games of the Fancy lifestyle, poor men could not pull it off with the freedom of the the rich. Nevertheless, no doubt the inaccessibility of marriage to young artisans promoted a few to imitate debauched gentlemen.<sup>240</sup>

Although Thornton was not a Londoner, as an artisan, it is possible that he might have been part of the minority of young workingmen who tried to live a libertine life. Evidence emerged that Thornton had libertine values, believing women were prizes, dehumanized objects to be used.<sup>241</sup> But this was not treatment workingwomen expected as their due. Libertinism was not supported by working class communities. But that Thornton's behaviour represented lack of socialization, anomie,<sup>242</sup> in the context of his social group, did not ultimately matter. He received justification instead from an elite source: Judge Holroyd. And from this source such justification was legally powerful.

## E. LEGAL LIBERTINISM: "CONSENT TO FORCE" AND THE "PUBLIC WOMAN"

In his charge to the jury, Holroyd made the first known statement of "consent to force", when he claimed that Mary Ashford, while being held down, probably consented to sex. The use of force did not negative any consent given

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<sup>238</sup> As Davidoff, "Class and Gender", p.40, noted for the mid-Victorian middle class/servant liason between Munby and Hannah Cullwick: Their "games of mastery and submission" were radically unequal because "[a]ll of this happens at the will of the middle class male protagonist who creates the situation and engineers the transformation."

<sup>239</sup> Hartman, p.58-9: Increasing religious seriousness in the late fifteenth century led to laws closing municipally supported brothels.

<sup>240</sup> Clark, The Struggle, p.42, called the result a "sexual crisis", following Wrigley and Scholfield, and John Gillis in For Better, for Worse (1985); on p.49, she cited Nicholas Roger's evidence from London Poor Law illegitimacy records, (in "Carnal Knowledge", Journal of Social History (1989), pp.355-75, at 359-62) which showed a history of increasingly long-term relationships in the accounts of single mothers abandoned after pregnancy. Some 30% had been in common law unions before they were abandoned in 1800, up from only 3.5% cohabiting before 1735, and 5% from 1738-1752. Rogers ascribed this rise in common law unions and subsequent abandonment to journeymen's growing difficulties becoming masters.

<sup>241</sup> Hall, pp.2-3.

<sup>242</sup> "Anomie" was originally coined from Greek roots meaning "without law" by Jean Marie Guyau, and borrowed by Emile Durkheim in Suicide (1897). Durkheim's anomie is usually explained as "normlessness" or "purposelessness". It occurred, as Durkheim claimed for Third Republic France, after industrialization had dissolved earlier cultural norms, but individuals had not been able to replace them with a new system of norms. See Marco Orru, "The Ethics of Anomie", British Journal of Sociology, (1983), pp.499-518.

verbally, or merely by ending her struggling, as it would now be understood to do;<sup>243</sup> in fact, force changed her intention to consent. Force persuaded Ashford to give sex to Thornton because it showed how seriously he wanted sex.<sup>244</sup>

Holroyd suggested Ashford yielded out of pity, that she was generous to Thornton because his violence proved he "needed" sex with her. He interpreted her as a sexually submissive, caring and selfless woman who owed Thornton sex, even though they had just met that night. He claimed this scenario was so probable it amounted to reasonable doubt about the motive for murder.

It was as if working class Ashford was an automatic part-time wife who fell under a duty to meet the sexual needs of any man who got her alone. He constructed Ashford as a woman who ought to be available--a "public woman", a whore, but with a feminine "heart of gold".

Holroyd's imagined construction of working class sexual mores was not at all like the traditional folk sexual culture. Holroyd accepted a view of sex that made the casual sexual use of a woman like Ashford possible to any man who really wanted sex, because forceful passionate desire would readily persuade her. He imagined Ashford to be a kind of woman she was very unlikely to be. He imagined her as a woman any man could go to to relieve pressing sexual needs--imagining male sexuality according to the ahistorical "hydraulic" model of sexuality for which Porter criticized Edward Shorter. Male sexuality in this model was part of "nature", and rape was inevitable whenever marriage was restricted or late.<sup>245</sup> Holroyd's description of consent to force amounted to a legal endorsement of libertinism: the treatment of commoner women as "catches" to be used without mercy. That this endorsement of libertinism defined the official moral code of the nation, by defining the sexual assumptions to be applied in the law of rape, boded ill for the social peace of Britain.

While the ideal of a well-ordered social world was not seriously threatened in the first half of the early nineteenth century in England<sup>246</sup>--most "radicals" looked backwards to a world of fair prices and wages, "moral prices", set by

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<sup>243</sup> In Canadian law, force or threat of force negates consent to any sort of assault, by *Criminal Code Section 265 subsection 3*: "no consent is obtained where the complainant submits or does not resist by reason of (a) the application of force to the complainant or to a person other than the complainant; (b) threats or fear of the application of force" to any person; "(c) fraud; or (d) the exercise of authority." S. 273.1 subsection (1) defines consent to sexual activity as "voluntary agreement of the complainant to engage in the sexual activity".

<sup>244</sup> See passage from Holroyd, *Observations*, pp.24 and 87, quoted in Clark, *Women's Silence*, pp.114-5: "...after some efforts to get away, and struggle and resistance at first, [she] yielded, a yielding obtained most probably reluctantly, and by artifice, promises and oaths, and urgent importunity, to which [by] her own extreme imprudence in remaining alone with a man...she was unfortunately exposed."

<sup>245</sup> Porter, "Rape", p.219, discussing Shorter, "On Writing the History of Rape".

<sup>246</sup> Pearson, pp.160-2, contrasts fearful middle-class rhetoric about the Chartists of the 1830s and '40s, which identified them with "juvenile delinquency", ignorance and irreligion, with the real movement: "respectable artisans and working men, with a liberal sprinkling of shopkeepers, teachers, parsons, doctors,

(continued...)

tradition<sup>247</sup> and not by the marketplace--there were increasing numbers of people who could not view their lives as embodying a certain place in the well-ordered polity. These unfortunate people were marginalized to such an extent that there really was no "place" for them.<sup>248</sup>

Holroyd defended the idea of libertinism by reconstructing Ashford's submission as consent, for the sake of a male privilege which was most salient to gentlemen like Holroyd himself, not working-class accuseds like Thornton. Libertinism demanded a group of females to be defined as prey:

...[I]f society was to allow men comparative sexual freedom and at the same time keep single women virgin and married women chaste than a solution had to be found...The answer lay in prostitution and the widespread view that a class of fallen women was needed to keep the rest of the world pure.<sup>249</sup>

If there had to be female prey, it was obvious that they must be working class.

The middle-class fetishist, A.J. Munby, sexually obsessed with the dirty calloused hands and sunburned faces of working class girls, rejoicing in collecting photographs of them in positions of hard manual labour, described workingwomen as marvelously open and approachable: "They are accustomed to be close-questioned about themselves by mistresses and to be called 'Anne' or 'May' by anyone who chooses to address them." Historian Leonore Davidoff pointed out Munby was blind to his own class privilege, because he

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<sup>246</sup>(...continued)

publishers...infused with a radical and populist Christianity" marching along to the "'Old Hundredth' [Hymn] with God on their side". This was the most serious working-class threat to the status quo before the 1880s, when international socialism and anarchism began to appear in the U.K.

<sup>247</sup> See EP Thompson, "The Moral Economy of the Crowd", pp.185-258 in Customs in Common, at 193-200. By 1800, traditional "just prices" were falling into disuse most of the time. In 1775, the Elizabethan statute against "forestalling" (hoarding) grain had been repealed. But food riots during times of dearth could enforce them; wise authorities reverted to the customs, including allowing small buyers first right to buy in times of scarcity. Thus, Chief Justice Lord Kenyon declared that forestalling remained a Common Law offense in 1795, one of the worst harvesttimes. See also Elizabeth Fox-Genovese, "The Many Faces of Moral Economy", Past and Present (1978), pp.161-8; E.J. Hobsbawm, "Custom, Wages and Work-Load in Nineteenth Century Industry", in Labouring Men, pp.344-70; R. Solow, The Labor Market (1990), pp.5-10; Robert Storch, Popular Culture and Custom (1982); and Stephen and Eileen Yeo, eds., Popular Culture and Class Conflict (1981).

<sup>248</sup> The phenomenon of people losing a traditional "place" and facing an economy which had no use for them, accelerated at about the same time as Rev. Thomas Robert Malthus wrote his famous Essay on the Principle of Population, in 1798, which introduced the phrase "surplus population".

<sup>249</sup> Keith Thomas, "The Double Standard", Journal of the History of Ideas (1959), pp.195-216, at 197. Thomas noted this attitude from as far back as Augustine; he noted Bernard de Mandeville, who wrote A Modest Defence of Publick Stews (1724) as well as The Fable of the Bees (1714) which famously argued for consumption economics as a defence of the public virtues promoted by private vices, as a prominent eighteenth century source, and W.E.H. Lecky, in his History of European Morals (London, 1913), II, pp.282-3, as a twentieth century endorsement of treating the prostitute as "'the eternal priestess of humanity, blasted for the sins of the people.'"

does not acknowledge that this quality...was a result of his position as a dominating middle-class man, who for sixpence could feel a girl's palm or for a shilling could take her to a photographer to have her picture taken in whatever pose he chose to put her. It was economic necessity combined with the service role, which made his "wenches" so available.<sup>250</sup>

Libertine sex demanded disposable women. Holroyd's charge to the jury proclaimed that if a man wanted a woman like Ashford, and was frustrated, she must bear the brunt of his disappointment. If he was satisfied, she fulfilled her use and was of no further concern to him. She could not access any tools of moral reproach. The rape law's foregrounding of male desire was an amoral and asocial approach to premarital heterosexuality, distinct from traditional courtship, because it refused to limit men's means of sexual "persuasion" of women.

Holroyd did not explicitly allow libertines to murder women in order not to be encumbered by demands to support their bastards. But the physical well-being of women was not an active concern to him. The logic of libertinism was sadistic--any force required, no matter the bodily consequences for women, was justifiable to obtain male pleasure. Bourgeois lack of concern for lower class females' bodily well-being drew from Sadism,<sup>251</sup> so did the sleight-of-hand justification for treating women not of one's class as disposeable, by equating them with prostitutes. After all, prostitutes were highly visible sexual objects theorized not to be real "women", but sufferers from gynaecological problems, overabundant male hormones or even chromosomal mutations, because they violated the norm of female sexual passivity.<sup>252</sup>

As bourgeois thinkers defined gender normalcy in terms of men involved in a "rational" "public sphere" and women "sheltered from the winds of change" in a "private sphere", they desexualized both working class men and women at the altar of production of goods: "middle class reformers did not admit plebeian men into the public sphere or allow plebeian women to remain at home; rather they expected all plebeians to work at strenuous labour for low wages."<sup>253</sup> Along with disabling workingmen, middle class ideology justified sexual exploitation of workingwomen because they were not truly womanly. By the end of the century, working class women's sexuality was compared to "wild beasts".<sup>254</sup>

Libertinism was defended by the Marquis de Sade as republican political philosophy during the French Revolution. Pushing individualism to an extreme, de Sade argued for women's freedom to have extramarital sex, but only

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<sup>250</sup> Davidoff, "Class and Gender", p.35, quoting Munby's diary.

<sup>251</sup> Ibid., p.58, noted Munby's inability to take Hannah seriously when she complained of physical injury or illness: "Munby's 'not seeing' Hannah's distress and physical exhaustion was part of the natural relationship of the servant/wife."

<sup>252</sup> Edwards, pp.24-5, citing W.R. Greg, a social scientist and doctor, "Prostitution", in The Westminster Review, #53 (1850), p.457.

<sup>253</sup> Clark, The Struggle, p.91.

<sup>254</sup> Edwards, p.55, quoting the Illustrated Police News, 27 June 1896, "Women Act Like Wild Beasts", a report purporting to be from a man describing the women in a working class neighborhood.

if they gave up the right to refuse any man's sexual requests. He wanted all women to be "public women"--forced to commit adultery and fornication--to solve the traditional problem adulterous women represented to a lineage system requiring known paternity of heirs.<sup>255</sup>

Of course Sadean philosophy never became the orthodoxy of the bourgeois, in France or in England. Under Napoleon, revolutionary individualism was limited and private male ownership of women confirmed. But this re-privatization was premised on rejection an alternative of mass legitimated rape: a Tory paper, the Reformer's Guide or the Rights of Man Considered, (packaged to ape the real radical journals which were being read in industrial districts in 1816), warned workingmen that Radicals advocated

an equal right to the property of others...[T]he same argument...would palliate and excuse the violation of their wives and daughters...Be thankful you are an Englishman...Read your Bible...Keep your wives and daughters at home.<sup>256</sup>

Political philosophy reflected Stranger Danger. As historian Lynn Hunt summarized:

In the early nineteenth century, a set of parallel concerns began to occupy writers about social problems: worries about the effects of prostitution, of women acting politically, and of childhood masturbation, for example, all reflected anxieties about the bodies of those who had been excluded from the political order. All were imagined as powerful sources of disorder, confusion, and even degeneration of the race...[T]he position of women (and the relationship of children with their parents) would preoccupy a pivotal figure such as Sade.<sup>257</sup>

We can see in the orthodox reaction to de Sade that the idea of Stranger Danger was already in the air before the changes in rape law after the Thornton case. Thornton confirmed and "legalized" the notion that women need protection against rape by random strangers, and that this protection must come from men they know privately, on whom they are usually financially dependent.

When Holroyd charged the jury in Thornton, he referenced and legitimated a sadistic philosophy about sex and women's bodies. His nonchalance about Ashford's suffering finessed the biggest evidentiary problem in his theory of the crime, the amount of blood Ashford lost:<sup>258</sup> the sheer quantity of blood washed away any rational possibility of her consent.

Holroyd was not alone in his nonchalance about female suffering, or in believing it was possible for suffering to coexist with meaningful female consent to sex. Sadean ideas were an undercurrent among many streams of elite thought in the 1810s. Holroyd used a medical witness, a surgeon, to theorize that Mary Ashford bled so profusely from a

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<sup>255</sup> Lynn Hunt, The Family Romance, pp.138 and 141.

<sup>256</sup> EP Thompson, The Making, p.744. The Reformer's Guide was published in Leeds.

<sup>257</sup> Hunt, The Family Romance, p.138.

<sup>258</sup> Hall, pp.6-8, 76, and 78-89.

combination of defloration and a heavy menstruation.<sup>259</sup>

But Ashford's menstrual flow would have had to be so heavy that her female associates would have noticed, heavy enough to cause a large pool on the ground through petticoat and skirt.<sup>260</sup> When the surgeon argued that suffering did not negate consent, he referenced a morbid construction of natural female bodily processes. Many medical men believed a woman naturally involved horrific suffering. This was the leading edge of gynaecological thinking in the 1810s.<sup>261</sup>

Physicians did not necessarily have the best understanding of female bodily realities. Other women might have given Holroyd better evidence than the surgeon. Given the close proximity in which servants lived, if Ashford normally had profuse monthly bleeding other women would have known; standards of hygiene were low, and women used reuseable cloths. Most infanticide and abortion cases--which became so numerous that "Concealment of Birth" was called the "Great Social Evil" or "Sin of the Age" by the 1850s and '60s--relied on evidence from other women about the accused woman's suspicious behaviour and disposal of bloody bundles.<sup>262</sup> Bodily privacy for a servantgirl was almost nonexistent.<sup>263</sup> The silence of other females compounded the tragedy of the silence of Ashford's corpse in Thornton: male assumptions about female bodies went unchallenged.

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<sup>259</sup> Hall, pp.12-3: Mr. Freer at the inquest suggested the bleeding was not natural to defloration, but that "two lacerations, due to a sexual connection...had probably been effected by force and against her will". At the trial, pp.97-8, he stated that "[t]here might have been laceration though the intercourse had taken place by consent", but he equivocated: "The menses do not produce such blood as that" and "[t]here was an unusual quantity of blood." Nevertheless, Holroyd twice repeated to the jury that the "connection" had taken place before Ashford had gone back to Mrs. Butler's, and the bleeding was not unusual, pp.109, and 111.

<sup>260</sup> Porter, "Rape", p.226, said Holroyd's opinion was based on the surgeon's evidence, which was typical of "contemporary forensic medicine"; Porter cited as an example G.E. Male, Epitome of Forensic Medicine (Philadelphia, 1819), p.229.

<sup>261</sup> Edwards, pp.73-84, and 90-99. Laqueur, Making Sex, pp.221-2: Menstruation, often confused with ovulation or even orgasm in the nineteenth century, was described as an horrific wounding, or fundamental crisis, making extreme suffering part of the very nature of a woman.

<sup>262</sup> See "Child Murder-Obstetric Morality", in the Dublin Review, 45, 1858, p.54. Cited in George Behlmer, "Deadly Motherhood", Journal of the History of Medicine (1979), pp...., at 404. See also: Ann Higginbotham, "'Sin of the Age': Infanticide and Illegitimacy", Victorian Studies, (1989), pp.319-37. In 1862, William Ryan's Infanticide (1862) described small suspicious bundles and disturbing smells from decomposing infants "everywhere", pp.45-6. Josephine McDonagh, "Child-Murder Narratives in George Eliot's Adam Bede", at pp.228-33 cited the mid-century obsession to explain the infanticide in George Eliot's Adam Bede, written in 1857, but also found literary forerunners to Eliot's infanticide plot, from William Wordsworth (1798), Goethe (1808), Sir Walter Scott (1818), Thomas Carlyle (1843), Dickens (1844), Elizabeth Barrett Browning (1848), and Alfred Lord Tennyson (1855); Eliot dated Adam Bede's action in the period 1792-1807, and recalled a family tale about an infanticide case of 1802 in Nottingham, p.229-32.

<sup>263</sup> See Laura Gowing, "Secret Births and Infanticide", Past and Present (1997), pp.87-115, discussed further in Chapter Three.

That libertinism declared open season on certain types of women, easy to locate and stalk, coalesced with the degradation of some ordinary people to produce a huge population of poor women who prostituted in Regency and Victorian cities. Those who were so poor experienced life as such a gamble that the traditional courtship tactics to arrange longterm subsistence were irrelevant. Their women would resort to prostitution from time to time, to fill bellies.

Holroyd's Sadean construction of Ashford as public woman was applied indiscriminately to all workingwomen, all the time. He believed Ashford was a properly virgin maiden; if he treated her as a prostitute, he could do the same to any obedient servantgirl going about the business of finding a husband in the traditional manner. Holroyd's doctrine did not allow for the distinctions between respectable and "rough" working class people which these were becoming crucially important to ordinary people enduring the stress and flux of early industrial Britain.

In the late eighteenth century, especially in London, the very marginalized poor were joined by artisans, higher up the ranks of common people, who formed longterm common law relationships, and passed for married. It is not possible to determine whether the children of these couples--legally illegitimate--were counted as bastards or not,<sup>264</sup> but their increased numbers were related to economic and social stress, the novel difficulties of artisans in declining trades.<sup>265</sup> An insecure group, formerly respectable, these artisans must have felt that the disorderly poor were snapping at their heels. The image of the prostitute loomed larger than the reality and increasingly obscured the realities of other women whose chastity was disputable.

From the 1780s more commoners lived common law, but by the 1820s, that a woman was living common law became ammunition to demean her reputation in the East End of London. By then, the quest for respectability was an obsession for many working class people. Living common law caused gossip and led to defamation cases in the London Consistory Court.<sup>266</sup> Being called a whore was a serious problem: "...[T]hey lived in a society where magistrates, charity officials, clerics and constables could punish them, for deviating from middle class standards."<sup>267</sup>

"Whore" could mean prostitute, but was used mostly for adultery or fornication, including living common-law as a spinster or a woman unofficially separated from a real legal husband. "Whore" was increasingly used by women who were themselves common law wives, against other women for living common law, showing a deterioration in women's

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<sup>264</sup> Laslett, Family Life, pp.147-59: Figures for the Metropolis of London, including the slum areas, are difficult to ascertain because of poor preservation of parish registers before 1851; some of the London rates of illegitimacy after the census began in 1851 are so low that Laslett doubted their accuracy. But urban areas generally had far lower illegitimacy than the countryside. It seems likely that either many of the late eighteenth century common-law unions gave rise to births which were not recorded as illegitimate or their births were missed altogether.

<sup>265</sup> Clark, The Struggle, pp.15-7. Francis Place, originally a leather breeches-maker, was in a declining trade in the early 1790s when leather breeches became less fashionable. Place legally married, but was the product of a common-law marriage. See Miles, Francis Place.

<sup>266</sup> *Ibid.*, pp.52-3.

<sup>267</sup> *Ibid.*, p.51.

solidarity with other women.<sup>268</sup> "...[P]lebeian culture was just as implicated in power relations" as the bourgeois and the elite.<sup>269</sup>

But the sexual reputation problems of the wives of London artisans were still quite distinct from those of women involved in prostitution. For the lowest rank of the "lower orders", prostitution led to very different cross-class couplings than those romanticized for middle class female novel readers. Given widespread prostitution of the urban poor, it was inevitable that gender ideology and the rape law's treatment of rape complainants would become deeply inflected by social class issues, masquerading as concerns about women's sexual morality.

The consequences of prostitution for the vendors were not as bad as they were made out to be in classic literary depictions of "fallen women".<sup>270</sup> Prostitution was certainly not worse than starving, which remained a real possibility for unskilled, casual labourers.<sup>271</sup> Many of the prostitution issues which cause controversy among feminists in the modern era could be as easily illustrated by nineteenth century sex workers: prostitution carried a high risk of violence, disease, and

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<sup>268</sup> Ibid., pp.54-5.

<sup>269</sup> Ibid., p.52.

<sup>270</sup> Walkowitz, Prostitution and Victorian Society: real prostitution was strikingly different from the classic Victorian narrative of the whore's early death. The classic depiction is the "Harlot's Progress", William Hogarth's six prints: from country girl met by a bawd, through to the whore's death by venereal disease, and a funeral among associates who steal her goods (original paintings 1731, prints 1732, see <[www.litencyc.com](http://www.litencyc.com)>, entry in Literary Encyclopedia). James Northcote's 1796-7 "Diligence and Dissipation" prints contrasted the "Good or Modest girl" and the "Wanton girl": the bad girl not only has male visitors, but is a bad housekeeper; she dies in poverty after losing her work for pregnancy, while the good servant marries the employer--the mistress (who had shown the bad girl the door) having mysteriously disappeared (<[www.philaprintshop.com/northcote.html](http://www.philaprintshop.com/northcote.html)>). In the nineteenth century, the basic scenario was complemented by prostitute as "social victim" and "true woman" despite sexual stain. Robert Garnett, "Oliver Twist's Nancy", Religion and the Arts (2000), pp.491-516: Dickens' (1837) Nancy was a "true woman" imprisoned in sinful flesh as a prostitute, partly because of her status as fallen, mostly because she remained loyal to Bill Sikes despite his wickedness. Yet the Nancy who cannot free herself from sin was still able to rescue Oliver. See also the treatment of Mary Barton's Aunt Esther in Elizabeth Gaskell's Mary Barton (1848): Marcy Hess, Discursive Decontamination, Dissertation, University of Alabama, 2001, noted, pp.55-9, and 62-73, that Esther's superior mobility as a street prostitute, along with her true woman's soul, enables her to save her niece and brother-in-law by solving a murder mystery--and to help her niece recognize the identity of the best man for her, a man of her own class. Hess argued Gaskell went further than Dickens to rehabilitate the prostitute: not only was Esther maternal, but her prostitution itself was due to maternal love: "it is a mother's love and concern for her child's very survival that forces her to offer her body as a commodity" (p.71).

<sup>271</sup> Laslett, The World, Chapter 9, "After the Transformation: English Society in the Early Twentieth Century", noted at p.200 that, in 1901, nearly 25% of the population were still in poverty, as defined by Seebohm Rowntree in Poverty (1901), his house-to-house survey of conditions in York: "total earnings are insufficient to obtain the minimum necessities for the maintenance of merely physical efficiency." 25% experienced hunger and were in danger of being stunted by lack of nutrition.

social opprobrium;<sup>272</sup> but it was one of very few "female trades" whereby a working class woman could earn as much as a skilled workingman.<sup>273</sup>

Prostitution did not make a young woman unmarriageable before the *Contagious Diseases Acts* of the 1860s.<sup>274</sup> Before then, prostitution, usually part-time, was a passing phase, a "stop-gap" resorted to when a young woman was in dire economic need.<sup>275</sup> When prostitutes grew out of the peak prostitution years of late teens to early twenties, many married--to men of the same "rough", disorderly section of the working classes as themselves.<sup>276</sup> Prostitution did not represent the general "mores" of the common people. It was one of many misfortunes poor woman might encounter. The attitude of poorer workers to neighbour women who prostituted included a "there but for the grace of God go I" attitude.

Prostitution was associated with lack of parental protection, supervision, care and provisioning for young women. Economically stable families (with both parents present and the father working), reduced the chances of their daughters being forced into the trade: Most of the young women recorded under the *CD Acts* registration scheme were complete

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<sup>272</sup> Walkowitz, *Prostitution*, p.13: most dire descriptions and predictions of inevitable death at a young age were in Evangelical tracts. But from the 1840s (pp.36-9), statistical investigators prostitutes as "social casualties of cataclysmic developments". The model for British sociologists of prostitution was A.J.B. Parent-Duchatelet's *De la prostitution dans la ville de Paris* (1836), a systematic demographic study of 12,000 prostitutes registered between 1816-31. His findings were replicated in England, though the datasets for England were far less systematic than Parent's in Paris: Prostitution was a transitional occupation of young women from families of the working poor; most did not die but reentered ordinary working class life after their mid-20s. Nevertheless, Walkowitz cautioned (p.31): "...[I]t did not free women from a life of poverty and insecurity, and further subjected them to physical danger, alcoholism, venereal disease, and police harassment."

<sup>273</sup> *Ibid.*, p.23: Especially in the West End of London, a higher-class market for better-looking girls, prostitutes could obtain as much as a pound from one customer, a rate that could allow them to save a stake to open a business after retirement. Other markets were not so lucrative, and many women adjusted the prices to the customer's class or seasons of the year. For the ports of Plymouth and Southampton, the work was very irregular, but "[w]hen the ships came in a prostitute, even a sailor's woman, could easily earn the weekly wages of a respectable workingwoman in a day" (p.195). This gave them an income equivalent to a skilled workingman over the year.

<sup>274</sup> *Ibid.*, pp.196-7: Prostitutes left the business to settle down with men at the same time as other working women married, their mid-20s; they married, or became longterm sailors' concubines, essentially common law wives. But after the *CD Acts*, stigmatization made prostitution hard to exit--the women became older, and the communities they resided in identified them as prostitutes: they had to enter well-known Lock Hospitals for examinations during daylight hours. See also Walkowitz, "The Making of an Outcast Group", in Roger Matthews and Maggie O'Neill, *Prostitution* (2002), pp.83-109.

<sup>275</sup> Clark, *Women's Silence*, pp.21-2, 27-8, and 31-3.

<sup>276</sup> Walkowitz, *Prostitution*, p.15, noted they were "unskilled daughters of the unskilled classes" (quoting Abraham Flexner, *Prostitution in Europe*, NY, 1914, p.6). A high proportion had been servants, p.16; a substantial minority had been seduced by masters, but more lost their virginity around 16 with a working class partner. Prostitutes could be well-integrated in neighborhoods of unskilled workers, p.29, although they were not well-tolerated by artisans or the Irish.

orphans or half orphans (having lost one parent, usually the father).<sup>277</sup> Chastity was a sign that a working class girl had been cherished and nurtured to the greatest degree possible.

Prostitution could be "lived down" precisely because it was kept secret. Working class communities could be forgiving if ex-prostitutes did not make their pasts too obvious: they recognized the limited control these women had over economic fate. Prostitution was not romanticized as a glamorous lifestyle. Working people were down-to-earth about it, viewing it as a reflection of poverty. But working people did not approve of unnecessary prostitution, in a girl who was employed.

Prostitution was not conducted with the innocent openness of Mary Ashford, who followed Thornton without any attempt to disguise her movements: she treated going with him as if it were cause for celebration, not something disreputable. But in the atmosphere created by her murder, it became important to disprove that rape victims were involved in prostitution; this is still the case today.<sup>278</sup> Before, however, it is unlikely that anyone would have thought of Ashford as a possible prostitute. Legal skepticism of raped women's respectability and chastity was a red herring, directing attention away from more typical cross-class scenarios: between master and servant--scenarios which were notorious among the working class but almost completely reduced to silence at law. Given the shape of working women's employment, the most numerous cross-class sexual transactions were secret occurrences within households employing young women servants. These were painful and dangerous realities women could do little to avoid. For typical female domestic servants, from increasingly poor backgrounds as the nineteenth century wore on,<sup>279</sup> the "classing" of sexual morality and the increasing evidentiary rigours of the rape law conspired to make it more likely that, if sexually harassed in her Master's family, she would keep silent.

## F. SUMMARY: LAW AND THE CONSTRUCTION OF A "NEW NORMAL" FOR SEX

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<sup>277</sup> *Ibid.*, pp.16-7, 20: Proportions of orphans went as high as 90%, and never less than half, of all samples of registered women. Less than one-third on average had both parents living. This is about twice the proportion of half and full orphans found by Anderson for the population of Preston in 1851, see Family Life in Nineteenth Century Lancashire (1971), p.148. See also Tilly, Scott and Cohen, pp.237-9: Alain Lottin ("Naissance Illegitimes et Filles-mere a Lille au XVIIIe siecle", Revue d'histoire moderne et contemporaine, (1970), pp.278-322 at 301) noted most unmarried mothers forced to answer questions in Lille during the eighteenth century, were half-orphans with no "avenging father" to enforce marriage; in 1836, Parent reported that the majority of prostitutes were migrants from the countryside, and one-third were former domestic servants who had been seduced with promises of marriage, became pregnant and were abandoned. They described their prostitution as necessary to feed children or pay for wet-nurses. Henry Mayhew, London Labour and the London Poor, heard much the same in 1851 (V. IV, pp.220, 255-6): they prostituted to support illegitimate children, preferring it to workhouses.

<sup>278</sup> Edwards, pp.53, 55-6, 59-61, a process beginning around 1800 and continuing to the early 1980s, when Edwards wrote; for our time, see Sherene Razack, "From Consent to Responsibility, From Pity to Respect", Law and Social Inquiry (1994), pp.891-922.

<sup>279</sup> Hartman, p.57, notes that an increasing preponderance of servants were drawn from the poor, a trend beginning from the eighteenth century, and accelerating in the nineteenth century.

Before the violence erupted on May 27, 1817, the most important fact by which their peers would have judged Mary Ashford and Abraham Thornton was that a semi-skilled man in the building trades, and a servant girl from a rural farm, would have made acceptable marriage partners. For Thornton to have approached Ashford as a possible bride was the "normal" thing, what was to be expected, to the adults who still policed the morals of their young in rural society.

Why then was Ashford's behaviour considered morally questionable? How did the idea get started to blame the young woman, because she went alone with a man into the fields, for the violence that the man unleashed in the semi-private location? Mary Ashford's behaviour became morally impugnable, because rape law began to expound a particular legal discourse to judge women's characters on chastity, rather than controlling men's violence.

Ideological currents originating above Ashford's class level caused increasing strain for working class rape victims in the half century after Thornton, as bourgeois men increasingly obtained social and political power to match their economic importance in industrial Britain. The challenge of individualism impacting a culture of deference caused problems in the middle class family--and led to increased class scapegoating, sexualizing, and victim blaming of working class women.

The next chapter will explore how anxieties over male control of marital sexuality in the new culturally dominant middle class affected the great mass of rape victims, working class women, and the manner in which rape law was implicated in that process.

# CHAPTER TWO: WHAT IS A GOOD GIRL?: THE SEXUAL CONTRACT AND THE RAPE LAW

## A. INTRODUCTION: REACHING FOR SEXUAL AUTONOMY

At the highest level of the Canadian judiciary, the former Madame Justice L'Heureux-Dube of the Supreme Court of Canada admitted the relationship between rape law and women's status as citizens.<sup>1</sup> Because rape is a crime that occurs predominantly to women and is perpetrated primarily by men, and because women cannot control whether they will be victimized or not, rape has a broad social meaning. The way rape law works at the social level makes a political point about the exclusion of women from power: women do not have enough power in or over the legal system to protect themselves.

However, opponents of feminism mounted an elegant defence to the devastating political implications of underperforming rape law: they argued that women are not randomly victimized by rape, but singled out for reasons under their control, for which they can be faulted. The idea of Stranger Danger was used to reduce sympathy for "bad" raped women, and to console other women by promising: if they avoid being caught alone by strange men, they will be safe from rape.

Raped women have been efficiently isolated through rape myths. Women who have not been raped are promised that they will not be raped if they are "good"--until they get raped. Then, formerly "good" women find the consolation empty: they are redefined as "bad", risk-taking, women. But because they are now "bad", they cannot teach this hard lesson to "good" women, from whom they are now isolated.

Rape myths function as gender ideology, setting out rules which determine women's social acceptability. With its policing of women as "good" or "bad", rape law became the judge of feminine propriety. The cliché--that in rape cases, the complaining witness becomes the real "accused" whose guilt is to be measured, while the defendant basks in the

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<sup>1</sup> See L'Heureux-Dube, dissent in Seaboyer [1991] 2 S.C.R. 577 at 649.

sympathy of the men in the courtroom<sup>2</sup>--was true from the early nineteenth century, and remains largely true.<sup>3</sup>

As a tool of gender ideology, rape law from the nineteenth century onwards built complex relationships between female identities--"maiden", "wife", "mother" and "prostitute". But the categories were not watertight, and slippage between categories became a management problem for the forces who wanted to keep women isolated in order to mystify the societal-level operation of rape law. Victorians believed in "good" women who would never be tempted to engage in illegitimate sex, but they were obsessed with good women who "fell", going "bad" for reasons that hinted at the culpability of men.<sup>4</sup>

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<sup>2</sup> Although four of nine Supreme Court of Canada judges--and the Chief Justice--are female, only 25.8% of federally appointed judges were female in 2003. See Target Groups Project, Women and Men in Canada, Statistics Canada (2003 version) available from <<http://epe.lac-bac.gc.ca/100/200/301/swc-cfc/>>Figure 51, "Distributions of Positions of Power", p.28. Laurie Goering, "In Africa, Women are Vanguard of Progress", Chicago Tribune, Aug. 10, 2006: Rwanda was the only country in the world with near numerical parity between women and men in power positions, at 48% female legislative members and 50% judges. However, since the 1994 genocide, Rwanda has had more women than usual in the population.

<sup>3</sup> This is the premise of "The Accused", the 1987 Jonathan Kaplan movie starring Jodie Foster as the raped woman Sarah Tobias. Her reputation is destroyed by defence arguments that she consented to public sex in a bar with three strange men. "The Accused" remains a powerful cultural reference: see Tanya Horeck, Public Rape: Representing Violation (2004), Sarah Projansky, Watching Rape (2001), Jacinda Read, The New Avengers (2000), and Lisa Cuklanz, Rape on Trial (1996). "The Accused" was based on a real 1983 New Bedford MA case. But its representation of the gang rape is problematic: Martha McCaughey and Neal King, "Rape Education Videos", Teaching Sociology (1995), pp.374-88, discussed how the "scary man, victimized woman" scenario can reenforce eroticization of rape in men influenced by rape myths, rape fear and despair of the possibility of resistance in women, and male desire to "protect" women by chaperoning them. This does not deny the film's criticism of a criminal justice system still biased against victims: see Eschholz and Vaughn, "Police Sexual Violence and Rape Myths"; Kwong-leung Tang, "Cultural Stereotypes and the Justice System", International Journal of Offender Therapy and Comparative Criminology (2000), pp.681-91; Patricia Hughes, "From a Woman's Point of View", University of New Brunswick Law Journal (1993), pp.341-7; S. Lees, Carnal Knowledge (1997); Ronet Bachman and Raymond Paternoster, "A Contemporary Look at the Effects of Rape Law Reform", The Journal of Criminal Law and Criminology (1993), pp.554-75; Julie Horney and Cassia Spohn, "Rape Law Reform and Instrumental Change", Law and Society Review (1991), pp.117-51; Kenneth Polk, "Rape Reform and Criminal Justice Processing", Crime and Delinquency (1985), pp.191-205; Wallace Loh, "The Impact of Common Law and Reform Rape Statutes", Washington Law Review (1981), pp.543-625; and H.S. Field, "Attitudes Toward Rape", Journal of Personality and Social Psychology (1978), pp.156-79. For specific problem areas, see: P.R. Sanday, A Woman Scorned: Acquaintance Rape (1996); and K. Painter, Wife Rape, Marriage and the Law (1991). The classic second wave feminist analysis is Susan Rae Peterson, "Coercion and Rape" in R.A. Elliston and J. English, eds., Feminism and Philosophy (1977), pp.360-71.

<sup>4</sup> Monica Fryckstedt, Elizabeth Gaskell's Mary Barton and Ruth (1982); Deborah Morse, "Stitching Repentance, Sewing Rebellion: Seamstresses and Fallen Women" in Vanessa Dickerson, ed., Keeping the Victorian House (1995); Dorothy McGavran, "Ruthless for Reform", Postscript (1995), pp.39-49; Peter Stiles, "Grace, Redemption, and the 'Fallen Woman'", The Gaskell Society Journal (1992), pp.48-66; Diane D'Amico, "'Equal Before God': Christina Rossetti and the Fallen Women", in Antony Harrison and Beverly

(continued...)

The plight of seduced women, especially those who had sex after a fraudulent promise of marriage, was close enough to the experiences of married bourgeois ladies to serve as a bridge for sympathy between "good" and "bad" women. Some respectable women questioned the use of rape law to support patriarchal marriage. The possibility of a ghost in the machine, an ordinary man behind the implacable authoritative voice, like the Wizard of Oz,<sup>5</sup> fascinated bourgeois "ladies" who believed in absolute chastity for women. The unspoken question, "What about demanding chastity from men, who 'ruin' women but walk away unscathed?", clamoured in the subconsciouses of proper ladies, until it burst forth into feminist activism against predatory male sexuality.<sup>6</sup>

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<sup>4</sup>(...continued)

Taylor, eds., Gender and Discourse in Victorian Literature (1992), pp.67-83; George Kennedy, "Women Redeemed", Dickensian (1978), pp.42-8; Nicola Harris, "An Impure Woman", Thomas Hardy Yearbook (1998), pp.18-21; William Davis, "The Rape of Tess", Nineteenth Century Literature, pp.221-31; Ellen Rooney, "A Little More than Persuading" in Lynn Higgins and Brenda Silver, eds., Rape and Representation (1991), pp.86-114; Anthony Redford, "Lost Girls in Hardy and Lawrence", Southern Humanities Review (2004), pp.217-43; Paula Roy, "Agent or Victim", in Jerilyn Fisher, Ellen Silber and David Sadker, eds., Women in Literature (2003), pp.277-9; Melanie Williams, "Tess of the D'Urbervilles" in Michael Freeman, Andrew Lewis and Anthony Julius, eds. Law and Literature (1999), pp.167-90; Nadya Chisty-Mujahid, "Scarred and Healed Identities", Victorian Review (2004), pp.58-80; W. Gareth Jones, "George Eliot's Adam Bede" in Jones, ed., Tolstoi and Britain (1995), pp.79-92; Leslee Thorne-Murphy, "Prostitute Rescue, Rape and Poetic Inspiration", Women's Writing, (2005), pp.241-57; Susan Brown, "Economical Representations", Victorian Review (1991), pp.78-95; Sarah Goodwin, "Wordsworth and Romantic Voice", in Leslie Dunn and Nancy Jones, Embodied Voices (1994), pp.65-79; Amanda Anderson, Tainted Souls and Painted Faces (1993); and Deborah Nord, "The Urban Peripatetic", Nineteenth Century Literature (1991), pp.351-75 and Walking the Victorian Streets (1995). Many depictions of fallen women as unjust victims of men were written by middle class respectable "ladies". Elizabeth Gaskell even questioned whether fallenness was irreparable: Sara Malton, "Illicit Inscriptions", pp.187-202, discussed how the fraud committed by Gaskell's Ruth (1853)--who pretended to be a widow so that her illegitimate son did not stop her from working as a governess--revealed her employers', the Bradshaws', bad judgment, because they believed unwed mothers were morally unfit, but Ruth performed admirably: "Scientific" classifications of "fallenness" which permanently inscribed the fallen woman and her child as degenerate were revealed to be meaningless (p.189).

<sup>5</sup> See L. Frank Baum, The Wonderful Wizard of Oz (1899) and Victor Fleming's MGM film, "The Wizard of Oz" (1939). The answers sought from the Wizard are inside the seeker; adults are untrustworthy and the child has a superior knowledge of truth, see Salman Rushdie, The Wizard of Oz (1997). Once seen as a roman a clef about populism and the bimetalist theory, see David Parker, "The Rise and Fall of the Wonderful World of Oz as a 'Parable of Populism'", Journal of the Georgia Association of Historians (1994), pp.49-63, it might reflect Baum's interest in theosophy. Theosophy was a female-friendly late nineteenth century belief system; Raylyn Moore, Wonderful Wizard, Marvelous Land (1974) emphasized how Baum developed the series in subsequent volumes, especially The Marvelous Land of Oz (1904): Princess Ozma leads a utopian matriarchy after Dorothy's overthrow of the humbug wizard.

<sup>6</sup> Roy Porter dismissed sexual issues as a focus of nineteenth century feminist activism ("Rape", p.222). But this view of nineteenth century feminism is obsolete. See Susan Kent, Sex and Suffrage (1987); Olive and JA Banks, Feminism and Family Planning (1964); Olive Banks, Faces of Feminism (1986); Mary Shanley, Feminism, Marriage and the Law (1989); Les Garner, Stepping Stones to Women's Liberty (1984); Brian Harrison, Separate Spheres (1978), Drink and the Victorians (1971) and "Women's Suffrage

(continued...)

Rape law was perverted by misogynist ideology from a medium to defend women's personal security--what the statutes said it was for--to a medium to trash victim's sexual reputations. The insight, that "good" women could in fact be raped and labelled "bad" women by the rape law, challenged this process and the gender ideology underlying it. Nineteenth century rape law made "good" women rapeable, and women who hoped to marry terrified of strange men. The effect was to promote a culture of female masochism: good women, clinging to men they knew, became more vulnerable to private sexual assaults.

Legally, the harm of rape was theft of male property rights in the raped woman's body, not a crime against a woman's autonomy. Its harm included the loss of a man's peace of mind about the paternity of his children by his wife, or the loss to her father of an unmarried daughter's "exchange value" on the "marriage market". The degree of harm to male interests was related to whether the rapist had ejaculated.

But this culture began to unravel when good women recognized that a law which systematically denounced a large proportion of rape victims as unrapeable, "bad" women<sup>7</sup> was not in their interest. This recognition was sparked by the realization that marriage laws made wives unrapeable,<sup>8</sup> treating them not as models of appropriate femininity, but just like "bad" women.<sup>9</sup> This recognition is still hidden by orthodox ideology, however: current gender ideology, developed from

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<sup>6</sup>(...continued)

in Westminster" in Michael Bentley and John Stevenson, eds., High and Low Politics in Modern Britain (1983), pp.80-122; Sheila Jeffreys, The Spinster and Her Enemies (1985); and Margaret Jackson, The Real Facts of Life (1994). Kent, p.3, argued that "[s]uffragists sought...the total transformation of the lives of women...to redefine and recreate, by political means, the sexual culture of Britain." Christabel Pankhurst's 1913 slogan for the WSPU, "Votes for Women and Chastity for Men", was the central plank of a popular advertising campaign tailored to women, see Paige Reynolds, "Chaos Invading Concept", Twentieth Century Literature (2000), pp.238-68. Jackson defended Christabel Pankhurst's tome, The Great Scourge and How to End It (1914), which blamed men for venereal disease in the context of women's disempowerment, economically forced marriages, and brutal sexual exploitation in employment and prostitution; Linda Martz, "An AIDS-Era Reassessment", Women's History Review (2005), pp.435-46, made an even more pointed defence.

<sup>7</sup> V.A.C. Gattrell suggested that reported rapes rose but conviction went down, especially of middle class and higher class men, through the nineteenth century. See Gattrell, B. Lenman and B. Parker, eds., Crime and the Law (1980). Of course, such historical statistical analyses are necessarily impressionistic.

<sup>8</sup> See Sheila Jeffreys, The Spinster; Susan Kingsley Kent, Sex and Suffrage; and Mary Lyndon Shanley, Femininity and the Law. J.S. Mill and Harriet Taylor Mill, A.S. Rossi ed., Essays on Sex Equality (1970), presents the mid-century critique; Sandra Holton, "Free Love and Victorian Feminism", Victorian Studies (1994), pp.199-222, discussed one feminist's experiment with common law marriage in the 1870s; a younger, more radical generation from the 1880s, the "New Women", are covered in Stephanie Forward, "Attitudes to Marriage and Prostitution", and Ann Heilman, "Mona Caird...Radical Feminist Critic of Marriage and Motherhood"; Laura Mayhall, "The Rhetorics of Slavery and Citizenship", Gender and History (2001), pp.481-97, and Harriet Blodgett, "Cicely Hamilton, Independent Feminist", follow the critique of marriage law into the generation of suffragettes.

<sup>9</sup> Catharine MacKinnon, Towards a Feminist Theory of the State (1989), p.175, noted that the legal

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Victorianism, continues to disguise the link between marriage, consent, and rape law.

Harsh resistance standards for proof of lack of consent developed from the legal doctrine of "consent to force". On the one hand, extreme resistance standards demanded that women resist rapists strenuously if they had no right to sex. However, the original articulation of consent to force--in Thornton--also implied that women had to consent, no matter the amount of force, to men who held proprietorial (or quasi-proprietorial) rights to sex with them. A woman's kin, by arranging a marriage, could remove her ability to withdraw consent from a brutal man. But as the Thornton case showed, so could a woman's status and location in time and place. The working woman outside alone, especially at night, was not allowed to withhold consent even from men looking for casual sex.

Realization that the wife was subject to "consent to force" in her marriage outraged elite women. In some cases, they developed sympathy for the seduced woman as quasi-wife--and even for the prostitute, to whom "consent to force" gave the sexual property right to all men in general. It became possible to construct a feminist politics which defended even prostitutes; to the extent that bourgeois ladies could extend sympathy to the prostitute and working woman, the myth of Stranger Danger failed to police women. Then the idea that lone women at large in public space manifested the intention to consent to all strange men crumbled under feminist scrutiny, among some ladies of the women's suffrage movements.<sup>10</sup> Feminists struggled, and continue to struggle, against rape myths to remake the rape law into adequate protection of female citizens.

## B. BACKGROUND TO THE PROBLEM: POLITICAL LIBERALS AND "ANOREXIC" FEMALES

In the last chapter, the encounter between Mary Ashford and Abraham Thornton was historically contextualized. It was reframed completely differently from how such an event would be imagined now--within the context of fear of a

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<sup>9</sup>(...continued)

category of "unrapeable women"--women not legally vindicated when they claim to be raped--lumps together both wives and prostitutes, against the symbol of virtuous innocence, young girls.

<sup>10</sup> Suffrage was the the symbol of sexual autonomy for women: See Kent, Sex and Suffrage; Susan Margarey, The Politics of Passion (2001); and Barbara Caine, Victorian Feminists (1992). For suffragists' interests in family law, see Lee Holcombe, Wives and Property (1983) and Dorothy Stetson, A Woman's Issue (1982). For the continuation of campaigns for family reform past suffrage, see Susan Pederson, Eleanor Rathbone and the Politics of Conscience (2004). In 1919, Eleanor Rathbone, leader of the National Union of Women's Suffrage Societies, adopted a Six Point Reform Program--Equal Pay for Equal Work; Equal standard of sex morals for men and women; Pensions for widows with children; Equal Franchise (since the first women's suffrage gave women the vote at 30 rather than 21); Equal Guardianship of children for mothers and fathers; and Equal Opportunity for women as lawyers and in the magistracy--summing up the breadth of feminist interests in reforming families. See also Rathbone's The Condition of Widows under the Poor Law (1913), Equal Pay and the Family: A Proposal for the National Endowment of Motherhood (1914), The Disinherited Family (1925) and Child Marriage: The Indian Minotaur (1934). See also Jane Lewis, "Beyond Suffrage", Maryland Historian (1975), pp.1-17.

"monster" or "sexual predator" lurking in the dark, awaiting a woman careless of her safety.<sup>11</sup> The historical context was courtship at a time of incredible economic, social and cultural stress, "a new era of risk and uncertainty in the lives of large swathes of ordinary people."<sup>12</sup> In terms of Ashford's society, this amounts to "normalization"<sup>13</sup> of the encounter. What brought Ashford to the field with Thornton were ordinary motives and behaviours.

The importance of recognizing Ashford's normalcy goes beyond vindicating her blamelessness. It points to a context for rape law: marriage. Only this context explains the rationale of rape law's harshness against complainants. To understand rape law, it must be understood that its purpose was to buttress male supremacy within marriage by requiring wives' sexual submission to husbands.

The courtship context raises the issue of how marriage structures gender in society, or the terms and meaning of what feminist political scientist Carole Pateman called "the Sexual Contract", the forgotten gender story behind the seventeenth and eighteenth century "social contract" theories proposed by Thomas Hobbes, John Locke, Jean-Jacques Rousseau, and others.<sup>14</sup> The sexual contract denied women the benefits of liberal democracy, and explains why "Patriarchy" (male dominance over women in general) survived after the political defeat of "Patriarchalism" (Divine Right

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<sup>11</sup> See Rancy Thornhill and Craig Palmer, The Natural History of Rape (2000). Thornhill and his associates in Sociobiology (now rebranded "Evolutionary Psychology"), believe rape conveys an evolutionary advantage to certain men and has been naturally selected. Because the majority of rapes happen to reproductively fertile women, rapes can propagate male genetic lines (based on analogies from Thornhill's main study subjects, Scorpionflies). But Thornton and Palmer do not consider the rate of pregnancy associated with rapes, or the results of such pregnancies. That children resulting from rape--in those rape pregnancies not aborted--might be poorly cared for and not reach sexual maturity is not considered, nor any social factors which impact reproductive success. They do not address the substantial minorities of rape which occur to non-fertile females (young prepubertal girls and post menopausal women), or forced sex without insemination. They also assume that procreatively successful rape is perpetrated by men who cannot afford the main means to ensure procreation--buying mating rights to females by gifts of food. Thornhill and Palmer do not address marital rapes, rapes in clandestine relationships where pregnancy would give away the secret, or rapes committed by men who also have wives bearing children. Thornhill and Palmer state they do not approve of rape, but the "truth" about male evolutionary psychology should be made known to help women avoid rape. Their advice to women is strikingly conservative: they should dress conservatively to not provoke sexual attention and avoid being alone with men who are not fit marital partners. In other words: scientific rhetoric for Stranger Danger.

<sup>12</sup> Steven King, "Chance, Choice and Calculation in the Process of 'Getting Married'", International Review of Social History (1999), pp.69-76, at p.71. He argued that 25% of couples began to marry without adequate economic prospects (p.75). These couples depended on kin and neighborhood solidarity, and luck, to keep their new families afloat (pp.73-5), because "eighteenth- and nineteenth-century England...[was] an increasingly risky place where economic prospects had little relevance to lived experience" (p.76).

<sup>13</sup> The Foucault Dictionary defines "normalization" as the classification of people into categories judged as "normal" and away from "abnormal" forms, to encourage people to conform to social rules which define the normal in society, at <<http://users.california.com/~rathbone/foucau10.htm>>, accessed July 2006.

<sup>14</sup> Pateman, The Sexual Contract.

kingship). Recovering the sexual contract debunks the mainstream liberal story that Patriarchy fell, in the seventeenth century in England and the late eighteenth century in the rest of Western Europe,<sup>15</sup> because apologists for the old regimes like Sir Robert Filmer<sup>16</sup> rested Divine Right on the "fathership" of King to people.<sup>17</sup> Locke, the main apologist for English opponents of Divine Right, did not oppose Filmer's patriarchalism when it came to women: the subjection of wives to husbands had "a Foundation in Nature", and the husband's will ought to "take place before that of his wife in all things of their common Concernment."<sup>18</sup>

Brides cast their political capacity into doubt by agreeing to give up autonomy in marriage.<sup>19</sup> Because they did, any woman's capacity to consent was doubtful: as daughters they were still "given away" in marriage,<sup>20</sup> without practical means to refuse.<sup>21</sup> Meaningful consent requires a real choice;<sup>22</sup> the ability to consent is based on preexisting freedom and

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<sup>15</sup> The success of the contract theory in England is usually dated to the "Glorious Revolution", the expulsion of James II and his replacement by his daughter Mary and her Dutch husband, William of Orange. Others would date the apogee of contract theory to 1649, the execution of James II's father, Charles I, during the English Civil War between Republicans and Royalists. Those who date the liberal theory to the earlier date were more radical, and less likely to approve late eighteenth century contractarianism: they were Republicans, which lost out by 1660, the Restoration of Charles II. For the rest of Europe, liberalism did not begin to appear until the French Revolution, at varying dates past 1789.

<sup>16</sup> Sir Robert Filmer was born 1588 and wrote in defence of the Stuart dynasty during the 1640s; Locke responded to a posthumous Filmer collection from 1680.

<sup>17</sup> Pateman, The Sexual Contract, pp.2-3.

<sup>18</sup> Pateman, "Women and Consent", p.152, quoting Locke, Two Treatises of Government, ed. Peter Laslett, (1967), V.II, ss.119.

<sup>19</sup> Pateman, The Sexual Contract, p.163, noted that most contemporary liberal theorists deny the capacity of individuals to agree to a contract of slavery as a self-contradiction.

<sup>20</sup> Pateman, "Women and Consent", p.153.

<sup>21</sup> Stone, The Family, Sex and Marriage, pp.180-93, 270-90, noted a gradual loosening of propertied parents' absolute control over the marriages of sons and daughters. Originally patriarchal control was total. R. Allestree's 1663 The Whole Duty of Man (London), p.291, argued: "Children are so much the goods, the possessions of the parent, that they cannot, without a kind of theft, give away themselves without the allowance of those that have the right in them." This proprietorial argument was retained longer for daughters than sons. During the late seventeenth century gentry began to allow sons a veto over parentally-chosen brides: aristocratic parents required total obedience into the late eighteenth century. By the late eighteenth century, most gentry allowed sons to pick their own brides with parents' retaining a veto, "from a family of more or less equal financial and status position" (p.271); they trusted sons to "choose their wives as one would choose a brood mare, with a great care for their personal genetic inheritance, and train their children with the same patience and attention as they had long devoted to their horses, dogs or hawks" (p.234). But only the most liberal gentry and upper middle class granted daughters' choice with parental veto late in the eighteenth century. But seventeenth century protestant emphasis on marriage as a

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equality. The willingness of women to become adults who did not govern themselves was seen as a female character flaw.<sup>23</sup>

The Whigs' Lockean account gives credit to social contract for democratic human rights. But history argues for skepticism: the first Whigs, a cabal of wealthy English and Dutchmen, holding scads of acres awash in an ocean of cash,<sup>24</sup> were unlikely champions of equality. The triumphalist Whig account ignores the hardscrabble battles of generations of later feminists against patriarchy, and turns the advancement of women into the "gift" of benevolent Liberal men.<sup>25</sup>

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<sup>21</sup>(...continued)

sacrament, and the rise of romanticism in the eighteenth century, caused increased parental guilt over forcing daughters to marry. Love marriage was most accepted by the "middling classes": Daniel Defoe denied that "property begets affection" in Conjugal Lewdness or Matrimonial Whoredom (London 1727), pp.98-102, 166-71, 199.

By the early nineteenth century, aristocratic marriages were still parentally arranged; the husband was tacitly allowed to commit adultery; but among gentry, marriage for love and complete faithfulness was the ideal (Stone, pp.391-2). But Hall and Davidoff, Family Fortunes (1987), found economics still sharply limited the degree of choice even for upper middle class women. Whether her family wanted the daughter's labour given to the family enterprise, or her hand in marriage to promote business, her feelings were not allowed to interfere. The middle class son could support himself, but the bourgeois' daughter had to please her kin. The ideology of companionate marriage prescribed women to love the men who choose them for companions--it did not provide wives with companionship and love in return.

<sup>22</sup> Pateman, "Women and Consent", p.150, called this "Consent as ideology".

<sup>23</sup> Pateman, "Women and Consent", p.153: the authority of husband over wife in the family breaches from the foundational premise of social contract theory, because "[l]ogically, two free and equal individuals should be expected to govern their families jointly."

<sup>24</sup> Neale, pp.47-51.

<sup>25</sup> This idea stemmed from the Women's Social and Political Union (the "suffragettes") stopping militancy in 1914 to agitate for the war effort, suggesting that Prime Minister Lloyd George, shaken by widespread pre-war turmoil, granted women's suffrage in 1918 out of gratitude. See: George Dangerfield, The Strange Death of Liberal England ([1935] 1983); Keith Lance, "Strategy Choices of the British Women's Social and Political Union", Social Science Quarterly (1979), pp.51-61; Nartin Pugh, "Politicians and the Woman's Vote", History (1974), pp.358-74; and Ray Strachey, The Cause (1969). More recent historians deemphasize the WSPU: many suffragettes left it to be peace activists. See Jo Newberry, "Women and War in England", Peace and Change (1977), pp.13-8; Sandra Holton, Feminism and Democracy (1986); Claire Eustance, "Protests from behind the Grille", Parliamentary History (1997), pp.107-26; Sophia Van Wingerden, The Women's Suffrage Movement (1999); Jo Vellacott, From Liberal to Labour (1993), and "Feminism as if People Mattered", Contemporary European History (2001), pp.275-94.

Simone de Beauvoir called women's suffrage a gift from men which women never used. See de Beauvoir, Extract from The Second Sex, [1952], pp.325-41, in James P. Sterba, ed., Ethics (2000): "They have gained only what men have been willing to grant; they have taken nothing, they have only received"; "men...give partial emancipation to women..." (pp.327 and 339). Some historians argue "amnesia" followed women's suffrage in France in 1945, in reaction to war trauma. See Sian Reynolds, "Lateness, Amnesia, and Unfinished Business", European History Quarterly, (2002), pp.85-109; but Hanna Diamond, "A New

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Whiggism refigures past generations of Liberal governing men into benevolent converts to women's equality. This historical narrative underestimates how hard women suffragists, especially "suffragettes" in England, America and the British Empire,<sup>26</sup> if not France,<sup>27</sup> fought the establishment. The first wave of feminists achieved gains as the result of effort and analytical sharpness. Yet their work has not been appreciated enough, even by later feminists. Unfortunately, feminists are not immune to internalized sexism.<sup>28</sup>

Internalized sexism has been an effect of gender ideology from the beginning. Mary Wollstonecraft herself, the great name in British feminism from the French Revolution till the mid-nineteenth century,<sup>29</sup> has been criticized as a

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<sup>25</sup>(...continued)

Dawn?", Women's Studies International Forum (2000), pp.729-38, debunks the idea women's suffrage was given to reward women's Resistance work, p.730. Germaine Greer, The Female Eunuch (1971) pp.1-2, also blasted suffragettes, "liv[ing] on through the years of gradual admission of women into professions which they declined to follow, into parliamentary freedoms which they declined to exercise, into academies...where they could take out degrees while waiting to get married"; "the suffragettes betrayed their own cause...The cage door had been opened but the canary had refused to fly out..." That suffrage should be "earned" stems from Liberal PM William Gladstone's conversion in 1867 to the franchise for the upper working class because they saved money, but no one claims working class movements failed or owed their progress to his benevolence.

<sup>26</sup> For Britain, see Maroula Joannou and June Purvis, Women's Suffrage Movement (1998); Barbara Green, Spectacular Confessions (1997); Cheryl R. Jorgensen-Earp, "The Transfiguring Sword" (1997); and Laura Mayhall, "Defining Militancy", Journal of British Studies (2000), pp.340-71. Alyson Brown, "Conflicting Objectives", Women's Studies (2002), pp.627-44, at pp.627-9 described suffragette crimes. Edward Commentale, "Thesmophia: Suffragettes, Sympathetic Magic, and H.D.'s Ritual Poetics", Modernity/Modernism (2001), pp.471-92, classified the WSPU as avant-garde. Laura Ugolini, "'We Must Stand By Our Bairns'", Labour History Review (2002), pp.149-69, at 150-3, noted WSPU militancy was welcomed in the Independent Labour Party's newspaper, though ILP men were later taken aback by "unwomanly" militancy.

For Canada, see Mariana Valverde, "'Racial Poison': Drink, Male Vice, and Degeneration", in Ian Fletcher, Mayhall and Philippa Levine, eds., Women's Suffrage in the British Empire (2000), pp.33-50; for the U.S., Ellen DuBois, Harriet Stanton Blatch (1997) and Sandra Holton, "'To Educate Women into Rebellion'", American Historical Review (1994), pp.1112-36.

<sup>27</sup> Joan Tumblety, "Responses to Women's Enfranchisement", Women's Studies International Forum (2003), pp.483-97; Steven Hause and Anne Kenney, Women's Suffrage and Social Politics (1984): cycles of repression and rebirth characterized French feminism in the nineteenth century as a result of political regime change and Liberal apathy to women.

<sup>28</sup> Intellectual feminists, like de Beauvoir, may pay too much credence to the patriarchal roots of their disciplines. For example, Nancy Chodorow, The Reproduction of Mothering (1978), pulls many punches against psychoanalysis.

<sup>29</sup> Wollstonecraft was the foremost English feminist before John Stuart Mill in the 1850s. See Ann Cudd and Robin Andreasen, eds., Feminist Theory (2005), Barbara Caine, "Victorian Feminism", Women's Writing (1997), pp.261-75, and Jacob Bouten, Mary Wollstonecraft and the Beginnings of Female Emancipation (1975).

misogynist.<sup>30</sup>

Wollstonecraft's Vindication of the Rights of Woman (1792) argued for liberal equality by denouncing marriage for economic survival;<sup>31</sup> to her, femininity was abject,<sup>32</sup> and most women led useless lives. Her Vindication "codifies 'equality feminism'" based on "an egalitarian refusal of the feminine."<sup>33</sup> It established liberal feminism "over [women's] dead bodies"<sup>34</sup> as an "anorexic" philosophy to real female bodies and needs.<sup>35</sup> Wollstonecraft claimed death was good because "there is neither marrying nor giving in marriage."<sup>36</sup> Wollstonecraft wanted women to fit the model of "manly" virtue: "Independence...[is] the basis of every virtue--and independence I will secure by contracting my wants, though I were to live on a barren heath."<sup>37</sup> But most women could not be ideal liberal individuals: they were financially dependent.

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<sup>30</sup> Susan Gubar, "Feminist Misogyny", in Diane Elam and Robyn Wiegman, eds., Feminism Beside Itself (1995), pp.133-54; Anne Snitow, "A Gender Diary" and Joan Scott, "Deconstructing Equality versus Difference", in Marianne Hirsch and Evelyn Keller, eds., Conflicts in Feminism (1990), pp.9-43 and 134-48; Tom Furniss, "Nasty Tricks and Tropes", Studies in Romanticism (1993), pp.179-210; Julia Allen, "The Uses and Problems of 'Manly' Rhetoric: Mary Wollstonecraft's Adaptations", in Molly Wertheimer, ed., Listening to their Voices (1997); and Steven Blakemore, Intertextual War: Edmund Burke and the French Revolution (1997).

<sup>31</sup> See Christine Skolnik, "Wollstonecraft's Dislocation of the Masculine Sublime", Rhetorica (2003), pp.205-23 at 207.

<sup>32</sup> Ashley Tauchert, "Mary Wollstonecraft and Jane Austen", Women (2003), pp.144-58 at 144.

<sup>33</sup> Mandell, "The First Women (Psycho) Analysts", p.70. See also Skolnik, pp.206-8: Wollstonecraft made her professional reputation as a writer by "the performance of manly rhetoric." Her problems were endemic to liberalism, see Ewa Badowska, "The Anorexic Body of Liberal Feminism", Tulsa Studies in Women's Literature (1998), pp.283-303, at 286, citing Gillian Brown, "Anorexia, Humanism and Feminism", Yale Journal of Criticism (1991), pp.189-215 at 211-3, 194, 196-7; as Mandell noted, "feminism is both antidote to and child of Enlightenment thinking" (p.70).

<sup>34</sup> Mary Jacobus, "The Difference of View", in Catherine Belsey and Jane Moore, eds., The Feminist Reader (1989), pp.39-64 at 54. See also Diane Hoeveler, "Vindicating Northanger Abbey", in Devoney Looser, ed., Jane Austen and the Discourses of Feminism (1995), pp.117-35 at 118: Wollstonecraft's was a "gothic feminism".

<sup>35</sup> Badowska, p.284; Miriam Brody, Introduction in Mary Wollstonecraft, Brody, ed., A Vindication of the Rights of Woman (1992), p.69.

<sup>36</sup> Wollstonecraft's first novel, Mary, A Fiction, in Janet Todd and Marilyn Butler, eds., The Works of Mary Wollstonecraft, V.1 (1989[1788]), p.73, (original emphasis). Quoted in Tauchert, pp.153-4.

<sup>37</sup> Wollstonecraft, A Vindication of the Rights of Woman, (1995: Dent, London), p.3, quoted in Tauchert, p.150.

They did not "own the property in their persons"; they were not the "guardian of his [sic] own consent".<sup>38</sup>

Wollstonecraft's extreme self discipline,<sup>39</sup> did not address the material realities of women's lives. Women were still effectively forced to marry: up to 1850, by middle age workingwomen could not support themselves by their own earnings.<sup>40</sup> Most women could not say "No" to marriage. But that they said "Yes" was used to define them as morally inferior. Wives' "natural" dependency justified making husbands heads of households and denied women's capacity to be citizens--"selves" in the political sense.<sup>41</sup> They could not consent to the social contract because they were dependant; they had to be dependant, because they could not participate in civil society. This political conundrum was reflected in, and enforced by, the rape law.

Male philosophers described marriage as female manipulation of men. To Rousseau, women were the "antithesis of republic virtue, prone to...using their seductive wiles to wield excessive influence over males."<sup>42</sup> To the eighteenth century Encyclopediste Denis Diderot, marriage was a male "indiscretion", into which women forced men by denying indiscriminate sexual access. Marriage was the price a modest woman demanded to prostitute herself to one man for support.<sup>43</sup> Thus, the prostitute was not only a disciplinary example of the worst kind of woman: she was the worst in all women. Even the wife was a prostitute; women's nature was epitomized by the prostitute. Rousseau divided women in categories by chastity, but not to scapegoat certain women and privilege others: all women had the nature of "whores".<sup>44</sup>

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<sup>38</sup> Pateman, "Women and Consent", p.152, quoting R.E. Flathman, Political Obligation (1972: Atheneum Press, New York), p.230.

<sup>39</sup> Badowska, pp.285, 290-2.

<sup>40</sup> King, "Chance, Choice, and Calculation", p.73: ordinary women aged 35-44 could not subsist on their average earnings, from late 18th through mid-19th Centuries.

<sup>41</sup> Badowska, p.150, 152-7, 161-2.

<sup>42</sup> Marisa Linton, "Virtue Rewarded? Women and the Politics of Virtue", History of European Ideas (2000), pp.35-49 at 37.

<sup>43</sup> Laqueur, Making Sex, pp.199-201, discussing Enlightenment thinkers on modesty (defined as women's "discrimination" between men as opposed to letting all men have access). Diderot claimed family life began "when woman began to discriminate,...to take care in choosing between several men...[and] the veils of modesty cast over the charms of women allowed...the most delicate illusions...to exaggerate the happiness of the moment" so that they would "vo[w] themselves to each other forever", see Encyclopedie, the entry "jouissance", trans. by Stephen J. Gendzier (1967: Harper and Row, NY), V.5, p.889. Laqueur (pp.234-5) also noted that Freud in Three Essays on Sexuality (1905) described the repression of the girl's sexuality at puberty (when "clitoral sexuality" was repressed to ready for the passive role in intercourse) in terms similar to Diderot and Rousseau: "female modesty incites male desire while female acquiescence, in allowing it to be gratified, leads humanity out of the savage's cage".

<sup>44</sup> Pateman, "Women and Consent", p.154.

The only questions were the conditions of their whoredom and their price.

An extraordinary case at the York Assizes in 1830, Anonymous, showed Rousseau's degraded view of female nature in action, defining all women as whores regardless of chastity. A short paragraph of reasons alluded to multiple sex partners and mentioned prostitution--but failed to identify whether the woman was chaste or unchaste. The jury acquitted, because Parke, J. told them:

In transactions of this kind, the injured party is not always altogether innocent. She has...with more or less reluctance...given her consent, [yet] will afterwards, for the purpose of protecting her character, be ready to deny it...There is some degree of resistance generally when the desire of the woman goes along with that of the man...Now it is contrary to the nature of a woman's feelings, unless debased by a long course of prostitution, to admit of the embraces of more than one...in the presence of another...<sup>45</sup>

We don't know whether this case involved a gang rape, or a rape following consensual sex with another man, nor the degree and method of complainant resistance, nor whether the complainant had ever been a prostitute. The most obvious interpretation of Parke's reasons is that prostitution was introduced to destroy the credibility of the complainant: her feelings were not those of a "natural" woman. But the very ambiguity--that one cannot tell if she was one or not--confuses the prostitute's nature with the "natural" woman.

On the other hand, Parke's reasons can be read as suggesting that the complainant was embarrassed at the approach of the second partner because she had the "natural feelings of a woman", unlike a prostitute. But while this reading elevates her moral standing, her expression of non-consent is still discounted. The logic of the remarks casts doubt on non-consent either way: a prostitute would not refuse; a non-prostitute will resist, but her resistance shows only "embarrassment", not her true intention. If she was unchaste, she is lying now about saying No then. But if she was chaste, she is not lying about saying No then, but her No was itself a lie even as she spoke it, because she still really wanted (more) sex. If she was a non-prostitute, her virtue still counted against her credibility as a complainant.

In either case, Justice Parke concluded that her "desire goes along with the man's". In other words, the "good" woman's nature is only a thin veneer over a sexuality as strong as--and exactly the same as--the man's. The good woman's nature is easily overcome. When it is overcome, she is exactly like the prostitute. The "good woman" was only a woman controlled by a husband, not a better character than the "bad woman".

The most important point to be drawn from this cryptic paragraph of reasons is that the judge spoke as an authority on "woman's nature", and that meant more than what the woman herself said or did during the offense. The only proper way for a woman to remain chaste was never to be "overcome" by sexual attention from any man but her husband. Women will "naturally" mirror the sexual desires of any man, so they must only be exposed to the sexual desires of their husbands.

Rousseau argued marriage is good for women because it empowered men to force women, "creatures of unlimited desire", into proper sexual relations, to "take the initiative and control sexual activity" in the interests of ruling families. It wasn't that husbands should seduce their wives into chaste marital sexuality--indeed, that would be a bad thing, for it would mean that husbands were giving too much credence to a different, female, sexuality rather than the only lawful sexuality, their own. Women's sexual desires had to be silenced. Because they could respond to any men, their desires must

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<sup>45</sup> Anonymous, E.R. V.168, Cr. Cases I, p.1045, originally 1 Lewin 293.

be erased, by placing them into the power of their husbands. Sex must occur solely at the command of husbands.<sup>46</sup>

Rousseau believed the moral codes of the sexes were based on penetration:

In the union of the sexes each alike contributes to the common end, but in different ways. From this diversity springs the first difference...between man and woman in their moral relations.<sup>47</sup>

For women, the "passivity" of penetration<sup>48</sup> was the moral ideal: females should make husbands feel strong by showing token resistance but finally accepting aggressive sex from their husbands. Sex must only occur at the command of male desire: "access cannot be a matter of mutual agreement because women's and men's bodies do not have the same political meaning."<sup>49</sup> Luce Irigaray concluded Rousseau made rape "the model for the sexual relation"<sup>50</sup>--that is, marital rape.

Rousseau justified male domination to teach women modesty, but female modesty was always sham and trickery. He argued women must "say 'no' when they mean 'yes', a social practice that makes the separation of coerced from consensual sexual relations almost impossible."<sup>51</sup> Wollstonecraft tried to counter that women under patriarchy were innocent victims.<sup>52</sup> But her raped woman, whose modesty represents true refusal, was "unreadable from the masculinist perspective

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<sup>46</sup> Pateman, The Sexual Contract, p.100.

<sup>47</sup> Tauchert, p.146, quoting Rousseau, Book V, Emile trans. Barbara Foxley, P.D. Jimack, ed., (1992 [1762]: Dent, London), p.322

<sup>48</sup> The idea that the vagina is passive during intercourse has been discounted. It reacts actively to penetration: it adapts to fit the penis, engorges in the "orgasmic platform" in the lower third, and muscles contract in the uterus, vagina and pelvic floor muscles (W.H. Masters and V.E. Johnson, Human Sexual Response (1966)); the vagina actively sorts sperm (Catherine Blackledge, The Story of V (2003), citing B.G. Bianchi, A. De Agostini, N. Tarozzi, D. Bizzaro and G.C. Manicardi, "Human Cervical Mucus can Act In Vitro", Journal of Assisted Reproduction and Genetics (2004), pp.97-102, using natural vaginal mucus to sort semen for in vitro fertilization, and Richard Fehring, Kathleen Raviele and Mary Schneider, "A Comparison of the Fertile Phase as Determined by the Clearplan Easy Fertility Monitor and Self Assessment of Cervical Mucus", Contraception (2004), pp.15-28). Luce Irigaray, This Sex Which is Not One (1985) proposed a polymorphous sexuality replacing the penis with female genitals as the model of active sexuality. Emily Martin, "The Egg and the Sperm: How Science has Constructed a Romance", in Sharlene Hesse-Biber, Christina Gilmartin and Robin Lydenberg, eds., Feminist Approaches to Theory and Methodology (1999), and Gerald and Heide Schatten, "The Energetic Egg", The Sciences (1983), pp.28-35, described ova moving to draw sperm in.

<sup>49</sup> Pateman, The Sexual Contract, pp.100-1.

<sup>50</sup> Irigaray, An Ethics of Sexual Difference (1993), p.66., quoted by Pateman, pp.100-1. Wollstonecraft also understood Rousseau's vision of femininity as "the humiliation of the symbolic rape scene" (Tauchert, p.148), which is another reason she rejected femininity.

<sup>51</sup> Pateman, "Women and Consent", pp.154, 162.

<sup>52</sup> Tauchert, p.154.

of Rousseau's primal scene."<sup>53</sup> An ascetic wife did not look unwilling: she merely looked modest; a modest wife was still continually sexually available.

Many people agreed with Rousseau in the eighteenth and early nineteenth century, that all women were vain, obsessed with "reputation", "dependen[t]" and "deceitfu[l]". Like him, many also agreed with Plutarch that the most virtuous woman is she who is least talked about, that is, she who remains chaste in the home and does not play any kind of part in public affairs.<sup>54</sup>

The good woman's safeguard was "her ability 'to recognize the voice of the head of the house.'"<sup>55</sup> Her chastity was safe because she was controlled by her husband or father: chaste women "'submitted themselves to the will of others', that is the will of men."<sup>56</sup> The ideology used to discipline "bad" women in rape law drew from the shaping of marital sexuality to uphold the authority of men in the household. While the idea that the kingdom was like a household passed away after 1688, the passing of the King as paterfamilias did not change the way that society upheld the authority of each husband within the little households of the nation.

In the eighteenth century, norms of affection and companionship in marriage became more common.<sup>57</sup> But it was

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<sup>53</sup> Ibid., p.147. Wollstonecraft still supported modesty, despite her critique of Rousseau. See Wollstonecraft, A Vindication of the Rights of Woman in Works, p.191: "Modesty! sacred offspring of sensibility and reason!--may I unblamed presume to invigorate thy nature...modulate for me the language of persuasive reason, till I rouse my sex from the flowerly bed on which they supinely sleep life away!" Quoted by Skolnick, p.239.

<sup>54</sup> Linton, pp.41-2.

<sup>55</sup> Pateman, The Sexual Contract, p.99, quoting Rousseau, Emile, or On Education (1799), p.408.

<sup>56</sup> Pateman, "Women and Consent", p.154, quoting Rousseau, Emile (1911), p.332. Wollstonecraft believed women were "'cunning and lasciviou[s]" but blamed Rousseau for female vice and dissimulation (Tauchert, p.147, quoting Wollstonecraft, A Vindication of the Rights of Woman, (1995: Dent, London), p.89).

<sup>57</sup> Stone, The Family, Sex and Marriage, pp.325-34, 361-75, 390-404. However, Stone gives a leadership role to the gentry and upper middle class, on the basis of literate culture. His model does not address the implications of a traditionally high degree of spousal choice in the lower classes under the North West European marriage system. His only real source on lower class people's attitudes to marriage, Francis Place, as an artisan who made a fortune between the 1790s-1810s in business, is not representative. Stone's default position, that the poor became the latest proponents of companionate marriage, was based primarily on presuppositions. Nor did he explain what a privatized, leisured model of highly emotional family relations could even mean for people living at the margins of subsistence. Hartman and Laslett's work implies that more equal economic partnerships of lower class spouses led to more real respect than the highly romanticized bourgeois model.

wives who provided affection, and husbands who required "companions".<sup>58</sup> Increased intimacy did not imply mutuality. Brides gave newly individualized sons of bourgeois families affection, while grooms received young women socialized to be good companions to men regardless of their personal preferences. "Choice" of marriage partner was allowed more to sons than daughters in gentry or middle class families;<sup>59</sup> daughters who depended on family for financial support married as family wished, often to business partners or important clients, or as spinsters provided unpaid work (household management, hostessing, and bookkeeping) for fathers or brothers.<sup>60</sup> Middle class feminists worried about coercion of daughters: the Kensington Discussion Society, a feminist debating club, queried, in the 1860s, "What is the true basis, and what are the limits of parental authority?" and Frances Power Cobbe spoke on "The Limits of Obedience of Daughters."<sup>61</sup>

While the old power of men in families over their wives did not change, in the eighteenth century the political embarrassment implied by women's subordination grew as men took increasing pride in their political value as citizens. Women, insofar as they were wives, were not eligible to be citizens. The development of romantic ideas about marriages based on true sentiments of affection did not counter the fact that the dominant liberal political theories of the day glorified masculinity. The liberal ideal of independence conflicted with sentiment.

This is why Wollstonecraft felt humiliated<sup>62</sup> by conventional advice on how to win and please a husband,<sup>63</sup> "the

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<sup>58</sup> Ibid., pp.221-68, 281-2, aspirations towards romantic love were associated with the rise of individualism, privacy, and non-lineage-based nuclear families. The applicability of individualism to middle class women as well as men is questionable: see Hall and Davidoff, Family Fortunes, and Poovey, The Proper Lady on the constraints on bourgeois women's individuality.

<sup>59</sup> Ibid., pp.180-92, 271, 275-6, and 278-80. The implications of the North West European marriage pattern imply that lower class people--the vast majority of the population--may have had a great deal more personal control over the choice of spouse than persons of higher rank, both men and women. See Hartman; Stone, p.54 admitted this for propertyless people.

<sup>60</sup> See Davidoff and Hall, Family Fortunes.

<sup>61</sup> Janet Oppenheim, "A Mother's Role, A Daughter's Duty", Journal of British Studies (1995), pp.186-232 at 197. The main concern was the refusal of the right to marry and the exploitation of spinster daughters.

<sup>62</sup> Tauchert, p.148.

<sup>63</sup> "Conduct books", common in the eighteenth and nineteenth centuries, taught women good manners. Rousseau and Wollstonecraft wrote within the genre. Barbara Darby, "The More Things Change...The Rules and Late Eighteenth Century Conduct Books", Women's Studies (2000), pp.333-55; Jane Rose, "Conduct Books for Women", in Catherine Hobbs, ed., Nineteenth Century Women Learn to Write (1995); Christopher Clausen, "How to Join the Middle Classes", American Scholar (1993), pp.403-18; Jacques Carre, ed., The Crisis of Courtesy (1994).

usual feminine dissimulations".<sup>64</sup> Liberalism made femininity hard to bear for politically engaged and intellectually serious women. Many nineteenth century feminists saw marriage as prostitution.<sup>65</sup> As Josephine Butler, the charismatic leader of the Anti-Contagious Diseases Acts movement, wrote in 1875:

"The English marriage laws are impure. Marriage under English law is an unholy thing...It is a species of legal prostitution the woman being the man's property. Many of us live above that hateful law."<sup>66</sup>

Some feminists advocated women avoid marriage. If women could not support their children themselves, they should forego sex, rather than agree to immoral and irrational dependence upon a man.<sup>67</sup> But avoiding childbearing was impractical for most women. Stoic independence<sup>68</sup> will not work for most of the high proportion of women in each generation who become mothers without state support.<sup>69</sup>

### C. MATRIMONIAL LAW AS A REFLECTION OF CONTINUING PATRIARCHY

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<sup>64</sup> Skolnick, p.207.

<sup>65</sup> See Stephanie Forward, "Attitudes to Marriage and Prostitution"; Ann Heilman, "Mona Caird"; Maureen Montgomery, "Gilded Prostitution"; Katie Holmes "'Spinsters Indispensable'"; and Harriet Blodgett, "Cicely Hamilton". Holton, "Free Love and Victorian Feminism", discussed Elizabeth Wolstoneholme's sexual liason after exchanging private vows with Ben Elmy. When she was visibly pregnant in late 1874, some feminists (her employers in the Vigilance Association) forced her to marry legally at the Registry Office. Feminists who supported her first vows also wanted votes for all women, including wives; those who insisted on formal marriage wanted the vote for single women and widows.

<sup>66</sup> Holton, p.211, quoting Josephine Butler, Millfield Papers, Box 22, n.d., c. Nov. 1875; she circulated the statement to suffragists to support Wolstonehome. Other feminists in the North West industrial areas, including Emmeline Goulden (later Pankhurst), emulated Wolstoneholme-Elmy by taking private vows, refusing to wear wedding rings, or keeping their maiden names alone or hyphenated (p.212).

<sup>67</sup> Skolnik, p.207. G.J. Barker-Benfield, "Mary Wollstonecraft: Eighteenth Century Commonwealthwoman", Journal of the History of Ideas (1989), pp.95-115, discussed Wollstonecraft's sources among Commonwealthmen critics of divine right, especially Rev. Richard Price. Price believed independence was necessary to rational thought, because no one could have "elevated ideas" if "obliged from our birth to look up to a creature no better than ourselves as the master of our fortunes and to receive his will as law..." (p.97, quoting Price from William Stafford, Socialism, Radicalism, and Nostalgia (1987), pp.88-9). See Wollstonecraft, A Vindication of the Rights of Woman, ed. Carol Poston, (1975 [1792]), pp.261-2, 139, and 144 (p.110).

<sup>68</sup> Wollstonecraft said women should refuse pleasure to avoid becoming objects of men's "gross appetite" (Skolnick, p.214, quoting A Vindication of the Rights of Men, (1790) Vol. 5 in Works, pp.8-9, 27, 31) and protect their "sovereignty of reason" (Badowska, pp.291-2, citing Rights of Women, Brody ed., pp.252-3, 103, 170, and 157). See also Barker-Benfield, pp.104-8 and 97-103.

<sup>69</sup> Carole Pateman, "The Patriarchal Welfare State", in Christopher Pierson and Francis Castles, The Welfare State Reader (2000), pp.133-50 at 142.

The private law of marriage supported limiting rape law: women had to have sex at the will of their husbands. What was applied to protect the legitimated sexual realm of the marital bedroom, was later generalized to affect "bad women" in public space, to allow men an illegitimate realm for casually consumed sexual services. The process began in the late seventeenth century.

The Lord Chief Justice (1671 to 1676) Sir Matthew Hale, in his Pleas of the Crown of 1678, applied contract theory to the rape law to justify the marital exemption: "by their matrimonial consent and contract the wife hath given up herself in this kind unto the husband, which she cannot retract."<sup>70</sup> A new form of patriarchy, centered on rule by the husband over the wife, crystallized in the common law. William Blackstone's Commentaries on the Laws of England (1765-9) defended the marital exception with the legal doctrine of unities: marriage makes a man and woman one person and one body, at the direction of the husband as "head".<sup>71</sup> This distorted rape law, because it depersonalized women to the point where it made all women's lack of consent suspect.

The impact of the theory of matrimony creating a unity of personality can hardly be understated. The rights of man as husband amounted to proprietorial ownership of his wife to a degree which is now shocking to confront. The rape law marital exemption was the tip of the iceberg. Rape law was supported by a large number of actions in Tort by which husbands could demand money from third parties for trespass against their property rights in their wives. The effect of these special actions, "Domestic Torts", was to treat women after marriage as chattels which their husbands had almost unlimited rights to confine and control.

Tort law by the early modern period defined marriage as a source of a husband's property rights to personal services from his wife. Domestic torts were elaborated on the premise that it was trespass on the body of the husband himself (because of Blackstone's doctrine of unities) to interfere in any way with his enjoyment of his wife's "services", due to him by right upon demand. The simplest of domestic torts was "criminal conversation", an action for damages for acts of adultery, brought by a husband against a wife's lover.<sup>72</sup> But another tort, "incitement", meant simply causing a wife to fall in love, interfering in her love for her husband, or encouraging her to think badly of him or leave him.

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<sup>70</sup> Matthew Hale, The History of the Pleas of the Crown, Sollom Emllyn, ed., ([1678] 1736: Gyles, Woodward and Davis, London), p.629.

<sup>71</sup> Blackstone, Commentaries on the Laws of England ([1771/2] 1967: Oceania Publications, New York), V.1, p.442.

<sup>72</sup> A modern definition of the meaning of this tort can be found in the North Carolina Family Planning Council's electronic newsletter, in an article by John Rustin and Jere Royall, "Protecting Marriage", Findings, June 2002 <[www.ncfamily.org/PolicyPapers/Findings](http://www.ncfamily.org/PolicyPapers/Findings)>, p.1. Their basic definition of criminal conversation remains the same as it was in the nineteenth century. However, the impact of the action has radically changed in those few American jurisdictions where it still exists: the tort is now available to wives with respect to acts of adultery with their husbands. The extension of domestic torts actions to women plaintiffs--a process which began in North America before 1850--systemically changed the way that the rights were conceptualized.

A man's rights to his wife were so absolute that a third person could be sued even for "harbouring" her--providing shelter and food if she left her matrimonial residence, no matter how serious the cause. Taking a battered wife into one's home could sound in damages to her husband,<sup>73</sup> as a form of trespass, for loss of the husband's enjoyment of "consortium", a term derived from the seventeenth century case, Hyde v. Scysson.<sup>74</sup>

Consortium had been defined as the husband's right to the "society and services" of his wife.<sup>75</sup> This right was absolute. Her presence wherever the husband wanted her to be was required. She had no independent rights of mobility. The absoluteness of the right to consortium is illustrated by the fact that harbouring was sometimes approached as "abduction".<sup>76</sup> To modern minds, this seems to confuse actions which the wife freely undertakes to flee her marriage, with the actions of others to forcibly remove her. But in fact it was a logical extension of the preoccupation of the common law with the interests of the husband.

This confusion of the wife's will with that of others towards her, in abduction, parallels the confusion in rape law over a woman's consent to sex: in marriage, a woman was routinely placed in a position where it was deemed legitimate to ignore when she said No to sex (or where she stopped saying No altogether because she knew it would not be heard). Therefore, in illegitimate sexual situations, there tended to be confusion over whether a woman's will went along with the third party who "stole" her "services" from the husband or father who owned them. Because the tort system privileged the husband's interests in his wife, not the woman's interests in herself, whether her will "went along" with the third party in domestic tort cases was not what the law was concerned about. The point was to provide her society to her husband, not to protect her rights to choose where and how to live.

The interests protected by harbouring and abduction were so important that common law was reinforced in every American state but Louisiana by statutes during the nineteenth century.<sup>77</sup> Even before the American Victorian proliferation of measures to protect these interests, the original tort actions had set their nets very wide: third parties sued for incitement or harbouring could include the wife's relatives, charitable agencies or religious orders--anyone who encouraged or helped her to leave him. No separate wrongful act, such as adultery, was required. From the twelfth century, a woman separated

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<sup>73</sup> See the discussion of the history of domestic tort theory discussed in Michael Rustad and Thomas Koenig, "Taming the Tort Monster", Brooklyn Law Review, (2002-3), pp.1-122 at 20.

<sup>74</sup> [1620] E.R. V.79 462, originally 2 Inst. 435.

<sup>75</sup> Rustin and Royall, p.1.

<sup>76</sup> Ibid. This was the case as it developed in nineteenth century America. See below, footnote 77.

<sup>77</sup> Ibid. The tort now recognized as "alienation of affections" in North Carolina evolved from the tort of abduction. The exceptional status of Louisiana resulted from its history as a colony of France, a civil law jurisdiction.

from her husband lived in "a state of virtual outlawry" under common law.<sup>78</sup>

Consortium included companionship, affection and sexual intercourse, as well as "servitium", "the services such as housekeeping and cooking, which a wife might provide her husband".<sup>79</sup> Wherever actions for loss of consortium remained restricted to husbands and unavailable to wives, as in the U.K., the language used to describe the damages for which the aggrieved husband could be compensated included sexual services, the traditional unpaid labour women performed in the home, and "family honour". In this tradition, a twentieth century Canadian case, Fidiuk v. Lastiwa,<sup>80</sup> defined consortium as

the value of the wife to the husband, including benefit derived from her fortune, her assistance in business, her capacity as a housekeeper and ability generally in the home, and benefit derived from her society and affection and her general qualities as a wife and mother; secondly, compensation to a husband for injury to his feelings and honour and hurt to his matrimonial and family life.<sup>81</sup>

In early cases, sexual intercourse was central to consortium. By the late nineteenth century, the central damage was described as interference with the wife's "affections" for the husband. Perhaps the courts had begun to be influenced, several generations after brides and grooms, by the ideology of "companionate marriage". But other issues were also in play.

The tendency to describe consortium in terms of affection was most pronounced in the U.S., where wives' actions for loss of consortium were allowed. This is how the damage is now understood in the few American jurisdictions which still have tort actions for loss of consortium, all of which provide the action to plaintiffs of either gender.<sup>82</sup>

But in jurisdictions where men only remained able to claim loss of consortium, language involving damages for

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<sup>78</sup> See Keith Thomas, "The Double Standard", p.200. Thomas was referring to a state of affairs from at least the twelfth century, the beginning of Ecclesiastical Court jurisdiction over marriage, separation and divorce.

<sup>79</sup> British Columbia Law Institute, Report on the Action Per Quod Servitium Amisit, Nov. 1986, pp.9-10, available at <www.bcli.org/>. They cited Guelph v. Samuelson, (1976) 25 R.F.L. 394 (B.C.S.C.) which defined consortium as including servitium at p.396. The right to damages for loss of consortium was abolished by the B.C. Family Relations Act of 1979.

<sup>80</sup> Fidiuk v. Lastiwa (1957) 21 W.W.R. 74.

<sup>81</sup> Stella Bailey, "A Married Woman's Right of Action for Loss of Consortium in Alberta", Alberta Law Review (1970), pp.513-31 at 524. Bailey's article explored the possibility of a wife bringing the action, but found her loss of consortium was probably not actionable in Canada. Bailey sought to explain the situation by looking at loss of consortium actions brought by husbands. Fidiuk v. Lastiwa (1957) 21 W.W.R. 74 was a typical husband-plaintiff criminal conversation suit. Mrs. Fidiuk's adultery had been followed by Mr. Fidiuk refusing himself to sleep with her, not the wife refusing sex with him. Since she remained at home and did all her normal work, his damages from her former lover were limited. This case treated crim. con. more like a general consortium claim and less like a simple action on adultery.

<sup>82</sup> Rustin and Royall, p.1: "The exclusive right of sexual intercourse is not the right protected...The actual affection between spouses is the right protected."

"honour", the "family name", or reputation, remained more common than the language of affection. Even as late as 1957 in the Canadian Fidiuk case, with a husband-plaintiff, "affection" language is limited to the "benefit" provided by the wife feeling such affection for the husband. Affection was not described as a good in itself—as if the husband's feelings were not engaged in the marriage. The wife's feelings are important, because they increase her willingness to work, and her productivity, as the man's "servant". Where the plaintiffs were the husbands, loss of consortium still affected the person of the patriarch, not through his feelings, but through his honour vis a vis the outside world and direct diminution of his wealth.

In the original understanding of domestic torts, as actions on trespass on the body of the husband, any sexual or physical damage to wife, children or servants was an invasion of the right to family privacy, from the point of view of the patriarch.<sup>83</sup> Domestic torts could be used by men to protect their interests as fathers and masters as well as husbands. As long as legal theorists thought in terms of male plaintiffs, damages continued to be described as impeding a right to enjoyment of property in private.

In early twentieth century U.S., women plaintiffs briefly became the focus of legal theoretical interest in domestic torts, and the language for damages became more emotional. "Hurt feelings" language to express harm went along with allowing loss of consortium to be brought by wives.

American jurisdictions also allowed domestic tort suits to be brought by single women on their own behalf. The most common tort for single women became the tort of "seduction" (damages to single women caused by pregnancy), which in North America, but not the U.K., could by mid-nineteenth century be brought by women themselves;<sup>84</sup> "breach of promise of marriage" also became common in both North America and England. Damages for adultery with a U.S. woman's husband, or for her seduction, could be "very large and exemplary" when the plaintiff was of high rank.<sup>85</sup>

Domestic torts a father could use for losses related to his children had originally included "ravishment" (abduction

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<sup>83</sup> <[www.historyofprivacy.net](http://www.historyofprivacy.net)>, A Man's Honor: Rethinking the Origins of the Public/Private Dichotomy in American Law, Part 2, "Anxieties of Exposure", discussed how the "most influential law review article" in American law, Samuel Warren and Louis Brandeis, "The Right to Privacy", Harvard Law Review (1890), pp.193-221, approved of per quod servitium amisit in domestic torts, arguing in a footnote that "the debauching of a daughter specifically injures the person of a patriarch...Then the feelings of the parent, the dishonor to himself and his family, were...the most important element of damage...[and] that the invasion upon the honor of the family is an injury to the parent's person..."

<sup>84</sup> See Constance Backouse, "The Tort of Seduction: Fathers and Daughters in Nineteenth Century Canada", Dalhousie Law Journal (1986), pp.331-74; Martha Bailey, "Servant Girls and Masters: The Tort of Seduction and the Support of Bastards", Canadian Journal of Family Law (1991), pp.137-62; Patrick Brode, Courted and Abandoned: Seduction in Canadian Law (2002); Stephen Robertson, "Seduction, Sexual Violence, and Marriage in New York", Law and History Review (2006), pp.331-74; and Brian Donovan, "Gender Inequality and Criminal Seduction: Prosecuting Sexual Coercion", Law and Social Inquiry (2005), pp.61-88

<sup>85</sup> Rustad and Koenig, pp.21 and 57.

and rape/marriage) of the heir/ess to his fortune,<sup>86</sup> or the "seduction" of his daughter (impregnation), with or without the daughter's consent.<sup>87</sup> These were early creations and received throughout the common law world. Like torts involving adultery or loss of the wife, these torts were based on the property rights of a man to "services" from his children. But seduction began to diverge in different jurisdictions. In mid-nineteenth century U.S., the services provided by the daughter to the father were admitted to be mostly fictional;<sup>88</sup> seduction suits brought by fathers sought damages for hurt honour, loss of reputation, or emotional damage--for "violations of the family as a social institution".<sup>89</sup>

Twentieth century American domestic torts cases referred to "mental anguish, shame, humiliation, injury to feelings, defamation or...injury to character".<sup>90</sup> Rather than the injured honour of the patriarch, they used language redolent of corruption of innocence. But this language weakened the strength of the actions, even when the cases also involved breach of fiduciary duties or professional malpractice.<sup>91</sup> In unreformed jurisdictions which continued to use property and

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<sup>86</sup> Rustad and Koenig, p.21.

<sup>87</sup> Jane Larson, "Women Understand So Little, They Call My Good Nature a Deceit", Columbia Law Review (1993), pp.375-472, noted that seduction became one of the most common civil actions at the end of the nineteenth century, because fathers were seen viewed sympathetically by juries. Elizabeth Hardwick, Seduction and Betrayal (1990), p.206, noted that the tort fit the "canonical story of seduction and the plot of sex and its destructive force for women...[as] a pattern of social destiny".

<sup>88</sup> See [www.historyofprivacy.net](http://www.historyofprivacy.net), "A Man's Home", Part two, discussing Warren and Brandeis: while equating the right to damages to the father's loss of the services of the seduced daughter was a "mean fiction", it was justifiable; it met the "demands of society" by hiding the true nature of what had happened, while it allowed "damages for injuries to the parents' feelings".

<sup>89</sup> Rustad and Koenig, pp.58-9. See also Rustin and Royall, pp.2-3, the "ten reasons" for not abolishing the tort of alienation of affections included "9. These torts support and protect families and children" and "10. Lawmakers should...not contribute to the breakup of the family." Rustin and Royall at least defended domestic torts in terms which seemed to take the emotional needs of children seriously; as recently as 1987, Peter Kutner, "Law Reform in Tort", Canadian Journal of Family Law (1987), pp.287-326 analyzed the family affection protected by torts involving children as the rights of men to have their emotional needs met by wives and children. [www.historyofprivacy.net](http://www.historyofprivacy.net) noted in "A Man's Home", Part two, that "if an unmarried daughter were despoiled, her father could seek compensation" because the "'dishonor to himself and his family'" amounted to a "personal physical attack".

<sup>90</sup> Nancy Goldberg, "Sex and the Attorney-Client Relationship", Akron Law Review (1992), pp.45-77 at 62 n.101, referring to Suppressed v. Suppressed 565 NE 2d 101 (Ill. App. Ct., 1990) at p.105. But see footnote 91 below: this language was used in a losing case. Yet similar language had been/was used in successful nineteenth and twentieth century American domestic tort cases, beginning with Heermance v. James 46 Barb. 120 (NY App. Div., 1866).

<sup>91</sup> Suppressed v. Suppressed involved a woman who was the client of a male lawyer sued for legal malpractice as a result of their affair during his representation, but her claim was disallowed because of the heightened emotional language of the damages claimed. The court viewed the claim as "tantamount to allowing a claim for seduction, alienation of affections, or criminal conversation to proceed under less strict

(continued...)

honour to conceptualize damages claimed by men, no such weakening occurred.

After U.S. wives began to claim loss of consortium, most domestic torts were repealed by legislation in most states in the 1930s. They were denounced as damages for "broken hearts", or "heart balm" suits. After these torts were gendered female, they became seen as frivolous and prone to abuse through collusion and deceit. Emotional framing of damages diminished their seriousness. This situation persists: even in a suit involving breach of fiduciary duty through sex between a clergyman and a female parishioner, an American court recently discounted "elements which summon images of the damsel pining from unrequited love".<sup>92</sup>

Minimization of women's use of domestic torts as emotional indulgence after romantic disappointment was based on the same problem raised by Rousseau's model of feminine modesty: real female hurt was read as a charming sham performance meant to captivate men. Like Rousseau's model of marital sex, the framing of domestic torts by about feminine emotions led to denial of some real rapes, and minimized the suffering they caused.

This was especially true of the tort of seduction, used to get de facto child support for bastards. Seduction was often brought to ameliorate the effects of rape.<sup>93</sup> Yet by the 1930s, tort theorists assumed that seduced women had suffered only from the breakdown of a relationship, the absence of a fairy tale ending of marriage and living "happily ever after", not the reproductive results of violation of sexual autonomy. They failed to understand the degree of harm which many women bringing seduction suits had really suffered.

The female tort plaintiff in seduction often suffered from unwanted sex which left her with a child, or an originally desirable relationship which went wrong through deception or even force.<sup>94</sup> But because she could not lay claim to proprietary rights to her own sexual autonomy and her family honour, she laid claim only to pity for her plight--and when

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<sup>91</sup>(...continued)

standards than required by statute for actions of this type, merely by virtue of the fact that the parties involved happened to have met in the context of a legal relationship." In Illinois, Alienation of affections is still allowed for matrimonial cases but with high standards of proof; the Suppressed court denied the claim for reasons akin to the anti-heart balm reforms in other states, rather than analyzing the case as sexual exploitation of a vulnerable person and breach of a fiduciary relationship between lawyer and client.

<sup>92</sup> See for example Ahern v. Kappalumakkel, 36 Conn. L. Rprtr. 756 (Super. Ct. Milford, March 9, 2004) at pp.760-1: The central issue was that "Kappalumakkel engaged in an inappropriate and ultimately harmful relationship with her", not that he broke her heart.

<sup>93</sup> See Brian Donovan, "Gender Inequality and Criminal Seduction"; we will also see English working women attempting to use seduction to get child support for bastards conceived in rape, see R. v. Goddard [1861] E.R. V.172 1096, originally 2 Foster and Finlason 361-2, Dean v. Peel (1802) 5 East 45, and Wellock v. Constantine [1862] E.R. V.172 1287, originally 2 Foster and Finlason 791-3, discussed below, Chapter Three, pp.229-31.

<sup>94</sup> See Robertson, "Seduction, Sexual Coercion and Violence", p.331. He began his analysis with an incident of rape committed through use of force upon a servant woman by her long term beau; the prosecutor actually considered laying the charge as a rape, but disturbingly the complainant pulled out because she married the assailant to ensure the legitimacy of the child.

morality was invoked, it was used to depict her character as "ruined" more than to depict the defendant as behaving badly. Thus the significance of "shame" and "damage to character".

Seduction in its classic mode--an action of the father of a seduced woman, a status it retained in England--analyzed the harm as the damage that a daughter's unwed pregnancy and illegitimate child represented to her father. This implied that the main damage was the loss of virginity revealed by pregnancy, not pregnancy--or children.

If a woman was not a virgin, an unplanned pregnancy was not compensable damage, even if the man obtained sex through misrepresentation or force. The non-virgin woman who became pregnant by someone other than the man who took her virginity fell outside the protection of the law: she had already lost what was most important to her father's family honour--her virginity, which kept up her value on the marriage market.<sup>95</sup>

The proprietorial approach obfuscated even the ability to understand women's childbearing alone outside of marriage as a harm. It greatly diminished the ability of mothers of bastards to use the tort system to obtain child support. Ironically this meant that other traditional rights of men in families were undermined, for limiting seduction actions on the basis of lack of virginity upheld male rights as husbands (detering premarital loss of virginity) but sapped the protection of fathers of young women. Limiting seduction also obliterated the rights of men's grandchildren to access the fortunes of their fathers. Seduction law in its classic phase harmonized the interests of young unwed mothers to those of their own fathers and set them against those of the putative fathers of their bastard children. Unfortunately, the putative fathers' interests tended to have the advantage in law, especially if there was a class difference in favour of the men.

The underlying theory of domestic tort law made the entire family into property of the head of household, including the children. But this did not always lead to conflict between the children and the father, because the father's property right often supported the claims children wanted to make. But the father's property rights were often played off against evaluating the daughter's chastity in terms of a future husband's property right; the common interests of fathers and daughters were often discounted together. This is illustrated in the legal analysis of an abduction in R. v. James Hopkins.<sup>96</sup>

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<sup>95</sup> Certain women--especially working class women--lost the right to have their fathers pursue damages as a result of seduction, related to their residence and work outside the family home in the early nineteenth century in England. See Chapter Three, when we discuss the cases of Dean v. Peel (1802) 5 East 45 and Wellock v. Constantine [1862] E.R. V.172, 2 Foster and Finalason 791-3, pp.241-2. The non-chaste victim analysis also bedevilled working women, as their sexual reputations were popularly disparaged after the mid-nineteenth century, see Edwards, Female Sexuality and the Law, pp.83-8, and 96-9. The non-chaste victim analysis is still used in seduction. For example, in Teadt v. Lutheran Church Missouri Synod (Sept. 17, 1999) 237 Mich App 567, Seduction was defined as "the act of persuading or inducing a woman of previously chaste character to depart from the path of virtue...resulting in her...submitting her person to the sexual embraces of the person accused" in the case of a minister's sexual activity with a teen parishioner; the lack of previous chastity was used to shield the defendant in L.N.K. v. St. Mary's Medical Center (March 18, 2003) Indiana Court of Appeals #82A01-0210-CV-417, sexual misconduct by a professional counselor towards a teenaged client in a residential substance abuse program. There is no analysis of authority or dependency in Teadt and LNK, as factors facilitating sexual exploitation of very young women by older men in positions of power and trust.

<sup>96</sup> E.R. (1842) V.174, Nisi Prius V, pp.495-7, originally Carrington and Marshman 254-8.

Hopkins was technically not a tort but a criminal case of abduction, brought in 1842 under "*An Act for consolidating and amending the Statutes of England relative to Offences against the Person*" of 1828,<sup>97</sup> one of the first statutes which attempted to reign in the evidentiary rules produced by judges in rape trials.<sup>98</sup> Among other things, the 1828 *Offences against the Person Act* raised the age of sexual consent to 12 from 10 years of age by *section XVII*.<sup>99</sup> Its abduction provisions criminalized an earlier tort, and in Hopkins, the issues were still analyzed like a tort case.

The Hopkins case proceeded under abduction sections which followed the age of consent section: *s. XIX, "Forcible Abduction of a Woman on account of her Fortune, with Intent to marry her &c."*, had no age limit, but required the abduction to be "against her Will", and the intention to "marry or defile her" had to proceed "from Motives of Lucre"; *s. XX, "Unlawful Abduction of a Girl from her Parents or Guardians"* applied to girls under 16 and had to be "against the Will of her Father or Mother, or of any other Person having the lawful Care or Charge of her", but no "defilement" or specific intent was required; *s. XXI, "Child-stealing"*, applied to a child of either sex under 10, taken "maliciously" or "with Intent to steal any Article", and using "Force or Fraud".

Although *9 George IV c.31* created criminal charges for abduction, then, the lack of an age requirement where the "child" was heiress to a fortune, show that these sections buttressed the private law of abduction. They protected the rights of parents to control children's location, sexual activity and marriage, not children's rights to protection from sexual assault or exploitation after being removed from their parents' custody. The primary concern was to prevent marriage--and the passing of property--without parental consent, especially with respect to daughters. The legislation was not tailored to respond to sexual violence.

In Hopkins, the defendant, a grandfatherly type known by the parents "for a long time as a respectable man, and the father of fifteen children", induced the parents to let their 10-year-old girl go with him by claiming he knew a lady who would employ her as a nursemaid. He kept her at his home for five days and "slept in the same bed with her every night."<sup>100</sup> Such indirect language suggests that everyone in court knew what had transpired between Hopkins and the girl, but no one

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<sup>97</sup> *9 George IV, c.31*. This was one of Sir Robert Peel's first great criminal law reforms during his term as Home Secretary.

<sup>98</sup> MacFarlane, "The Historical Development", pp.32-5 and 42-8; Edwards, *Female Sexuality*, pp.23-31 and 49-50.

<sup>99</sup> *9 George IV, c.31, section XVII*. This section created a misdemeanour offense of carnal knowledge of a girl between the ages of 10 and 12, even if she consented. It also confirmed the felony status of sex with a girl under age 10, which had been stated in *18 Eliz. I c.7, "An Act to take away clergy from the offenders in rape or burglary..."*, *section IV*, in 1576.

<sup>100</sup> Unlike a rape case, which would have discussed sex very explicitly to prove the complainant's lack of consent and sex obtained "by force and against her will", this case only discussed sex obliquely by referring to the defendant having "slept in the bed with her every night". This in itself shows how important it could be for raped women and girls to avoid rape charges and use tort or statutory constructions based on trespass to the father or husband's property rights in the raped female.

wanted to inquire into it in depth. The Hopkins case is an example of a social reality which was probably well-recognized, but was not represented for what it really was in the courtroom.

Hopkins was old (and probably married), and the child far too young to be married; that the child's family contemplated sending their daughter into service in the junior position of a nursemaid so young, implies poverty. Clearly the interests of the family were not about preventing inappropriate marriage. They were no doubt interested in retribution for sexual abuse over five days.

Perhaps the fact that the court treated the case as abduction was an act of charity to the family. Certainly the facts--rape repeated over a long period without the child leaving or complaining--did not fit the evidentiary requirements imposed, after Thornton, on rape cases, especially immediate outcry and strenuous resistance.<sup>101</sup> The same legislation which defined the abduction also, in *s.XVII*, defined the age of consent as 12, two years above the girl's age. This formally removed the requirement that a 10-year-old show she did not consent. But case law between 1828 and 1844 had already reimposed the requirement that a child show lack of consent through resistance.<sup>102</sup>

Perhaps abduction was a charge of last resort, allowed by a sympathetic court. But abduction logic twisted the analysis of the case in such a way that the family was probably traumatized by the discussion in the court, even though the defendant was convicted.

The judge, Baron Gurney, analyzed the case in terms of the consent of the father to the possession of his daughter by Hopkins. This produced a double irony, for if the case had been analyzed as carnal knowledge of a child, under *9 George IV c.31 S. XVII*, no one's consent should have been at issue. But if charged that way, the girl would have been treated like an adult rape victim, and very little scope was given in rape law to fraud to invalidate sexual consent from a female.<sup>103</sup> By treating the case as one about the father's consent to pass property, Baron Gurney allowed the obvious deceit of Hopkins--he said he would take the girl to a lady for a nursemaid position, and then he kept her to himself and sexually used her instead--

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<sup>101</sup> MacFarlane, "Historical Development", pp.17-28 and 51-2.

<sup>102</sup> R. v. Martin [1840] E.R. V. 169 Cr. Cases II 49, originally 2 Moody 123-4 and R. v. Neale [1844] E.R. V.169 Cr. Cases II 140, originally 1 Denison 36-7.

<sup>103</sup> See R. v. Peter Stanton, [1844] E.R. V.174 Nisi Prius V 872, originally 1 Carrington and Kirwan 415-7: a doctor asked the complainant to lean forward onto a bed for an injection, and proceeded to penetrate her. But the court found that this did not vitiate her consent by fraud: "...[I]f it had appeared that the defendant had intended to have had a criminal connexion with the prosecutrix by force, the complete offence of rape would, upon this evidence, have been proved, but...getting possession of the person of the woman by surprise was not an assault with intent to commit a rape, but was an assault." In R. v. Joseph Jackson [1822] E.R. V.168 Cr. Cases I 911, originally Russell and Ryan 487, a man climbing into bed with a sleeping woman and initiating sex by pretending to be her husband was acquitted, because "when she made the discovery...he desisted" and "he entered the house with intent to pass for her husband, and to have connexion with her if she did not discover the mistake, but not with intention of forcing her if she made that discovery." To deny that fraud could invalidate a female's consent to sex was an admission of her lack of property right in herself. She was not a property owner of herself the way that any man was of the smallest coin of the realm, for forging currency was dealt with very severely at this time.

to invalidate the father's consent for her to go along with him.

Gurney said: "the consent of the father having been obtained by the fraudulent representations of the prisoner is, in truth, no consent at all", analogizing the case to a man borrowing a horse for a specified purpose and then selling it, which was larceny.<sup>104</sup> He analyzed lack of consent by the standards used for contracts for passing property, which were much less onerous than standards used to show lack of consent to sex for rape law. But while the family may have approved of the result, one cannot help but think they were less than pleased to have their daughter analogized to a horse. Gurney's analysis also unfortunately suggested that the father could have legitimized Hopkin's sexual use of the girl, had he known of it and consented to it beforehand. This was offensive to a family reacting to extended sexual abuse of their child.

In addition, the family had to withstand a vigorous defence which suggested that their daughter had actually been seduced--that is, that she could either be presumed to have consented, or that it did not matter legally if she had not consented--and that it did not matter for how long or how many times she had been raped. The defence lawyer, Price, argued it was obviously an absurdity to consider what Hopkins did to the 10-year-old a crime, if he had done it only for an hour; therefore, no one should be concerned that he did it for five nights. Price, having admitted that "abduction is, in point of law, a stealing", went on to press:

It may have been the prisoner's original intention to take the girl to live with a lady; and on the journey down, he began to think of a different course; and this would not be, in law or in fact, abduction. It is a case for an acquittal if you shall think that the abduction was not complete...Any seducing of a young female for an hour would be an abduction if this is one. That would be absurd. And, in this case, the keeping the girl for three or six days makes no difference; it is merely a question of time. There is no intention shewn to deprive the parents of their child.<sup>105</sup>

Price argued that whether it was abduction or not should hinge on whether the abduction was complete--that is, whether Hopkins intended to steal her away permanently. If he only wanted to use her sexually, for an hour or a week, then he had not abducted her. Further, brief usage of such a girl, even at the tender age of 10, could not be taken seriously as a harm as great as abduction. There was no proof that his intention to have sex with her--over and over, as it turned out--had been more than a transient impulse, not contradicting an honest intention to actually transport the girl to a lady for work.

Because Price relied on the legal definition of abduction as a crime against the father's property right, he took the position that the only problem with Hopkin's behaviour was whether he had lied to the father about his intention to convey the girl to an employer. The intention to have sex with a girl two years under the age of consent was not legally wrongful in itself. By having sex with the girl, Hopkins did nothing more than if, on a trip using a borrowed horse, he had decided on a whim to take it out for a quick gallop through a field adjoining the route. The return of the girl to her father was complete repair of any harm. Harm derived only from taking her somewhere her father did not expect, not from the sexual use of the girl.

Though the defence argument failed, it is extremely informative about the mores of the time to find the violation

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<sup>104</sup> R. v. James Hopkins.

<sup>105</sup> Ibid.

of a young girl so clearly argued not to be a "real" crime. The lawyer presented desire for a prepubertal child as something which could arise in a man in a whimsical, off hand fashion. A gentleman could contemplate a momentary impulse to copulate with a working class girl, without the immorality causing moral reflection, without tussling with his urges. Desiring a young girl would not disrupt his ongoing sense of his identity as a respectable man, or disturb his ongoing intention to fulfill his promise to her father, anymore than purchasing a snack and eating it while continuing his journey. The difference between a 10-year-old and a woman was incidental. A respectable man could turn pedophile merely because the opportunity to abuse an underage girl fell into his lap, without contradicting his intention to do a good deed for her father. His abuse did not imply a plan to obtain custody of a child by deceit, because sexual use of a prepubertal girl was not unthinkable in the everyday course of events.

Price's analysis also suggests that even by age 10, a working class girl's virginity was not valuable in itself. All of this was "obvious"--commonsense, at least for sexual uses that took only an hour of the girl's time. That this was considered by a lawyer a credible argument to raise for his client, confirms the limitations of the proprietorial concept of rape, especially once the lower property value of working class girls to their families was factored into the equation.

There was no discussion at all in Hopkins of the girl's consent, resistance, or lack of capacity to consent at her age. Her personal ordeal at the hands of this "respectable father of fifteen" for five days literally was not relevant to the legal analysis of the case. It was not important, despite the clear language of other sections of the statute under which the charge was laid.

In a case like Hopkins, the statute was nothing but a support for fatherly proprietorial rights over a young daughter; the idea of rape as a personal offence against the complainant was completely absent. The problematic nature of this conceptual framework is obvious to modern observers. It was probably obvious to some people in the nineteenth century too: middle class women's concern for girl children became a basis for organized feminism; even within a patriarchal framework, it was problematic to working class men as fathers, because it denied the value of their daughters, compared to the daughters of people of wealth. Cases like Hopkins exposed working class men to arguments which emasculated them completely as fathers.

The problems with the concepts used in domestic torts fed back into the rape law, and continue to obfuscate rape law theory. A modern American theorist of rape law, David Bryden, scoffed at the history of seduction in a manner which continues to efface the meaning of--and minimize the damage caused by--sex obtained by deceit: he noted that

[h]istorically, one prominent type of sexual deception was seduction in breach of promise to marry...In our age, premarital sex is extremely common. Few women regard a formal engagement as a prerequisite to sexual intercourse.<sup>106</sup>

The fact that premarital sex is common or that women no longer appear to expect an engagement before becoming sexually active should have no place in modern rape law. It does not matter whether or not most women nowadays are virgins at the altar: A person must not presume the consent of one woman to a sexual act on the basis of group mores of behaviour.

Any false promises violate the right to make a fully voluntary choice about engaging in sexual behaviour. It does

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<sup>106</sup> David Bryden, "Redefining Rape", Buffalo Criminal Law Review (1999-2000), pp.317-513.

not matter what the usual terms of marital bargains are for most women, because the issue is not the price of a fungible commodity. The issue in rape is whether misrepresentations were made and if they interfered with the sex partner's freedom of choice, not whether the particular misrepresentations are unnecessary to obtain sex with other women, even most other women. There is a vast difference between applying analyses based on women's value as property versus analyses based on women's rights to personal sexual autonomy. The framing of law by considerations of women as property is subtle but very wide ranging in its effects. We still see law reflecting the commodification of women in a de facto marriage market.

In the U.K., the law in the nineteenth century was very clear: torts for loss of consortium were not available to wives. Women were not believed to require the same sort of a bargain from their husbands as their husbands were presumed to need when they married. The meaning of consortium was completely different when applied to a husband than when applied to a wife: a woman bargained away her right to sexual choice when she married and owed her husband absolute fidelity, while men did not lose their right to commit adultery when they signed a marriage contract binding them to their wives.

Two divorce cases in Ashford's period presented facts that drew sympathy for the wives--extreme infidelity by the husband, beginning from the wedding night, flaunting the mistress and the bastard family, combined with cruelty--and yet in 1802, during the first case, Lord Eldon, the Lord Chancellor, regretfully declared that divorce on the petition of the wife had to be refused "on general grounds of public morality."<sup>107</sup> Men could use "violence and physical restraint to secure the person and services of his wife (her consortium)" but wives could only get court orders stipulating that straying husbands should restore their "conjugal rights".

Likewise, in 1825, Sir John Nicholl argued in the Ecclesiastical Court that in cases of adultery, "Forgiveness on the part of the wife, especially with a large family, in the hopes of reclaiming her husband, is meritorious; while a similar forgiveness on the part of the husband would be degrading and dishonourable."<sup>108</sup> Given such British intransigence, Canadian judges after 1927 upheld the 1896 reasoning of Lallis v. Lambert,<sup>109</sup> that

"[A] married woman could not maintain an action for criminal conversation because she should condone her husband's infidelity though he need not condone hers...[T]he wife's interest in the marital consortium is of a different character than that of her husband so that she suffers only loss of his society and

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<sup>107</sup> Thomas, "The Double Standard", p.201, discussing Mrs. Moffatt's Case (1832) and Mrs. Teusch's Case (1802). To even bring a suit of divorce required vast sums, for divorce was obtained by private act of Parliament. Mr. Moffatt "occupied himself...in constant experiments on the chastity of his female domestics". Lord Eldon's comments in Mrs. Teusch's Case, quoted from J. MacQueen, A Practical Treatise on the Appellate Jurisdiction of the House of Lords and Privy Council (1842, London), pp.603-4; Mrs. Moffatt's Case was discussed on p.658. The situation improved only marginally in 1847 when the Marriage Act moved divorce jurisdiction to civil courts: women had to prove adultery plus another injury (such as bigamy, cruelty, desertion, incest, rape or unnatural offenses) to sue for divorce, while men required evidence only of adultery. These remained the standard grounds for divorce in England until 1923.

<sup>108</sup> *Ibid.*, pp.202-3, quoting Nicholl from J. Haggard, Reports of Cases argued and determined in the Ecclesiastical Courts at Doctors' Commons, and in the High Court of Delegates (London, 1829-32) I, p.752.

<sup>109</sup> (1897) 24 O.A.R. 653.

affections and not of her maintenance when there is an interference in the conjugal relationship while he suffers a pecuniary loss, that of loss of services."<sup>110</sup>

No damages for wives' losses of consortium were upheld in Canada until after the Second World War, and then they were discounted in damages, because the woman's command over her husband's affections was "of a different character and of a less quality than of her husband."<sup>111</sup> States in which torts for loss of consortium remain available, to wives as well as husbands, limit its use in divorce cases alleging cruelty or abuse, fearing to extend it to routine hurts rather than "outrageous" conduct beyond the "normal ebb and flow of married life."<sup>112</sup> Of course, what is considered to be outside the "normal ebb and flow of married life" is precisely what is at issue in an analysis of how matrimonial law affects women's rights to sexual autonomy in any given time, place and cultural milieu. Clearly in nineteenth century England, a husband's fidelity was worth more than a wife's and she could not purchase his fidelity with her own.

Blackstone had been even more blunt, stating that "the inferior has no kind of property in the company, care, or assistance of the superior as the superior is held to have in those of the inferior, and therefore the inferior can suffer no loss or injury".<sup>113</sup> Domestic torts, not becoming widely used by lovelorn women, were not attacked in Canada and the UK as frivolous; they were taken seriously until the underlying notion of male property rights in family members became seen as unacceptable. In Canada, domestic torts were removed by statute and judicial abhorrence in the 1980s on the basis of their "offensive" rationale:<sup>114</sup>

All the old cases emphasize that a man has a right in action in trespass against anyone who, with or without her consent, has violated his wife. Underlying and involved in this is the right of a husband to

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<sup>110</sup> Stella Bailey, p.514, explained that Alberta cases considered wives' rights to damages for loss of consortium under the 1927 *Domestic Relations Act* and denied them, because of the common law received in the province at its inception. Alberta followed Lallis v. Lambert, which upheld the British case Lynch v. Knight (1861-73) All Eng. Rep. 2344 (H.L.) over Quick v. Church (1893) 23 O.A.R. 262 (QB).

<sup>111</sup> Ibid. A few Canadian cases, after Applebaum v. Gilchrist, [1946] O.R. 695, allowed wives damages for loss of consortium with respect to their husbands in Ont., B.C. and Alberta, though Applebaum discounted the wife's rights in consortium.

<sup>112</sup> See Gwen Sequist and Eileen Kelly, "Intentional Infliction of Emotional Distress", Buffalo Women's Law Journal (2001-2) pp.29-46 at 29-30, citing Vasquez v. Vasquez 670 NYS 2d 740 (Sup. Ct. Queen's Co. 1998), and Leonard and Cheryl Karp, "Spousal Infliction of Emotional Distress...Beyond the Normal Ebb and Flow of Married Life", Family Law Quarterly (1995), pp.389-406.

<sup>113</sup> Stella Bailey, p.514, quoting Blackstone, Commentaries, at 142-3. Coverture, of course, was overcome in the nineteenth century by the *Married Women's Property Act*, but Canadian law on domestic torts held that it only gave women a right to sue with respect to her separate property and contracts, but not "a general right to sue and be sued" (p.515).

<sup>114</sup> Dickson, C.J.C., wrote scathingly against the basic per quod servitium amisit action in The Queen v. Buchinsky 1 S.C.R. 481 (1983) at 490: "The debate is not whether the original assumptions underlying the action can any longer be supported. That rationale is plainly offensive in today's society."

have his wife inviolate.<sup>115</sup>

Domestic torts were defended, even in twentieth century England, for enforcing the economic dependence of women: Winchester v. Fleming defined harbouring as "objectionable because it interfered with the economic process by which a wife, refused food and shelter elsewhere than in the matrimonial home, would eventually be forced to return to it."<sup>116</sup> Winchester preserved virtually unchanged the logic of the great Victorian legal theorist J.F. Stephen, who wrote in 1874 that "[w]hen a woman married she practically renounces...the possibility of undertaking any profession but one, and the possibility of carrying on that profession in the society of any man but one".<sup>117</sup>

Economic independence is (even now) the experience of few women.<sup>118</sup> In the nineteenth century, women's work was lower paying, professional work nearly unavailable, and average female earnings not enough for subsistence.<sup>119</sup> There was little birth control, especially kinds women could use without the agreement of male partners.<sup>120</sup> Wollstonecraft admitted most women had to "eat the bitter bread of dependence" and be "standing dishes to which every glutton may have access."<sup>121</sup>

The Enlightenment Revolutions left equality for later ages to win. Fraternal patriarchy retained the power of the father over the mother. Male control of sexual access to females was upheld: "the father's legacy of sex-right" was "shared

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<sup>115</sup> Stella Bailey, pp.522-3, quoting J. McRuer from Frampton v. Whiteman [1954] O.R. The case also raised as a policy reason for treating the husband's cause of action for loss of consortium more seriously than the wife's the old saw that the wife's adultery could have the more "serious" effect of making the husband raise a child who was not his own, while the husband's adultery would not inflict a bastard on his wife. What happened to the husband's bastard, in the absence of his support was not a concern before the court.

<sup>116</sup> [1958] I.Q.B. 259 at 264-5, J. Devlin, quoted in Stella Bailey, p.525.

<sup>117</sup> Stephen, Liberty, Equality, Fraternity, p.200. Thus, women had to be submissive to men because equality would lead to easier divorce and since women lose attractiveness to men as they age more than men lose attractiveness to women, equality would create great risk of female penury: divorce must lead to a woman losing her ability to support herself after a broken marriage, since her only valuable commodity (her virginity) was sacrificed to her first husband.

<sup>118</sup> Pateman, "The Patriarchal Welfare State", pp.136-9. Economic independence, in the fullest sense of not being beholden to employers, is still a minority experience even for men.

<sup>119</sup> King, "Chance, Choice, and Calculation", p.73, in agreement with Richard Wall.

<sup>120</sup> See McLaren, A History of Contraception.

<sup>121</sup> Mary Wollstonecraft, A Vindication of the Rights of Woman, ed. Brody, pp.160, 254, quoted in Badowska, p.283.

equally among all the brothers" to ensure "an orderly access by each man to a woman."<sup>122</sup> Bourgeois "citoyens" in the French Revolution agreed to each man's private engrossment of a woman and refused women "the rights of man".<sup>123</sup> Fraternity identified the sex of those who shared equality and liberty; it masqueraded as community, but only applied to elite males. The social contract was made by heads of households; headship was established by marriage, which transferred property in the female body.<sup>124</sup> As Anna Clark noted, "patriarchy, narrowly defined...as the domination of husband or father over wife and children within the family", treated "female sexuality as property"; women's prized chastity "ostensibly mean[t] a woman's virginity, or if married, fidelity; but...[came] down to her submission to the exclusive ownership of husband or father."<sup>125</sup>

#### D. FRATERNITY AND TACIT CONSENT: THE CLASS POLITICS OF THE MARITAL EXCEPTION

After the passing of the Ancien Regime of France, when the death knell to feudalism throughout Western Europe was dealt by the French Revolution, patriarchy centered patriarchal power not on fathers' power over sons, but husbands' power over wives, expressed through conjugal rights--the wife's sexual provisioning of the man.<sup>126</sup> This was fraternal patriarchy. It contained women within the family.<sup>127</sup>

For the first time, distinct "public" and "private" spheres were established, in a "transition...from a form of

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<sup>122</sup> Pateman, The Sexual Contract, p.109.

<sup>123</sup> Lynn Hunt, The Family Romance, pp.67, 82-3. 85, 94-5. 97-100, 113-23, 139, 151-6, 159-65, and 202-4.

<sup>124</sup> Pateman, The Sexual Contract, pp.114, 3-7.

<sup>125</sup> Clark, Women's Silence, pp.6-7.

<sup>126</sup> Pateman, The Sexual Contract, p.3: "Political right originates in sex-right or conjugal right...A man's power as a father comes after he has exercised the patriarchal right of a man (a husband) over a woman (wife)...Patriarchy ceased to be paternal...[W]omen are subordinated...to men as a fraternity."

<sup>127</sup> Pateman, "Women and Consent", p.154: Rousseau praised his Calvinist hometown, Geneva, because women stayed out of the citizen circles which discussed political policy, because women's "nature" disturbed the reason of men. To protect men's virtue, women were kept away from men, except in "proper" sexual relations within the family for the purpose of reproduction. Male political power was no longer based on the father's procreative power (p.152), but women's lack of political power was justified by their reproductive power.

sociability in which private and public are confounded to one in which they are distinct."<sup>128</sup> The "Separate Spheres" of public and private were gendered male and female. This was a massive shift:

Prior to the mid-eighteenth century, men and women were not seen as opposites;...people saw gender, like the social structure as a whole, as a hierarchy[,...]...women as flawed versions of men. Men ruled over women...just as gentry ruled over common people, householders over servants, and masters over apprentices and journeymen. The manhood of the master was not the same...as the masculinity of his servant. By the early nineteenth century, however,..ideology of gender as separate spheres had arisen...[I]ndividual men joined together as equals to form the public sphere of politics, while keeping their wives in the private sphere of the home. Putting separate spheres into practice, however, was a class privilege...Working men were denied political power, and working women could not take shelter in the home, but had to earn wages...[T]he making of the working class was in part a struggle by radicals to universalize this class-bound notion of gender.<sup>129</sup>

Separate Spheres ideology responded to lessened emphasis on other forms of hierarchy by increasing the importance of the hierarchy of male over female. But because economic privilege was so centrally involved in maintaining the idealized separation, gender itself became a classed category. Men who could not keep their wives from working outside the home were not just lowly in class, they were less manly men. As for women who could not be secluded, they were no longer truly feminine.

Belief that women were "naturally" moral sweetened pushing women out of the public sphere into "domestic" life. Separate Spheres was sold to elite women as a source of honour.<sup>130</sup> But it also mobilized insecurity about females, requiring continual policing of women. "Natural" femininity was not something that could be left to naturally unfold: women not confined in men's private home were suspected of not being feminine.

Because the bourgeois household was a difficult ideal to attain, the "Angel in the Home"<sup>131</sup> was shadowed by the nightmarish "unsexed" woman, one who had lost the essential characteristics of her gender. "Unsexing" happened when a woman was "hardened" by too much exposure to man's world; the biology of women was believed to require confinement,

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<sup>128</sup> Philippe Aries, A History of Private Life (1989), p.9; cited in Brian Cowan, "What was Masculine about the Public Sphere?", History Workshop Journal (2001), pp.127-56 at 130. Cowan related the cultural shift to Jurgen Habermas' idea of the public sphere.

<sup>129</sup> Clark, The Struggle, p.2.

<sup>130</sup> Mary Poovey, The "Proper Lady" and the Woman Writer, (1984), Chapter One, "The Proper Lady", pp.3-47, described the historical construction of the ideal Victorian woman based on eighteenth century notions of "modesty" as elements of bourgeois gender ideology.

<sup>131</sup> Edwards, Female Sexuality, p.26: the term "Angel in the Home" originated with Coventry Patmore, (1823-96) a minor Pre-Raphaelite Brotherhood poet, whose most famous poem was the 1854 "The Angel in the House".

and so the "unsexed woman" was impaired in body.<sup>132</sup> In the long view of historians, this nineteenth century monster was a direct continuation of the earlier hypersexual, disloyal, and promiscuous "fickle woman" of the sixteenth and seventeenth centuries.<sup>133</sup>

By her class, and by her frequent appearance in public space--going to work, doing marketing as a servant, or travelling by foot instead of carriage--the unfeminine, unsexed woman was also the "public woman". The public woman, unconfined, could not be the exclusive property of one man; therefore she belonged to every man alike--she was the prostitute who could not refuse any male.<sup>134</sup> By associating sexual misdeeds with lack of femininity, Separate Spheres worked neatly to not only demoralize lower class people, but to suggest the solution: accepting the "sexing" of their women through conforming to the ideology.

The stress industrialization placed on families encouraged working class men to accept the need to change their lifestyles: the most motivated workingmen imitated the new bourgeois family model, with its emphasis on the husband as authority. As they improved skill levels, incomes, and educational attainment, and became politically conscious, they tended to redefine their wives from economic partners to precious commodities to be stored away in the home, as children were coming to be seen--and they knew who to blame for the ideal not being achieved:

Who are compelling women and tender babes to procure the means of subsistence in the cotton factories--to be nipt in the bud, to be sacrificed at the shrine of Moloch? They are the rich, the capitalists.<sup>135</sup>

In resisting the implication of political enemies that working class people were uncivilized, they largely accepted the new middle class definition of domestic family life, centered around an at-home mother, as the pinnacle of civilization.

If Ashford had lived, she would have experienced the way that debased views of labourers' characters were used

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<sup>132</sup> Edwards, Female Sexuality, pp.24, 52-3, 83-4, 86-8, and 96-9. Working class women were reputed to be generally "loose"; working women, especially prostitutes, were theorized to suffer chromosomal problems, or to have high levels of male sex hormones which made them lack the "natural" chastity of "real women". Note: Edwards used the term "desexed". But she used it not to refer to an ungendered woman who is not feminine, as "desexed" was often used in the nineteenth century, but to reference the prescribed asexuality demanded of all women. In my usage, an "unsexed" woman is not one without sexual feelings, but a woman who disobeys gender conventions--usually by being "oversexed" compared to "proper women". A woman without sexual feelings in the nineteenth century was obeying gender norms.

<sup>133</sup> Poovey, The "Proper Lady" and the Woman Writer, p.21: the mobilization of strict training and social control to police women's modesty showed the continuation of the seventeenth century idea of women as naturally "licentious" and "fickle": the mechanisms of enforcement "indicated that female sexuality was still assertive enough to require control."

<sup>134</sup> Hunt, The Family Romance, pp.136-42, gives one of the most creative and insightful analyses of this attitude to the prostitute as "public woman" in her reading of de Sade's Philosophie dans le Boudoir (1795).

<sup>135</sup> Speech of Mr. Deegan, Chartist, at Stalybridge, Northern Star, June 1, 1839, quoted in Anna Clark, "The Rhetoric of Chartist Domesticity", Journal of British Studies (1992), pp.62-88, at 62.

to justify state action splitting up their families. The hated 1834 *New Poor Law* drew ordinary men and women into the streets to protest, because the legislation was supposed to make receipt of poor relief contingent upon entering workhouses--and these large institutions divided the paupers by sex. So families would be split up--mothers and daughters to one barracks, fathers and sons to another--to obtain social support.<sup>136</sup> This was not a new idea, but it was meant to be implemented efficiently by a centralized authority. When a similar local plan was touted in 1775 for Norfolk, petitions expressed what the poor thought of breaking up families:

[T]hat imprisonment of our persons, that separation from our children, that destruction of our race, that loss to the kingdom, and that curse from the Almighty which must attend establishing a poor house upon the fallacy of providing for our comfort, by the breaking of our hearts.<sup>137</sup>

Male concern for wives and children was evident. However, this concern was mixed with concern for their own comfort. Working class Chartists attacked the *New Poor Law*, because it

crushes, through the bitter privations it inflicts upon us, the energies of our manhood, making our hearths desolate, our homes wretched, inflicting upon our heart's companions an eternal round of sorrow and despair.<sup>138</sup>

A less sentimental, more ominous, version of this argument for domesticity aroused great rounds of cheers when Rev. J.R. Stephens proclaimed to Wigan Chartists,

God cursed woman as well as man...that she should be in subjection to her own husband, her desire should be unto her husband, and he should rule over her [hear hear] and not the millowners [tremendous cheering] nor the coal pit masters [continuous cheering]--not the Poor Law Commissioners.<sup>139</sup>

Issues of power and control, and sexual jealousy, were involved in workingmen's support for domesticity, as well as genuine concern for the welfare of wives and families.

In the short run, working class radicals exploited bourgeois rhapsodies about the Angel in the Home, "turn[ing] middle class domestic ideology against itself" to claim better pay for male workers and seclusion for their wives. This undermined the claims of bourgeois political economists that all working people must labour for as little as possible, or the economy would fail. Working class radicals "exposed the contradictions between the doctrines of political economy and

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<sup>136</sup> Clark, "The New Poor Law", *Journal of Social History* (2000), pp.261-81 at 261, and 264-5.

<sup>137</sup> John Rule, *Albion's People* (1992), pp.126-7, quoting small-holders and labourers in Norfolk, 1766, petition to their two county MPs, quoted in A. Digby, *Pauper Palaces* (1978) pp.34-6.

<sup>138</sup> Clark, "The Rhetoric", p.62, quoting George Harney to Yorkshire Chartists, *Northern Star*, Oct. 13, 1838,

<sup>139</sup> *Ibid.*, p.72, quoting Rev. Stephens, Wigan Chartist meeting, reported in *Northern Star*, Nov. 17, 1838

separate spheres, both central to middle-class identity."<sup>140</sup> Their version of domesticity differed from bourgeois Separate Spheres in that "[i]nstead of a rigid separation between home and work, public politics and family privacy, Chartists politicized family life, defending it against attack and drawing on the family as a political resource."<sup>141</sup> The working class family was less ideologically separated from public politics and thus arguably more possible to integrate with support for women's civic participation.

But while the strategy worked in the short term, by convicting capitalists on their own standards, it did not allow workers to argue that all work be paid what it was worth. Dividing the working class on gender lines conceded to capital that extreme underpayment of workingwomen was justified. Workingmen's preoccupation with the demarcation of "men's work", based on outmoded artisanal notions of independent control over skilled labour,<sup>142</sup> excluded women from most early trade unions. This condemned workingmen to continued competition with a large pool of desperate, underpaid workers.<sup>143</sup>

Political defense of working class rights was thus ironically expressed by capitulation to bourgeois gender ideology. But working class passionate opposition to the exclusion of workingwomen from the category of "ladies" is not hard to understand: the definition of working women as "public women" was painful and demeaning; while there may not have been as many seduced servants betrayed by masters as literature suggested,<sup>144</sup> the trope was realistic enough to fuel working class outrage.

The Chartist Northern Star journal printed "English Life", a story of a "typical" working family, evicted from a

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<sup>140</sup> Ibid., p.82.

<sup>141</sup> Ibid., p.74.

<sup>142</sup> Ibid., p.81-2, noted: "Men regarded their labor as a source of pride and independence (even if the reality was different) while for women labor was an alienated cash nexus", because "the Chartists wished to recreate artisanal independence and control over women." See also Eric Hobsbawm, "Artisans and Labour Aristocracy", in Workers: Worlds of Labour (1984), pp.252-72; Allen Fox, History and Heritage (1985), pp.7 and 14-5, which discussed how artisanal ideas did not serve the working class well because it encouraged proletarianization by excluding working women from early craft-based trade unions and thus perpetuating a reserve army of extremely poorly paid workers; and Charles Tilly, "Demographic Origins of the European Proletariat", in David Levine, ed., Proletarianization and Family History (1984), pp.1-85, at 26-7, and 30-42, proletarianization created almost all of the increase in the population of Europe from 1500 to 1800, as well as the supply of a dependent class of willing wage-labourers with no other choice but to work for others for their subsistence, which was the real fuel for, and innovation behind, the Industrial Revolution, not new technologies of production.

<sup>143</sup> Ibid., p.81, noted the attack on women's work and promotion of artisanal independence and control of skill distracted workingmen from analysing the economics of proletarianization--deskilling and rendering workers insecure through industrialization.

<sup>144</sup> Clark, Women's Silence, pp.91-7, noted that while there were a far number of anecdotes about sexual exploitation in the workplace, more of the perpetrators in factories at least were overlookers--thus working class--rather than middle class factory owners.

cottage and forced to relocate in a factory town:<sup>145</sup> "The son is crippled in the army, while the beautiful daughter is seduced by the factory master, deserted, becomes a prostitute and dies."<sup>146</sup> A Chartist poet generalized the idea of sexual harassment of workingmen's daughters into the stock situation of all poor people:

Our Fathers are Praying for Pauper Pay  
Our Mothers with Death's Kiss are white;  
Our Sons are the rich man's Serfs by day,  
And our Daughters his Slaves by night.<sup>147</sup>

Chartist women spoke out at a public meeting against the rich because "our daughters, are considered, by haughty and iniquitous capitalists, as only created to satisfy their wicked desires."<sup>148</sup> The desire to fight back--perhaps especially among the men--was a very human one. Radical Chartist men who advocated use of force to obtain franchise reform spouted the slogan: "For child and wife, We will fight to the knife!"<sup>149</sup>

But the use of gendered sentimentalism to shame the rich did not serve the working class well in the long term: it was soon used to dehumanize workingwomen. Middle class people responded to Chartist denunciation of sexual exploitation by pathologizing women who worked outside their homes as the cause of working class social problems: drunken men, ill-supervised and neglected children, and lack of moral socialization of youth. The women's sexual exploitation receded into the background: it may have been the original cause of working class women's moral depravity, but the depravity was recast as something inherent to the women which could not be fixed; what started out as a harm done to these women was used to confirm their present corruption, and then that corruption could be used to blame the women themselves for all sorts of working class problems for which middle class people refused to accept responsibility. The classic maneuver of victim-blaming became established in the bourgeois "common sense" about the working class, working class families, and especially working class women.

In the end, radical working class rhetoric demonizing the "rapacious capitalist", which had exposed the faultlines between idealization of the bourgeois home and woman (Separate Spheres) and the rationalized world of *laissez-faire* which treated working people as objectified factors of production, provided its own scapegoat to distract bourgeois attention away from their own share in the blame for exploitation of working class people: working mothers. Pathologizing women's work became a convenient way to "protect political economy from the criticisms of its methodology and its doctrines on

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<sup>145</sup> Charles Tilly, "Demographic Origins", argued that dispossession from small peasant holdings sufficient to provide subsistence was the crucial step to creating a proletariat. So "English Life" in this sense was realistic.

<sup>146</sup> Clark, "The Rhetoric", p.68, summarizing "English Life", Northern Star, June 5, 1847.

<sup>147</sup> *Ibid.*, p.68, quoting Gerald Massey, Poems and Ballads (NY, 1854), p.149.

<sup>148</sup> *Ibid.*, p.78, quoting unnamed women delegates quoted in the Northern Star, Feb. 2, 1839.

<sup>149</sup> *Ibid.*, p.73, quoting the Northern Star, May 18, 1839.

industrialization."<sup>150</sup>

"Public woman" began to mean a "female" who was not feminine enough to count as a real woman; over the century, they were equated with animals, and assumed to be congenitally inferior.<sup>151</sup> Eugenics first questioned, and then demonized, the heredity of the British working classes;<sup>152</sup> at the same time that British imperialism extended the gaze of the British bourgeois public onto the "heart of darkness" in Africa, British social scientists wrote about "darkest England", the poor people in the East End of London.<sup>153</sup>

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<sup>150</sup> Maxine Berg, The Machinery Question and the Making of Political Economy (1980), p.296. Clark, "The Rhetoric", p.85, applied Berg's quote, originally applied to the issue of the use of machines to division of labour, to the gender issues of classed use of domesticity ideology.

<sup>151</sup> Edwards, Female Sexuality, pp.55 (animal comparison), and 53, (congenital unchastity): Rev. Dr. Hannah reported to the the Contagious Diseases Acts review (Report of the Royal Commission upon the Administration and Operation of the Contagious Diseases Acts, 1871, c.7448) that the women registered had likely "fallen" from "a sort of innate want of virtue."

<sup>152</sup> Lower class women were associated with degeneration in Cesare Lombroso and Guglielmo Ferrero, The Criminal Woman, the Prostitute and the Normal Woman (2004 [1894]); Margaret Sanger, The Pivot of Civilization (1969 [1922]); H.G. Wells, Anticipations of the Reaction of Mechanical and Scientific Progress upon Human Life (1902 [1901]) and Mankind in the Making (1903); George Bernard Shaw, Man and Superman (1907 [1903]); and several writings published by the Fabian Society. See Michael Perry, ed., The Pivot of Civilization in Historical Perspective (2001). Wells' Anticipations said a World State would "tolerate no little dark corners where the people of the Abyss may fester, no vast diffused slums of peasant proprietors, no stagnant plague preserves" (p.272) full of the "bulky irremovable excretion" and "gall stones of vicious, helpless, and pauper masses" (pp.70-1), "the multiplying rejected of the white and yellow civilizations": "[t]o give them equality is to sink to their level, to protect and cherish them is to be swamped in their fecundity" (pp.241-2 and 250). Shaw's Man and Superman, advocated deliberate breeding to "dra[w] the teeth of insurgent poverty" by changing the nature of (working class) man (pp.710, 712). Sidney Webb's Fabian tract #69 "The Problems of Individualism" (1896: Fabian Society, London), criticized capitalism for "breeding...degenerate hordes of a demoralized residuum unfit for social life" (p.6); "The Decline in the Birth-rate", Fabian tract #131 (1906: Fabian Society, London) complained that the birthrate had fallen in those parts of London where servants were kept, but not among Irish Catholics, East European Jews, and "the thriftless and irresponsible--largely the casual laborers and the other denizens of the one-roomed tenements" (pp.16-7). Kevin Gaines, Uplifting the Race (1996), noted that lower class women, like black women, were judged "complicit" with sexual abuse and "naturally" unchaste. Angelique Richardson, Love and Eugenics in the Late Nineteenth Century (2003) and Stephanie Athey, "Eugenic Feminisms in Late Nineteenth Century America", Genders (2000) at <www.genders.org> defined eugenics as "a fusion of evolutionist, imperialist and capitalist principles...to promote policy that targeted...'degeneracy'" and aimed at "women of all races, men of color and those on the margins of 'whiteness', disabled men, and immigrant or poor males", yet some feminists liked it for providing "a discourse of female bodily sovereignty" by emphasizing the importance of reproduction.

<sup>153</sup> cf. General William Booth (founder of the Salvation Army), In Darkest England and the Way Out (1890). Charles Booth (no relation) began the trend to describe the slums, especially the East End, as full of habitual criminals, with Life and Labour of the People of London (1886-1903); the poorest areas, shaded in black, were labelled "Lowest class. Vicious, semi-criminal". See also Margaret Harkness, In Darkest London (1889); A.O.M. Jay, Life in Darkest London (1891); and Ada Chesterton, In Darkest London

(continued...)

African women had since the eighteenth century been debased and sexualized by scientific speculations that they mated with apes,<sup>154</sup> and Africans were commonly described as a subspecies just above great apes.<sup>155</sup> The use of language of darkness for lower class English people sent a clear dehumanizing message--and it was gendered as well as classed and raced. The racist language applied to the poor confirmed "the power of the male white gaze" over workingwomen, just as it did overseas with black women; white gentlemen were implicitly granted a power to conceptually degrade poor women along with black women, "backed up by the power to buy and 'take' the body of the slave."<sup>156</sup>

Working women became equated with "fallen women"--women who had lost their virginity and thus potential (in bourgeois imagination) for marriage. Working class girls were commonly believed to be "ruined" very young.<sup>157</sup> We would now understand them as victimized; but although men could technically be charged for having sex with working class girls under 12, the prevailing wisdom was that among the poor, girls could not be kept virgin but would inevitably be ruined by puberty.<sup>158</sup> This was the backstory to the defence argument raised by Mr. Price, the lawyer for James Hopkins in the 1842

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<sup>153</sup> (...continued)  
(1929).

<sup>154</sup> Edward Tyson, Orang-outang, Sive Homo Sylvestris (1699); and Charles White, An Account of the Regular Gradation in Man (1799), claimed that orangutans carried off negro boys, girls and women for sex, producing children. See Robert Wokler, "Tyson and Buffon on the Orangutan", SVED (1976), pp.2301-17. Voltaire claimed that either Africans came from monkeys or monkeys from Africans in Essai sur les mœurs, (1756) CC, 12, p.357 (see Scott Foutz, "Ignorant Science", Quodlibet Journal, (1999) <www.quodlibet.net>). Henry Gates, The Trials of Phillis Wheatley (2003) discussed the 1772 examination by 18 whites to determine if a black woman could have written poetry; Thomas Jefferson stated it was as natural for black men to prefer white women as for orangutan males to prefer black women (pp.20, 30).

<sup>155</sup> The greatest biologists of the eighteenth century, including Georges-Louis Leclerc, Comte de Buffon, in Histoire Naturelle (1749-88), considered orangutans likely to breed with mankind (see Ritvo). Carol von Linnaeus classified orangutans among the races of man as "homo troglodytes" just below the Africans in Systema Naturae I (1758), pp.24-5; Rousseau agreed (Foutz). Norbert Finzsch, "Discourses of Genocide", in Rac(e)ing Questions II, (2005), Gender Forum <www.genderforum.uni-koeln.de/racing2.finzsch.html>, noted that Linnaeus' "Orangutans" "...included imaginary cave people, chimpanzees, and Asian Orangutan"; see also Brett Mizelle, "Man Cannot Behold It Without Contemplating Himself", Pennsylvania History (1999), pp.144-73. Edward Long, (in History of Jamaica, 1774) claimed "Africans were closer to primates than to humans and...were in fact interbreeding with apes"; see also Louis Agassiz' Essay on Classification (1851) developed a twelve race typology; #10, the only one using the term "zoological", was the "African Zoological Race". Michel Foucault, Society Must be Defended (2003 [1978-9]) described the "race conflict theory" as the first popular history, stemming from the 1688 Glorious Revolution and the end of the reign of Louis XIV.

<sup>156</sup> Norbert Finzsch, "Discourses of Genocide".

<sup>157</sup> Edwards, Female Sexuality, pp.53-4.

<sup>158</sup> <www.historyofprivacy.com>, A Man's Honor, Part 2, "Anxieties of Exposure", analyzed a tabloid

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statutory abduction case.<sup>159</sup> Their loss of chastity was lamentable, but the common phrase for a working class woman of loose morals became "she was no better than she ought to be".

The proprietorial attitude to women's value did not allow the bad ethics of men, inherent in their "fall", to free women from the implications of loss of chastity for their embodied social worth. Like Humpty Dumpty's smashed eggshell, fallen women could not be recuperated to virtue again. No matter how much the man who took their virginity has abused or exploited them, they could not be redeemed. This meant that non-virgin women were de facto relegated to the status of "public women"--a classification which made them forever after available for sexual use by any men.

Fallen women were victims of a "system", but no matter how much they were pitied, the system could not be changed. The nineteenth century bourgeois imagination could not stretch to finding a practical way around the necessity that a woman come to marriage a virgin. The physicality of women's condition as matrimonial property was an implacable obstacle to forgiveness of this sin in women, despite the redeemability of any other sin under Christianity. This was how individual bourgeois, privileged by the degradation of "fallen women", spun ideological justifications.

Complicated and self-contradictory, the ideology of Separate Spheres suggested women were "naturally" asexual, yet must be sexually controlled.<sup>160</sup> Female asceticism became an ideal, first for middle class women, then all women. But for ordinary women, the ascetic ideal became more of a standing reproach than a realistic aspiration: "passionlessness"<sup>161</sup> defined early nineteenth century "ladies" as indifferent to bodily needs. But the logic of the market place was centered on provisioning those needs and was thus sullyng to women.

Emerging among the bourgeois, spread to the gentry as an argument for moral superiority over the licentious aristocracy, and envied by the poor, the purity of the "proper Lady" was inextricably mixed up with the capacity of a family to manage without its women emerging from the private home to earn wages. "[S]eparating masculine work from the

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<sup>158</sup>(...continued)

story under the headline "Work of Obscene Pictures. Young Girl of 14 Years Charges George Dimmock, A Cambridge Naturalist, with Causing Her Downfall--Arrest Follows Finding of Bill by Grand Jury", The Boston Daily Globe, Dec. 15, 1890. The victim had first been violated at 10; though under the age of consent, she was described as if she consented, because she had not told anyone and the abuse was ongoing for a long time. It was assumed that the dirty pictures and sexual activity was welcome. "Clara" was not an entirely innocent victim, and after the abuse she had become corrupt. This attitude to abused working class girls was typical throughout the Anglo-American world during the Victorian era. See Deborah Logan, Fallenness in Victorian Women's Writing (1998); Jo Doezema, "Loose Women or Lost Women?", Gender Issues (2000), pp.23-50, discussed how similar issues arise in our current discussions of prostitution, including the child sex trade.

<sup>159</sup> In R. v. James Hopkins, E.R. V. 174 (1842), Nisi Prius V., pp.495-7, originally Carrington and Marshman 254-8.

<sup>160</sup> Poovey, The "Proper Lady", p.21. See also Laqueur, pp.196-9.

<sup>161</sup> Ibid., pp.3-8, noting that the belief that women could "naturally" altogether defer personal desire--not only sexual but even hunger--was common by the end of the eighteenth century.

feminine home became a marker of middle class status<sup>162</sup> in the last half of the eighteenth century. Modern social classes were gendered from the beginning: middle class status was inscribed on a family by the private morality of its women.

The political consequence of the separation of the private world of family from the public world of politics<sup>163</sup> was to limit the power of women in the state. Patriarchy changed: modern patriarchy no longer meant "[a] young girl was given in marriage to a family rather than an individual."<sup>164</sup> But fraternal patriarchy was not an unmixed advance for women. Modern patriarchy idealized motherhood as a valued identity, but it was practiced in a colonized manner, as personal service for husbands, producing thoroughly "patriarchal" mothers.<sup>165</sup>

In old patrilineal families, women had to bear sons to continue the lineage, not meet the personal needs of husbands.<sup>166</sup> Once this duty was fulfilled, patrilineage often granted older women more personal freedom; they sometimes wielded the political power of elite patrilineages' networks of patrons and clients,<sup>167</sup> and thus often held more political power

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<sup>162</sup> Ibid., pp.10-1; Clark, The Struggle, p.7.

<sup>163</sup> Pateman, The Social Contract, pp.10-2. Comparative history looking at parts of the world which do not divide up the world into private family life and public political life show the degree to which Separate Spheres is arbitrary. For example, Elizabeth Thompson, "Public and Private in Middle Eastern Women's History", Journal of Women's History (2003), pp.52-69, argued that the typical public-private analysis common in Eurocentric women's history was completely divorced from the worldview of Middle Eastern women.

<sup>164</sup> Tapan Raychguadhuri "Love in a Colonial Climate", Modern Asian Studies (2000), pp.349-78 at 350-1, used this apt phrase to describe the nature of marriage as giving a bride to a group rather than an individual, based on India, an extreme example of a culture using the major alternative marriage system Hartman contrasted to the North West European marriage system, the early marriage system.

<sup>165</sup> Pateman, The Sexual Contract, pp.46-8: Hobbes described marriage as an imposition upon a woman by a man who threatened her life; the "family" originated from conquest of a woman, and the state began with the "family-kingdom" in which all members are related to the father as sons or servants. "Servants" included the father's wife and daughters, as well as co-residing employees. Only the father acted as a real parent with authority; the mother's authority was derivative and determined by the wishes of the father.

<sup>166</sup> Stone, The Family, Sex and Marriage, pp.85-6, and 89-90. Hartman, pp.52-4, 56, 64-5, contrasted patrilineage to the Western pattern: in early marriage societies, where pubescent brides join patrilocal families through arranged marriages to sons ten to fifteen years older, women at all ages commit suicide more than peer-aged men, especially in the early months of marriage. In the Western marriage system, courtship is the difficult stage for both sexes. See also Raychaudhuri for insightful discussion of the consequences of patrilineal marriage.

<sup>167</sup> See Elaine Chalus and Hannah Barker, Gender in Eighteenth Century England (1997); Chalus, "Elite Women, Social Politics, and the Political World", The Historical Journal (2000), pp.669-97; Chalus, Elite Women in English Political Life (2005); for France, Sara Chapman, "Patronage as Family Economy", French Historical Studies, pp.669-97; and Dena Goodman, "Public Sphere and Private Life", History and Theory (1992), pp.1-20. For Medieval time, Barbara Harris, "Women and Politics in Early Tudor

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than wives under bourgeois liberalism.<sup>168</sup> Modern patriarchy closed loopholes which had enabled women to be "powers behind the thrones" when private life was not separated from politics.<sup>169</sup>

The modern sexual contract was centered on providing for male supremacy in marriage, but as implied by the discussion of domestic torts, and especially the discussion of the intersection of class and gender in Separate Spheres ideology, modern contractual patriarchy was not just about marriage. The new, reformed fraternal patriarchy established all the ways "men claim right of sexual access to women's bodies and...right of command over the use of women's bodies."<sup>170</sup>

The existence of a new, highly commercialized, public sphere expanded the power of "men [to] demand that women's bodies are for sale as commodities" in prostitution. That it did so was not just an adjunct to the enforcement of marital sexuality however, for the images of "good" and "bad" women were linked and symbiotic. Fraternal patriarchy seemed to divide women into opposed categories, but the categories themselves were inextricably linked together. Bourgeois liberalism unified both categories of women by treating all "women as embodied sexual beings."<sup>171</sup>

The sexual contract produced both the degraded position of wives, and that of prostitutes. The classing of the private Angel in the Home as bourgeois implied that "public women" would also be classed: lower class women would be treated as "public".

Edward Holroyd, in his pamphlet defending his father's charge to the Thornton jury, suggested that Mary Ashford probably consented to Abraham Thornton after he had battered her. This was "consent to force". He said Ashford consented because of Thornton's "'considerable earnestness, exertion and importunity'" and even imagined that Thornton probably promised to marry her:

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<sup>167</sup>(...continued)

England", The Historical Journal (1990), pp.259-81; M.Mercer, "Lancastrian Loyalism in the South-West", Southern History (1997), pp.42-60; and Noel Menuge, ed., Medieval Women and the Law (2000). Menuge's volume discussed how elite women used law to press their own interests through family positions. Most interesting, Kim Phillips' "Written on the Body: Reading Rape", pp.125-44 in Menuge, discussed how "raptus" was originally conceived as violent assault in the work of Glanvill, then as defloration of virgins (Bracton), and then in the late Medieval period as abduction as a "theft" of females as property of men.

<sup>168</sup> See Olwen Hutton, Women and the Limits of Citizenship (1992); Lynn Hunt, The Family Romance and "The Unstable Boundaries of the French Revolution", Michelle Perrot, ed., A History of Private Life (1990), pp.13-45; Joan Landes, Women and the Public Sphere (1988) and "Women and the French Revolution", Gender and History (1994), pp.281-9; Maire Cross and Felicia Gordon, Early French Feminisms (1996); Joan Scott, Only Paradoxes to Offer (1996); Doris Kadish, Politicizing Gender (1991); Elinor Accampo, "Class and Gender", in Malcolm Crook, ed., Revolutionary France (2002) and "Integrating Women and Gender into the Teaching of French History", French Historical Studies (2004), pp.267-92; and Ida Blom, Karen Hagemann, and Catherine Hall, eds., Gendered Nations (2000).

<sup>169</sup> Elizabeth Thompson, "Public and Private in Middle Eastern Women's History".

<sup>170</sup> Pateman, pp.16-7.

<sup>171</sup> Ibid.

...after some efforts to get away, and struggle and resistance at first, [she] yielded, a yielding obtained most probably reluctantly, and by artifice, promises and oaths, and urgent importunity, to which [by] her own extreme imprudence in remaining alone with a man...she was unfortunately exposed.<sup>172</sup>

In defending his father's judgment, the younger Holroyd linked the "fallen woman"--a woman who "yielded" her virginity to a man whose "artifice, promises, and oaths" were inherently not believable--with the respectable, middle class "Angel in the Home" whose mission was to serve the needs of her husband. Holroyd expected Ashford to give up her virginity without a real expectation of marriage, yet with a wife-like solicitude for a man's sexual needs. He made her into a sort of "angel in the streets".

Sir George Holroyd's characterization of Mary Ashford in court was odd enough. But it is even more odd that his son Edward imagined her submitting to a formulaic promise without really expecting to marry. The accused was her social equal. There was no reason for Ashford not to think that Thornton might be interested in marrying her.<sup>173</sup> Why not assume she believed they would marry? The answer is that Edward Holroyd's "angel of the streets" fantasy did not relate to the actual working class man accused of murder standing before him--it was a fantasy drawn from an elite sexual culture: elite men associated sex more with intercourse,<sup>174</sup> and were much more likely to be influenced by the literate elite culture of libertinism.<sup>175</sup>

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<sup>172</sup> Holroyd, Observations, pp.24 and 87, quoted in Clark, Women's Silence, pp.114-5.

<sup>173</sup> See Chapter One, p.88, above. Of course, if Ashford had taken Thornton seriously as a suitor, she would still not have expected full vaginal intercourse, since folk mores supported only non-procreative sex before a long term commitment. However, Holroyd may have known little about the sexual culture of ordinary people. While the lower class people closely watched the "Quality", elite people knew little about workers. Holroyd's time was on the cusp of growing bourgeois fascination with industrial workers, but as a member of the gentry he would still be above such an urban, charitable-cum-prurient interest as the bourgeois interest in factory workers would become. When the bourgeois turned its eye to urban workers made much more visible by concentration into slums, the horrors they described revealed more about themselves--their obsessions and fears--than the workers social historians find in working class sources.

<sup>174</sup> Two sources promoted elite men thinking reductively of sex as intercourse: the Christian Church's moral absolute of premarital virginity; and the debased culture of "libertinism", which since the Restoration of the monarchy in 1660 had promoted sexual exploitation of women. Susan Owen, Restoration Theatre and Crisis (1996), discussed the political meanings of sexuality: rape was used to critique the opposing party, whether Tory or Whig. Samuel Mintz, The Hunting of Leviathan (1970) pointed out that Hobbes was unfairly associated with libertines by moralists, especially clergy, because of his agnosticism; critics associated the sexual licence of the court with Hobbes' state of nature as "the war of all against all" (even though Hobbes criticized the state of nature), because libertine revolt against restraint on sexual relations was based on the principle "that Power is Right, and justifies all actions whatsoever" (pp.134-5, quoting Bishop Samuel Parker, "Apes of Wit" in A Discussion of Ecclesiastical Politie (London, 1670), pp.xxii-xxiii, xxxv-xxxvi).

<sup>175</sup> Libertine pursuit of "taking Maiden-heads" drew from theatre and literature of the Court of Charles II after 1660. See Geoffrey Ashe, The Hell-Fire Clubs (2000 [1976]): elite all-male groups used sexuality

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In the discussion of the 1830 Anonymous case<sup>176</sup> in York--where, by raising prostitution, the credibility of the complainant's non-consent was demolished, whether she was chaste or not--the elite male judge, Justice Parke, assumed the authority to speak for female sexuality. He generalized about all women as if they were the same, and assumed their desires always "go along with the man's". He required of himself only the most superficial analysis of female intention. He only needed to look at the complainant to feel he knew her inmost desires in a way which qualified him to falsify her utterances. This self-authorization rested on no more than the glancing recognition of the female as physical body before him--the intrusive epistemology of the "gaze". Allowing the elite male gaze to construct the legal "facts" of complainants' intentions and desires turned women into "passive beings whose sole function is to provide an image of perpetually desired bodies."<sup>177</sup>

In the Thornton case, the epistemological privileging of the male judge's viewpoint is even more extreme than in Anonymous, because Sir George Holroyd manufactured the consent of a completely silenced corpse. Judge Holroyd's suggested consent out of sympathy<sup>178</sup> originated from his understanding of the content of male desire, augmented by the convenient presumption that women's desire would "go along". The role of "promises, arguments and oaths, and urgent importunity" came from Holroyd:<sup>179</sup> Thornton never said that he "importuned" or "made promises", only that she consented

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<sup>175</sup> (...continued)

to express private defiance of the Church. Alex Garganico, "The Heroic Drama's Legend of Good Women", Criticism (2003), pp.483-505, pointed out that at first, Charles II's body, prodigiously productive of bastards, was seen as a symbol of a prosperous body politic, in contrast to the dearth, conflict and religious piety of the Civil War and Republic; but after the Plague and Great Fire of London--and the King's childless marriage--the public feared the nation was being punished because the King was too influenced by his mistresses, associating licentiousness with emasculation and tyranny, (see John Dryden's Tyrannick Love (1669)). See also Derek Wilson, All the King's Women (2003). Barbara Kachur, Etheredge and Wycherley (2004) contextualized four Restoration plays with the promise of the Court to also restore class hierarchy as well as prosperity, associating libertinism not only with religious radicalism but political conservatism. The Republicans were Puritan, but included groups promoting a radical social experiments, including primitive communism and redistribution of property. See also Mintz, p.135-6: Robert Sharrock, a Calvinist Anglican cleric at New College, Oxford, described libertines as glorying in uncontrolled power: "Fill yourselves with costly Wine and Oynments and let none of you go without some part of his voluptuousnesse...opresse the poor righteous man, spare not the Widow and...let your strength be the Law of Justice and what is feeble--count it little worth." John Wilmot, Earl of Rochester, wrote a line for his fictional King (a caricature of Charles II) in his Sodom, or the Quintessence of Debauchery (1684) describing libertine sex as will to power: "And with my Prick, I'll govern all the land", see Rictor Norton, "England's First Pornographer", in A History of Homoeroticica, at <www.infopt.demon.co.uk/wilmot.htm>.

<sup>176</sup> R. v. Anonymous E.R. V.168, Cr. Cases I, p.1045, originally 1 Lewin 293. See discussion above, this chapter, p132.

<sup>177</sup> Schultz, p.2, discussing P. and R. Gibson, Dirty Looks (1993), p.7.

<sup>178</sup> Hall, pp.106-7: see Judge Holroyd's use of the term "importuning" to describe how he thought Thornton may have obtained Ashford's consent.

<sup>179</sup> It was described briefly in the judge's charge, and elaborated more fully in the son's pamphlet.

because she wanted to have sex.<sup>180</sup>

The younger Holroyd's elaboration of his father the judge's account of Ashford's sympathy accessed a fully-fledged elite fantasy, which relied on working class women like Ashford believing they must submit when "importuned"--that is, that working class women acknowledged they had no right to withhold sex from an authoritative male of higher status. He implied that force was rightful punishment for Ashford not yet yielding. Imagining her in relation to an elite man, not a social equal, he argued she had to agree to casual sexual use, because she was not marriageable--to those elite men. The only women who could properly refuse the elite man's sexual demands were those of privileged social status who could hold out for marriage; the lowly were so dehumanized and distanced from "ladies"--so "othered"--that they could be treated as "fair game" by gentlemen. "...[W]omen who once may have been defined within a traditional family model that promoted reproduction,...[had] simply been reduced to sexual objects for the purpose of male gratification."<sup>181</sup>

Judge Holroyd did not attend to the actual accused's situation. Thornton's social class was not determinative--the social class of the victim was. Holroyd ensured working women would be defined as sexually available to gentlemen like him. In this, he was not unusual: It was elite men whose rights judges were most concerned to protect. Judges referenced a notional model of a "typical man" implicitly classed as elite in their rape decisions, no matter the actual class status of the men accused. This dynamic still continues to affect rape law.<sup>182</sup>

Holroyd constructed Ashford, an ordinary working woman, as a rich man's whore. In her, the most feminine virtue

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<sup>180</sup> See Hall, pp.11, 93, evidence of Constable Dales, that Thornton had said, "he had been concerned with the girl, by her own consent"; p.49, statement by Omar Hall, given Nov. 29; and pp.129-30, "Memorandum as to the Taking of Thornton": John Hackney, the constable who arrested Thornton the second time (Oct. 9, 1817) for the Appeal of Murder, reported Thornton said, "if he had not have gone with her it would not have happened" but "she was as willing as he was." Hackney may have been a friend or sympathizer: he got Thornton a room at the Bradford Arms Inn for the night while travelling to London instead of placing him in a cell. Presumably Thornton did not think an assertion of Ashford's equal desire would be believed in court alongside the forensic evidence of blood and footsteps.

<sup>181</sup> Schultz, p.9.

<sup>182</sup> Compare to the racial dynamic noted in Teresa Nahanee, "Sexual Assault of Inuit Females". She found that the offender's race in 1980s sexual assault cases in Canada's North West Territories was less determinative of sentencing than the victim's race. Aboriginal offenders who had been drinking were treated leniently; but Aboriginal victims faced an ideology which denied their rapes hurt them by maligning Aboriginal culture. A white judge claimed Inuit accepted sex under the age of consent; Inuit women were not harmed by sex while asleep or unconscious, because indiscriminate sex at drinking parties was culturally accepted; and pregnancy in a 13-year-old victim was not an aggravating factor in gang rape, because the Inuit accepted unwed teen mothers. Similarly, the burden of class prejudice was borne disproportionately by nineteenth century victims of sexual assault. See also "Comments about Judge Lack Fairness, Balance", Sept. 25, 2003, Saskatoon Star Phoenix, a letter to the editor by Robert J. Gibbings, President of the Law Society of Saskatchewan, defending the judge, Fred Kovach J., from charges of racism in the notorious 2003 cases of R. v. Edmondson (Sept. 4, 2003, Melfort, Sask. and [2005] SkCA 51) and R. v. Kindrat and Brown (July 10, 2003, Melfort), by noting a case in which Kovach acquitted an Aboriginal male for raping a white female. That racism might be expressed more against racialized women than racialized men in sexual contexts was not considered.

(selfless responsiveness to male desire) was dishonourable because of her class; she was not economically independent of the labour market, and worked for men outside family. She was not raped, because she was the kind of woman who always had to have sex when required for the pleasure of a "Master". As Porter put it,

[a] great deal of what we would call rape would have been passed off as droit de seigneur or "seduction" (e.g. the bedding of servant girls by their masters, under conditions in which the maid's "no" carried no weight); these never resulted in court cases.<sup>183</sup>

This was the elite male view. But in the early nineteenth century it became increasingly clear that working people would not agree that sex which lower class women verbally refused was not rape, because the man was their employer, and did not have to listen to them.

Holroyd's doctrine was an elite male fantasy. Arthur J. Munby expressed the same elite fantasy which the judge's son Edward Holroyd accessed in his pamphlet, in photographs and poetry reflecting his perverse affair with the maid-of-all-work at his Inns of Court, Hannah Cullwick. Munby also subtly attacked middle class women for being too powerful, claiming working women better expressed the proper attitude of submission, obedience and care for bourgeois men:

"And even a slave obeying finds reward  
That Woman should still mould herself to Man  
And not to Woman. Masculine regard  
Is hers by right for blessing or for ban."<sup>184</sup>

Munby believed Hannah, like "all young servants while outwardly respectful, regards 'the ladies as her natural enemies' but the gentlemen as her allies."<sup>185</sup>

The nineteenth century definition of rape came to rest on whether "a man believed he had a right to sex from a woman". Holroyd's "consent to force" stipulated that, given the proper social distance to assert such a right, a man could use force: if "she refused, he could rape her, seeking sexual satisfaction and violent revenge...[M]en who raped believed that sex involved the 'taking' of women and that they had a right to women's sexuality."<sup>186</sup>

The legal doctrine of "consent to force" meant that Ashford could not escape a duty to comply with a man's desire,

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<sup>183</sup> Porter, "Rape", p.221.

<sup>184</sup> Davidoff, "Class and Gender", p.55, quoting Munby [Jones Brown, pseudonym], Vulgar Verses (1890).

<sup>185</sup> Ibid., p.55.

<sup>186</sup> Clark, Women's Silence, p.7. This libertinism was connected with men of property, but also young artisans trying to prove their masculinity, p.6 and 22-4. See also Clark, The Struggle, especially Chapter Four, "Plebeian Sexual Morality, 1780-1825", pp.42-62.

not even by running 300 yards,<sup>187</sup> because such exemplary exertion was not "enough" resistance to legally prove lack of consent. Her own ethics and the ethics of her community did not matter in the eyes of the law: "...[T]he balance of society...[was] overtaken by the desire of the male."<sup>188</sup> Rape decisions in which elite male judges overwrote women's expressions of non-consent by inserting male imaginings of women's desires provided "instructional guide[s] as to how women are defined,...and, ultimately, how they may successfully be conquered through violence and sexual dominance."<sup>189</sup>

Implicitly acquisitive, the male gaze was associated with conquest, of territory and of females: "Territorial conquest equals possession of the abstract and literal female body and rape often follows gaze."<sup>190</sup> The best a raped working class woman could expect (according to the elite male ethic of Edward Holroyd and Arthur Munby), after attracting the conquering gaze of an elite male, was to be compensated economically. Refusal was not an option Holroyd left open for Ashford; but prostitution always was.

Forty years after Thornton, the classed belief that working girls had to submit sexually was resisted in popular press for an increasingly literate working class readership. The classic scenario was the householder who "importuned"--or extorted sex from--his domestic servant. The News of the World of Aug. 18, 1861 sympathetically described a working woman caught in a social situation in which Holroyd would have thought it appropriate to expect her to yield.<sup>191</sup> Emma Reeves said her master, William Slade Bailey, assaulted her three weeks after she began working in his home. She "told him she would go to the magistrates at Berkeley" (in Gloucester). Bailey simply

...put a sovereign down upon the dresser, but she refused to take it, and told him that if he left it there she would give it to her mistress. Subsequently both Mrs Bailey and the prisoner then offered her money to make it up, and Mrs Bailey began to cry and said she could not help her husband's faults, and tried to persuade her not to leave and not to say anything about it. The prosecutrix at length consented to remain, and the prisoner drew up a paper which she signed, to serve Mrs Bailey from May 23 1861 to October 11.

Miss Reeves nevertheless went to the Magistrate, Rev. Mr. Karr, to make her complaint. Her employer countered: "The prisoner had followed her there and denied the charge and said she only wanted to extort money." The Magistrate accordingly did not take Reeves seriously and "told the parties to see if they could settle the matter". But he also promised Reeves he would revisit the situation the next Friday if necessary.

At this point, the story was complicated by the Mistress, Mrs. Bailey, and the situation for the servant took a big

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<sup>187</sup> Hall, p.83 and map, foldout after p.183.

<sup>188</sup> Schultz, p.9.

<sup>189</sup> Ibid., p.13.

<sup>190</sup> Finsch, "Discourses of Genocide".

<sup>191</sup> "Charge of Violation", The News of the World, Aug. 18, 1861, p.3. Accessed from SOLON database (www.ntu.ac.uk/solon), Nov. 2003.

turn for the worse:

The girl had a glass of beer at Berkeley and a glass of ginger wine, and then went back to the prisoner's house, and when she got there Mrs Bailey said she was intoxicated and she did not believe a word about the matter. She [Miss Reeves] asked her master to be allowed to leave but he refused, and said that if she went away he would send a policeman after her. Upon that, the prosecutrix said she did not know what to do, and became so excited and distressed that she attempted to destroy herself by throwing herself into a pool of water, from which she was taken out in a state of insensibility.

Quitting employment was not always possible for servants, even when economically feasible, since their legal position was still status based and quasi-familial.<sup>192</sup> Torts related to private family service--including crim. con., harbouring, and seduction--were built upon the tort of "enticing servants away." They were all based on the action "per quod servitium amisit", whether the personal care--manual services, companionship, loyalty and affection, all the things encompassed by the term "servitium"--was supplied to the head of the family by servants, or wives and children.<sup>193</sup>

Enticement of servants meant that during the term of a contract, employers could sue third parties who encouraged their servants to leave, including other would-be employers, because "[t]he feudal tenant and the master's servant was seen in quasi-property terms".<sup>194</sup> The same proprietary rights had traditionally applied to both servants and dependent family members. Although in the nineteenth century political economy provided a theory to support the idea of "freedom of

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<sup>192</sup> Judy Fudge, Eric Tucker and Leah Vosko, "The Legal Concept of Employment", Law Commission of Canada (2002), Part 3, "Legal History of the Scope of Employment Law", p.8ff at <[www.lcc.gc.ca/research\\_project/02\\_concept\\_8\\_en.asp](http://www.lcc.gc.ca/research_project/02_concept_8_en.asp)>. They argued that freedom of contract was not established in employment law by the early nineteenth century; the "legal subordination of one person to another" through employment narrowed (but never completely disappeared) from the 1820s to 1843. In the 1850s and '60s, "Master-Servant", or status-based, employment law extended to "nearly all manual workers". See Doug Hay, "Master and Servant in England", in W. Steinmetz, ed., Social Inequality in the Industrial Age, pp.227-64, and Robert Steinfeld, Coercion, Contract and Free Labor (2001). Hay, p.263, said "use of the compulsory features of master and servant law" actually increased between 1750-1850 and "the law grew more punitive and one-sided"; "contract may have been the principal gateway into the master and servant relationship, but the law fixed many of its incidents in a manner that conferred upon servants a distinct and subordinate status". S. Deakin, "The Evolution of the Contract of Employment", in N. Whiteside and R. Salais, eds., Governance, Industry and Labour Markets (1998), pp.212-30 at 219-22 noted the "control" test, wrongly supposed by twentieth century legal scholars to have governed which employment was covered by contracts of service or contracts for services, was cited to Yewens v. Noakes [1881] 6 QBD 530--the extreme case, a live-in domestic servant. So its scope was not as broad as labour lawyers had traditionally considered it. He argued "labour markets never enjoyed a period of laissez-faire" but proceeded directly from Master-servant law to regulation through labour statutes.

<sup>193</sup> See B.C. Law Institute "Report on the Action Per Quod Servitium Amisit", pp.9-10, and Shauna Van Praagh with Rachel Parsons, "Compensation for Relational Harm", Law Commission of Canada (2001) at <[www.lcc.gc.ca/pdf/vanpraagh.pdf](http://www.lcc.gc.ca/pdf/vanpraagh.pdf)>. Sometimes the basic action was restated as "per quod consortium amisit" for loss of services of a wife, which simply added another sort of service to the original list.

<sup>194</sup> Deepa Varadarajan, "Tortious Interference and the Law of Contract", Yale Law Review (2001), pp.735-60, traced Enticement to the Statute of Artificers, 1349, which set terms of labour to control the upward pressure on wages caused by labour shortages after the Black Death (p.744). Statutory maximums placed on wages helped nobles control "a scarce, not easily replaceable, good."

contract" as a framework for employment, it remained a new ideal which was followed more in the breach than in the application in the mid nineteenth century.<sup>195</sup>

In 1881, Yewens v. Noakes<sup>196</sup> confirmed that domestic servants were covered not by a free contract for labour services but a "contract of service" governed by traditional Master-Servant law and centrally involving a duty of obedience by servant to master,<sup>197</sup> the 1853 enticement case of Lumley v. Gye,<sup>198</sup> a case against a theatre owner who convinced Joanna Wagner, an opera singer, to leave her original venue and come sing for him instead, reiterated that employment which included "the requirement of personal service" still invoked the older quasi-property nature of Master-Servant employment contracts.<sup>199</sup> The more specific, emotional, and embodied a worker's service to her employer was, the more likely it was that she would be treated legally as a kind of property, legally parallel to his wife or his daughter, and her ability to vote with her feet by leaving and finding another job before her contract expired would be radically circumscribed.

Through the first half of the nineteenth century, domestic service work became more likely to be performed by women as opposed to men, and by children of poorer families, not middle class.<sup>200</sup> Domestic service was conceptually close to the service of wives to their husbands in their homes; if anything, domestic service was becoming more personalized, intimate, feminine--and eroticized--from the time of Ashford to the time of Reeves. Servants, like wives, were exceptions to liberal *laissez faire* ideology of freedom, independence, and personal responsibility, probably more so than they had been before the convulsions of the French Revolution; servants, like wives, were classified as persons in the private sphere under the direct and total authority of bourgeois men as heads of families.

The threat of a policeman was credible: as with runaway children, the law of Master-Servant enforced dependency on servants.<sup>201</sup> With the Magistrate expecting the "minor" dispute to resolve itself, and the Mistress impugning her sobriety,

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<sup>195</sup> See Fudge et.al; Hay, "Master and Servant"; Steinfeld, Coercion, Contract and Free Labor; Deakin, "The Evolution of the Contract".

<sup>196</sup> [1881] 6 QBD 530.

<sup>197</sup> Note that Deakin's dispute over the meaning lawyers have ascribed to Yewens v. Noakes was not in its application of Master-Servant law to the facts at hand, a dispute involving a live-in domestic servant; rather, Deakin merely disagreed that the case could be used to suggest that other employment contracts, for workers other than live-in domestic servants, were completely free. Deakin would extend the application of Yewens to more employment contracts; this does not shake the central meaning of Yewens for domestic servants' contracts.

<sup>198</sup> E.R. V.118 749, originally 2 El. & Bl. 215.

<sup>199</sup> Varadarajan, p.745.

<sup>200</sup> See Chapter One, p.93.

<sup>201</sup> Hay, "Master and Servant", p.263.

Reeves seemed to be ensnared.

But the case turned in favour of Reeves the next day: her mistress repeated the money offer--"half a sovereign and a new dress to make it up, and not to have any more ado"--in front of a policeman. Probably summoned to keep her from running, the policeman vouched for Reeves' refusal of money. She survived until the next meeting with the Magistrate; Bailey increased his offer to "a sovereign and her wages", again in front of the policeman. With a respectable witness on her side, and after being "subjected to a long and rigid cross examination" during which "she answered all the questions put to her with great readiness, even when they seemed to tell against her", Bailey was ultimately convicted "for an assault with intent to commit a rape". He got eighteen months hard labour.

The tale of a courageous working class girl, a predatory master, and a duplicitous mistress appealed to the class prejudices of the readership, but the victim-sympathetic reportage of Bailey was unusual, even for working-class Victorian tabloids. More typical was an opinion piece in The Spectator, Oct. 15, 1864, which accepted that "respectable men" were only accused of sexual assaults to extort money:

The manufacture of charges of ind ass [sic: indecent assault] seems to be becoming a mania. No less than 3 have been detected this week. In one, a girl of 15 charged a surgeon with rape and it was proved beyond question that he was not in the house all day, and that the girl had declared herself 'to make any married woman jealous'. In another 3 children swore to a charge of exposure on the part of a respectable tradesman, and the mag [sic: magistrate], after a patient inquiry, dismissed him 'without a stain on his character'. In the third, a boy 10 years old was charged with an assault upon a child of 4 and the usual offer made to compromise, which was refused, and the mag declared the charge 'morally impossible'. The only remedy seems to be the one judges are applying and making extortion the heaviest of all offenses except murder.<sup>202</sup>

The deplorable behaviour of Mrs. Bailey to her servant was just as legally mandated as the proprietorial treatment of wives, children and servants by male heads of households. The law insisted that women's status as wives ruled over all other statuses. The privatization of women to men's homes meant women had to serve the interests of husbands first and foremost. A man's wife's first duty was as a servant to her husband. Wives as accomplices to husbands were presumed not criminally responsible because obeying their husbands' will, unless the husband was extraordinarily physically incapacitated. Even mothers who caved in, like Mrs. Bailey covering up her husband's rape of Emma Reeves, but against their own children's interests, were acting legally.

R. v. Thomas Cruse and Mary, His Wife, in 1838, upheld the legal presumption of coercion by the husband, judging the wife's duty to obey her husband greater than maternal duty. Mary Cruse, mother of Charlotte Heath, a 7-year-old viciously beaten by her step-father, had no duty to protect her child against her husband.<sup>203</sup> A child without her father was legally in the same position as an orphan, even if residing with her mother. The step-father's rights, as head of household, superseded the mother-child relationship.

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<sup>202</sup> Untitled, The Spectator, Oct. 15, 1864. Accessed from the SOLON database (www.ntu.ac.uk/solon), Nov. 2003.

<sup>203</sup> E.R. V.169, Cr. Cases II, pp.21-4, originally 2 Moody 53-9.

Even when the mother herself, and not her new husband was the primary malfeasor, remarriage could erase a mother's duty. In R. v. Sarah Shepherd, Mrs. Shepherd refused help in childbirth to her eighteen-year-old daughter, Mary Ann Ashton, a servant who resided with her mother when "out of place". She came home at harvest in 1861 and went into labour at the end of October. Her mother, "having great ill will towards the deceased", refused to call a midwife; Mary Ann died in hard labour. Yet Mrs. Shepherd was not liable: her legal duty was determined by her relationship to her husband, the girl's step-father. The girl was in the legal position of a stranger to Mrs. Shepherd. The judges were disturbed about denying a mother's duty to aid her daughter in the most elemental of female crises. But the law was clear. They found her morally guilty, but not legally liable:<sup>204</sup>

"The prisoner is indicted as a married woman. If her husband supplied her with food for this child, and she wilfully neglected to give it to the child...it might be murder in her. In these cases the wife is in the nature of the servant to the husband. It does not at all turn upon the natural relation of mother."<sup>205</sup>

Unlike the conspicuous fraternity of men--judges protecting scoundrels like Thornton for the sexual interests of elite men--women were unwilling to protect common gender interests. Feminism in the last thirty years has led to an explosion of female narratives of sexual assault.<sup>206</sup> Equivalent discourses do not exist for the nineteenth century. Making other women out to be "whores" was common, especially when women gained class privilege by protecting men. Men encouraged women to betray other women.

In 1997, Jacques Derrida said the French Revolutionary ideals of "fraternity" properly excluded women:<sup>207</sup> The woman is not yet fraternal enough...[S]he does not know what "fraternity" means...what it will and should mean, she does not understand--not yet--the fraternal promise...what it thinks in spirit--and so it

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<sup>204</sup> [1862] E.R. V.169, Crown Cases II, pp.1340-3, originally Leigh and Cave 147-56. This was a family of poverty but probably not utter destitution. The Devon jury originally convicted Mrs. Shepherd of manslaughter; the judge, Justice Williams, respited the case to the King's Bench. There Mrs. Shepherd's barrister from the Assizes appeared as *amicus curiae*, but the judges thought she probably had the funds to hire a midwife. They also noted that the midwife may have provided her services *gratus* if Shepherd was truly destitute.

<sup>205</sup> Shepherd, p.1341, quoting Alderson, B. from R. v. Saunders and Archer (1573) 7 Car. & P. 277.

<sup>206</sup> E.g.: Robin West, "The Difference in Women's Hedonic Lives", originally Wisconsin Women's Law Journal, V.3 1985, pp.81-110, included her own experiences of coerced, unwanted sex and exploitative relationships. See also a very different narrative, Liza Potvin's elegaic expose of the emotional complexities of incest by her father, especially her relationship with her mother, White Lies for My Mother (1992).

<sup>207</sup> Jacques Derrida, discussing a passage from Jules Michelet, Le peuple, in Politics of Friendship (1997), pp.227, 236-7, quoted in Mandell, "The First Women (Psycho)analysts", p.69. Derrida was discussing Jules Michelet's description of "fraternity" as the heavenly law of "Brotherly equality", which "France taught...to the whole world". Michelet was one of the most important nineteenth century French historians, a romantic and Republican. See Stephen Kippur, Jules Michelet: A Study (1981) and Linda Orr, Jules Michelet: Nature, History and Language (1976).

is the sacred that she misses, and history and the future...<sup>208</sup>

Fraternity excluded women as incapable of friendship because they did not treat the interests of non-family as just as important as the interests of their men.<sup>209</sup> Women's citizenship was contradicted by loyalty to men. Wives remained subject to husbands as "kings" of families, and for the most part, this situation was not questioned.<sup>210</sup> Husbands' authority was an everyday expectation; the question of women's consent hardly arose. Social contract theorists special pleaded that women were not fit for citizenship because of natural inferiority.<sup>211</sup> Women's consent to marriage was a mere theoretical

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<sup>208</sup> Derrida, *Ibid.* See also, Pateman, [The Sexual Contract](#), p.99: discussing Freud's similarity to Rousseau on the political subversiveness of women, Pateman noted that [Civilization and its Discontents](#) (1930) dated phallic order and law to the male's permanent possession of the female. The female decided that her motherhood obliged her to stay with the stronger male for the good of her children; she bartered exclusive sexual access for the protection of her young. But her understanding of morality was partial and selfish, restricted to her family.

<sup>209</sup> Linton, "Virtue Rewarded?", pp.35-6.

<sup>210</sup> Some women were forced to question it. Caroline Norton, granddaughter of the actor Richard Sheridan, married George Norton, MP for Guildford, in haste in 1827--her youngest sister Georgiana, the family beauty in a widow's impoverished family, needed to marry well, but Caroline had to marry first to make her sister's hand available. Norton beat her within three months; in her fourth pregnancy in 1835, he caused her to miscarry. A Tory who lost his seat in 1830 when the Whigs came to power, George encouraged her to work the Sheridan Whig connections; she befriended then Home Secretary Lord Melbourne and George was made a magistrate. When Caroline fled a violent argument in 1836, George ordered the servants to keep her out, and sent the boys to his cousin. Then he brought a suit for crim. con. against Melbourne, by now Prime Minister. Melbourne won, but because there was no adultery, there were no grounds for divorce. George could legally keep her from her boys; the criminal conversation suit, although failed, ruined her reputation; she was separated but unable to divorce or remarry. "...One of the first women to make the personal political", she was "too socially grand and too socially compromised" for most bourgeois feminists ("A Candle for Caroline", [The Guardian](#), June 12, 2006). With nothing to lose, she lobbied for the *Infant Custody Act* of 1839, which limited absolute paternal control over children by the "Tender Years" doctrine, a presumption that the mother should have custody of children under seven and visitation of children under sixteen. George moved to Scotland, where the law did not apply. In 1842, her youngest son died before she could see him. By 1848, they had an informal Separation Agreement, but when in 1851 she received a legacy from her mother--made in equity so George could not touch it--George stopped paying her annuity and confiscated her earnings from her writing. She discovered the Separation Agreement was not legally enforceable. Caroline responded by writing; in [A Letter to the Queen on Lord Chancellor Cranworth's Marriage and Divorce Bill](#), in 1855, she joked that George could claim her profits from the pamphlet, influencing the 1857 *Marriage and Divorce Act*. See Lee Holcombe, [Wives and Property](#); Mary Lyndon Shanley, [Feminism, Marriage and the Law](#); Susan Staves, [Married Women's Separate Property](#) (1990); John Wroath, [Until They are Seven: The Origin of Women's Legal Rights](#) (1998); and Mary Mason, [From Father's Property to Children's Rights](#) (1994).

<sup>211</sup> Pateman, [The Sexual Contract](#), pp.5-6, 41, and 50-4, discussing Pufendorf, Locke and Rousseau.

"embarrassment".<sup>212</sup>

Women's partiality, laid out as political argument, means only that women cannot be citizens because men want them to be wives, mothers and sisters first. In other words, women can't be citizens because men prefer them to be something else. This had dire consequences for other women and children who needed support to combat abuse in the domestic sphere. But politically, these problems counted for nothing--prior to organized feminism.<sup>213</sup> Feminists campaigned on moral arguments; legally, they didn't have a leg to stand on.

Law, run by men for men, set up obstacles to women's acts of sympathy for other women, especially nurturing girls. But sexual assault of other women--especially little girls--could motivate women's resistance later in the nineteenth century, as well as complicity. Their concern blossomed into feminist campaigns against sexual exploitation of underaged girls and young women.<sup>214</sup>

In the early nineteenth century there were many cases where a girl's first statement about rape was given to her mother. But the law intervened in such natural alliances: where the girl was too young to be sworn, by mid-century her mother was no longer allowed to testify to what the victim had said, though such evidence had been accepted in the late eighteenth century. R. v. William Nicholas, at the Monmouth Assizes in 1846,<sup>215</sup> refused to allow the evidence of Mrs. Roberts, the aunt of 6-year-old victim Margaret Hyde, following R. v. Guttridge<sup>216</sup> in overturning R. v. Brazier, a case from the Reading Assizes, 1779<sup>217</sup>--because "it is certainly a very odd reason for receiving the evidence of what a child has said, that that child is not capable of taking an oath." The law outlawed the maternal-child connection as a source of knowledge. This disallowed the most natural setting for women to exercise "fraternity". Rape victims were increasingly isolated from

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<sup>212</sup> Pateman, "Women and Consent", pp. 153, 152.

<sup>213</sup> See Holcombe; J.S. and Harriet T. Mill; Shanley, Feminism, Marriage and the Law; Wroath; and Mason.

<sup>214</sup> See Millicent Fawcett, Josephine Butler: Her Work and Principles (1927); William Leach, True Love and Perfect Union (1980); Lesley H/hall, Sex, Gender and Social Change (2000), "'No Virtue in Evasion'" in Judith Forrai, ed., Civilisation, Sexuality and Social Life (1996), and "'A Masculine Mythology Suppressing and Distorting All the Facts'" in Waltraud Ernst and Chandak Sengoopta, eds., The Normal and the Abnormal (2006); Louise Jackson, Child Sexual Abuse in Victorian England (2000); Linda Gordon, "The Politics of Child Sexual Abuse", Feminist Review (1988), pp.56-64; Judith Still, "What Foucault Fails to Acknowledge", History of the Human Sciences (1994), pp.150-7; Margaret Jackson, "Sexual Liberation or Social Control?", Women's Studies International Forum (1983), pp.1-17; Nancy Paxton, Writing Under the Raj (1999); Emma Liggins, "Writing Against the 'Husband-Fiend'", Women's Writing (DATE), pp.175-95; Ann Heilmann, New Woman Strategies (2004); Angelique Richardson and Chris Willis, eds., The New Woman in Fiction and in Fact (2002); and Susan Magarey, Passions of the First Wave (2001).

<sup>215</sup> E.R. V.175, Nisi Prius VI, pp.102-3, originally 2 Carrington and Kirwan 246-8.

<sup>216</sup> 9 C. & P. 471.

<sup>217</sup> E.R. V.168, Crown Cases I, pp. 202-3, originally 1 East P.C. 443.

other women from the 1810s, even their mothers--a girl in 1822 was beaten by her mother after being raped.<sup>218</sup>

Elite men negotiated "three centuries of mutual accommodation between liberalism and patriarchy." Women's consent was not canvassed. Instead, it was argued that women consented to subordination by living with men without rebellion. Women's "consent" could be shown by "habitual acquiescence, assent, silent dissent, submission, or even enforced submission."<sup>220</sup> Called implicit or tacit consent, the liberal accommodation of patriarchy affected women's relations with men, other women and children.

In sex, tacit consent theory denied that non-consent had to be an open option to make consent meaningful.<sup>221</sup> When women's political "no" cannot be heard, consent and non-consent become impossible to disentangle in sexuality, leading to an absence of agreed norms for heterosexual conduct.<sup>222</sup>

This is the way that political revolution advanced men's rights yet preserved an anti-victim bias in rape law. Without a standard for sexual consent accepted by both genders rape law embodies gender conflict.<sup>223</sup> Without inclusion of women in civil society, no standard for consent was reached.

## E. THE IMPACT OF VIOLENCE ON A FINELY-TUNED SOCIAL SYSTEM

We have seen that, to passersby, what was going on between Mary Ashford and Abraham Thornton appeared perfectly ordinary--what we would now call a "date". There was a lot of to-ing and fro-ing in the neighborhood that May night in 1817, but passersby did not raise alarm. John Hompidge, going home from his encounter with his intended, did not

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<sup>218</sup> Clark, Women's Silence, pp.63-9, especially p.64, Mary Chapman, a pitman's daughter in the North East circuit around Newcastle, was struck by her mother after telling of a rape (PRO Assi. 45/55 Pt. 2 Spring 1822, and two similar cases, Elliot, 45/56 Pt.2 Summer Assizes 1823, and the Fentiman case); also 13-year-old Anne Cooper delayed telling her mother for three or four days because she was afraid her mother would beat her, and the judge let the accused go because "'it would be better for the public morals' if the case did not go further" (reported in the Weekly Dispatch, 4 Oct. 1834). On the other hand, p.65, Mary Ann Rawson's mother told the rapist, Mary Ann's master, that "'It was a scandalous shame'" (20 July 1822, PRO Assi.45/55 Pt.2).

<sup>219</sup> Pateman, "Women and Consent", p.162.

<sup>220</sup> Ibid., p.150.

<sup>221</sup> Ibid.

<sup>222</sup> Ibid., p.161.

<sup>223</sup> Pateman in "Women and Consent", devoted 25% of her article to rape law complications resulting from fraternal patriarchy, from Hale in the 17th century to 1980 in Britain, the U.S., Australia, and Canada. See pp.157-62.

offer assistance to Miss Ashford.<sup>224</sup> Everyone knew that young couples were allowed to spend time alone together.

An 1824 Birmingham tort suit for seduction, brought to get de facto child support,<sup>225</sup> confirmed the typicality of Ashford's behaviour. Evidence to prove paternity revealed that Mary Turner "courted several different men, walking in the fields during summer evenings", and "spent the night in a pub with her fiancée after he bought their wedding ring", with her family's approval.<sup>226</sup>

Ashford's behaviour suggested no dishonourable purpose. She and her friend Hannah Cox, another servantgirl, obtained permission to go out together, and to sleep overnight at Hannah's mother's house, near the Inn. They did not hide their actions to escape their master's oversight. When Ashford went to the house to change her clothes, Cox testified that she was lighthearted, happy to get to know Thornton.<sup>227</sup> This was the behaviour of a hopeful girl, not ashamed of her actions. But her body, marked by sexual violence, was found only a couple of hours later at 6:30 A.M.<sup>228</sup>

After the fact, there were radically different interpretations of the courting which passersby had found so innocent.

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<sup>224</sup> Hall, pp.72-6, six witnesses testified to seeing Ashford after she and Thornton left Cox and Benjamin Carter after the dance and before her body was found, one saw Ashford with Thornton; the one who saw her with Thornton, John Hompidge, had also heard their voices from inside his fiancée's house. Eight witnesses testified they had seen Thornton alone on his way home, pp.99-103.

<sup>225</sup> Seduction provided the equivalent of child support in a lump sum, especially in North America, where women were allowed to bring the tort on their own behalf: the need to prove loss of service by the father was removed in the 1834 Seduction Act in Upper Canada; various American states followed suit, and some added criminal laws on Seduction: see Constance Backhouse, "The Tort of Seduction"; Martha Bailey, "Servant Girls and Masters"; Brode, *Courted and Abandoned*; Stephen Robertson, "Seduction, Sexual Violence and Marriage"; and Brian Donovan, "Gender Inequality and Criminal Seduction". But when North American jurisdictions removed the need to prove lost services by the woman's father, they added requirements like "previously chaste character". See John Parry and Andrea Hibbard, "Law, Seduction and the Sentimental Heroine", *American Literature* (2006), pp.325-55. The debate continued as recently as the late 1980s, between defences of the law of Seduction for feminist purposes (to provide recompense for pregnancy) or patriarchal purposes (to protect men's rights to emotional service by family members). See Linda Lacey, "Introducing Feminist Jurisprudence: An Analysis of Oklahoma's Seduction Statute", *Tulsa Law Journal* (1989/90), pp.775-98, which emphasized the protective potential of Seduction law for young women from bad effects from rape and sexual harassment at work, especially pregnancy; Peter Kutner, "Law Reform in Tort", *Canadian Journal of Family Law* (1987), pp.287-326, defended domestic torts as protection for the "rights" of men to have their emotional needs by wives but also children. By contrast, Backhouse, while acknowledging the use for de facto child support in the nineteenth century, emphasized that the tort limited young women's sexual autonomy.

<sup>226</sup> Clark, *Women's Silence*, pp.113-4, citing the Turner seduction suit from *The Times*, 19 Aug. 1824.

<sup>227</sup> Porter, "Rape", p.224. On pp.228-9, Porter stated that she went home (actually to Mrs. Butler's) "possibly after having sex". Note that Porter followed Hall's defence of Holroyd almost exactly. Cf. Hall, pp.23-5.

<sup>228</sup> Clark, *Women's Silence*, pp.113-4. See also Hall, pp.6-9, 18, 23-5, and from the trial, 76, 81-2, 84-5, 88-91; the people who first found her bundle by the pit full of water described the blood left under a tree by a hedge next to the field as a "lake of blood".

Prosecution and defence analyzed the violence very differently, but they also diverged radically from the "normal expectations" of the community, the folk mores which approved of young people meeting at dances and talking in fields. For this reason--direct evidence of two standards, one applied before the events of May 26, 1817, to Mary Ashford and the male witnesses, and a new standard applied after the events to Mary Ashford but not the male witnesses<sup>229</sup>--Thornton is a turning point.

The appropriateness of Ashford's behaviour was denied after the attack. She lost the benefit of traditional mores which had granted a fair degree of de facto sexual freedom to young commoners. Young working women would no longer possess the traditional limited sexual freedom which had been in place in Northern Europe for centuries.<sup>230</sup> The legal attack on the character of an emblematic working woman occurred when working women lost much traditional support from male partners. Abandonment after pregnancy became a realistic female fear. Many women partnering artisans between the 1790s and the 1840s had husbands who did not value traditional family solidarity.<sup>231</sup>

Some workingmen, especially artisans influenced by libertinism, continued as adults to act like apprentices, refusing to grow up and work with their wives to ensure the financial survival of the family. Solidarity with mates at the workshop competed with loyalty to family, while employers reorganized to use cheaper labour (women's and children's)

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<sup>229</sup> Hall, pp.73-6.

<sup>230</sup> Laslett, Family Life, pp.110-1, noted community acceptance of "petting" and lying on each others' beds fully clothed, but little evidence of "bundling"--a community witnessing an unmarried couple being put in one blanket and left to lie all night in the fields, or together in one supersized garment, to test fertility in contemplation of marriage--although common in Scandinavia up to the nineteenth century. Births clustered around Feb. through April, nine months past May through July. Stone, The Family, Sex and Marriage, p.54, noted lower class women had more freedom in the preindustrial era to pick their own spouses: given late ages of marriage, "the individuals concerned, provided they were from the propertyless classes, were largely free to make the individual choice of a partner, since they were now mature adults; they had been away from home for ten years or more..."; "the family and kin interest in the marriage of the propertyless was low since no money or land changed hands, and the incentive to interfere was consequently limited" (p.92). See also Hartman, pp.61-4.

<sup>231</sup> Clark, The Struggle, pp.30-4. Artisanal drinking to promote solidarity with men in the trade led to hardship for their families at this time of downward pressures on real wages. In "A New and Diverting Dialogue Between a Shoemaker and His Wife", (London, 1800), p.6, a woman complained about the publicans' wives living well from artisans' drinking: "The landladies flourish in their rings, gold chains, lockets and what not, while we and our children have not bread to eat." See also Clark, "The Rhetoric", p.74: Chartists promoted temperance to appeal to wives by promising "'good government at home...Instead of the old Tory system of the husband coming home drunk to his family, we will have him sober, contented and happy'" (quoting Scottish Patriot, Dec. 14, 1839). Whether due to drink or not, the stinting of working class women and children, especially little girls, was famous; see Robert Roberts, The Classic Slum (1971): World War One, when serving men's pay went directly to their wives, was noted for improving the diet and health of working class women and children.

to produce lower quality goods, rather than fully trained artisans.<sup>232</sup> De-skilling and proletarianization--increased dependence on the wage rather than control over the ownership and retail of the products of labour--demoralized artisans, and made alcoholic escape more alluring,<sup>233</sup> creating hardship for their women and children. The result was more gender conflict and domestic violence.<sup>234</sup>

Lower class libertinism represented some workingmen's willingness to use workingwomen as elite men had been doing since the Restoration. Libertinism did not appeal to young women: it depended on sticking someone else with the reproductive consequences of sexual activity, and women in a precontraceptive society could not avoid those burdens. Libertinism had always been misogynist.<sup>235</sup> As illegitimacy rose, disorganization and chaos followed. For a judge to apply such a "lad's own"<sup>236</sup> ethos to explain the intentions of rape complainants, as if libertine norms set standards women had to live up to, was unfair. Legal libertinism treated the woman complainant as "allegory" rather than a real person, an object with "no name, no identity, no history of any real value before man arrives and gives her a name and a life--for his purpose

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<sup>232</sup> Honeyman, Women, Gender and Industrialization in England, 1700-1870, pp.43-94.

<sup>233</sup> Fox, History and Heritage, pp.14-5: excluding women from many unions was a tragically shortsighted policy which ensured continued proletarianization; Stone, The Family, Sex and Marriage, pp.638-9, quoted Francis Place (British Museum, Add. Mss, 27825), that the rise in premarital conceptions in the late eighteenth century was due to desperation and desire for escapist pleasures (like drinking and promiscuous sex), brought on by increasing proletarianization. Place gave precedence, however, to booze over sex for escape.

<sup>234</sup> Clark, The Struggle, pp.30-1, 33, and 74-85.

<sup>235</sup> James Turner, Libertines and Radicals in Early Modern London (2001), described the purpose of Restoration satires as "an attempt to neutralize women's efforts to establish their own institutions and voice." Justin Champion, whose The Pillars of Priestcraft Shaken (1992) emphasized the anti-clerical part of Restoration libertinism, criticized the 1995 movie, "Restoration", because "[t]he world of the Restoration rakes was much more brutal and debauched than the rather foppish portayal here...Figures such as Rochester had a bleak and pessimistic view of humanity and relationships between the genders..." (<[www.channel4.com/history/microsites/#/history/e-h/film-restoration.html](http://www.channel4.com/history/microsites/#/history/e-h/film-restoration.html)>.) The glbtq encyclopedia entry on Rochester described his Satyr Against Mankind (1675) as showing "his vaunted misogyny...Sapphic vision of male self-sufficiency" (<[www.glbtq.com/literature/eng\\_lit4\\_restoration\\_18c,2.html](http://www.glbtq.com/literature/eng_lit4_restoration_18c,2.html)>).

<sup>236</sup> Tim Hitchcock, "Breeches and Barricades", p.177, used this term for Clark's view of "artisanal culture" produced by "a group of men in crisis". For present day use of the phrase for a hedonistic irresponsible male lifestyle, see the review of Frank McAvennie, Scoring: An Expert's Guide (2003) on the Glasgow Celtic's football fan website, <[www.ntvcelticfanzine.com/review/rev%20mcavennie.htm](http://www.ntvcelticfanzine.com/review/rev%20mcavennie.htm)> as a "lad's own story": "He really was...in a state of almost total thrall to his apendage[sic: appendage]...marauding through nightclubs like a dog straining on a leash, sniffing out vodka and oestrogen in almost equal measure...'Sex', he says, 'was my pre-match training.'"

and his possession."<sup>237</sup>

After Ashford was found murdered, people disagreed about whether it was rape, but everyone believed Thornton had sex with her.<sup>238</sup> Thornton's defenders accepted that he treated her like a common whore.<sup>239</sup> We are accustomed now to men claiming they had easy casual sex to counter sexual assault complaints. But in 1817, that argument breached a centuries-old traditional plebeian sexual ethic. To Ashcroft's defenders, Thornton was a sexual predator;<sup>240</sup> to Thornton's defenders, he had every right to use force to get easy sex.<sup>241</sup> The contrast between both positions and folk beliefs bespeaks a changing era.

In our time, the Thornton narratives' disjunctures between pre- and post-event analyses is extremely resonant. A generation of scholars have taught that most sexual assaults occur between friends, acquaintances, family, workmates, and "dates": a generation of feminists criticized the legal system's for failing to censure rapists known to their victims. The Thornton case shows a lack of legal responsiveness still with us. The three discourses for the case--the pro-Ashford "monster" discourse, Thornton's "easy sex" discourse, and the legal discourse of manipulation and brutality as persuasion--belong to our era in rape history, and not traditional courtship.

Modern researchers correlate two types of sexism with men's beliefs in "rape myths"--gender ideology which impedes legal disciplining of male sexual offenders, such as the "Stranger Danger" myth that women are in danger of rape only from strange men, and alone at night where bad men can get them, unless they are chaperoned. One form is "hostile sexism": "antipathy" to "women in nontraditional roles", belief that sexual relations are naturally "adversarial", that women

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<sup>237</sup> Finzsch, "Genocidal Discourses".

<sup>238</sup> Clark, Women's Silence, p.71, said Thornton told the court Mary Ashford had "consented to connexion" with him, based on Hall, p.98. Hall associated Thornton's claim with medical evidence from the surgeon. Porter, "Rape", p.226, said Thornton told the court that "he had had consensual sex with her". Neither Clark nor Porter said Thornton's testimony suggested courtship.

<sup>239</sup> See Hall, pp.2-3, 94-5: John Cooke testified that Thornton said, upon viewing Mary Ashford for the first time, that he would have sex with her. He also claimed that he had her sister three times. The defence asked Cooke if he tried to warn Ashford away, as if this implied something about Ashford's consent. See also evidence from the jailhouse informant, Omar Hall, pp.47-9, trial evidence of Constable Thomas Dales, pp.92-3, and Memorandum of John Hackney, the Constable who took him into custody the second time, p.130.

<sup>240</sup> The popular response, Clark, Women's Silence, pp.113-4, and Porter, pp.226-8, was to depict Thornton as a monster in the shape of a man. Ultimately he was painted as an upper class rapacious class enemy of the working people (see Clark, Chapter 6, "The Daughters of Poor Men: Radical Rhetoric, Women's Experience", pp.90-109 and pp.114-6).

<sup>241</sup> Thornton presented the encounter as purely sexual--what we would now call a "one night stand", which would have been called "going whoring" or "wenching", whether money passed hands or not.

deliberately incite male passion to tease them, sex is a battle, and only one lover "wins".<sup>242</sup> Men high in hostile sexism are more likely to admit they might commit rape.<sup>243</sup> But the other type of sexism is more insidious: "benevolent sexism" leads to stereotyping women, but not negative feelings.<sup>244</sup> Benevolent sexism classifies "good" and "bad" women, affirming women in "traditional roles" as "guardians of sexuality", "more virtuous than men", "pure and special", and deserving "protection". However, the positive attitudes only benefit women who do not stray from "where they belong" into situations with "potential for consensual sex."<sup>245</sup>

Benevolent sexism differentiates rape by strangers from rape in relationships, increasing blame for acquaintance rape victims. It is less related to men admitting they might rape,<sup>246</sup> but reinforces controlling attitudes to female sexuality. Benevolent sexism is easier for women to internalize against themselves--it explains why women who believe rape myths are less affected by reading descriptions of rape than women low in rape myth acceptance, when victims are portrayed as different from themselves: they do not believe it could happen to them.<sup>247</sup> But if raped women remind them of themselves, their self-esteem is damaged by reading rape stories.<sup>248</sup> This psychological mechanism, when applied to non-raped women

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<sup>242</sup> Abrams, Viki, Massey and Bohner, "Perceptions of Stranger and Acquaintance Rape", at pp.112-3.

<sup>243</sup> Ibid., pp.117-9, 122; G. Bohner, M. Reinhard, S. Rutz, S. Sturm, B. Kerschbaum and D. Effler, "Rape Myths as Neutralizing Cognitions", European Journal of Social Psychology (1998), pp.257-68; N.M. Malamuth, "Rape Proclivity Among Males", Journal of Social Issues (1981), pp.138-57; Malamuth and J.V.P. Check, "The Effects of Aggressive Pornography on Beliefs in Rape Myths", Journal of Research in Personality (1985), pp.299-320; R.L. Quackenbush, "A Comparison of Androgynous, Masculine Sex-Types and Undifferentiated Males on Dimensions of Attitudes Towards Rape", Journal of Research in Personality (1989), pp.318-42; and L.A. Rudman and P. Glick, "Feminized Management and Backlash Toward Agentic Women", Journal of Personality and Social Psychology (1999), pp.1004-19.

<sup>244</sup> Ibid., p.112, quoting P. Glick and S.T. Fiske, "The Ambivalent Sexism Inventory", Journal of Personality and Social Psychology (1996), pp.491-512 at p.491.

<sup>245</sup> Ibid., p.112-3.

<sup>246</sup> Ibid., pp.112, 115-9, 122. The two forms of sexism can coexist; a portion of the variation in tendency to blame raped women or consider raping women is related to rape myth belief but not either form of sexism.

<sup>247</sup> Gerd Bohner, Christina Weisbrod, Paula Raymond, Alexandra Barzvi, and Norbert Schwarz, "Salience of Rape Affects Self-Esteem", European Journal of Personality (1993), pp.551-79, especially at 563-4.

<sup>248</sup> N. Schwarz and J.F. Brand, "Effects of Salience of Rape on Sex-Role Attitudes, Trust and Self-Esteem", European Journal of Social Psychology (1983), pp.71-6, applying E.J. Johnson and A. Tversky, "Affect Generalization and the Perception of Risk", Journal of Personality and Social Psychology (1983), pp.20-31; Schwarz, "Feelings as Information", in E.T. Higgins and R. Sorrentino, eds., Handbook of Motivation and Cognition (1990), pp.527-61; and Schwarz and G.L. Clore, "How Do I Feel About It?", in

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fearful of rape, explains why victim-blaming in rape law would tend to exploit and reinforce lines of difference between women, and undermine the level of solidarity among women.

Hostile and benevolent sexism are both apparent in the gender ideology and rape law of the early nineteenth century. This is why feminist historical approaches are helpful to understand the period and its law: "The feminist analysis of female sexuality as property helps solve this paradox of simultaneous punishment and sanctioning of rape."<sup>249</sup>

If the jailhouse informant Omar Hall was right, and Thornton commented that women pretend to faint to avoid giving men sex,<sup>250</sup> then Thornton was clearly a hostile sexist. One would not think a woman would faint to avoid providing sex unless one believed that sex is a resource women control, and they enjoy manipulatively withholding it from men as a means to gain power. Calling fainting a ruse assumes sex is a struggle a man must "win" to "conquer" a woman as a sort of property.

On the other side, because Thornton was so harsh, benevolent sexists tried to confine women to protect them; they even encouraged raped women to avoid court altogether--an extraordinary step, given that the common law enshrined the citizen's rights to protection by the Crown's law. Yet in the Morning Chronicle of Aug. 3, 1826, an editorialist said a good father would rather see his daughter's rapist go free than make her testify.<sup>251</sup>

Two years later, the *Offences against the Person Act* tried to reverse the sentiment that it was worse to testify to rape than to be raped. It specified, in *section XVIII*, that sexual offences no longer required proof of ejaculation:

And Whereas upon Trials for the Crimes of Buggery and of Rape, and of carnally abusing Girls under the respective Ages..., Offenders frequently escape by reason of the Difficulty of the Proof which has been required of the Completion of those several Crimes; for Remedy thereof be it enacted, That it shall not be necessary,...to prove the actual Emission of Seed..., but that the carnal Knowledge shall be deemed complete upon Proof of Penetration only.

The requirement that women testify to ejaculation had been imposed by some judges in the eighteenth century, yet other judges continued to follow older authorities which did not require the evidence.<sup>252</sup>

The emission requirement was indicative of increased concern that rape "polluted" a woman by contact with semen from a man other than her husband (whether presently married, or to be married in the future); biological understanding of

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<sup>248</sup>(...continued)

K. Fiedler and J. Forgas, eds., Affect, Cognition and Social Behavior (1988), pp.44-62.

<sup>249</sup> Clark, Women's Silence, pp.6-7.

<sup>250</sup> Hall, p.49.

<sup>251</sup> Clark, Women's Silence, p.62-3.

<sup>252</sup> MacFarlane, "Historical Development", pp.41-6.

the roles of male and female in reproduction was still crude,<sup>253</sup> and many men feared that contact with sperm would cause changes in the female's body which would result in her passing on the characteristics of the wrong man's sperm to a later, marital child.<sup>254</sup>

The emission requirement was related to the physicality associated with the nature and purpose of women under fraternal patriarchy. It was a mechanistic justification of the view that unchastity, even if forced upon a woman, ruined her for her major role in society as matrimonial property.

Removal of the emission requirement shows legislative perception of a need for more protection from rape. It also shows that lawmakers recognized that speech about rape had become more problematic. Female ignorance about sexual physiology and reticence about describing sex had both increased.<sup>255</sup>

But the reform was aimed at a side issue. It could not reverse the silencing effect of Thornton, because it did not attack the shamefulness of rape adjudication; it did not dispute the increasing victim-blaming, at a time when "the procedural rules in trials...subjected the complainant to an increasingly detailed and onerous cross-examination as to sexual and moral character."<sup>256</sup> The message had been embedded throughout the rape law: Raped women were not trustworthy. This was magnified by the woman's class status.

After Thornton's acquittal, the construction of Mary Ashford as a dishonourable, consenting woman, was forcefully contested, by Rev. Booker's A Moral Review of the Conduct and Case of Mary Ashford in 1818. He thundered: "Mary

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<sup>253</sup> Laqueur, Making Sex, pp.98-108, 116-7, and 142-8, discussed the medical confusion, in the period between the Renaissance and the mid-eighteenth century, over whether a child was conceived solely by the seed of its father, and then grown in the mother's womb, or whether both parents emitted a sort of "seed" to create a fetus; after the mid-eighteenth century, when dissection of animals proved that the ovaries of females after heat showed signs of a scar where a small body had been released into the womb, the idea that women made a material contribution to the fetus at conception, and did not just nurture it in the womb from a male product, was accepted, but doctors remained confused about what exactly the female emitted, the relation of ovulation (emission of the "ovum") to menstruation and female orgasm, and which of ova or sperm was responsible for the nature and characteristics of the offspring, pp.149-50, 161-3, 169-92, and 211-27.

<sup>254</sup> *Ibid.*, pp.103-5, in the Galenic world view--orthodox before the eighteenth century, and still influential into the nineteenth--fluids in the body were commonly considered fungible, affecting and turning into one another, thus semen could persist in the fluids of the woman's body and transfer characteristics of the wrong man to her future children, even if she did not conceive initially from fornication or adultery; and 230-2, in the extreme case, prostitutes were likely to become barren because of mixing so many men's sperm, as well as likely to suffer from other bodily pathologies like "slippery womb" or too much heat, etc.

<sup>255</sup> Clark, Women's Silence, pp.63-5.

<sup>256</sup> The statute not only did not dispute the impossible resistance requirements drawn from "consent to force", but also the use of prior evidence of unchastity as evidence of the complainant's character, with implications for her honesty and likelihood of consenting to the sex act charged, described by Edwards, Female Sexuality, p.22.

Ashford was savagely seized by a Sabine, and after experiencing the most brutal treatment, inhumanly immolated by her rapacious defiler!"<sup>257</sup> But while Booker demonized Thornton to defend Ashford's honour, he was a major disseminator of *Stranger Danger*, suggesting a woman always risks rape if she goes unchaperoned. His ideas are criticized by feminists today for bedeviling the lives of women, yet he presented himself as Ashford's friend.

The paradox of Booker makes more sense when *Stranger Danger* is placed in the context of "Consent to Force": Although the rape myth was harmful in its way, it was less harmful than the elite legal doctrine, for at least it offered some possibility of women earning a right to be free of the duty to fulfill the sexual needs of men who approached them in public space. *Stranger Danger* could at least be a vehicle for sympathy for raped women, though inflected by benevolent sexism. But it gave a "covert warning" that women do not belong in public space, and going beyond "their place" will be punishable by rape.<sup>258</sup>

Booker said Ashford showed "imprudence" by going to the dance "unattended by a discreet Male Relative, or a prudent Matron-Friend."<sup>259</sup> He imposed novel, unrealistic restrictions on women like Ashford. As Munby, the middle class London lecher,<sup>260</sup> wrote in the 1860s, lower class women were often seen in public going about doing respectable work to earn their living:

London Bridge, more than any place I know here, seems to be the great thoroughfare for young women and girls. One meets them at every step: young women carrying large bundles of umbrella-frames home to be covered; young women carrying wooden cages full of hats, which yet want the silk and binding; costergirls, often dirty and sordid, going to fill their empty baskets, and above all, female sackmakers.<sup>261</sup>

For women involved in the putting-out system finishing articles, going to and from suppliers and merchants was an absolute necessity. Poorly paid women could not be expected to have a spare "Discreet Male Relation" or "Prudent Matron Friend" to accompany them--everyone they knew was also working to make ends meet.<sup>262</sup> Booker knew better: female servants--those working women a middle class man saw in his own home--were always scurrying about in public doing marketing. Thus, one critical commentator on Booker complained: "Really, if the doctor went on in this manner, his cookmaid will

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<sup>257</sup> Clark, Women's Silence, p.114, quoting Booker, A Moral Review of the Conduct and Case of Mary Ashford (Dudley, 1818), p.26.

<sup>258</sup> Clark, Women's Silence, pp.110-27.

<sup>259</sup> *Ibid.*, p.116, quoting Booker, p.10.

<sup>260</sup> cf. Davidoff, "Class and Gender".

<sup>261</sup> Clark, Women's Silence, p.11, quoting Munby from Derek Hudson, Munby: A Man of Two Worlds (1974), p.99.

<sup>262</sup> Honeyman, Women, Gender and Industrialization.

not be able to cross the street with a pie to the baker's without a chaperone."<sup>263</sup>

The preeminent polite bourgeois monthly, the Gentleman's Magazine, supported Booker's position,<sup>264</sup> trying to be helpful to young women in Ashcroft's position. The magazine editors echoed an anonymous attorney who attacked Holroyd's "licentious sentiments", as "an atrocious libel on the whole female race",<sup>265</sup> viewing Thornton as an attack on all women. But the application of Ashford's plight to everywoman did not promote women's solidarity, for Stranger Danger caused women to question other women's personal integrity and respectability. Not avoiding public space was enough to get workingwomen taken up as prostitutes by the new police forces patrolling nineteenth century cities.<sup>266</sup> Protecting reputation, especially from other women, still prompts women's risk avoidance to protect themselves from being judged "deserving" of rape.<sup>267</sup>

From Ashford, it was easy for middle class commentators to move to a defense of the women best known to them, middle class women. Middle class comment shifted from Ashford's real situation, to describing her as a ideal middle class girl: the Ladies Monthly Magazine declared that

She promised, at a very early age, to rise superior to her station by the graces of her mind and person...[S]o lovely a girl could not have been without admirers, but it was proved, that although she had a great share of vivacity, it was so tempered by discretion, that scandal itself could not cast aspersion on her fair fame...[S]he was of a retired and domestic turn.<sup>268</sup>

That a domestic servant, who travelled roughly 15 to 20 miles by foot during the day and night before her death to do marketing in Birmingham and to socialize<sup>269</sup> could be described this way is a tribute to the power of Separate Spheres

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<sup>263</sup> Clark, Women's Silence, p.116, quoting Anonymous, "Friend to Justice", Reply to the Remarks of the Rev. Luke Booker, (1818, Birmingham), p.34.

<sup>264</sup> Ibid., p.115: the Gentleman's Magazine of June 1818, p.535, printed an opinion that Mary Ashford's death should be taken by other young women as a warning to stay sequestered in their homes.

<sup>265</sup> Ibid., p.115, quoting "Attorney at Law", An Investigation into the Case of Abraham Thornton, (1818, London), pp.16-8.

<sup>266</sup> Edwards, Female Sexuality, pp.56-7, noted that the *Vagrancy Act* 1824, followed by the *Metropolitan Police Act* 1829 and 1839, gave police the power "to apprehend anyone disturbing the peace or acting suspiciously." The "sus" provisions were mostly used against women for prostitution. The *Town Police Clauses Act* 1847, *section 28* mentioned prostitution; vagrancy law was "the most lucid expression of a legal attempt to control and victimize the unchaste woman."

<sup>267</sup> Clark, Women's Silence, pp.1-7. See also Susan Estrich, "Rape", Yale Law Review (1985-6), pp.1087-1185 at 1095.

<sup>268</sup> Ibid., p.115, quoting Ladies Monthly Magazine, March 1818, pp.121-6.

<sup>269</sup> Hall, pp.1-2, and 6, based on two trips from Birmingham to Langley and Erdington (about 5 miles,

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ideology to associate "woman" with the home.

But denying her mobility is the least of the Ladies Monthly's sins against Ashford. It also demeaned her class by describing her good character in terms of "rising above her station"; this is like praising a person of colour for "acting white". It also minimized the court's assault on her reputation to reassure its readers that danger would not touch them--that a good woman could keep her reputation unbesmirched because her essential virtue would shine forth. In the context of Thornton, the Ladies Monthly's blithe assurance that Ashford's modesty could defeat attackers is jolting. This was hardly helpful to women rape victims.

Working women would not have recognized themselves in the Ladies Monthly's Mary Ashford. For middle class "ladies", it gave a sop for fear of rape, but at the cost of defining them solely through male reactions: resisting shame through a beautiful silence requires an audience's aesthetic appreciation of the woman's blameless purity. The virtuous maiden must attract a good man to protect her--she was not freed from being forced to become a sexual object.

Separate Spheres paid lipservice to honouring women for their self-restraint and moral fiber, but through Stranger Danger, it was centrally involved in enforcing new, stringent moral standards upon women to meet the class qualifications for the status of bourgeois "Ladies"--without freeing them from the duty to pander sexually to men.

## F. THE (BOURGEOIS) MAKING OF THE "FEMININE" WOMAN

A larger group of men desired the goods, lands and funds which had been concentrated in the hands of heads of patrilineages, so they restrained individual liberty and reestablished new bonds of authority.<sup>270</sup> In the great Enlightenment revolutions, liberty was not granted to men who were not householders. Locke claimed the "tacit consent" of others could be inferred: "if individuals are going peacefully about their daily lives" their consent to the "social practices and institutions which guide ordinary affairs" was given "even though there are 'no Expressions of it at all.'"<sup>271</sup>

Rousseau developed the implications of tacit consent for marital sexuality. In Emile, he eroticized women's silence as sexual consent:

Why do you consult their words when it is not their mouths that speak?...The lips always say 'No', and rightly so, but the tone is not always the same...Does she not require a means of indicating her inclinations

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<sup>269</sup>(...continued)

based on the distance travelled by George Jackson from Birmingham to his work at Penn's Mills near Erdington), and from Erdington to Tyburn House and back again, about two miles each way, with allowance for rambling in the fields.

<sup>270</sup> Pateman, "Women and Consent", p.151.

<sup>271</sup> Ibid., p.151, quoting Locke, Two Treatises of Government (1967) II, ss.119.

without open expression?<sup>272</sup>

Rousseau believed male sexual aggression was in the sexual interests of good women, whose latent desires awaited a man to awaken them. In his 1757 essay, Politics and the Arts, he approved using "all the violence permitted in love" to "win this silent consent":

To read it in the eyes, to see it in the ways in spite of the mouth's denial...If he then completes his happiness, he is not brutal, he is decent. He does not insult chasteness; he respects it; he serves it. He leaves it the honor of still defending what it would perhaps have abandoned.<sup>273</sup>

He explicitly legitimated male violence: a man must take his sexual pleasure, to protect the woman's honour and reputation for chastity--and even to free her from herself.

At the level of the majority of the population, Anna Clark found parallel, but later, ideological changes when she contrasted an eighteenth century verse in the "Aristotle's Master-piece" of 1771--

My Rudder, with thy bold Hand, like a try'd  
And skilful pilot, thou shalt steer, and guide  
My bark in love's dark channel, where it shall  
Dance, as the bounding waves shall rise and fall...<sup>274</sup>

--with one of 1812, showing increased male acceptance of sex as "Conquest", and for overcoming female resistance by force without deferring to the woman's pace or the necessity of avoiding impregnation:

Perhaps when you attempt  
The sweet admission, toyfully she resists;  
With shy reluctance: dauntless you pursue  
The soft attack, and warmly push the war,  
Till quite overpowered with love, the melting maid  
Faintly opposes...<sup>275</sup>

Most contract theorists presented the subjection of women in marriage as a natural relationship of authority. But Hobbes believed women were equal to men in nature. A man might force sex on a woman if he tricked her, but she could then kill him. Neither sex would dominate the other.<sup>276</sup> But then "submission in fear of a conqueror's sword" made women wives, servants of men. Contract could mean conquest; a bargain accepted because of "overwhelming power" still binds.

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<sup>272</sup> Ibid., quoting Rousseau, Emile, trans. B. Foxley (1911), p.348.

<sup>273</sup> Ibid., p.155, quoting Rousseau, trans. A. Bloom, Politics and the Arts (1968), p.85.

<sup>274</sup> Clark, Women's Silence, p.85, quoting Aristotle's Master-piece, (London, 1771), p.38.

<sup>275</sup> Ibid., quoting Aristotle's Master-piece, (London, 1812), p.32.

<sup>276</sup> Pateman, The Sexual Contract, pp.41, 44.

The means did not matter:

[I]t makes no difference whether submission is voluntary or obtained through threats, even the threat of death...Hobbes' concept of 'consent' merely reinterprets the fact of power and submission.<sup>277</sup>

Submission as a sign of contract, and consent inferred from submission, was embodied in rape law a century and a half later: Peel's 1828 *Offences against the Person Act*,<sup>278</sup> section XVII, confirmed an age of consent to sex, based on a substantive notion of consent involving voluntariness, which can be negated by lack of knowledge, strength or power. But it quickly became a dead letter.

There is a shocking proponderance of child rapes in the published reports for the nineteenth century. The interest may have been because such early loss of virginity represented financial loss for a girl's father vis a vis her marriage later. But they also interested lawyers because of the pathologization of female sexuality: child rapes raised interesting legal issues because they defined the limits of resistance--they required judges to uphold the duty of resistance even in situations of extreme discrepancies of power and strength.

Peel's rape reform of 1828, section XVII, provided a misdemeanour offense for sex with a girl between the ages of 10 and 12, and confirmed the felony status of sex with a "woman-child" under 10.<sup>279</sup> Section XVII thus created a two part offence, the first the felony of unlawful carnal knowledge of a girl under ten, and the second a misdemeanour where the girl was above 10 and under 12. Neither branch required use of force or lack of consent. The basic structure of modern sexual offenses--one offense as adult sex without consent, and another as child sex with or without consent--existed in statute since 1576 and was toughened up and confirmed in 1828.

But common law judges killed the prohibition of sex with girls under 12 in *9 Geo. IV c.31* by the simple expedient of interpreting "unlawfully" in the phrase "unlawfully and carnally know"<sup>280</sup> as requiring lack of consent. *R. v. Martin*, in 1840,<sup>281</sup> acquitted because the girl, between 10 and 12, was found to consent, although "the prosecutrix proved that the prisoner had laid her down in a field, and had applied his private parts to hers, and hurt her much." *R. v. Neale*,<sup>282</sup> at Chester Assizes in 1844, convicted on the misdemeanour of carnal knowledge of a girl between 10 and 12, but only because the girl

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<sup>277</sup> *Ibid.*, pp.47-9, 151.

<sup>278</sup> *9 George IV c.31*.

<sup>279</sup> That is, it confirmed *18 Eliz. I, c.7, "An Act to take away clergy from the offenders in rape or burglary..."*, s. IV (1576): "And for plain declaration of law, be it enacted, That if any person shall unlawfully and carnally know and abuse any woman-child under the age of ten years, every such...knowledge shall be felony..."

<sup>280</sup> *Ibid.*, the language of *18 Eliz. I, c.7, s.IV*.

<sup>281</sup> *E.R.* V.169, Cr. Cases II, p.49, originally 2 Moody 123-4.

<sup>282</sup> *E.R.* V. 169, Cr. Cases II, p.140, originally 1 Denison 36-7.

proved in cross-examination that "he effected his purpose by force and against her will"--the same test as for the felony of rape. The youth of the complainant did not protect her against the searching enquiries directed at adult complainants of rape, but lessened the sentence because it was charged as a misdemeanour.

Likewise, the tort law, which through criminal conversation allowed the successful plaintiff "the dubious victory of compelling a forced sale of the spouse's affection",<sup>283</sup> also permitted a discounting of the value of the consortium of particular women because of their character: the 1890 case of Darbishire v. Darbishire stated that

there is a particular distinction between the value of different wives...[for] if she has led a loose life before marriage, her value is not the same as that of a virtuous woman...If a man's wife goes and walks the street, the husband is not entitled to come here and recover damages against any man...<sup>284</sup>

Just as domestic torts tended to lump together the wife with the children and servants as service-providers for the head of the family, the calibration of damages to chastity spread from torts based on sexual contact with the plaintiff's wife to sexual contact with the plaintiff's daughter. The same logic applied to underage daughters with respect to their fathers' actions for seduction.<sup>285</sup> Given the degree to which visions of appropriate femininity were class-linked in the nineteenth century, it should come as no surprise then that working class girls under the age of consent were often treated as too sexualized to be worthy of legal protection. When it came to working class girls, age was no impediment to judging their characters to be ruined.

The use of character tests for a rape complainant's claim of maltreatment defeated the statutory intent of the child sex sections of *9 George IV c.31*. Rape law reflected a paradox:<sup>286</sup> statutes expanded protection of women against a wider variety of sexual acts, and defined women as unable to be charged as perpetrators, thus embodying the idea of female sexual passivity.<sup>287</sup> Yet evidentiary and procedural decisions promoted "the belief that the woman might have encouraged and precipitated the assault", promoting "a model of female sexuality as agent provocateur, temptress or seductress".<sup>288</sup> Both sides of this paradox were applied just as much to girls underage as it was to women.

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<sup>283</sup> Lynn v. Shaw, (1980) OK 179 (Sup. Ct. Okla), denying the action of crim. con. was still available in the state.

<sup>284</sup> Edwards, Female Sexuality, pp.32-3, quoting Darbishire v. Darbishire (1890) 62 Law Times Rep., p.664; see also Comyn v. Comyn and Hump (1860) 32 Law Journ. (P), p.210, where the amount of damages was to be reduced "[i]f a woman surrenders herself very readily to a man, who takes no pains to obtain her affections, or if you have reason to suppose tht she has made the first advances..."

<sup>285</sup> Ibid., p.33.

<sup>286</sup> Ibid., cf. her chapter title "The Female Paradox".

<sup>287</sup> Ibid., p.22.

<sup>288</sup> Ibid., pp.49-50.

To Hobbes, the sexual contract was imposed on women because of special ability, not weakness;<sup>289</sup> women solved the problem of reproduction, but rearing infants was the germ of their political downfall. Hobbes could not understand this. If selfishness guided everyone's actions, no one would raise an infant and "the individuals in the state of nature would be the last generation."<sup>290</sup> Mothers obtained natural dominion over infants, but there was no immediate benefit from a "contract to become a lord over an infant."<sup>291</sup> Before having a child, a woman would revenge rape with murder, but with a child, the need to defend the child and herself exposed her to extra risk.<sup>292</sup> This made rape a particularly effective weapon against women--not at first, but from nine months after nature began. The efficacy of male violence stemmed from women's distraction by children.

Hobbes theorized that mothers hoped for social alliances with children, that the child, "grown to full age he become not her enemy",<sup>293</sup> but men continued the war of all against all. Because of moral lack in men, women's allegiance to children led to conquest by males.<sup>294</sup> Hobbes linked women's motivation to marry to the protection of children, but not as contemporary gender conservatives do: they define marriage as prostitution--women obtain food for kids by providing sex to men.<sup>295</sup> Rather, Hobbes' logic implies that men directly threatened children.

Men gained a strategic advantage, because if mothers killed men, children would suffer. But how? It had to be due to more than the mother's absence--otherwise, in Hobbes' individualistic nature, every child would die the first time post-

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<sup>289</sup> Other theorists, including revisionists of Freud such as Gregory Zilboorg ("Masculine and Feminine", Psychiatry, (1944), pp.257-96), described the original state of humanity similarly as a "gynaecocentric period", which ended when a man discovered rape. Against Freud's argument that there was a "primal horde" of male allies until paternity was discovered and patriarchy was founded, Zilboorg, writing in reaction to World War II, described the first sexual possession of a woman by force as a "phallic, sadistic act" (pp.282-3).

<sup>290</sup> Pateman, The Sexual Contract, pp.48-9.

<sup>291</sup> Ibid., p.44.

<sup>292</sup> Ibid., pp.48-9.

<sup>293</sup> Ibid., quoting Hobbes, Philosophical Rudiments Concerning Government and Society in Sir William Molesworth, ed. The English Works of Thomas Hobbes (1962), Chapter IX, p.116.

<sup>294</sup> Ibid., pp.49-50.

<sup>295</sup> For example, Thornhill and Palmer, The Natural History of Rape, argued rape is a sensible evolutionary strategy for some men--losers who cannot provide well--based on an analogy to scorpionflies: the smaller males of this insect species grow a special appendage to help them hold onto females, which they use to force sex on them; the larger males obtain mates by providing special food treats.

partum women left to obtain food.<sup>296</sup> Therefore, men who would rape mothers must directly threaten children: while a mother exacts revenge, other men, the rapist's allies, could directly attack her child. It is the other men supporting her rapist who make her willing to placate the rapist in order to protect the child.<sup>297</sup> Thus, Hobbes assumed a fraternity in nature--men cooperating to attack children if women attack men. Community is derailed by male sexuality, and women respond to the lack of community by placing themselves in the way of men's violence to protect children.<sup>298</sup>

Hobbes linked rape to marriage, but not through Stranger Danger, the need to secure protection of "good men" against "bad men". That women grant sex to good men for protection against strange men is commonly believed now. But to Hobbes, marriage was a result of rape, not a means to avoid rape by other men. Women married in fear of death, not from strange men, but from their husbands. Hobbes suggests male power is based on sexual violence, an affinity between him and Brownmiller. But Hobbes located sexual violence within the family. Sexual violence occurs between the male who becomes the husband and the female who becomes the wife. She gives sex after rape in hope of less violence. Further, males threaten not only women, but children. The regime of male domination in Hobbes is thoroughly antisocial.

Hobbes admitted motherlove--there is too much evidence to deny it. But he had no real explanation for it. Allegiance when the infant is grown is hypothetical and distant,<sup>299</sup> and could not offset the immediate cost. He may have

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<sup>296</sup> Of course, a post partum mother needing to obtain food by herself without childcare is one of the most improbable points in Hobbes' model. Evidence from history and anthropology suggests new mothers usually had women kin to help them feed themselves and with childcare. But Hobbes did not imagine women caring for one another.

<sup>297</sup> Pateman, The Sexual Contract, p.65, noted that female slaves were often defined as beings useable at will for sexual purposes; Gilda Lerner, The Creation of Patriarchy (1986), p.78, suggested that enslaved women work to please the Master more assiduously once they have given birth, in order to protect their children.

<sup>298</sup> Stephen, a follower of Hobbes, approved the value of a "rule of mere force" in Liberty, Equality, Fraternity, p.189, which J.S. Mill decried in The Subjection of Women; he denied Mill's conclusion that force put "each individual of the subject class...in a chronic state of bribery and intimidation combined." Rather, force was good because "Force is an absolutely essential element of all law whatever...[L]aw is nothing but regulated force...The...withdrawal of the element of force from law...would be the destruction of law altogether" (p.200). Force enforced the dominance of husband over wife because men could to keep children away from their mothers, which made women submit: if marriage based upon equality of contract were allowed, divorce would be easily available; since "[a] woman loses the qualities which make her attractive to men much earlier than men lose those which make them attractive to females", she would be likely to be discarded, and since "the tie between a woman and young children is generally far closer than the tie between them and their father" she would lose access to her children "if he might put an end to the marriage when he pleased." It is remarkable that Stephen wrote in the 1870s as if no change to child custody law had taken place at all; perhaps the reforms for which Caroline Norton had worked so hard had little impact. Stephen began his argument for women's natural inequality (p.188) by defining feminism "by far the most ignoble and mischievous of all the popular feelings of the age".

<sup>299</sup> Especially given the infant mortality of the mid-seventeenth century, hope of any return from a newborn was a fool's gamble.

concluded that women were unreasonable. But his lack of theoretical comprehension of motherlove convicts him of insufficient rationality. If a theory of human society cannot comprehend reproduction, what use is it? Because it makes childrearing nonsensical, Hobbes' theory cannot be correct. Like Brownmiller, his theory is an historical artifact, rather than a true history of the origins of society. Hobbes elucidates how seventeenth century contractarians understood the continuing patriarchal power of men in families--as power over wives, rooted in male violence against women and women's loyalties as mothers.<sup>300</sup>

Missing from Hobbes' analysis is paternal feeling, or even material benefit (exploitable labour, or an heir for one's property) to the father from the production of children of certain paternity. Yet traditionally this was the favourite argument for a double standard punishing women's adultery but not men's. In rape trials, the main legal issue was the social legitimacy of sex, determined by the rights of men of particular statuses to propagate themselves upon certain women--a right to service rather than a meeting of minds. This was why ejaculation became a required part of women's testimony in rape cases in the late eighteenth century, the requirement which Peel's *9 Geo. IV c.31* removed. Hobbes' analysis comprehends the sexualization of men's property rights in women, but he was not primarily concerned with the nature of the subordination of wives--he emphasized the fact of subordination alone.

According to Hobbes, women become servants of men; marriage is a contract of subordination, not community or affection. Women owe men obedience, including use of their bodies at pleasure for life. In return, wives obtained a promise of protection. Hobbesian marriage, a lifetime service contract, is not a good bargain. The subordinate in marriage (like a domestic servant) entered, through one contract, a whole series of contracts in which the other party always set the terms.<sup>301</sup> John Stuart Mill called a wife a "personal body servant of a despot."<sup>302</sup> They were like slaves who agreed to lifetime service in return for their lives.<sup>303</sup>

Nineteenth century feminists often compared marriage to slavery, appealing to the liberal tradition of

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<sup>300</sup> Hobbes, born 1588, died in 1679, thirty years after the execution of Charles I, but before the Glorious Revolution (see A.P. Martinic, "Thomas Hobbes" in Steven Emmanuel, The Blackwell Guide to the Modern Philosophers (2001), pp.28-42). Pateman, The Sexual Contract, p.46, noted that some political scientists, such as R.W.K. Hinton, ("Husbands, Fathers and Conquerors", Political Studies (1968), pp.55-67 at 62 and 57) described Hobbes as a patriarchalist, but she found his apology for patriarchy closer to the social contract theory than to Filmer. However, his inclusion of conquest in contract, and ruthless discussion of relations between genders, made him too open: "Hobbes was too revealing...to become a founding father of modern patriarchy" (Pateman, The Sexual Contract, p.44). Hobbes could be approached as a sort of "missing link" between old and fraternal patriarchy.

<sup>301</sup> Pateman, The Sexual Contract, pp.50-1, 59.

<sup>302</sup> Mayhall, "The Rhetorics of Slavery and Citizenship", p.486.

<sup>303</sup> Pateman, The Sexual Contract, pp.57-60, 64.

Abolitionism.<sup>304</sup> J.S. Mill, and his wife, Harriet Taylor Mill,<sup>305</sup> defined wives as the most extreme slaves: "no slave is a slave to the same lengths", because of the marital exception. A wife's "Master" could "enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclinations."<sup>306</sup>

Making female vulnerability sexually attractive impacted how class was embodied in the nineteenth century: the corset sexualized female fragility and weakness--and visually conveyed their unsuitability for hard physical labour, classing gender and gendering class.<sup>307</sup> Cultural representation paralleled economic reality: bourgeois women's economic dependence promoted wives' obsequiousness towards husbands. But it did not relieve male anxiety: men knew modesty could be faked.<sup>308</sup>

But women's seclusion did lessen social support for women who had been raped, especially rape in private. Compared to eighteenth century women who mixed in public, there were fewer trusted friends and potential witnesses.<sup>309</sup> Middle class households, especially, were increasingly devoted to "privacy" by mid-nineteenth century.<sup>310</sup> Domestic ideology increased the difficulty of disciplining men's rape of dependent women.

Marriages create social matrixes, "a deployment of alliance..., of fixation and development of kinship ties, of

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<sup>304</sup> Mayhall, "The Rhetorics of Slavery and Citizenship".

<sup>305</sup> Harriet Taylor Mill certainly inspired, and may have actually written, much of her husband's works on feminism. See for example Janet Seiz and Michele Pujol, "Harriet Taylor Mill", The American Economic Review (2000), pp.476-9

<sup>306</sup> Pateman, "Women and Consent", p.156, quoting J.S. Mill, "The Subjection of Women" in J.S. and Harriet Taylor Mill, Essays on Sex Equality (1970), pp.123-252 at 159-60.

<sup>307</sup> Stoianovich, pp.98-9.

<sup>308</sup> Poovey, pp.18 and 22-7. Supposed to mean that a woman was virginal and not on display, modesty was conceded to be the "best lure" for men in the conduct books. This was why Dr. Gregory, a moralist, complained that modesty was difficult to prove in practise: it created "a very complicated distress" by requiring young women to avoid participating in risque behaviours that they were supposed to be so ignorant of that they might not even perceive the dangerousness of the social situation. For instance, a truly modest girl might laugh at a dirty joke to be polite because she did not understand enough about sex to understand the double entendres. The converse was also true: a worldly, immodest woman might know enough about risque allusions to appear to be more modest than the truly innocent ingenue.

<sup>309</sup> Clark, Women's Silence, pp.26-33 and 64-5.

<sup>310</sup> Richard Wall, "Work, Welfare and the Family", in The World We Have Gained, pp.261-94, noted at 263, that farmers' "increased taste for privacy" by 1851 caused numbers of (live-in) agricultural servants to decline from the late eighteenth century, and an increased use of day labourers. Ashford and Thornton lived earlier in the transition from "family economy" to "family wage economy", p.265.

transmission of names and possessions'...linking the cultural acquisition of sexuality to kinship structure."<sup>311</sup> Marriages weave together a person's kin, spouse's kin, and innocents of the next generation. Each relationship adds another incentive for women to keep silent about rape by men in the web. Rape law plays a special role in the reproduction of sexuality through generations because of its links to alliances built by marriage--it is central to the "system of rules and regulations" which uphold not only marriage relationships but whole systems of kinship.<sup>312</sup> If courts don't take relationships, loyalties, economic dependency, and ideological commitments--if courtship, marriage, and family are ignored--raped women's testimony cannot make sense. In the nineteenth century, courts began to throw out rape allegations not only because women were "bad", but because they were feminine:<sup>313</sup> they were loyal, silent and willing to suffer for others.

Some suffragists rebelled against the legal rights of husbands under law by practising more mutual relations. Elizabeth Wolstoneholme-Elmy contrasted traditional and feminist marriage in 1881, after her husband Ben Elmy's death:

In every happy home the change is complete. There no husband claims supremacy and no wife surrenders her conscience and her will. There the true unity,...which law can do nothing to create, but which bad law had done much to weaken and destroy, reigns alone.<sup>314</sup>

The closeness of marriage to slavery in Hobbes explains why later political theorists preferred to make the subjection of women seem "natural". But there were tensions in this approach. They prescribed double standards of sexual morality for women compared to men. But if subjection was natural, no moral discipline should be necessary. It was an open secret that the sexual double standard was "the reflection of the view that men have property in women",<sup>315</sup> once Victorian feminists attached reform of marriage, custody, rape, and prostitution law to the demands for the vote.<sup>316</sup> The

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<sup>311</sup> Edwards, Female Sexuality, p.14, quoting Foucault, The History of Sexuality, p.106.

<sup>312</sup> *Ibid.*, p.14.

<sup>313</sup> Clark, Women's Silence, pp.63-5, described early nineteenth century examples of women's euphemisms: 17-year-old Ann Chandler told two neighbours Edward Hooper had "'taken liberties with her'" and "'insulted'" her (The Times, 5 Sept. 1840); the courts decided complainants like this did not know enough about what rape meant to prove it had happened. On the other hand, pp.67-9, women whose speech was too clear, like a 19-year-old Sunderland barmaid who used terms learned from sailors, sparked hostility in judges, who encouraged juries to find assailants not guilty on the grounds of poor character and lack of femininity--in the case of the barmaid, augmented by resistance which showed unfeminine "'presence of mind during the violence of her struggle'" (The Times, 27 Aug. 1821). Complainants were caught in a modesty-induced Catch 22 almost impossible to negotiate.

<sup>314</sup> Holton, p.216, quoting Wolstoneholme-Elmy, "The Law of England as to the Maintenance of Wives and Children", Journal of the Vigilance Association, May 15, 1881, p.41-2.

<sup>315</sup> Keith Thomas, "The Double Standard", pp.209-10.

<sup>316</sup> Agitations against prostitution and the sexual exploitation of young women and girls were central. See Holton, p.201-5.

similarity of marriage to slavery--and of marital sexuality to rape--were common feminist observations by mid-century.<sup>317</sup>

Marriage denied women's political capacity and was central to the containment of women.<sup>318</sup> Subversive, resistant solidarity among women was utilized by feminists: "Rational" or "Enlightened" friendships based on honest speech were fashionable in the 1790s among English Jacobins.<sup>319</sup> British state reaction against Revolutionary intellectuals<sup>320</sup> silenced them, but not forever. The history of their voices was recovered.

## G. INDIVIDUALISM: (MALE) ENTITLEMENT AND (FEMALE) REPUTATION

The reinforcement of women's subordination in marriage under fraternal patriarchy reached a new pitch around the end of the eighteenth century, as women's service as wives became more servile and sexualized than before. For bourgeois women, this meant identity difficulties negotiating the productive ethic coming to define the middle class. Virtuous women could only participate in the culture of individual achievement negatively, by applying strict self-control over their own needs. As Hannah More, conduct book writer in the late eighteenth century, put it, girls should

...be inured when very young to contradiction...They should be led to distrust their own judgment;...to expect and endure opposition...It is of the last importance that they should early acquire a submissive temper and a forbearing spirit.<sup>321</sup>

This implicitly raised possibilities of sexual immorality: young women trained in this way could not always avoid submitting to the "wrong" man. Mary Shelley, the Romantic novelist, wrote in Lodore in 1835 about the "sexual education" of Ethel Lodore by a father who trained her to be the perfect bride, but also inculcated vulnerability to manipulation by

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<sup>317</sup> Pateman, "Women and Consent", p.156; The Sexual Contract, pp.120-4, traces the theme back as far as Mary Astell in the seventeenth century.

<sup>318</sup> Pateman, "Women and Consent", p.154, discussing Rousseau, Politics and the Arts, p.84: any female political involvement subverted civic order. Women's "disorder" was sexual: their excessive sexual passions could never be completely disciplined, men could be contaminated by women, and led into irrational behaviour. To Rousseau, women's potential to create chaos was self-evident. See also Pateman, "The Disorder of Women", Ethics (1980), pp.20-34.

<sup>319</sup> Mandell, p.70, referred to Mary Wollstonecraft and Mary Hayes as "test cases" of such presumptuous friendships, with other women--and with William Godwin. Both bared personal struggles, egotistical concerns, and what were usually seen as excessive emotions for women, to the "secular millenarian" Godwin.

<sup>320</sup> See Alfred Cobban, The Debate on the French Revolution (1950), Robert Dozier, For King, Constitution and Country (1983), H.T. Dickinson, British Radicalism and the French Revolution (1985), Mark Philp, ed., The French Revolution and British Popular Politics (1991), Jennifer Mori, William Pitt (1997), and Andrew Stuart, The British Periodical Press and the French Revolution (1999).

<sup>321</sup> Hannah More, Strictures on the Modern System of Female Education ([1799] 1974), V.I, pp.152-3.

fradulent men:

...[B]y his incessant care and watchfulness...[he] tended to soften her mind, and make her spirit ductile and dependent...[A] word or look from him made her...turn as with a silken string, and bend at once to his will...He resolved to make her all that woman can be of generous, soft and devoted...to render her ever pliant to his will

but "the pupil...puts forth, as a parasite, tendrils by which to cling, not knowing to what, a supporter or destroyer."<sup>322</sup> Exploitation of a self-sacrificing woman by an improper man would waste her only chance to become a proper wife, the property of a properly-matched man. For once she had lost her "sexual innocence", no matter how, she could no longer be a proper vessel fit to reproduce a good man's seed. It is easy to understand why bourgeois women would be upset by the implications of Holroyd's treatment of Ashford's reputation, given the irremediable nature of loss of virginity in their ideology.

By the 1820s, working class women participated in the game of classifying each other's virtue, but with much less distance from the category of "whore": women in the East End called down other women as "whores", which connoted sins against patriarchy "that a woman had no self-respect, that she did not control herself, that she was loud and sexually profligate, that she roamed the streets, that she did not submit to the control of a husband or father."<sup>323</sup> Higher working class women--shopkeepers or wives of artisans--sued to "keep up not only their sexual reputations but also their class status", as almost middle class.<sup>324</sup> Plaintiffs were improving in status. They denied sexual promiscuity to defend creditworthiness with suppliers and keep customers. Gender and sexual reputation were thoroughly mixed with class for working class women--and by using the term "whore", they were complicit with defining their sexuality as property of husbands or fathers.

James Fitzjames Stephen, in Liberty, Equality and Fraternity (1874), applied a "contractual" analysis to female virtue: women traded sex for their husbands' economic support and protection from other men's violence. Defense of premarital virginity was a sacred duty akin to men's duty to provide military service to defend the state.<sup>325</sup> Female patriotism

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<sup>322</sup> Mary Shelley, ed. Lisa Vargo, Lodore ([1835] 1997), pp.62, and 65-6.

<sup>323</sup> Clark, The Struggle, pp.54-5.

<sup>324</sup> *Ibid.*, pp.52-3. 75% were wives or widows of artisans, tradesmen and shopkeepers. But there are only 39 remaining case documents, out of several hundred cases brought between 1780 and 1820.

<sup>325</sup> Stephen, Liberty, Equality, Fraternity, p.194, said the difference of strength between the sexes led inevitably to "a division of labour between men and women, the general outline of which is as familiar and as universal as the general outline of the differences between them": men only could provide military service, and girls keep house, cook and sew. Stephen thought it only necessary to state the gendering of these tasks to prove them true by the ridiculousness of the contrary. As part of their household tasks, women had to sexually provision husbands and resist sex with other men. Women could only support themselves by marriage, a "profession" requiring fidelity (pp.196-7, and 208-9); because force is omnipresent in social life, the happiness of marriages and states depend on the naturally inferior accepting the leadership of the naturally superior. If the inferior submit, power can be exercised smoothly and brute

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was proved by resisting sexual advances by impermissible men and the reproduction of inferior children.<sup>326</sup> But not propagating the wrong men implied they had to reproduce the "right" men. Wife and whore were equally subject to sexual coercion.

Wife and whore were linked by duty to give sexual consent to certain men (the one or the many as the case may be). Consent was a matter of comparing particular women's social positions relative to elite men. If the woman could be construed as under a duty to elite men--in other words, if she was servile--she could be reframed as a sort of casual wife-by-the-hour. It was easy for defence to make a working woman seem like a prostitute. The classification of a particular woman as "modest" or "whore" could determine the legal decision.

By 1834, British common law allowed evidence of prior sexual activity between the complainant and the accused in rape, although the accused could not be asked if he had previously had sex with her or his intent on the occasion charged.<sup>327</sup> Cases admitting prior sexual activity with the accused tended to give "the rights of consortium"--the rights of a husband to sexual service and household services of a wife--to any man a woman had slept with previously.<sup>328</sup> But like the rights of men to family relationships, in the nineteenth century this privilege was implicitly classed. Rape trials were about the general rights of elite men to access the reproductive power of women, rather than a couple's negotiation of sexual desires.

Elite men had more de facto rights of access to women than working class men--who were the men increasingly subject to stereotyping as bestial and dangerous strangers, apt to jump out of bushes at lone women.<sup>329</sup> This is why there

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<sup>325</sup>(...continued)

force will not break the "repose" created by "the absence of conscious and painful restraint, [and] the calm play of unresisted and admitted force" (pp.190, 193, 195, 197, 199-201, 203, 205 and 208).

<sup>326</sup> Ibid., pp.206-7, affirmed natural inequalities which "expressed themselves through differences in wealth caused by biological differences in fitness from birth, as well as the differences of age and sex: In particular, what equality is there between the well-born and well-bred man, the son of a good, careful, prudent, prosperous parent, who has transmitted to him a healthy mind and body, and given him a careful education; and the ill-born, ill-bred man whose parents had nothing to teach which would not have been better unlearned and nothing to transmit which would not have been better uninherited." The elite bourgeois well-bred man's fitness was due to the action of one parent (the father), careful to pick a woman of good stock to bear his children for him; but the unfitness of the ill-bred man was blamed on two parents who did not make any kind of plan before conceiving him. Nothing could be done about these differences; one's place in a hierarchy of skill and command ought to be accepted without complaint to ensure social peace, similar to that Stephen said existed in India because of the caste system (p.208).

<sup>327</sup> Edwards, Female Sexuality, p.65, citing R. v. Moses and Aaron Martin, [1834] E.R. V.172 at 136, originally 6 Car. & P. 561.

<sup>328</sup> Ibid., p.65

<sup>329</sup> See Wiener, "Alice Arden to Bill Sikes", p.204, citing Edwin Chadwick's Report on the Sanitary Condition of the Labouring Classes (1842) as a clear crystallization of this view of workingmen as

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was so little attention to mens rea--in the 1861 *Offenses against the Persons Act*, an omnibus reform of all personal violence offenses, rape was the only offense not to have an elaborate analysis of its mens rea element exhaustively defined in the statutory language.<sup>330</sup> The accused man's intention did not matter: it was the complainant's social position which determined whether men could expect her to meet sexual needs. Likewise, consent was not about women's subjective feelings and intentions at all. The 1861 consolidation reenforced the idea that female sexuality was passive, an matter of allowing or denying men's sexual access, not consent based upon her inward desires.<sup>331</sup>

Judge Holroyd implied in Thornton that any man could have sex with a woman who was not "owned" by one man. Since a man's ability to privatize a woman as his wife depended upon his financial status, and because a man of sufficient financial status to keep a wife in his private home would not marry a working class woman, Ashford's chastity did not have to be respected. Further, a man of sufficient status to privatize a wife was likely to sometimes experience a yen for casual access to a woman like Ashford. Therefore, sexual access to Ashford was up for grabs. She represented property which had not been reduced to legally effective possession, like a beast in the wild.<sup>332</sup> Only the "law of the jungle" prevailed with respect to a woman of such low status.

The judge's son, Edward Holroyd, identified Ashford's "imprudence"--which "unfortunately exposed her" to Thornton's naturalized, inevitable, legitimate violence<sup>333</sup>--simply with being alone with him, not with her showing any sexual or even romantic interest in him. Holroyd's reasoning did not identify Ashford's mistake as "going on a date"; he refused to identify Thornton as a suitor--any promise of marriage coming from him must be obviously fraudulent, leaving Ashford with no hope of "rescue" for her respectability after Thornton deflowered her.

That Ashford might have drowned herself in the pond was casually brought up at the Appeal of Murder by Judge

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<sup>329</sup>(...continued)

dangerous. Note, Chadwick was a public servant who was centrally involved in the design of the 1834 New Poor Law.

<sup>330</sup> Kim Stevenson, "Observations on the Law Relating to Sexual Offences", Web Journal of Current Legal Issues (1999), discussed the mens rea requirements of the 1861 *Offenses against the Persons Act*.

<sup>331</sup> Edwards, Female Sexuality, p.23, described the 1861 Offenses Against the Person Act as a consolidation of the idea of women's sexuality as passive.

<sup>332</sup> That is, one could compare the situation of the "public woman" to the doctrine of feras naturae, that a wild animal is not owned by the owner of the land which it crosses, but is only possessed by a person who gains property rights in it if it is "tamed and captured" or has undergone "actual bodily seizing" or "mortal wounding". See Pierson v. Post (1805) 3 Cai. R. 175 (Sup. Ct. NY), which held that although Post was in the process of using his hounds to run down a fox when Pierson interposed himself between the fox and its pursuers and shot the fox and removed its body.

<sup>333</sup> Edward Holroyd, Observations, pp.24 and 87.

Bayley, with complete lack of emotion at the prospect of such a loss of a young woman.<sup>334</sup> The elite judges not only saw suicide as a likely response to a woman's guilt over losing her virginity, but were unconcerned about it. She was to them an utterly disposable woman. Her best recourse was to throw herself in the pond, for she had no longer had any value without her virginity.

Ironically, the legal elite anticipated in imagination what working class political radicals would decry in their literature to spread the Stranger Danger message of Thornton to a wide working class audience: radicals insisted that men who desired to casually use and abandon working class girls just as they pleased were elite men. Thornton was decided as if the accused Thornton was not himself a commoner who might honourably look at a woman like Ashford for a wife. It stood for libertinism--casual sexual use, even if obtained through cynical, predatory, dishonest and/or violent means--based on effacing the class status of the real man and the possibility of real courtship. Radicals discussed Thornton and Stranger Danger as if the man who raped Ashford was a gentleman. But they inflated Thornton's class status to recuperate workingmen as "protectors" of women like Ashford, to deflect attention from real experiences of workingwomen with violence from men of their own class.<sup>335</sup>

Judge Holroyd created rape law with the rights of a standard "gentleman" at the fore in his mind: his rape law undermined community protection of workingwomen during courtship. Radicals used Holroyd's model of rape law to critique the law and the class it privileged, and to promote working class unity under workingmen as patriarchs of families.

But by contrast to radicals who used Stranger Danger to blast the predatory upper classes for what they supposed were mass sexual depredations against respectable working class girls,<sup>336</sup> Holroyd's "consent to force" blamed working-class girls for exposing themselves to unknown men in public space. He might have decided to treat Thornton as a monstrous workingman and thus differentiate him to protect the ersatz virtue of elite men, but that would not provide impunity for future elite sexual misbehaviours. For this purpose, victim blaming was the better strategy: it would keep elite men from being convicted when they "importuned" workingwomen for sex.

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<sup>334</sup> Hall, p.161: Bayley asked Chitty, "...what is there to shew that she might not have thrown herself in, or have tumbled in?"

<sup>335</sup> Clark, Women's Silence, pp.90-100. See also Clark, The Struggle, pp.194-5: The New Poor Law's bastardy provisions intensified the radical representation of "honourable, controlled, manly" workingmen as chivalrous protectors against "gross and brutal libertines" in the aristocracy, whom they represented as the "great majority" of those Englishmen who sired "natural children", in G.R. Wythen Baxter, The Book of the Bastiles: Or, The History of the Working of the New Poor Law (London, 1841), pp.4 and 180, and The Pioneer, 28 June, 1834.

<sup>336</sup> For example, Clark, Women's Silence, p.35, quoted Allen Davenport, an Owenite socialist, from his Life of Thomas Spence (1839) at p.22: "The vile aristocracy...seduce and abandon more girls than all the other male population put together."

By identifying Ashford's presence in public space as sufficient provocation<sup>337</sup> to her casual sexual use, Edward Holroyd argued the chastity of working class women was not worthy of respect. This marked workingwomen off from bourgeois and upper class women, losing the privileges of their gender. It also meant distinguishing workingmen from the standard rights of men: Thornton implied that working class men could not expect their brides to be unabused and virginal. In the context of fraternal patriarchy, this was a denial of working class men's marital rights. If a father could not afford to sequester his daughter during her prime earning years, then he had no legal complaint against libertines--elite men who would never marry her--using her sexually. This dehumanizing rejection of workingmen's rights to facilitate sexual exploitation of working class women by elite men was a harbinger of the greatest provocation of the working class in the first half of the century: the 1834 *New Poor Law*.

The *New Poor Law* abolished the procedure which had required unwed mothers to name the fathers of their bastards, allowing the Poor Law Guardians to seek child support. Both proponents and critics of the "Bastardy Law" changes argued that it was meant to keep pauper women from naming higher-class putative fathers to obtain higher and more certain child support.<sup>338</sup>

The *New Poor Law* also proposed forcing all relief recipients into workhouses, which would separate pauper women and girls from pauper men and boys, breaking up families of the poor to prevent them breeding more indigent "surplus population".<sup>339</sup> This meant that for men, obtaining the status of "breadwinner"--a head of household who provided financially for his wife and children on his own--became "a rare privilege and onerous responsibility, not a right of working men."<sup>340</sup> This made marriage itself a symbol of working class resistance to the elite, with a special political meaning which overshadowed analysis of women's inequality within marriage. Very few working class women would identify as feminists

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<sup>337</sup> Edwards, Female Sexuality, pp.50, 52-3, and 55: working class women were treated as "precipitating" illicit sex, and "considered responsible for the moral pollution of the nation".

<sup>338</sup> See Lisa Cody, "The Politics of Illegitimacy", Journal of Women's History (2000), pp.131-56; Marjorie Levine-Clark, "Engendering Relief", Journal of Women's History (2000), pp.107-30; Helen Heinemen, "Frances Trollope's Jessie Phillips", International Journal of Women's Studies (1978), pp.96-106; and Susan Zlotnick, "'The Law's a Batchelor'", Victorian Literature and Culture (2000), pp.131-46. Opponents and supporters of the New Poor Law took opposing positions on whether such accusations were likely to be mostly true or false.

<sup>339</sup> See Derek Fraser, ed., The New Poor Law (1976); D.E. Bland, "Population and Liberalism", Journal of the History of Ideas (1973), pp.113-22; Peter Dunkley, "Whigs and Paupers", Journal of British Studies (1981), pp.124-49; William Apfel and Peter Dunkley, "English Rural Society and the New Poor Law", Social History (1985), pp.37-68; and David Collard, "Malthus, Population and the Generational Bargain", History of Political Economy (2001), pp.697-716.

<sup>340</sup> Anna Clark, "The New Poor Law and the Breadwinner Wage", Journal of Social History (2000), pp.261-81 at 261.

until the Women's Social and Political Union, the Suffragettes, incorporated socialism with their feminism.<sup>341</sup>

But working class marriages by mid century continued to commonly include domestic violence and inequality of access to resources: women and little girls in working class families ate last, while workingmen were preferentially served the best food their families could afford.<sup>342</sup> The level of strife and stress went down, compared to the Regency--the most disorganized phase of industrialism--but patriarchy became as strong in Victorian working families as it was in the bourgeoisie.

Marriage for Victorian women at every class level remained risky and often brutal. But apologists for fraternal patriarchy wanted to argue that women consented to, enjoyed, and benefitted from men's dominance. John Locke insisted on women's consent to the marriage contract:<sup>343</sup> men could bring women, as property, up to the altar,<sup>344</sup> but women "contracted in" by taking marriage vows. They blossomed from "signs" of exchange to parties to contract. Then as wives they reverted to property, but the principle of "universal freedom" was preserved.<sup>345</sup> Locke simply denied contracts could lead to lifetime servitude.<sup>346</sup>

Rousseau denied one could agree to slavery: "anyone who entered into a contract to be another's slave would not be in his right mind";<sup>347</sup> but he affirmed female subjection in marriage. He merely hid his illogic through fear-mongering about the horrible results of female freedom--promiscuity. In the eighteenth century, Diderot said female modesty was the

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<sup>341</sup> Krista Cowman, "'Incipient Toryism?' The Women's Social and Political Union", History Workshop Journal (2002), pp.128-48, assessed the evidence for the socialism of the founders of the WSPU, defending against the claim the WSPU turned sharply to the right by assessing the lack of commitment the Independent Labour Party showed them, and their degree of attachment to socialism. Jane Purvis, Emmeline Pankhurst: A Biography (2002) discussed the very socialist underpinnings of the beliefs of the controversial leader most associated with the turn to the right; the British Socialist Party at <[www.socialistparty.org.uk/socialistwomen/sw9.htm](http://www.socialistparty.org.uk/socialistwomen/sw9.htm)> continues to claim the WSPU in "The Struggle for Liberation", emphasizing working class members of the WSPU whose socialism cannot be faulted.

<sup>342</sup> See Robert Roberts, The Classic Slum.

<sup>343</sup> In The Sexual Contract, pp.92-5, and 99-114, Pateman reads Locke through Freud and Claude Levi-Strauss' anthropology of male-male exchange of property in females.

<sup>344</sup> *Ibid.*, pp.59-60 and 110-1, discussing the contradictory approach of Levi-Strauss who treated women as the original token of exchange, as property and "sign", but then also insisted that women were persons even though their exchange marked the origin of civilization.

<sup>345</sup> *Ibid.*, p.112.

<sup>346</sup> *Ibid.*, pp.70-1. He argued that the slavemaster's power of life and death belonged only to God.

<sup>347</sup> *Ibid.*, p.75.

origin of civilisation, because it led to marriage.<sup>348</sup> Of course this logic, after the 1834 *Poor Law*, suggested that people on poor relief segregated by sex in workhouses were not civilized, making working class people defensive about the chastity of their women.

In the French Revolution, the continued existence of Diderot's foundation of civilization, marriage, was for a brief time questioned. The Marquis de Sade wanted to free men from the sexual limitations which had protected lineage. He therefore argued for the abolition of marriage. But because this would mean the end to men's assured sexual access to coerced women through marriage, with its male right to consortium and the marital rape exception, de Sade decreed that women should never be allowed to refuse any man. Equality of men required common access to all women; because "all men are born free, all are equal in rights", therefore

no man may be excluded from possessing a woman...All men therefore have equal rights of enjoyment in all women.<sup>349</sup>

De Sade also turned against the traditional duty to reproduce. He fantasized about a daughter sterilizing her mother: raping her with a dildo, allowing a venereally infected servant to rape her, and sewing her mother's vagina shut to ensure infection and keep her from having more children.<sup>350</sup> Another Sadean hero reproduced by line-breeding his daughters and granddaughters to turn the generational transmission of property in upon itself,<sup>351</sup> because "incest ought to be the law of any government based on fraternity"; the citizen "should have no other mother than the country."<sup>352</sup>

Like many fanatics, de Sade drew the most extreme conclusions possible. But his premises were broadly accepted: individualism for men. His ideas fuelled a backlash, but not one which criticized de Sade for his promotion of violence against women. Rather, bourgeois leaders rejected de Sade's promotion of promiscuous sexuality, but not his subordination of women to male sexual demands. As long as women were coerced to agree only to husbands, the new bourgeois orthodoxy even benefitted from having the Sadean extreme available as a bogeyman: the spectre of communal property in women was paraded to make women grateful for continued sexual submission to husbands.

To affirm male individualism but deny individualism for women, the circle was squared by following Rousseau: marriage benefitted women by putting them under the tutelage of men, on account of their "natural" inequality. Women's

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<sup>348</sup> Laqueur, Making Sex, p.200.

<sup>349</sup> Hunt, The Family Romance, p.138, quoting Philosophie dans le Boudoir, pp.221-2.

<sup>350</sup> Ibid., p.141, discussing Philosophie dans le Boudoir, p.283. She correctly calls this an "hallucinatory scene."

<sup>351</sup> Frances Ferguson, "Sade and the Pornographic Legacy", *Representations* (1991), pp.1-21 at 16, describing the family strategy Dolmance ascribed to an anonymous friend in Philosophie dans le Boudoir, pp.236-7 in The Complete Justine (1965).

<sup>352</sup> Hunt, The Family Romance, p.139, quoting Philosophie dans le Boudoir, pp.225, 230.

dependency was naturalized. To bourgeois men, it made no more sense to decry sex inequality than the inequality of children or servants to the head of the house.

The marital rape exception and domestic torts made sex a service wives must perform for husbands; wives were like "servants".<sup>353</sup> Marriage was analogous to young working class women's most common employment--and in an unknown number of cases, the converse was also often secretly the case: service was no more compatible with a practical right to refuse the master sex than marriage was.

Rape in marriage (sex not desired by the woman) was considered by Rousseau to be the most legitimate sex, because it actualized the husband's leadership. But since no legal rape was possible in marriage, the marital rape exception confused the language of sexual consent and made women's experiences unspeakable. Marital sex was never legally rape, but wives' duty to provide sex made it always rape, in the sense that wives did not have a right to say "No".<sup>354</sup>

Likewise, sex with dependent servants, persons of a status somewhere between employees and children, was unspeakable--but its half-admitted reality haunted middle class consciences. The blaming of working class rape complainants helped push down the reality of illicit sex inside the middle class home, perpetrated not by strangers but authority figures. The nineteenth century literary fascination with the "Fallen Woman" shows that suppressing knowledge of servants' sexual exploitation was not successful.

Ideal female sexuality came to mean pleasing husbands. This was supposedly natural to women: "The female has developed more on the lines of sympathy, emotion, of wanting to please those she loves, yielding to a man's wishes..."<sup>355</sup> By the end of the nineteenth century, a woman who did not embody this "natural" ideal was not only not a good, feminine woman, she was insane.<sup>356</sup>

But just as constant justification of the sexual privilege of heads of households could not keep Victorian minds from contemplating the lack of protection of servants from sexual exploitation, the naturalization of female passivity failed to be compelling belief in women's easy adjustment to their husbands' desires. Fraternal patriarchy distanced women from their desires and shamed them, but it could not make them function as sexual mirrors to men.

Good women had to assent to men and satisfy legitimate male desires. But they were never really trusted to resist illegitimate male desires. So the rape law stepped in to produce villainous women who could be punished for colluding<sup>357</sup>

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<sup>353</sup> Pateman, The Sexual Contract, p.50.

<sup>354</sup> *Ibid.*, pp.123-5, 164-5; Pateman, "Women and Consent", pp.155-6.

<sup>355</sup> Edwards, Female Sexuality, p.23, quoting T.S. Clouston, The Hygiene of Mind (1906: Methuen, London), p.24.

<sup>356</sup> *Ibid.*, pp.24, 52-3, 74-9, and 81-4.

<sup>357</sup> John Henry Wigmore, the foremost twentieth century legal treatise writer on evidence, reflected this in his classification of different sorts of complainants in sex-related crimes. In his original work, A Treatise  
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with bad men to meet illegitimate sexual desires. Women's enjoyment of their bodies became unacceptable; risking bodily harm by resisting likewise became unimportant. In Thornton, Holroyd defined Ashford's suffering as entirely natural.

After Thornton, rape was no longer sex against the complainant's wishes or without her consent, but "against her will", meaning her utmost resistance. Resistance proved a woman not a "public woman". Even though virtue was "natural" to women, the method of rape trials moved in the opposite direction: first a woman had to prove herself not a whore; then she might be classified as respectable. Because law viewed rape as lessening the property value of a woman, rape judges did not consider the rape victim as a real person. This profoundly dehumanized women.

In Thornton, Holroyd expanded the range of sexual behaviours that a woman could be assumed to accept, but radically restricted the possible causes of a man's anger at her. Sexual battery was not treatment to which a woman would probably not consent. Ashford could only motivate Thornton to murder her by refusing him sex--she had no other use. Ashford's very presence outdoors was sexual provocation. Holroyd made no bones about the lack of moral limits constraining a man's behaviour to a woman of Ashford's status.

Holroyd did not raise the spectre of an "evil stranger" or "monster" lurking in the shadows that we have come to expect in sexual murders. Such a discourse was available: there had been panics since the 1790s about "man-monsters" in London who attacked women on the street.<sup>358</sup> But Holroyd avoided the convenient solution. He chose to indemnify violent sexuality in the permissible sexual repertoire of men by denying battery implied a woman's non-consent and a man cruel enough to kill.

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<sup>357</sup>(...continued)

on the System of Evidence in Trials at Common Law [hereinafter On Evidence] (1905), pp.2055-8, subsection (2060) "Corroboration of an Accomplice: Who is an Accomplice?" included complainants in incest and adultery cases; ss.2061 addressed the "Uncorroborated Complainant in Rape, Seduction, Enticement, Bastardy, Breach of Marriage Promise and the like". Wigmore noted that Hale had not required corroboration, but made it clear that these witnesses' credibility needed to be tested more carefully. Wigmore approved of immediate outcry and cautioning the jury to avoid "undue sympathy"; he noted that many jurisdictions had recently begun to require corroboration in these cases--about half of the US; he cited statutory requirements of corroboration for the UK in Bastardy from 1835 (ie. the Poor Law), Breach of Marriage Promise in 1869, Rape under Age in 1885, and Cruelty in 1889. For Canada, corroboration had been required in 1890 for Rape under Age, Indecent Assault, and Breach of Marriage. By the 1940s, Wigmore became more adamant: not only corroboration, but routine psychiatric examination should be required for all women complainants. He referred to psychiatric treatises on female mental illnesses, including "nymphomania", "psychosis", "hysteria", "pathological lying", and being "the hussy type". See Wigmore, Chadbourne ed., On Evidence (1970), pp.454-64 (vastly expanded ss.2061), and 736-48, a separate section titled "Woman, complainant", mostly reprints of Wigmore's writing in the 1940s, excerpts from psychiatric case reports on "false accusers", almost all from children under the "so-called age of consent" (pp.737-48). Children were lying even when they suffered vaginal infections; physical irritation was reframed as causing sensations which led to sexual fantasy. Their detailed descriptions of sex were the result of earlier "atrocious sex knowledge and sex habits"; if previous child sexual abuse was known, it was held to produce both abnormal sexual appetites. In other words, previously abused girls were ruined and further complaints were not credible.

<sup>358</sup> Clark, Women's Silence, p.117, after Renwick Williams, "The Monster", in 1791 attacked a number of women, other attackers began to be called "monsters".

Holroyd went far beyond what was required to keep an innocent accused from being punished. He undermined public grieving of the death of a woman on the threshold of life. He held the death of the suffering body inconsequential. When Holroyd summed up the undetermined manner of death by saying "whether she had fallen in, whether she threw herself in, or how she came there, there was no evidence",<sup>359</sup> he showed callousness. When, later in the process, one of his King's Bench colleagues discussed suicide in a nonchalant way,<sup>360</sup> the impression that this death did not matter was reinforced. Legal discourse publically and visibly diverged from ordinary public morality.

Consent to force legal doctrine created tunnel vision, fixation on classifying the victim of rape, as either a provoker of sexual rage, or a provider of sexual release. Male sexual responses became the rape complainant's responsibility. For working women, like Ashford, the lack of male kin powerful enough to protect her virginity and guarantee her capacity to "breed true" a husband's seed meant availability to be used without remorse. Holroyd upheld the sexual ideology promoted by fraternal patriarchy.

## G. SUMMARY: FRATERNAL PATRIARCHY, RAPE AND MARRIAGE

Fraternal patriarchy encouraged women to subject their consciousness of desire to the pedagogy of men, to mirror their husbands' sexual desires. By defining a class of women as appropriate prey--cheap, disposable, torturable<sup>361</sup>--

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<sup>359</sup> Hall, p.109.

<sup>360</sup> Hall, p.161: Sir John Bailey, K.B.

<sup>361</sup> See Graham Greene, Our Man in Havana (1991): when Wormold, a British vacuum cleaner salesman in 1958 Cuba, agreed to spy for MI 6, he provided plans for a secret weapon which looked like a vacuum cleaner--but amidst the laughs, a sinister interrogator informed Wormold that there is a "torturable class", made up of "people who expect to be tortured". Prostitution in Victorian England worked on a similar logic. The recent experience of prostitutes in Western Canada, especially Aboriginals (see the "Sisters in Spirit" website of the Aboriginal Women's Association of Canada <[www.sistersinspirit.ca](http://www.sistersinspirit.ca)>, and Amnesty International's "Stolen Sisters" campaign, <[www.amnesty.ca/campaigns/sisters\\_overview.php](http://www.amnesty.ca/campaigns/sisters_overview.php)>), suggests there is still a tacit classification of some people into a "torturable class". Canada's most prolific serial killer, Robert "Willy" Pickton of Vancouver preyed upon prostitutes from the Downtown Eastside drug slum for almost two decades before a Missing Women taskforce was set up in 2001. See Maggie de Vries, Missing Sarah (2003); Dara Culhane, "Aboriginal Women in Downtown Eastside Vancouver Emerging into Visibility", The American Indian Quarterly (2003), pp.593-606; <[www.missingpeople.net](http://www.missingpeople.net)>; <[www.vanishedvoices.com](http://www.vanishedvoices.com)>; "B.C.'s Missing Women", CBC News in Review Feb. 2004 <[www.cbc.ca/newsinreview/feb04/PDFs/sarah/pdf](http://www.cbc.ca/newsinreview/feb04/PDFs/sarah/pdf)>; "Anti-Meat Ad Hints at Pig Farm Horror", CTV Apr.7, 2004 at <[www.ctv.ca](http://www.ctv.ca)> described a People for the Ethical Treatment of Animals campaign which played off the possibility that Pickton, a pig farmer, may have sent human flesh from his victims into the human food supply to promote vegetarianism. John Martin Crawford in Saskatoon, picked street women off in contexts of such police inertia that it amounted almost to impunity. See Warren Goulding, Just Another Indian (2001) on the Crawford case: some lives are cheaper than others and because ending them carried less consequences, Crawford targeted Aboriginal women to reduce his chances of being caught. See also Razack, "Gendered Racial Violence and Spatialized Justice" on the botched investigation and

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it also taught working women to mimic the sexual desires of employers or clients, in domestic service or prostitution. All women were required to adjust their desires into equivalence with the desires of men. For every male action, they were told to produce an equal and opposite female acquiescence. For working class women, successful acting could literally be a matter of life and death--but the open class exploitation of their situations vis a vis privileged sexually empowered elite men at least made them less likely to feel they had to internalize their pretended equivalence of desire.

Later in the nineteenth century, following the logic of Thornton, "bad woman" ideology first used against working class complainants began to be applied to all women.<sup>362</sup> Holroyd encapsulated a developing culture of female masochism, the expectation that women will naturally put up with great pain as part of their normal feminine roles, fuelled it up, and hastened it on its way.

The sexual contract reveals the political significance of the marital system. As Catharine MacKinnon would put it more than two centuries after Rousseau:

For the female, subordination is sexualized, in the way that dominance is for the male, as pleasure as well as gender identity, as femininity. Dominance, principally by men, and submission, principally by women, will be the ruling code through which sexual pleasure is experienced. Sexism will be a political inequality that is sexually enjoyed, if unequally so.<sup>363</sup>

Thornton was extraordinarily harsh against the woman victim. To effectively defend against its harshness, it is important to understand its basis in the judge's understanding of the psychology of heterosexual relations--to know why it was decided that way. Holroyd believed normal female sexuality entailed accepting an unthinkable level of brutality from men. In the long term, he was one of the sources of the most problematic notions in sexual assault law today.<sup>364</sup> In the medium term, the effects of Mary Ashford's tragedy for other women in the following half century would be profound.

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<sup>361</sup>(...continued)

discounting of sentence against two elite white college athletes for killing Aboriginal prostitute, Pamela George, as an exercise in social construction of a racialized "zone of deviance" for white bourgeois males to prove their heroic manliness through violence.

<sup>362</sup> Edwards, Female Sexuality, pp.59 and 96-7.

<sup>363</sup> Catharine MacKinnon, Feminism Unmodified (1987), pp.6-7.

<sup>364</sup> Clark, Women's Silence, pp.1-2.

# CHAPTER THREE. RETROGRADE MOVEMENT IN THE LAW OF RAPE: THE EARLY NINETEENTH CENTURY AS THE SOURCE OF MODERN RAPE MYTHS

## A. INTRODUCTION: BUILDING STRONG MEN AND CLINGING WOMEN

Rape is not a product of natural sexuality, but an effect of ideas about sex. Rape narratives reflect ideas about women and men in society, families, and intimate relationships. The legal treatment of rape also reflects gender ideology. Social ideas influence the decisions of prosecutors about which rape complaints go to the law;<sup>1</sup> "sex crimes" reported by the media "have a unique ability to touch upon the public's deep seated beliefs about gender roles..."<sup>2</sup> Ideology, "the codified aspect of culture",<sup>3</sup> in Europe included an "exploitative value and cognitive system" originally developed for "subjecting cattle and slaves to productive use."<sup>4</sup> Women were probably the first slaves;<sup>5</sup> exploitation of their labour was justified by defining their work as subordinate.<sup>6</sup> Industrialization intensified the ideology of gender: differentiation of tasks accelerated, and by the late eighteenth century, Europeans believed in "two human natures, masculine and feminine".<sup>7</sup>

By the late eighteenth century and the bifurcation of human nature, females were supposed "to police and domesticate the raw, undisciplined naked body; to control and channel the natural propensity of women to seduce and be

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<sup>1</sup> Lisa Eskow, "The Ultimate Weapon?: Demythologizing Spousal Rape", Stanford Law Review (1995-6), pp.677-709, at p.688, notes this direction of causation from general social ideas, to professional lawyering presumptions.

<sup>2</sup> Eskow, p.691, quoting Helen Benedict, Virgin or Vamp (1992), p.3.

<sup>3</sup> Traian Stoianovich, "Gender and Family", p.69, quoting Paul-Henry de Lauwe, La Culture et le pouvoir (1975), pp.90-1.

<sup>4</sup> Stoianovich, p.69.

<sup>5</sup> Pateman, The Sexual Contract, pp.110-2, discussing Claude Levi-Strauss, The Elementary Structures of Kinship (1969), pp.29, 481, 62 and 115, and pp.107-8, and Zilboorg, "Masculine and Feminine", pp.282-3, 266, 268, 288-90.

<sup>6</sup> Stoianovich, pp.68 and 70.

<sup>7</sup> *Ibid.*, p.71.

seduced."<sup>8</sup> Female nature was responsible not only for women's actions and desires, but men's. Women were responsible for male sexuality.

As women were increasingly restricted from participating in society,<sup>9</sup> educational theorists prescribed female education "relative to men",<sup>10</sup> to train them "to please and to be useful to men."<sup>11</sup> In the nineteenth century, women were increasingly asked to "civilize" men. They were believed capable of molding men's characters, and regulating their sexual appetite: marriage, "consonant with the fundamental principle of...the natural subordination of the woman", could control male sexuality. "Sexual love may become a powerful engine for good, but only on the condition of placing it under rigorous and permanent discipline..."<sup>12</sup>

Martin Wiener described a shift in attitudes to sexuality from the seventeenth century to the 1860s, by contrasting images of dangerous sexuality in crime literature and theatre: the image of sexual murder changed from Alice Arden in the seventeenth century--an adulterous wife charged with "petty treason" for murdering her "Lord and master" (husband), ambushing him with his own servant and guests<sup>13</sup>--to bestial brutes like Dickens' Bill Sikes in Oliver Twist, who beat his

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<sup>8</sup> Ibid., pp.71-2, discussing commentaries upon Rousseau's Emile. See also Leila Sebbar-Pignon, "Mlle Lili ou l'ordre des poupees", pp.1796-1828 and Elisabeth de Fontenay, "Pour Emile et par Emile", both Les Temps Modernes (1976), pp.1774-95.

<sup>9</sup> Ibid., p.70.

<sup>10</sup> Ibid., p.72, quoting Rousseau, "Emile ou de l'education" in Oeuvres Completes (1969) IV, especially Book 5, pp.692-710, 748, 766-9.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid., p.94, discussing Auguste Comte, founder of Positivism, who was extremely influential from the 1850s through the First World War. See Gertrud Lenzer, ed., Auguste Comte and Positivism (1975), pp.265-71, 338, 372-81, 404-15 and 456.

<sup>13</sup> Wiener, "Alice Arden to Bill Sykes", pp.184-5. Alice, the antagonist in Arden of Feversham, a 1592 play, murdered her husband out of lust. Based on a case of 1551, the play was restaged, even in a puppet show, through the seventeenth century. Its action involved "...a man, a woman, and three male 'guests'...[O]ne of the men strikes the host, and another stabs him, and he falls...[T]he woman steps forward (she had previously tried to poison him), seizes the knife, and plunges it home, crying, 'Take this for hind'ring Mosby's love and mine.'" Alice, her manservant/lover, and "avaricious accomplices", conspired to kill her "landowner husband." Alice was the central evildoer in Holinshed's Chronicles (1577), which excused the lover: "Mosby was a mere tool", but "Alice danc[ed] with her daughter in the murder room just moments after the body was removed to be buried" (p.189). The play did not go so far to blame all on Alice, but she was no fool of love. Philip Batteston's collection of murder narratives, God's Revenge against Murder and Adultery, reprinted 1620 to 1778, also featured mostly narratives about "a woman killing or instigating men to kill her husband or father", "the blocked ambitions or desires of women", adultery, and wives "allied with servants against their common husband-masters" (p.190).

common law wife Nancy to death, calculating that neighbours would not pay attention to a beating as a shot.<sup>14</sup> Sikes and Nancy were both working class, unlike the landed Ardens; this literature was part of the nineteenth century reframing of working class men as out of control.<sup>15</sup> Wiener locates some of the melodramas and pamphlets about Mary Ashford within the chain of texts that marks this development.<sup>16</sup>

The Victorian vision of lethal sexual violence is much more complicated than the earlier vision of the heinous murderer as an underling who killed a superior.<sup>17</sup> Fear of men as a source of "intimate danger" fuelled public desire to "tame men"; this desire was "patriarchal" because it "encourag[ed] women to stay at home", but it also provided "ideological armor for women against men."<sup>18</sup> The losses of women from industrialization--in personal mobility and economic power--were accompanied by the first organized feminism. The classification of murders of husbands by wives (or masters by servants) as "petty treason" was abolished in 1828; juries after 1790 had already begun refusing to label husband-murdering wives with "petty treason".<sup>19</sup>

Women victims of nineteenth century brutes could be sexually unchaste--like Nancy, a prostitute--yet nevertheless sympathetic. Nancy won admiration, not only from readers,<sup>20</sup> but the author: Dickens said she won him over against his

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<sup>14</sup> Ibid., p.185. Dickens "insisted...on its realism and claimed...its fidelity to the grim facts of Victorian urban life."

<sup>15</sup> Ibid., p.204, noted Edwin Chadwick's Report on the Sanitary Condition of the Labouring Classes of 1842 differentiated "dangerous, rootless men, liable to both physical and moral disease" and "settled family men, socially and physically healthy." This combined the idea of dangerous strangers and responsabilization of workingwomen for their men's health and morality.

<sup>16</sup> Ibid., pp.204-5.

<sup>17</sup> Ibid., p.188: the majority of ephemeral crime literature before 1650 featured a murderess, though more male than female killers were punished in all categories except infanticide (pp.186-7, citing: James Sharpe, Crime in Early Modern England (1999), and "Domestic Homicide", Historical Journal (1984), pp.29-48.) Wife-killing was much more common than husband-killing (citing Beattie, and James Cockburn, "Patterns of Violence in English Society", Past and Present (1991), pp.70-106). See also Joy Wiltenburg, Disorderly Women and Female Power (1992); Peter Lake, "Deeds Against Nature" in Kevin Sharpe and Peter Lake, eds., Culture and Politics in Early Stuart England (1994); and Frances Dolan, Dangerous Familiars (1994). Depictions of men killing intimate women rose in the nineteenth century; the prosecution of women for murdering husbands fell rapidly: in the 1840s, 20 women were charged with killing husbands in England and Wales, and 77 men with killing wives; by the 1890s, only 7 women charged with killing husbands, while 178 men were with killing wives (p.189).

<sup>18</sup> Ibid., pp.202 and 204.

<sup>19</sup> Ibid., pp.201, 194.

<sup>20</sup> Ibid., p.185: Oliver Twist was made into theatre right after it was published in 1838; by the late 1860s, Nancy's murder was Dickens' favorite reading, and audiences responded powerfully. The Times,

(continued...)

will during his serialized writing process.<sup>21</sup> Male violence against women began to be recognized as unfair; murderesses after the mid-eighteenth century were described as "driven" to murder by wife beating<sup>22</sup> and incest.<sup>23</sup>

Yet despite rising sympathy for unchaste women as victims of men when they were facing the death sentence,<sup>24</sup> their unchasteness continued to exclude them from normal life in Victorian fiction. Dickens, like nearly all Victorian authors writing about "fallen women", narrated his beloved Nancy dying, not recovering from her unjust condition.<sup>25</sup> Male lust was becoming seen as more problematic than female lasciviousness, but it still remained unpunished. It was relegated to the responsibility of women, even in imagination. Male sexuality became feared, but there was no political will to limit it.

The project of women managing male lusts built on eighteenth century roots. Rousseau had said wives could win

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<sup>20</sup>(...continued)

Jan. 8, 1869, said "never, probably, through the force of mere reading was a vast concourse held so completely within the grasp of one man." Wiener cited Helen Small that Dickens' public readings provided "moralization of the working class" after the highest income working class were enfranchised in 1867, "A Pulse of 124", in James Raven, Small and Naomi Tadmor, eds., The Practice and Representation of Reading (1996).

<sup>21</sup> Garnett, "Oliver Twist's Nancy: The Angel in Chains", pp.497 and 502-3, described Dickens' expanding the character of Nancy from a comic one-dimensional whore to a manifestation of the best of woman's spirit, locked into a degrading life of gross sexuality; Dickens himself was surprised by his own growing attachment to her.

<sup>22</sup> Wiener, p.195, linked the "female gothic" novel tradition from Anne Radcliffe's 1794 Mysteries of Udolpho to the Brontes in the mid-nineteenth century, with working class melodramas such as Chartist Ernest Jones' Women's Wrongs, in 1851-2, especially "The Labourer's Wife". There was also more sympathy for real husband-murderers, like Hannah Read, in 1825, who claimed her husband had beaten her, pp.197-8.

<sup>23</sup> Ibid., p.191-2, noted that 26-year old Elizabeth Jeffryes, who killed her uncle and guardian in 1752 for trying to make her break off a love affair with a lower class lover, received more sympathy than earlier "petty treason" murderesses: the uncle "corrupted" her (thereby making her more susceptible to seduction) through incest--he sired two children by her. By 1775, when Jane Butterfield poisoned her master-lover (who seduced her at 16), her prostitution after the master deserted her justified the murder; it did not reflect naturally lascivious character (p.194). Nevertheless, the young woman unnaturally initiated into sexuality was corrupted and unable to recapture her innocence.

<sup>24</sup> Ibid., pp.193-4, 196-201, noted that juries increasingly used female youth and beauty, or reference to gender, to reprieve murderesses from the ultimate penalty; the literature came to focus on their bodily weakness (such as fainting or being overcome) and their maternal concern for their children.

<sup>25</sup> Marcy Hess, Discursive Decontamination, p.38: Dickens had no choice but to narrate Nancy dying, after she had saved Oliver against Sikes' will, because he simply could not imagine a different life from her after she had broken from her life as prostitute and paramour of Sikes.

their husbands' hearts by rationing sexual favours.<sup>26</sup> Their ability to moderate male sexuality flowed from their docility produced by training from childhood for restriction: infant girls were to be swaddled while baby boys' limbs moved freely, girls were taught to read and keep accounts but not write, and girls were taught that men were "the head and sovereign of society". The father's rights as a citizen were guaranteed by abnegation of personal rights by his wife: "It was the wife's duty to give up play and pleasure, devote herself to the management of the house, [and] surrender her 'liberty'".<sup>27</sup> Wives' exemplary self-denial would be such an awesome example that men could not help but imitate them and somehow check male overindulgence.<sup>28</sup>

Rousseau said wives should delay their sexual consent. Sophie, his model wife, would win Emile's esteem by making her "favours scarce and precious".<sup>29</sup> But this strategy was not practical, because in marriage, the wife's consent was "legally and socially presupposed"; the wife had no power against her husband's ardour.<sup>30</sup> "Unless refusal of consent or withdrawal of consent are real possibilities, we can no longer speak of 'consent' in any genuine sense."<sup>31</sup>

By the nineteenth century, bourgeois political economy advised men to intensify work, accumulate capital, and lessen consumption.<sup>32</sup> Even the upper classes accepted "moral and cultural austerity".<sup>33</sup> Bourgeois economists, worried about men indulging in pleasurable consumption and lessening "virile production", asked wives to "domesticate libidinal energies and direct them toward production." Yet, the wife was "a pretty animal" who could "delight her husband (but hopefully not too much)"; the sages were paradoxically asking the prize possession to encourage less consumption.<sup>34</sup>

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<sup>26</sup> Stoianovich, p.72, quoting Rousseau, Emile, Book 5, pp.692-710, 748, 766-9.

<sup>27</sup> Ibid., p.86, quoting Almanach du cultivateur vendéen pour l'année 1838 (n.d.: chez Fontaine-Nerrière, Fontenay), pp.57-9.

<sup>28</sup> Ibid., pp.74-5, quoting Nicolas-Edme Restif de la Bretonne, Les Gynographes (1777), pp.57-95, 129, 146, 240-5, 271-2.

<sup>29</sup> Pateman, "Women and Consent", p.155, quoting Rousseau, Emile, p.443.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid., p.150.

<sup>32</sup> Ratna Saptari, "Rethinking Domestic Service", International Review of Social History (1999), pp.77-85, at 81-2.

<sup>33</sup> Ibid., pp.78-9, discussing the falling out of fashion of male domestic servants, who had been dressed in livery and used more for display than actual domestic labour, in larger establishments associated with aristocratic estates, in favour of small, female staffs, and especially single domestic servant households.

<sup>34</sup> Stoianovich, p.100, quoting French socialist, Pierre-Joseph Proudhon, La Pornocratie, ou les

(continued...)

Women's domestication of industrial modernity was undermined because they were themselves the most enjoyable commodities, sexually compliant wives.

Some moralists promoted the idea that obedient wives ought to be respected for allowing themselves to be made things to another, in service of an ideal. But no one explained how such women, by showing their husbands how they denied themselves, could convince their husbands to catch self discipline from them. It was often just assumed that men would automatically respond to their wives' exemplary self-denial by becoming kinder and more "gentle".<sup>35</sup> Naturally, since the most important female virtue was chastity, women expected that their husbands would admire their chastity and protect them from being raped by other men.<sup>36</sup> But how this was to moderate the sexual risk from the husbands themselves, uncontrolled by law and not required by ideology to think of limiting their sexuality according to the needs and limits of their sexual partners, no one ever explained.

Jeremy Bentham, the Utilitarian, appealed to husbands' "guardianship" to moderate their use of power for the "benefit" of "wards", wives and children.<sup>37</sup> But though he had a fancy rationale for the consideration of their dependents that he urged on men, he did not tell them how to listen for the needs and desires which they had been complicit in rendering silent compared to their own.

"Family" under fraternal patriarchy was based on "the sexual connection." Other relationships in the "sexual family" were deemphasized, compared to the marriage partners' sex life. Our law was built to protect "the gendered hierarchy of the marital institution", and we still accede to defining marital sex by the desires of the husband:<sup>38</sup> in the classic 1965 civil rights case of Griswold v. Connecticut,<sup>39</sup> when the right to contraceptive information was affirmed for married people, American law decided that

the marital bedroom stands as a questionable arena for state intervention. Sex has always been perceived

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<sup>34</sup>(...continued)  
Femmes (1875), pp.44, 54-7, 67, 203, 262, 266.

<sup>35</sup> In the nineteenth century context, the pun between "gentle", meaning not violent or rough in how one handles an object, and "gentle", meaning "gentlemanly", well-born, behaving like someone of the upper class ought to, is very appropriate. Although my predominant meaning in this sentence is the first, physical meaning, the classed meaning also applies.

<sup>36</sup> This was not what Hobbes said about "protection" under the sexual contract--it was the same as for slaves: protection from war, inclement weather, and starvation--food, shelter and armed defense. See Pateman, The Sexual Contract, pp.124, 137. But other theorists suggested women would not get raped if they would consent to be "good wives".

<sup>37</sup> Stoianovich, p.90, discussing Jeremy Bentham's An Introduction to the Principles of Morals and Legislation ([1790] 1948).

<sup>38</sup> Eskow, p.690, quoting Martha Fineman, The Neutered Mother (1995), pp.145-8.

<sup>39</sup> 381 U.S. 479 (1965).

as an integral component of 'domestic bliss'...[S]ex is the quintessence of privacy rights, triggering the...guarantee of freedom from state intrusion.<sup>40</sup>

The problem with leaving the determination of the content of the married couple's intimate life solely in the hands of the husband, as Rousseau suggested, was that there was no evidence that vulnerability compelled male chivalry. J.S. Mill, the second generation Utilitarian, during the Commons debates leading up to the Second Reform Bill of 1867, denied that men were "protectors" of women: women should vote because of "the number of women who are annually beaten to death, kicked to death, or trampled to death by their male protectors."<sup>41</sup>

Rape law promoted marriage, but it did not ensure any marriage's quality for the woman. In ideologically upholding patriarchal marriage, rape law also made maidenhood hazardous, difficult to protect and laced with possibilities for losing one's "virtue".

Rape law increased the husband's control over marital sex, and rape in marriage is still believed to promote marital sex, peace in the home, and private happiness.<sup>42</sup> As a legal feminist commented about the famous scene in Gone with the Wind, when Rhett Butler carried Scarlett O'Hara to bed by force: "We may disapprove of his methods, but we cannot help approving of his ends: conjugal relations."<sup>43</sup> Rape in "appropriate relationships"<sup>44</sup> builds the patriarchal family by "facilitat[ing] conjugal relations".<sup>45</sup>

The extent to which men were empowered to use force to obtain sex with females they desired after Thornton became truly outrageous. The "consent to force" doctrine ultimately resulted in extraordinarily draconian decisions. One of the worst was R. v. Thomas Saker in 1850.<sup>46</sup>

Thomas Saker was charged with raping a 5-year-old, Mary Hill, but was acquitted, because the little girl showed injuries that were extremely severe. A surgeon gave evidence concluding that Miss Hill's injuries were too severe for her not to have consented. In other words, this was a rape case where there was not the typical problem of having not enough physical corroboration of sex and of force, but a case where a medical expert perversely judged there was too much physical

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<sup>40</sup> Eskow, p.678, discussing American jurisprudence, especially Griswold, where a ban on married couples' contraceptive use was called (Griswold 381 U.S. 479 at 485) an intrusion against the Fourteenth Amendment on "the sacred precincts of marital bedrooms."

<sup>41</sup> Pateman, The Sexual Contract, p.123, quoting Mill, "Subjection of Women", p.163.

<sup>42</sup> Eskow, p.678.

<sup>43</sup> Ibid., p.689, quoting Finkelhor and Yllo, p.15.

<sup>44</sup> Eskow, p.681, quoting from Susan Estrich, Real Rape (1987), p.72.

<sup>45</sup> Ibid., p.678.

<sup>46</sup> R. v. Thomas Saker, reported by The Times, 3 Aug. 1850.

corroboration. A rape could not explain the little girl's injuries--that is, the five-year-old must have consented to the sex which caused her severe injuries--because the surgeon opined that if she had been hurt so badly in the course of activities to which she was not consenting, she must naturally have been motivated to resist far harder than she did, and in particular, she must have left some marks of resistance to Mr. Saker on Saker's body.<sup>47</sup>

There was no doubt that Saker was the assailant who caused Mary Hill's injuries. The circumstantial evidence that Saker was the only man to have sexual contact with Hill was stronger than the evidence that Thornton had been the only man to have contact with Ashford: he was caught almost in the act. The little girl had done as law required and raised an immediate outcry: witnesses heard her screams and found her, lying wounded and partially unclothed, at the same time that Saker was seen fleeing the scene. According to The Times report (3 Aug. 1850), there was no possibility of another assailant.<sup>48</sup> So the entire defence argument rested not on mistaken identity but the little girl's consent immunizing the sex from legal censure.

Of course, Mary Hill should have had the benefit of the age of consent provisions in the 1828 *Offences against the Person Act*.<sup>49</sup> But by 1850, neither the law nor common sense admitted that a working class girl could ever be too young for sex, and thus not required to claw and scratch a grown man to prove she did not consent to being ripped up. Age of consent was not considered in the courts when the rights of an amorous man to press his suit forcefully was at stake.

When Joseph Tidy threw Susan Mann to the ground outdoors in London in 1876, she struggled, screamed, was bloodied on the neck and underclothes, and finally fainted, attracting witnesses who carried her away unconscious. But Tidy successfully argued she had not shown lack of consent because her resistance was less than "the natural resistance a woman was capable of" (The Times, Nov. 25, 1876).<sup>50</sup>

By mid-century, "consent to force" was an orthodox tenet of rape doctrine, representing a consensus that a medically-based image of woman's essential nature could be used to judge any real female's behaviour in reaction to male violence. The certainty of medical experts about the rightfulness of the pathological image of female sexual physiology seems to have increased, since the halting, unsure testimony of Mr. Freer in the Thornton case, who blurted out there was a lot of blood for menstruation even as he produced the exculpatory opinion, that sex with consent could have caused Ashford's lacerations.<sup>51</sup>

If any female was confronted with the force required to cause truly severe injuries, such as Mary Hill's, without

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<sup>47</sup> Kim Stevenson, "Unequivocal Victims", Feminist Legal Studies (2000), pp.343-66 at 356.

<sup>48</sup> Ibid., quoting The Times, 3 Aug. 1850.

<sup>49</sup> 9 George IV c.31, discussed above in Chapter Two, pp...

<sup>50</sup> Stevenson, "Unequivocal Victims", p.358, quoting The Times, Nov. 25, 1876.

<sup>51</sup> See Hill, p.97-8, See discussion of Freer's evidence in Preface, pp.42-3, and discussion of the state of medical theories above in Preface and Chapter One, discussing Thomas Laqueur, Making Sex.

consenting, expert witnesses were willing to argue that the female, no matter how much smaller than the assailant, would "naturally" respond with violence against the attacker. If she didn't, she was an "unsexed" creature, her character corrupted, and not worthy of classification as a truly feminine, good, "normal" woman.<sup>52</sup>

The more intense the violence a man used, the more intense the complainant's violence in reaction to him had to be, to justify the law censuring him for forcing sex against her consent. A female had to fight back as hard as the man who battered her to justify her not giving him sex. The bizarre logic of these rulings implied that a man who wanted to have sex with a woman who refused him would actually have a better chance of avoiding a rape conviction the more force that he used--because the woman would have to prove a greater degree of resistance to prove she did not ultimately give in and consent to sex.

Saker shows that by mid-century, no credence was given to the difference in strength between assailant and complainant, not even when the complainant was a small child. Saker's extreme force had to cause Mary Hill, if truly unconsenting, to "mark his body" with her own violence: if he was not injured, the five-year-old must finally have consented, according to medical experts. We are left to wonder: did the court believe a little girl perversely enjoyed force, or that she was convinced by pity that Saker must really need sex to use so much force to "persuade" her? Neither possibility creates a liveable ethic for resolving sexual disputes between adult men and women, much less little girls.

The legal doctrine of "consent to force" quickly became troublesome, fantastical, even histrionic in its support of male sexual privilege. Perhaps the most important conclusion to draw from comparing Thornton in 1817, and Saker in 1850, along with the extremity of the degeneration of the morality of rape law, is the extreme withdrawal of the general population's moral sense from engagement with the legal system about rape. No one seems to have raised a fuss over the ruling in Saker as so many did against Thornton,<sup>53</sup> yet the later case could not possibly reflect the actual moral feeling of any sizeable proportion of the British population in 1850. Normal people don't have difficulty deciding it is wrong for a grown man to batter a five-year-old to get sex.

Lack of consent required evermore extreme resistance. The trope of the Victorian woman jumping out the window to avoid a kiss, making her would-be suitor guilty of murder under the "eggshell skull" rule,<sup>54</sup> was no exaggeration: in 1869,

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<sup>52</sup> Edwards, Female Sexuality, pp.24-5, 55, and 58-60.

<sup>53</sup> It may be that public disapproval of Saker has not been discovered in the archives yet, as neither Kim Stevenson nor I have looked very deeply for it. On the other hand, the howls of disapproval over Thornton did not require intense historical research, because there were so many of them.

<sup>54</sup> The expectation that the normal reaction of women to sexual assault was to resist, even though she risked death, was upheld by cases assigning responsibility to assailants for injuries or death of the victim during escape, even if the escape was unreasonably risky. The Victorian melodramatic trope of a woman jumping out a window to get away from a pass happened in case law. Douglas Schmeiser, Canadian Criminal Law (1985) p.68, discussed R. v. Halliday [1886-90] All Eng.R. 1028 (1889), originally 61 L.T. 701, a wife who fell out of a window trying to escape her husband's violence: Lord Coleridge stated, "If a man creates in another man's [sic] mind an immediate sense of danger which causes such person to try to

(continued...)

a machinist's wife, Jenny Stevenson, obtained the conviction of a farmer, George Makinson, for "Aggravated assault" for touching her in "a very indecent manner" in the railway carriage of a train pulling out of Manchester. To get away, she climbed out the carriage window. Mr. Makinson, worried she "would be killed", grabbed her foot, but

She succeeded in releasing herself and stepped onto the footboard. She passed from carriage to carriage until she reached the fourth from the engine where she was taken into the compartment by a gentleman.

However, Mrs. Stevenson's death-defying feat only cost Makinson a fine of 5 pounds or two months in default. He was able to pay.<sup>55</sup> On the other hand, Annie Griggs, indecently assaulted in a London train carriage by William Lyell, a 42-year-old seaman, was lectured by the Magistrate Mr. Benson: she

was somewhat to blame as the train she was in had stopped at two stations after the assault was committed and she had raised no alarm--nor did she call for assistance, or ask to be let out the carriage she was in and be permitted to enter another as she ought to have done. The prisoner's conduct was, however highly immoral--without justification. Females travelling on railways must be protected...

Lyell was fined 10 pounds which he also paid to avoid jail.<sup>56</sup>

But although direct physical damage caused by jumping out of windows was acknowledged legally as an appropriate response to unwanted sexual attention from men, English courts were not willing to extend the "eggshell skull" logic to the evidentiary complications caused by women's suicide after rape.<sup>57</sup> The York Assizes in R. v. Newton and Carpenter in 1859,<sup>58</sup> refused to allow victim Amelia Deighton's statement as evidence. She had identified two rapists to the police, and was examined by a surgeon. Then she went home and, immediately upon her arrival, cut her throat. Found mortally wounded, and told she would die, she again dictated the accusation to the magistrates. But the written transcript was not admitted as a hearsay exception: Hill, J. said, "It is not admissable as a dying declaration, as it does not relate to

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<sup>54</sup>(...continued)

escape and in so doing he injures himself, the person who creates such a state of mind is responsible for the injuries which result". Even closer to melodrama, R. v. Valade (1915) 26 C.C.C. 233 (Que. C.A.) involved a man convicted of manslaughter when a girl under fourteen, whom he had just raped, jumped out the window and died, because "[a] man engaged in a criminal act is liable for its indirect, as well as for its direct consequences."

<sup>55</sup> "Charged at Wigan with Indecent Assault", The Illustrated Police News, Jan. 20, 1869, p.2. Accessed from the SOLON database, (www.ntu.ac.uk/solon) Nov. 2003.

<sup>56</sup> "Police Intelligence", The Eastern Post, Dec. 26, 1869, p.6. Accessed from SOLON database (www.ntu.ac.uk/solon), Nov. 2003.

<sup>57</sup> This British intransigence was not followed in the U.S., at least by the early twentieth century. In Stephenson v. State (1932) 179 N.E. 633 (Sup. Ct. of Indiana), a man was convicted for second degree murder when a girl under fourteen, whom he had abducted, raped and mutilated, committed suicide by poison after she was freed.

<sup>58</sup> E.R. V.175, pp.887-8, originally 1 Foster and Finlason 641-4.

the offense which caused her death." The suicide was not attributed to anguish caused by the rape.<sup>59</sup> The law demanded that women show the utmost mental toughness in relation to their duty to defend their chastity.

With respect to ruling on women's suffering, especially psychological damage after rape, the law treated women as if they were not really human beings with feelings that should be respected. Rather, they were treated as if they ought to be automatons ferociously protective of the property interests of men to whom they belonged. The law imposed an absolute, implacable standard of resistance on all of them, requiring of each an equal ability to resist.

When even girls like Mary Hill--so young that, in our time, they would be expected to manage nothing more complicated than playing well with others in kindergarten--were expected to valiantly protect their virginity by injuring adult men intent on raping them, females legally had truly become commodities. Each female was equal to any other in sexual property value. In this way, the law made women fungible sexual property.

## B. NINETEENTH CENTURY SEXUAL CULTURE AND FEMALE DISCIPLINE

The use of sexuality to dehumanize and objectify persons was an ethical problem recognized by the great eighteenth century moral philosopher, Immanuel Kant.<sup>60</sup> Kant realized that the legal framework around marriage constituted a moral challenge to a fundamental social institution, so he attempted to justify marital sex as "contractual"--an equal objectification, each spouse alternating to turn the other into a thing. The objectification then could be justified by its mutuality and distributive fairness. But his attempt foundered on the asymmetry of fraternal patriarchy, which privileged the husband's desire. The spousal rape exception made only one spouse into an object of desire. One spouse had the right to initiate and the other had no right to refuse.<sup>61</sup>

Marriage in the eighteenth and nineteenth century was seen as based on "animalistic" passion, and women were defined by marriage; as a result, women were dehumanized. The animalistic passion that a man might use against a female became her responsibility because sex was her business. Both the woman and the sex was dirtied by low passion. Nineteenth century feminists debunked marriage as slavery because men saw wives as property convertible into conjugal rights.<sup>62</sup> Such feminists yearned for a way to define women separately from the sexual function with which they were so identified. But ascetic feminism dreaming of escape from low passion had no solution to offer the women at the front lines

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<sup>59</sup> The victim, Amelia Deighton, cut her throat. If the suicide had been seen as causally linked to the rape, the offense her statements related to, the written statement should have been allowed under the Dying Declaration exception to the rule against hearsay.

<sup>60</sup> In Kant's Philosophy of Law ([1797] 1887).

<sup>61</sup> Carole Pateman, The Sexual Contract, pp.169-73, discussing Kant, The Philosophy of Law, ([1797] 1887).

<sup>62</sup> *Ibid.*, p.123.

of the dehumanization of women by laws which treated them as property: rape complainants.

Responsibilization<sup>63</sup> of women for male sexuality led to less validation after rape victimization. The means by which this was accomplished involved assertions of rape myths. Many of the rape myths that developed in British rape law between the late 1810s and the 1870s were the same as ours now. From modern research on rape myths, we know that men prone to rape view their own sexual desires as women's illegitimate personal power against them: they label women's desirability a "weapon" against men.<sup>64</sup> Legal authorities which minimize rapes within relationships associate rape with ongoing relational conflict, assuming that the man is retaliating for something the woman has done, without evidence.<sup>65</sup> Both of these dynamics were present in nineteenth century rape law after the Thornton decision. Victim-blaming in law was not very different from now.

Rape-prone men now justify rape to discipline "bad women".<sup>66</sup> Modern men's proclivity to rape is mediated by

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<sup>63</sup> Philip Rumney, "Progress at a Price", Modern Law Review (2003), pp.870-84 at 875, defines responsibilization, in the context of recent British case law on marital rape, as "societal views...which 'focus on women's behaviour as an explanation for men's behaviour'" (quoting B. Stanko, Intimate Intrusions (1985), p.36). Kim Scheppele, "The Re-Vision of Rape Law", University of Chicago Law Review (1987), pp.1095-1123 at 1099-1100, discusses responsibilization in the post-second wave feminist period as a means for women to reconcile the perception that the law takes rape to be a very serious crime, and yet women experience their own complaints of rape being minimized. It is related to acquaintanceship. An excellent general description of "responsibilization" as a feature of 21st Century "neo-liberal" ideology (i.e.: political theory drawing upon classic liberalism of the early 19th Century) is in Steven Bittle, "When Protection is Punishment", Canadian Journal of Criminology (2002), pp.317-50.

<sup>64</sup> Eskow, p.677, quoting Ross, an informant to David Finkelhor and Kersti Yllo, License to Rape (1985), p.68. Identified only as "38, divorced, college-educated businessman", Ross felt that the marital rape exception should not have been repealed in the US of the 1980s and '90s, because: "too many women use sex as a weapon already. ...It's the ultimate weapon."

<sup>65</sup> Rumney, p.870, quoted from the Sentencing Advisory Panel, Advice to the Court of Appeal--9: Rape (2002), para. 5: "'Marital rape could sometimes reflect problems within the marital relationship, for which both parties might bear some responsibility.'" The Panel based this on commissioned public opinion research; most respondents assumed that a history of marital conflict implied "'culpability on both sides'" (p.875 n.50, citing A. Clarke, Attitudes to Date Rape and Relationship Rape: A Qualitative Study (2002), p.35). Therefore, the Panel advised the Court of Appeal to consider relationships with victims as sources of "'provocation or stress'" to mitigate rapists' sentences (Romney, p.876, quoting the Panel, para. 25). R. v. Millberry (2003) held that "'the continuing close nature of the relationship can explain how a particular offender came to commit what is always a serious offence that is out of character'" (Court of Appeal, 1 W.L.R. 546). The Court's language was is even broader: the Panel suggested relationship breakdown could justify anger, but the Court described closeness itself as potentially provocative. Millberry created broad entitlement for rape in relationships, verging on a reinscribing the spousal exception.

<sup>66</sup> Eskow, p.677: Ross said that "Since a woman's ultimate weapon is sex, a man's ultimate weapon has to be his strength." See also, p.691, quoting Finkelhor and Yllo, p.66: Ross admitted to "forcing his now ex-wife to have sex", and narrated how a verbal argument led him to pin her down and rape her: "she put up resistance for literally fifteen seconds and then just resigned herself to it...I felt very animalistic, and...very powerful...[D]amn it, I walked around with a smile on my face for three days." He justified his

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hostility to women,<sup>67</sup> and by belief that sex is competitive and sexual partners antagonists<sup>68</sup>--ideas reminiscent of libertinism. Acceptance of violence against women, as promoted by "consent to force" in the nineteenth century, also increases proclivity to rape.<sup>69</sup> In the context of modern psychological research on rape myths, it is clear that hearing or reading such decisions as Thornton, Anonymous,<sup>70</sup> and Saker<sup>71</sup> would in themselves directly influence men to develop attitudes which promoted rape of women.

Pro-rape ideas would have directly aided the project of fraternal patriarchy by reenforcing continuing hierarchical

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<sup>66</sup>(...continued)

behaviour as self-defence of rights to dominate: "...it was absolutely the only power I had over her....Subconsciously I think she kept egging me on because she wanted to be dominated...[S]he just completely emasculated me. It was the only thing I had left."

<sup>67</sup> See Kimberley Lonsway and Louise Fitzgerald, "Attitudinal Antecedents of Rape Myth Acceptance", Journal of Personality and Social Psychology (1995), pp.704-11; and J.V.P. Check, N.M. Malamuth, B. Elias and S. Barton, "On Hostile Ground", Psychology Today (1985), pp.56-61. David Cantor, Craig Bennell, Laurence Alison and Steve Reddy, "Differentiating Sex Offences", Behavioral Sciences and the Law (2003), pp.157-74, at pp.161 and 170: hostility to women marked the second largest category of rapes committed by a population of convicted stranger rapists, at 26%, exceeded by "Involvement"--fantasies of real relationships with victims, at 32%. The other two categories, "Control" and "Theft", represented only 10% and 5%.

<sup>68</sup> See: M.R. Burt, "Cultural Myths and Supports for Rape", Journal of Personality and Social Psychology (1980), pp.217-30; Burt and M.R. Haynes, "Factors Related to Coercive Sexual Behavior", Violence and Victims (1986), pp.255-78; C. Ward, "The Attitudes Toward Rape Victims Scale", Psychology of Women Quarterly (1988), pp.127-46; M.R. Burt "Rape Myths and Acquaintance Rape", in A. Parrot and L. Bechhofer, eds., Acquaintance Rape (1991), pp.26-40; M.W. Fonow, L. Richardson and V.A. Wemmurus, "Feminist Rape Education", Gender and Society (1992), pp.108-21; Lonsway and Fitzgerald, "Attitudinal Antecedents"; and Linda Kalof, "The Effects of Gender and Music Video Imagery", The Journal of Social Psychology (1999), pp.378-85. Gillian Mason, Stephanie Riger, Linda Foley, "The Impact of Past Sexual Experiences", Journal of Interpersonal Violence (2004), pp.1157-71, noted (p.1167) that women's tendency to blame rape victims was related to their scores on the Adversarial Sexual Beliefs sub-scale. See also K. Lonsway and L.F. Fitzgerald, "Rape Myths in Review", Psychology of Women Quarterly (1994), pp.133-64; C.Y. Senn and H.L. Radtke, "Women's Evaluations of and Affective Reactions to Mainstream Violent Pornography, Nonviolent Pornography, and Erotica", Violence and Victims (1990), pp.143-55; C.R. Mynatt and E.R. Allgeier, "Risk Factors, Self=Attributions and Adjustment Problems Among Victims", Journal of Applied Social Psychology (1990), pp.130-53; and M.E. Reilly, B. Lott, D. Caldwell and L. DeLuca, "Tolerance for Sexual Harassment", Gender and Society (1992), pp.122-38.

<sup>69</sup> H.S. Field, "Attitudes Toward Rape", Journal of Personality and Social Psychology (1978), pp.156-79; Murphy, Coleman and Haynes, 1986; M.P. Koss and T.E. Dinero, "Predictors of Sexual Aggression", Annals of the New York Academy of Sciences (1988), pp.133-47; Fonow, Richardson and Wemmurus, 1992; Lonsway and Fitzgerald, 1995; and Kalof, 1999.

<sup>70</sup> R. v. Anonymous, [1830] E.R. V.168, Cr. Cases I, p.1045, originally 1 Lewin 293.

<sup>71</sup> R. v. Saker, reported in The Times, 3 Aug. 1850.

domination. Current psychological research bears out a link between rape myths and dominating attitudes to women. Modern men are more likely to rape if they respond to stories about forced sex by imagining their enjoyment, not from the sex, but from dominating women, or "getting their way".<sup>72</sup>

Men who believe rape myths have measures of self esteem and affect rise after reading rape scenarios, because they imagine rape as "social control over women".<sup>73</sup> This was how the Stranger Danger rape myth was deployed in the nineteenth century, and judges in rape cases continued to use cases to lecture women on how they should behave to avoid or resist rape. Hostility to women now increases support for the "spousal exception" in rape law.<sup>74</sup> We know the marital exception was central to thinking about raped women in the past also.

By the late eighteenth century, women's sexual responsibility extended to policing their own and other women's sexuality. Educators asked older women to socialize girls, and act as patriarchal mothers<sup>75</sup> to "govern...the chaotic, disorderly nature of women",<sup>76</sup> by disciplining the sexuality of daughters-- and servants. The "Mere-de-famille" obedient to her husband was exalted over other women.<sup>77</sup> A married woman could gain prestige by oppressing other women under her control. It was easiest to do this when the other women were not her own blood but her employees.

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<sup>72</sup> Patrick Chiroro, Gerd Bohner, G. Tendaya Viki, Christopher Jarvis, "Rape Myth Acceptance and Rape Proclivity", Journal of Interpersonal Violence (2004), pp.427-42, at 436-9. At p.430, they noted that a relationship between desire to dominate and rape proclivity was implied by the content of many of the rape myths commonly measured in Rape Myth Acceptance scales: many rape myths suggest that "women who behave 'inappropriately' deserve to be 'punished'", which implies desire to wield power over women.

<sup>73</sup> Bohner, Weisbrod, Raymond, Barzvi, and Schwarz, "Salience of Rape Affects Self-Esteem", at pp.561, 563, 567-9.

<sup>74</sup> Eskow, p.677. Sandra Caron and D. Bruce Carter, "The Relationships Among Sex Role Orientation", Journal of Social Psychology (1997), pp.568-87, at 584, found that the tendency of both genders to blame rape victims strongly correlated with belief in male-dominant marriage.

<sup>75</sup> A patriarchal mother wields delegated power from the father of her children according to his dictates. Souad Hamerlain, "Translation as a Transmitter of Feminist Ideology", Annales de patrimoine (2005), defined a patriarchal mother as "the woman confined to reproduction and to her consequent predisposition to stifle (smother) her own children." Nicole Brossard, in L'Amor (1977), p.42, her title a pun on the French for "the mother" and "the bitter", discusses the Patriarchal Mother as "a white bride"; Christian Bok's critical essay "i, a mother/i am other", Studies in Canadian Literature (1992), pp.17-38, unpacks Brossard's white bride as the woman "who passively relinquishes her body to the masculine influence that debilitates her." See also Eva Figes, Patriarchal Attitudes (1978) and Rosalind Coward, Patriarchal Precedents (1983).

<sup>76</sup> Stoianovich, p.72, discussing Natalie Davis, "Women on Top", Society and Culture in Early Modern France, (1975), pp.124-51 at 124 and 146, and Jean Delumeau, La Peur en Occident (1978), pp.305-45.

<sup>77</sup> Ibid., p.75, discussed plans developed by Restif, Les Gynogrophes, and Martin, Education des meres de famille. Restif argued that all women, as daughters and wives, ought to be strictly confined to harems accessible to no men but their husbands or fathers.

Within the context of bourgeois ideology, it is clear that the most politically explosive rape cases to confront would have been cases of female servants raped by their masters or by their masters' sons, under the mistresses' noses, in the bourgeois homes they served. Given the high ideological stakes and the low power of the complainants, these were the cases most likely to meet a wall of denial. We do not know how many of these rapes occurred, and what information about lower class sexuality is available suggests they would not have outnumbered the rapes which occurred between working class peers, often in the context of courtship; yet these cross-class rapes deserve special attention, no matter that they probably constituted a minority of cases.

The master-servant relationship was quasi-familial. This meant that lower class women in their work were brought into direct contact with bourgeois ideologies through the bourgeois family. These ideologies sexualized working women as servants, set them up to be blamed for what men felt about them, and exposed them to unrealistically ascetic, unreachable ideals of femininity--at the same time as it placed them directly under the supervision of women charged and equipped to police women in accordance with bourgeois ideology.

Servants like Mary Ashford were under day-to-day surveillance by mistresses. This could be incredibly intrusive. Older women could demand to squeeze the breasts of subordinated young women, to judge if they were pregnant<sup>78</sup> or post partum. Servants were most likely to be accosted:

Their living situations and their material and economic circumstances made them especially open to intervention and observation....The life of female servants was one in which searches of both bodies and bedchambers were taken for granted.<sup>79</sup>

Mistresses were usually more unfeeling than female kin. But they sometimes protected the privacy of female servants, denying female kin the authority to inspect them.<sup>80</sup> But if they did so, they usually did it to protect husbands or sons by aiding servants to conceal pregnancies and births.<sup>81</sup>

Rape myths contribute to sexualized perceptions of female behaviour--identification of women with sex. Female

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<sup>78</sup> Gowing, "Secret Births and Infanticide", (1997), pp.91-2: Pregnancy was thought to cause milk to form from the fourth month.

<sup>79</sup> Ibid. Gowing explained that servants were more likely than other single women to be suspected of a concealed pregnancy, unattended birth, and infanticide.

<sup>80</sup> Ibid., pp.92-3: the sister and mother of a servant, Isabel Nicholson, were dissuaded by her mistress, Mary Holme, from viewing her breasts for signs of pregnancy. Holme claimed "authority over the suspicious bodies of women in service" by telling Isabel's kin no one could "view her maid's breasts without her [Mrs. Holme's] consent." See Public Record Office, ASSI 458/1/81, Information of Ann Porter, Hawkesdale, Cumberland, 13 May 1666.

<sup>81</sup> Ibid., p.104: Jane Cowper was delivered of twins in the presence of her mistress Margaret Mason; Cowper claimed Mason killed the infants, and then "forced her to sit up for the next two days and go to the door to show herself to the neighbours and stop any questions." PRO ASSI 45 13/2/32, examination of Jane Cowper, Stanley, Yorks. Feb. 9, 1682.

servants were more affected by this than other women:

...[M]ore than with girls living with their mothers, their sexuality was public property and a public threat...[S]ervants [were]...the most likely to produce children who they could not support...and their potential or actual mobility gave rise to fears that they may disappear leaving a child or have left the child's father so far behind that he could not be traced.<sup>82</sup>

Men understood the relative isolation of servants from kin as vulnerability which they could exploit. Servants had for centuries been "a kind of pleasure reserve" for upper class employers.<sup>83</sup> If the master wished to, he could make sex virtually a part of their domestic labour. If she got pregnant by him, though, he would not protect her.<sup>84</sup> Mistresses had more reason than mothers to place the needs of patriarchy over the welfare of young women not of their blood, because it was often their own husbands they would have had to oppose to protect them. To risk such open rebellion against fraternal patriarchy for a girl who was not bound to them by natural maternal affection would require extraordinary personal courage, politically radical opinions about the status quo, or both.

Ashford was given permission to go to the dance by her master:<sup>85</sup> her behavior was condoned by authority and she was obedient to social superiors. In this way, she fulfilled the requirements to be a "good girl" within the limits of her position. Insubordination was the second most likely fault<sup>86</sup>--after "unchasteness"<sup>87</sup>--to lose a servant her job. According

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<sup>82</sup> Ibid., p.92.

<sup>83</sup> Pistono, p.273, quoting Georges Duby, Medieval Marriage (1978), p.98.

<sup>84</sup> Gowing, p.109: "...[F]athers who were also masters had created conflicting roles and responsibilities which, almost inevitably, failed the pregnant servant".

<sup>85</sup> Hall, p.1; Clark, Women's Silence, pp.110-27, especially 110, 113 and 116.

<sup>86</sup> Didier Lancien, "Du Grande Domaine a l'Usine", History of European Ideas (1982), pp.31-42., at 33 noted Daniel Defoe's 1724 book, The Social Law of Subordination, Or, the Insolence and Insufferable Behaviour of Servants in England Duly Enquir'd Into. E.P. Thompson, "Patrician Society, Plebian Culture", Journal of Social History (1974), pp.382-405, emphasized deference in English society of the eighteenth century, which gradually broke down in the nineteenth century; Howard Newby, "The Deferential Dialectic", Comparative Studies in Society and History (1975), pp.139-64, described the hegemonic "game" of deference, dating the slow disintegration of deference to the second quarter of the nineteenth century; Lancien, p.36, pointed out that deference had not substantially lessened in rural England even by the last quarter of the nineteenth century. Domestic service was more invested in deference: Saptari, p.84, pointed out that domestic servants, after the field feminized and a larger proportion became single servants in smaller rather than large homes, were least likely to unionize. Even in the early twentieth century, servants expressed discontent through "primitive" means, see E.J. Hobsbawm, Primitive Rebels (1965): they poisoned employers or committed arson. See also Wiener, p.188.

<sup>87</sup> Gillis, "Servants, Sexual Relations, and the Risks of Illegitimacy", pp.143-6: servants were most likely to bear bastards, especially London servants, who were older, and settled in positions which required single marital status. Dr. William Acton's study in 1857 found 57.2 of the illegitimate births in the

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to bourgeois ideology, her obedience should have protected Ashford from harm, for domestic service was meant to protect young people.

But a bourgeois or upper-class home was a closed environment; girls like Ashford were not protected against sexual demands from the master and his sons, the men who had the most access to them, and the authority to intimidate and isolate them from working class peers.<sup>88</sup> Thus, domestic service bridged family and employment, and was marked by conflicts of both. Mistresses controlled servant girls, making class as well as gender central to their female identities. Working class women, especially servants, carried a "double burden" under disciplinary ideologies, as gendered discipline accelerated in the interests of a fraternal patriarchal social order.

### C. CLASSING GENDER: MASTERS, MISTRESSES, AND SERVANTGIRLS

Gender ideas common to upper-middle class and gentry in the mid-eighteenth century,<sup>89</sup> promoting ideals of "modesty", and the "Angel in the Home",<sup>90</sup> in Ashford's period moved from the middle both up and down the class structure, and became characteristic Victorian ideas.<sup>91</sup> By that time, "middle class consciousness"<sup>92</sup> dominated personal moralities

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<sup>87</sup>(...continued)

workhouses of St. Marylebone, St. Pancras, and St. George's (Southwark) were servants. At Queen Charlotte's Hospital, a major London maternity charity, 71.3% of single birthing women were servants. In 1883, in Scotland, 47% of unwed mothers were servants. The London Foundling Hospital identified 65.6% of mothers in 1200 cases as servants. It was particularly dangerous for servants to get pregnant: "Service differed from other female employments not only because of its live-in character, but also because the servant was involved in the elaboration of the employer's life-style--a role that required not only discipline and specific skills but also unique character traits and demeanour...a conformity to upper-class standards of respectability..." (p.143).

<sup>88</sup> Gowing, p.93: Ann Wright was twice suspected of pregnancy before May 13, 1666. A fellow servant gave evidence that he heard her labour, and saw her outdoors with a child, but: "neither this informant nor any other neighbour durst at all meddle to search or busy themselves about the matter by reason the said William Wriglesworth her master was a troublesome man." See PRO ASSI 45 13/2/105. examination of Ann Wright, Rigton, Yorks., Feb. 20 1681/2. Susanna Watkins gave birth to a child by her master, who refused to get a midwife to conceal the birth; the child was delivered stillborn (p.103). See PRO ASSI 45 13/2/100 Information of Elizabeth Lawman, Thorne, Yorks., July 7, 1681.

<sup>89</sup> Poovey, The "Proper Lady" and the Woman Writer, pp.3-47.

<sup>90</sup> Catharine Hall, "The Early Formation of Victorian Domestic Ideology", in Sandra Burman, ed., Fit Work for Women (1979), pp.15-33.

<sup>91</sup> Asa Briggs, "Middle Class Consciousness", Past and Present (1956), pp.65-74. See also David Spring, "Aristocracy, Social Structure and Religion", Victorian Studies (1962-3), pp.263-80: the Evangelical movement, originally middle class, influenced the aristocracy under a young, innocent Queen after 1837. Samuel and Robert Isaac Wilberforce, The Life of William Wilberforce, (1838: J. Murray,

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beyond the middle class. As Methodism began, in the 1740s, so the Victorian age continued the retreat from early eighteenth century rationalism: "after a half-century in which it seemed that free thought must triumph, England reawakened a Puritan nation, and has remained so until our day."<sup>93</sup>

Women's roles within a Puritan moral universe had changed significantly from the seventeenth to the nineteenth century: the Victorian "delicate damsel" was not the fickle adulteress of early Puritanism.<sup>94</sup> But there was underlying continuity: the "good girl" suitable for bourgeois marriage was defined against--and built upon--the "bad girl". Matronly respectability was often cynically felt, especially by men, to merely mask the disorder at the heart of the female sexual animal. Any woman could be disciplined by shame under the rape law.

The central core of bourgeois gender ideology, Separate Spheres, became popular. But even for middle class families, the separation of public and private, male breadwinner and female homemaker, never actually worked. Servants continually crossed the lines. The 1851 census described the "essential type" of the English family as "husband, wife, children and servants" and labelled households without servants as "less perfectly but more commonly" formed of husband, wife and children,<sup>95</sup> but servants could not be easily integrated into the Master's family. The Western European household

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<sup>91</sup>(...continued)

London), V.1, p.130, noted their father, the Evangelical leader, determined to equal what John Wesley had done, from the 1740s onwards, for the masses, convincing the upper classes to moralize their conduct. Wilberforce's protegee, Hannah More, wrote Thoughts on the Importance of the Manners of the Great to General Society (1788); she and her sister Martha also began, in Cheddar, Gloucester, in 1800 to teach the poor to read in Sunday Schools (with funding by Wilberforce). See Anne Stott, "Patriotism and Providence" in Kathryn Gleadle and Sarah Richardson eds., Women in British Politics (2000), and Martha More, ed. Arthur Roberts, Mendip Annals; Or, A Narrative of the Charitable Labours (1859). Herbert Schlossberg, The Silent Revolution (2000) argued Evangelicalism had created an altogether different England, by 1837, from eighteenth century England. See also Ford Brown, Fathers of the Victorians (1961).

<sup>92</sup> Asa Briggs, "Middle Class Consciousness", claimed it was created by political reaction to Pitt's income tax, the burdens of the Napoleonic Wars on industry, the struggle for Parliamentary Reform in 1830-1, and the opposition to the 1816-46 Corn Laws. These movements were shared with Artisans and factory workers.

<sup>93</sup> HZkin, p.48. The half-century abeyance was 1680-1740. The latter half of the eighteenth century was not a religious time, but Methodism was a Puritanical force in both the sexual and the wider sense. After 1800, when taken up by Evangelicals within the Church of England, a substantial minority of English people set a puritanical tone. For the sexual puritanism in Methodism, see John Newton, Susanna Wesley and the Puritan Tradition ([1968] 2002).

<sup>94</sup> Wiener, pp.185-6: there were increasingly restricted roles for women from the mid-eighteenth century, culminating in the "delicate damsel", but this was not completely bad--women were viewed as less dangerous, and society began to confront male violence. Victorian women gained moral authority to criticize men.

<sup>95</sup> Pateman, p.127, quoting the Registrar General in his Report on the 1851 Census in Britain, cited in

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was "relatively permeable": servants were "resident ambassadors from the wider world". Victorian gender ideologists tried to defend an indefensible, blurry boundary between public and private spheres: "the traffic of women across them had been heavy for centuries."<sup>96</sup> This does not mean that ideology was unimportant, but that the positions of servants, and their mistresses, were more ambiguous than people thought they ought to be.

A century before Ashford, even middle class people sent their teens into service--they might even trade children, receiving their children's Master's children to master in turn.<sup>97</sup> But by the 1810s, domestic service had become a lowly occupation. This is why governessing was represented as morally (and sexually) dubious in Victorian literature: required middle class literacy clashed with failure to fulfill bourgeois norms of "independence". A governess was educated, middle class, but too dependant.<sup>98</sup>

In the 1810s, "bourgeois" ideas of gender affected common people. Not only new forms of women's work in factories, but agriculture, a once huge employer of women,<sup>99</sup> became ideologically problematic: agricultural worksites also took women out of the home--in fact, into more isolated sites than the urban streets, places where in the eighteenth century

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<sup>95</sup>(...continued)

P. Corrigan, "Feudal Relics or Capitalist Monuments", Sociology (1977), pp.435-63 at 454, note 19.

<sup>96</sup> Hartman, p.174.

<sup>97</sup> Stone, The Family, Sex and Marriage, pp.107-8.

<sup>98</sup> See Laura Green, Educating Women (2001), and Cecilia Lecaros, The Victorian Governess Novel (2001). Jane Austen in Emma (1815) depicted two governesses, both in difficult situations, who had to get married to get out of dependence on rich clients who were insensitive and condescending. Miss Ross' The Governess: Or, the Politics of Private Life (1836), also portrayed the governess as victim. The Charlotte Bronte's Jane Eyre (1847) was a plucky and worthy heroine, but her marriage to the master sits uneasily with readers: Rochester was not clearly redeemed, and Jane's marriage was premised on the triple tragedies of the first Mrs. Rochester's madness, imprisonment in the attic by her husband, and self-destructive revenge through arson. The man might be all wrong for her. See Maria Lamonaca, "Jane's Crown of Thorns", Studies in the Novel (2002), pp.245-63 and Chih-Ping Cheng, "Am I a Monster?", Studies in the Novel (2002), pp.67-85. William Makepeace Thackeray, Vanity Fair (1848), capitalized on the fact that governesses were unknown quantities brought into the heart of the home; his Becky Sharp was evil, manipulative, and sexually duplicitous--and she married someone she shouldn't, secretly, without proper permission. Other evil governesses included Mrs. Henry Wood's Lady Isabel Carlyle in East Lynne (1861), an adulteress who deserted her husband and children, then returned in disguise to act as governess to her own children, her husband's second wife now her mistress. Anne Bronte's Agnes Grey (1847) presented a good but economically deprived governess, suffering under terrible clients. Henry James, The Turn of the Screw (1898) fully exploited Victorian anxiety about women working, middle class spinsters, and the risk of taking servants into one's home--or the risk of serving and residing with superiors not worthy of deference and respect. Readers can't be sure which script is true. It is impossible to tell if the governess--the unnamed narrator--was a moral paragon protecting her charges from supernatural evil, or driven insane, possibly by sublimated desire for the master, a distant, shady, and unsympathetic man.

<sup>99</sup> Tilly, Scott and Cohen, pp.230-2.

rapes did occur.<sup>100</sup> Domestic service appeared to provide women more safety in the private home.

The reduction of agricultural labour especially affected women, formerly the more casual, least skilled, most seasonal workers in agriculture--and created so much female unemployment that something had to take up the slack. Factories could not absorb all the women who needed wages. So domestic service had to expand for females.<sup>101</sup> The work was appropriately feminine and temporary; they were expected to think about marriage. The British state in the late eighteenth century reduced the numbers of male servants by taxing them as a luxury,<sup>102</sup> a policy shift which dovetailed with the elite moving away from excess and spectacle,<sup>103</sup> and workingmen adopting bourgeois norms of independence.<sup>104</sup>

But there were countervailing pressures. Middle class people were not the only ones who despised the dependence of domestic service, even for females. The 1851 census showed that working people avoided sending children out to service when local conditions provided alternatives, like in Preston, Lancashire.<sup>105</sup> Where industry provided relatively highly waged semi-skilled work for women and youth, teens remained in the parental home. Parents were well enough off that they could partially support them, subsidize youth's housing and food, and youth of both genders could work with their fathers in the

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<sup>100</sup> Clark, Women's Silence, pp.24-5: outdoor rapes were common in her eighteenth century cases, 48% of accusations related to travelling through moors or fields (typically going home from work), and 22% while working in fields, especially in the North-east, where many women worked in agriculture, especially in reaping. Her London sample included more indoor rapes, more sexual exploitation of servants, and more feelings of shame about rape, even in the eighteenth century, pp.26-8. For taboos against work outside the home, see Hall, "The Early Formation of Victorian Domestic Ideology"; Clark, The Struggle, pp.229-30, and 235-44: For the most part Chartists adopted a protective attitude towards women, especially married women with children, whom they felt were degraded or exploited in the factories; but the Scottish Chartist Circular claimed factories "contaminated" women workers, and the English Chartist Circular blamed women "victims" of the factory system with "perpetuat[ing] the contamination of the laboring classes" (Chartist Circular 3 (1841), p.519 and English Chartist Circular 2 (1842), p.225.)

<sup>101</sup> Saptari, pp.78-9, 80-1.

<sup>102</sup> *Ibid.*, pp.79-80. A special tax on manservants was imposed in 1777; a much lower tax on maidservants was imposed in 1785, when the tax on manservants reached "half a guinea per one servant", a considerable sum. This was a tax on wealth, since manservant wages were higher than maidservants by up to 300%.

<sup>103</sup> *Ibid.*, pp.81-2.

<sup>104</sup> See EP Thompson, "Patricians and Plebs", p.78, quote from Daniel Defoe's The Great Law of Subordination Consider'd (1725), p.97, describing a cloth worker insisting that a JP call the clothier for whom he worked his "employer" and not his "Master" because "I hope I am my own Master."

<sup>105</sup> Michael Anderson, "Household Structure and the Industrial Revolution", in Laslett and Wall, Household and Family, pp.215-35, described family structures in Preston, a mid-size typical Lancashire cotton town, compared to rural Lancashire.

factories.<sup>106</sup> When Preston mothers worked, they took in elderly kin to provide childcare in the home.<sup>107</sup>

Illegitimacy in Preston went down: young women's labour was more valuable, and unlike early in industrialization, when children under ten might work in factories, bastard children could no longer earn their own keep in the factories while living with extended family.<sup>108</sup> Factory workers' families became larger, closer to extended kin, more wealthy, and less likely to offend against bourgeois standards of respectability than the families of rural Lancashire daylabourers, the group from whom the factory workers had originally come.

Ashcroft worked in a traditional field which continued to be the largest employment for women until the First World War.<sup>109</sup> Domestic service did not disturb gender conservatives: a pamphlet of 1862 argued that domestic service fit woman's "nature", for they

discharge a most important and indispensable function in social life,...not an obligatory independent, and therefore for their sex an unnatural, career--on the contrary, they are attached to others and are connected with other existences, which they embellish, facilitate, and serve. In a word, they fulfill both essentials of woman's being; they are supported by, and they minister to, men.<sup>110</sup>

This was a view of service from the top. It was also a male view, which actually promoted the value of women servants over the value of those middle class women who could not find marriage partners, for it defined only the latter as "surplus women."<sup>111</sup> Its rhetoric of dependence on men uses almost sacred language to describe women's work of caring for men--"ministering". This implicitly allowed male employers to associate domestic attentions of servants with great sacrifice,

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<sup>106</sup> Ibid., pp.220-1.

<sup>107</sup> Ibid., pp.220-2.

<sup>108</sup> Ibid., pp.220-1.

<sup>109</sup> Tilly, Scott and Cohen, pp.229-34: domestic service, garment-making, and textiles were by far the largest employers of women in Europe outside of agriculture, and remained so into the twentieth century. In England in the 1840s, domestic service took in the most women, and in 1911, B.L. Hutchins, Women in Modern Industry (London, 1915), p.84, noted 35% in domestic service to 19.5% textiles and 15.6% garment making. Hartman, p.251, estimated that up to the late nineteenth century, 50-80% of the young people in North West Europe between 15 to 19 spent time in domestic service. In 1851, servants comprised 7.1% of the rural population, and 3.2% of the urban, in England. Pateman, pp.127-8, noted from Leonore Davidoff's classic essay, "Mastered for Life: Servant and Wife", Journal of Social History (1974), pp.409-28, at 409-10, that even upper working class families--headed by skilled workingmen--could afford one servant up to the 1930s. In 1881, one person in 22 was a domestic servant, and one-third of all women aged 15 to 20 were in service.

<sup>110</sup> See P. Hollis, Women in Public (1979), p.12, quoted by Pateman, The Sexual Contract, p.126.

<sup>111</sup> Ibid. Hollis' source was a 1862 pamphlet about "surplus women"--single women unlikely to marry Englishmen's higher death rates, propensity to emigrate, and service overseas in the Empire. Servants were not considered surplus women, because they were defended as more valuable to men than middle class spinsters.

intimacy and sexual attentions. But from the point of view of those working class women, caught by the continuing need for women's wages in working class family budgets, and the pressure of a contracting job market for female labour, economically coerced labour in rich people's homes must have often been a much more bitter and unexalted experience, for all that it was viewed as "feminine".

To the middle class, daughters were meant for marriage. As the anonymous author of The Law's Resolution of Women's Rights pithily summarized in 1632: women "are understood either married or to be married."<sup>112</sup> If bourgeois daughters did not marry--as increasingly happened when middle class Englishmen began serving overseas in the Army and settling in the Empire in large numbers--they became "surplus women". Rape law worked to police middle class women's chastity in an increasingly high stakes marriage market.

Factors which encouraged fear of rape law was related not only to the poor odds of prevailing if one brought a complaint, but very poor access to the law. Private criminal prosecutions cost victims money. The Crown brought very few cases and 90% of criminal cases were funded out by the victims themselves. This pushed the class level of prosecutors higher than defendants.<sup>113</sup> Private prosecutions encouraged victims to settle.<sup>114</sup> In rape, some prosecutions settled by marriage of victim and accused, as "restitution" to the family because rape victimization diminished marriageability.<sup>115</sup>

This coldhearted monetary solution made sense to bourgeois families if the accused was bourgeois. The interests of rapists and victim's relatives could coincide, so long as no one enquired into the brides' subjectivity. But to working class families whose daughters were raped by masters or higher class men, marriage was impossible. Some families accepted monetary compensation on a threat to bring a charge, through the mediation of a magistrate on the verge of bringing a

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<sup>112</sup> Anonymous, quoted from J.L. Klein, ed., Daughters, Wives and Widows (1992), p.32, quoted in Christine Peters, "Single Women in Early Modern England", Continuity and Change (1997), pp.325-45 at 325.

<sup>113</sup> Beattie, Crime and the Courts, pp.35, 40-2, and 47: even though allowances for costs were increasingly provided to winning parties, the rise of court costs through the eighteenth century made it nearly impossible for poor men to pay court fees upfront. This was exacerbated by increasing use of lawyers; also, in the absence of police forces, victims had to pay for any search to discover the whereabouts of absconding defendants, unless the offenders had been caught red-handed or immediately afterwards through the good office of the neighbours responding to the victims' hue-and-cry.

<sup>114</sup> *Ibid.*, p.59.

<sup>115</sup> *Ibid.*, pp.124, and 127. Though horrific to modern thinkers, the use of marriage to resolve rape cases had been central to rape law up to the time of Hale. In History of the Pleas of the Crown, Hale reported the old rules, from the late thirteenth century, that a woman could consent to a rape after the fact, though not legally effective if given "upon menace of death" (p.631); likewise, a woman whose "ravisher" was condemned to death could save him from execution or castration and blinding "if she elected him for her husband" (p.627). Consenting "after the fact" could result in the Crown taking over the rape charge, and both "ravisher and ravished" losing their property rights.

charge, or to drop a charge;<sup>116</sup> this remained a possibility in the 1860s in the Bailey case.<sup>117</sup> But when increased evidentiary requirements made rape charges more difficult to prosecute, the ability to leverage compensation must have been reduced.

By reason of financial logic, many eighteenth century families preferred to charge "attempted rape", even where the facts supported rape:<sup>118</sup> their daughters would remain more marriageable if they could pretend to be virgins. Attempted rapes could be brought to Quarter Sessions, rather than Assizes, making them cheaper and tried more quickly. Attempted rapes were about twice as commonly deposited to magistrates as rapes.<sup>119</sup>

However, moving from rape to attempted rape reduced sentences from capital to often trivial custodial sentences, the pillory, or transportation.<sup>120</sup> Sometimes this was unacceptable to the victim's family, as in a case of sexual abuse of a three-year-old girl which left her with "the clap", venereal disease: the father was too disgusted to negotiate.<sup>121</sup> On the other hand, non-capital cases met less jury resistance to proving guilt, especially in cases of young children, due to scepticism about their credibility as witnesses which increased reluctance to send a man to his death.<sup>122</sup> Attempted rapes were twice as likely to be found to be "true bills" by Grand Juries, rather than categorized as "Ignoramus", the eighteenth century version of "unfounding" cases.<sup>123</sup>

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<sup>116</sup> *Ibid.*, pp.129, 269, and 458. Private settlements were also often arranged, by magistrates or the parties, for assaults; the amount of fines varied with status of the assaulted party, but some fines to women of high status were so much higher than the others that Beattie thought these two must have been with respect to rapes, though the parties had not even wanted to call it "attempted rapes".

<sup>117</sup> See *R. v. Bailey*, reported in "Charge of Violation", News of the World, Aug. 18, 1861.

<sup>118</sup> *Beattie*, pp.129-32.

<sup>119</sup> *Ibid.*, p.128. Beattie searched all the manuscript sources for several courts in the County of Surrey, including Southwark, which despite being across the county border in Surrey was for all practical purposes a suburb of London. Southwark abutted the docks and included nuisance "river" trades, such as tanneries. With a swarming, lower class, and partly transient population base, Beattie obtained a wide range of criminal case notes. However, sexual offenses were very few in his records--from one to four per year. Clearly the "dark numbers" of unreported rapes must have been enormous.

<sup>120</sup> *Beattie*, Crime and the Courts, p.615.

<sup>121</sup> *Ibid.*, p.128, based on correspondence by the accused, Ravenscroft, to the girl's father. The assailant, a young man boarding with the girl's family, first tried to blame it on a 10-year-old apprentice, but the same disease appeared on him; then he offered money.

<sup>122</sup> See *Beattie*, Crime and the Courts, pp.127-8, 5 out of 12 printed rape cases in the Surrey Assizes Proceedings for his period, 1660-1800, were of Carnal knowledge of children under 10, including victims as young as 2 or 3 years old.

<sup>123</sup> *Ibid.*, p.401: fully 50% of rape charges were returned marked "Ig"[Ignoramus], compared to about  
(continued...)

Seduction cases too could be "informally resolved" by marriage. This was especially true in North America; although this might at first seem less distasteful than marriage of rape victims to rapists, most seduction cases in one sample were for pregnancies conceived by force, usually in the context of courting couples.<sup>124</sup> Many "seduced" women described violence, rather than an unkept promise of marriage procuring their consent. Even in statutory rapes (under the age of consent), 25% of cases ended in marriage, and 15% of those had involved forced intercourse. Sex before marriage commonly involved "physical force, and various forms of bullying and pressure."<sup>125</sup>

When women--or their families--used the courts to procure marriage with men who had raped them, longterm happiness of the marriages must be seriously doubted. That women were still prepared to enter such unpromising relationships, notwithstanding the violence they had already experienced, shows the extent to which unwed pregnancy was feared. Marrying a rapist was a capitulation to the inevitability of sexual exploitation. These women and families were calculating that if women were going to be exploited anyway, they might as well be kept for it. They shackled themselves to men capable of rape, but the legitimacy of their children was assured. The high proportion of marriages in rape and seduction cases reflects the degree to which marriage was the only legitimate economic option for most women. But a more telling refutation of the idea that women in the nineteenth century expected "companionate" marriage could hardly be imagined.

Some working class women attempted to make an end run around rape law by finding other ways to litigate. After the promulgation of corroboration rules, at various points in the half century after 1850 in the UK, Canada, and many American states,<sup>126</sup> seduction offered the opportunity to corroborate only a promise to marry, not intimate violence, a much

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<sup>123</sup>(...continued)

25% for other personal violence offences, and just shy of 25% thrown out for attempted rapes. Property offences were much less likely to be categorized as "Ig."

<sup>124</sup> See Stephen Robertson, "Seduction, Sexual Violence, and Marriage", pp.331-3: For example, Bridget Grady, a servant, brought a complaint against Bernard Reilly to a magistrate in 1886 when seven months pregnant, a result of being seized and forced to the floor by her steady boyfriend while her employer was out of town. At the bottom of the complaint, a Deputy Assistant District Attorney wrote a question to himself, about whether it could be charged as rape. But acquaintance rapes were almost never charged, and the rule of immediate outcry would destroy Bridget's credibility. At the bottom, after noting that as chances of conviction were not high, Reilly had been discharged from jail, the DADA noted "married". No other seduction cases found included evidence of a DADA considering a rape charge, but many seduction cases included "married".

<sup>125</sup> Ibid., p.332. The age of sexual consent at this time in New York was 18.

<sup>126</sup> See Wigmore, *On Evidence*, (1905), pp.2055-8: Corroboration began to be required in the UK from 1835 (*Bastardy*), 1869 (*Breach of Marriage Promise*), 1885 (*Rape under Age*), and 1880 (*Cruelty*), and in Canada in 1890 (*Rape under Age*, *Indecent Assault* and *Breach of Marriage*).

easier evidentiary burden.<sup>127</sup>

Other unexpected causes of action were creatively manipulated by women who confronted the social catastrophe of unwed pregnancy after rape. *R. v. Goddard*, Kent Assizes, 1861,<sup>128</sup> was a perjury charge, brought by a servant against her master's son who harassed and impregnated her, for denying paternity. Her testimony alleged a series of rapes: "I had not been at his father's above a month when he began to take liberties with me"; he "came into my bedroom...; on the second occasion...I scratched the defendant's face..."

The complainant in *Goddard* gave evidence proving lack of consent to the sex which conceived her child, although this was legally irrelevant to the issue of perjury over paternity. She was not asking for damages for rape, but only admission of paternity. The rape evidence presumably was meant to increase sympathy among the jury, to encourage them to take seriously the need to set the record straight. A woman whose sexual exploitation was validated as truly non-consensual was socially worthy of having paternity publicly stated. But in *Goddard* the class difference determined who defined the truth; the higher class defendant was acquitted.

Working people of both genders had a stake in deterring sexual harassment. Employers' interests in obtaining sexual access as a fringe benefit of economic power over women workers offended workingmen's most basic class interests, as well as the gendered interests of working women. Class and gender interests in the working class family multiplied resistance to the rape law. In eighteenth century Britain, rape and attempted rape criminal cases depended on the "crucial role of family and close friends" for women to bring charges; "few women on their own reported rape to a magistrate."<sup>129</sup> In the nineteenth century, the same dynamic applied to seduction cases. In North America, one scholar found most seduction cases were brought by working class fathers.<sup>130</sup>

There was more legal discussion of abduction, seduction and elopement in the nineteenth century than of rape: it was sexual experience per se, not forced sex, that damaged the father of a "fallen woman" and significantly interested the law. The tort of seduction originally compensated not the young<sup>131</sup> woman with whom the defendant had sex, with or without consent, but her father or master. Originally a woman's father could not sue a seducer who was also her employer:

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<sup>127</sup> Robertson, "Seduction, Sexual Violence, and Marriage", pp.332-3.

<sup>128</sup> *E.R. V.172*, pp.1096-7, originally 2 Foster and Finlason 361-2.

<sup>129</sup> Beattie, *Crime and the Courts*, pp.130 and 127.

<sup>130</sup> Larson, "'Women Understand So Little'", pp.383-4.

<sup>131</sup> The age of sexual consent had been set traditionally by canon law at 12 for a girl and 14 for a boy. It was reduced to 10 for girls in *18 Eliz. I c.7*, returned to 12 by *9 Geo. IV c.31*. But in seduction actions, the general age below which a father's right to compensation for someone having sex with his daughter, without the father's consent, was the age of majority, 21. This was the age at which a person could legally marry without parental consent under canon law. Yet in accordance with the practise that fathers still had enormous power to constrain daughters to marry or not to marry through financial and social pressure, seduction actions were sometimes brought by fathers even with respect to daughters over 21.

The basis of the action was per quod servitium amisit, "enticing" a servant from his or her master; this made the master legally untouchable.

Seduction required that the woman performed services for her father, which pregnancy, caused by the seduction, disrupted. The requirement of service to fathers was generally conceded in court if the girl had been living with her father. This made seduction more available to middle class families, but some working people tried to bend the action to suit their needs.

The biggest hurdle was the daughter's employment outside the home. The father had to be able to at least pretend that he had been receiving personal service from his daughter, and replacing her wages if she helped support the family through employment outside the family home were not grounds for compensation.

In Dean v. Peel, in Manchester in 1804,<sup>132</sup> the father's action did not succeed, because the underage daughter lived in another house as housekeeper. The decision was strictly based on the doctrine, because in this case the girl working outside the home had not been paid, but had been working for her board and room, keeping a pub run by her brother-in-law. From the point of view of the family, the girl was working for the good of the family as a whole. But this was not close enough to the model of service at the beck and call of the father, even though she returned to live with her father during her pregnancy, and the pub lost her services. Serving somebody else in the family was not enough. Seduction was not meant to replace the value of services the father as head of household decided to deploy in other aspects of household economy, only direct service to the father himself.

When English women themselves tried to recover for seduction, their actions were barred. Wellock v. Constantine, at Newcastle Assizes in 1862,<sup>133</sup> was a case where the defendant "violated her...against her will...whereby she became with child." But the father could not prove that his daughter provided him domestic service before her pregnancy; when she brought the civil suit instead of her father, it was nonsuited. English courts remained adamant in the traditional interpretation.

But the human realities underlying seduction in the UK were the same as those in the colonies. Immediately after Bridget Grady was raped in 1885 in New York, while she was crying and threatening suicide, Bernard Reilly promised he would marry her if "anything came of it".<sup>134</sup> Likewise, in Wellock v. Constantine, immediately after the assault, the plaintiff's father told the defendant: "[I]f a child did not come, he would say nothing more about it; but that if his daughter had a child, he should expect some amends."<sup>135</sup> But because her economic situation required her to earn a living outside her father's home, the judge demanded she prove the rape criminally. Willes, J. said:

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<sup>132</sup> 5 East 45-9.

<sup>133</sup> E.R. V.172, pp.1287-8, originally 2 Foster and Finlason 791-3.

<sup>134</sup> Robertson, "Seduction, Sexual Violence, and Marriage", p.331.

<sup>135</sup> Wellock v. Constantine [1862] E.R. V.172 at 1287.

the charge was one of rape, or it was nothing; and though, as there was no corroborative proof, most likely in a criminal court the defendant would be acquitted...it was contrary to public policy to allow it to be made the subject of a civil action until it had been the subject of a criminal prosecution.<sup>136</sup>

While taunting that he thought she could not corroborate it, Willes gave the complainant an opportunity to testify to the crime of rape. She refused.<sup>137</sup>

Seduction law poses a dilemma for feminists--it is theoretically repulsive. But it nevertheless offered a practical solution for unwed pregnancy. When it was available to women, it was an alternative to destitution for women who had born illegitimate children and provided limited independence for such women; it interfered in the ability of elite men to demand sex and then leave women with no recourse other than prostitution if they became pregnant. Any degree of freedom from men arbitrarily disposing of female sexuality was valuable. Given the large number of cases,<sup>138</sup> seduction law potentially had a huge effect on the "sexual economy"<sup>139</sup> of North America compared to Britain.

Nevertheless, seduction law exacerbated the obfuscation of women's sexual consent: given that most seduction cases which resulted in pregnancy were actually rapes,

"seduction law"...functioned as a tool in the prosecution of sexual assault. Yet a patriarchal ideology of romantic courtship embedded in the statute, and defence attorney strategies that drew on ideology, limited the law's ability to address sexual coercion.<sup>140</sup>

Our critique of seduction, post-second wave feminism, is based on the value of sexual autonomy; but this was not the legal critique advanced by contemporaries who experienced the tort at its height. When seduction was abolished in most American states in the 1930s, it was not abolished because of "the more enlightened view...that no other person had an

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<sup>136</sup> Ibid., p.1288.

<sup>137</sup> Ibid.

<sup>138</sup> Jane Larson, pp.383-4: Seduction was one of the most common civil actions at the end of the nineteenth century in the U.S.; juries were very sympathetic, especially to fathers.

<sup>139</sup> See Clark, Women's Silence, pp.24-33: many lower class eighteenth century women understood sexual access as something which might be traded for the necessities of life. They thought of their sexual bodies as property. But they vacillated between thinking of it as their own property which they could use to realize their own pleasure or profit, and despairing of their ability to keep men from stealing that property. Compared to the nineteenth century it was still quite a sexually violent time, but the balance tipped towards less despair, despite the sexual economy commoditizing them. North America in the nineteenth century may have been closer to the eighteenth century British situation, because of easier access to domestic torts, especially Seduction and Breach of Promise.

<sup>140</sup> Brian Donovan, "Gender Inequality and Criminal Seduction", p.61. Donovan discussed 30 cases in New York City between 1903-18.

interest in a woman's body but the woman herself,"<sup>141</sup> but because of the same basic distrust of women which promoted bad rape law.

The timing of corroboration requirements in the U.K. reflected specific preoccupations of elite men over their class interests at certain points in time. Thus, corroboration for bastardy in private law--a daunting evidentiary burden--was added to statutes in 1835, after the 1834 *Poor Law* denied lower class women access to the facilities of the *Poor Law* authorities to sue the fathers of their bastards, and made unwed pauper mothers solely responsible for supporting their bastard children. The swerve in *Poor Law* bastardy policy in 1834 was motivated by fear that bastardy accusations had been directed at higher class men by lower class women.<sup>142</sup>

Corroboration for rape under age was added to English law in 1885, the same time that feminists obtained an increase in the age of consent from 12 to 16.<sup>143</sup> Likewise in the U.S., the early abolition of domestic torts, derogatorily described as "heart-balm" torts,<sup>144</sup> reflected fear that "unchaste women would be able to cover up their sexual indulgences" and extort money from "innocent" wealthy men.<sup>145</sup> The success of women's breach of promise of marriage suits, on both sides of the Atlantic, depended upon women enacting tearful weakness and intense pain, "manifest[ing]...fragility and unhappiness" in court;<sup>146</sup> but the sympathy created by females' conspicuous emotional displays could easily turn against them, through blanket disbelief that they experienced any pain at all.<sup>147</sup>

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<sup>141</sup> Ibid.

<sup>142</sup> See Wigmore, Chadbourn ed., *On Evidence*, (1970), p.454: the requirement of corroboration for bastardy reversed the earlier requirement under the *Poor Law* for unwed mothers to reveal the fathers before being allowed poor relief, in order to facilitate suing fathers for support. The revision followed a negative Commission report on the Poor Law which endorsed public opinion that pauper women had often falsely accused wealthy men.

<sup>143</sup> Ibid. Twelve, because of poor nutrition in the nineteenth century, was usually well below puberty for working class girls, whereas 16 was a more reasonable approximation of puberty.

<sup>144</sup> Ellen Rosenman, "'Mimic Sorrows'", *Studies in the Novel* (2003), pp.22-37, at 27, cited Susie Steinbach, "The Melodramatic Contract: Breach of Promise", *Nineteenth Century Studies* (2000), pp.1-34 at 12-3, for the description of domestic torts as "heart-balm" torts with Breach of Promise (with predominantly female plaintiffs) especially in mind.

<sup>145</sup> Janice Villiers, quoted by Joanna Grossman, "Is the Tort of Wrongful Seduction Still Viable?", *FindLaw's Writ*, 2003, at <<http://writ.lp.findlaw.com/grossman/20030211.html>>. Prof. Villiers has written on related tort matters, sexual relations between clergy and parishioners, or counseling clients, in "Clergy Malpractice Revisited", *Denver Law Review* (1996), pp.1-64.

<sup>146</sup> Ginger Frost, *Promises Broken* (1995), p.49. Breach of Promise of Marriage was one of the few domestic torts which were extended to women in the U.K..

<sup>147</sup> Ellen Rosenman, in "'Mimic Sorrows'", sneered at women's Breach of Promise suits, referring to

(continued...)

Like the elite legal discourses on rape, domestic torts tended to grant a woman's virtue "protection" only insofar as her father had sufficient wealth to fit the model of an honourable, protective paterfamilias. Only if the father could keep his daughter in the home could his daughter's virtue really matter. This situation persisted especially in England. Lower class women who worked outside the home did not have a right to private life. Rather, it was the private life of men who wanted to use them sexually that mattered.

Even in North America, where seduced women's rights were allowed broader legal protection, theorists defended them with an honourable paterfamilias who secluded his wife and children at home in mind. Legal thinkers did not want domestic torts to open up family relationships to scrutiny. Thus, the state in an 1865 North Carolina case, State v. A.B. Rhodes,<sup>148</sup> refused to award tort damages to a wife against her husband for assault and battery. This was not because the court acknowledged a husband's right to chastise his wife; the court deliberately refused to decide on that basis. Rather, they decided because

however great are the evils of ill temper, quarrels and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bedchamber.<sup>149</sup>

To this mindset, the harm addressed by domestic torts, including seduction, was the intrusion of a stranger into a man's family life, not the misuse of a woman's body or fraudulent exploitation of her emotions.

The North Carolina court acknowledged that different fathers were worthy of different degrees of protection for their honour. The judge noted that damages for assault and battery would be difficult to quantify because the value of the wife's hurt feelings (in the absence of serious permanent physical injury) would vary according to the class, lifestyle and previous experiences of the family:

Suppose a case coming up to us from a hovel, where neither delicacy of sentiment nor refinement of manners is appreciated or known. The parties would be amazed...to be held responsible for...trifling violence. What do they care for insults and indignities?...Take a case from the middle class, where modesty and purity have their abode, but...are sometimes moved by the mysteries of passion. What could

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<sup>147</sup>(...continued)

women's "ostentatious pain--not necessarily insincere but consciously and vividly displayed" (p.27). She called such suits examples of female masochistic display, insinuating that women enjoyed displaying such pain: "Suffering...not only as a strategy but as a ruse, a cover for pleasure in power" (p.24). Rosenman failed to take seriously the nature of the harm: she described unwed mothers as tricking juries into ignoring the evidence that they were "sexually active" (their bastard children) to treat them as "innocent victim[s]" (p.26). Yet women could and did become unwed mothers of bastards without acting on their own sexual desires--many of the cases involved rape or near-rape experiences. Conception is not dependent upon consent. In addition, by defining innocence as invalidated by self-willed sexual activity, ignores trickery, the essence of the breach of promise action.

<sup>148</sup> State v. A.B. Rhodes 61 N.C. 453 (Sup. Ct. N. Car. 1865).

<sup>149</sup> Ibid., p.457, Edwin Godwin Reade, J. of the North Carolina Supreme Court, quoted by Affinity Internet, <www.historyofprivacy.net> "A Man's Home", Part 3, "The Mysteries of Passion: Privacy, Publicity and Domestic Violence".

be more harassing to them, or injuries to society, than to draw a crowd around their seclusion? Or take a case from the higher ranks, where education and culture have so refined nature, that a look cuts like a knife...where an indignity is disgrace and exposure is ruin...[A]ll have domestic government, which they have formed for themselves.<sup>150</sup>

The language of domestic torts took class into account as relevant to damages for protection of honour. At the lowest class level, class status completely removed the right to have feelings matter when their women were raped or exploited, manipulated and abandoned. At the middle and higher class levels, the court defined the damage to feelings in terms of a man's honour, embedded in the right to have no one know and interfere with his "domestic government", not the feelings of the wife he battered in the seclusion of the home.

In England, consortium damages were varied according to a woman's class and reputation.<sup>151</sup> A domestic servant could lose her "character"--her written reference from employers warranting her good moral character--and be rendered completely unable to work in service to support herself,<sup>152</sup> and yet the law considered her chastity of little value. Even a working class child between ten and fourteen, when sexually abused by a gentleman scientist, was not treated as an innocent victim; her family were not worthy of having their privacy protected.<sup>153</sup> Law constructed poor men's daughters as sexually available to socially privileged men; practically speaking, they could be forced into becoming "public women" at the whim of class superiors.

#### D. THE MELODRAMA OF CLASS: GENDER AND RADICAL POLITICS

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<sup>150</sup> Ibid., Reade in State v. AB Rhodes, at pp.458-9.

<sup>151</sup> Edwards, Female Sexuality, pp.32-3.

<sup>152</sup> In R. v. Elizabeth Jones, E.R. V.175 Nisi Prius VI, pp.98-102, originally Carrington and Kirwan 236-45, from Hereford in 1846, a domestic servant was convicted of theft in circumstances that illustrate the importance of the "character". Jones had obtained a new position on the condition that her previous mistress would return "a satisfactory answer...as to the character." Jones knew she would not get a positive character, so she asked for her new employer's mail at the Post Office and burnt the letter from the old mistress. This constituted theft from the Post Office because she used false pretenses to obtain the property and destroyed it.

<sup>153</sup> See "Work of Obscene Pictures. Young Girl of 14-Years Charges George Dimmock, a Cambridge Naturalist, with Causing Her Downfall--Arrest Follows Finding of Bill by Grand Jury", The Boston Daily Globe, Dec. 15, 1890, discussed in <[www.historyofprivacy.net](http://www.historyofprivacy.net)>, "A Man's Home", part 2, "Anxieties of Exposure". The father, a tailor with a German (possibly Jewish) name, had full name and address given; the daughter was also fully named. Dimmock's activities had not been detected for four years, until the girl's brother discovered an obscene letter from Dimmock, who was complaining because the girl was avoiding him. Yet the Globe opined that "the little girl kept her secret with a shrewdness worthy more mature heads for more than three years", until the brother "charged his sister with having intimate relations with Dimmock" and "[s]he confessed."

Among working class people, *Stranger Danger* had a radical political flavour. As working women became increasingly vulnerable to legal abuse because of classed assumptions about "character", working class radicals became exercised about "defending the honour" of their women and protested sexual exploitation by stereotypical aristocratic "rakes" and "millocrat" employers.<sup>154</sup> But as they did so, they implicitly accepted treatment of working class women as sexually attractive commodities.<sup>155</sup> Radicals reclaimed the "rapeability" of women like Mary Ashford, but encouraged workingmen to keep wives and daughters home, and "protect" them with as much sexual repression as bourgeois men imposed on their women. This raised the stakes of working women's sexual encounters: sex potentially involved class loyalty. If a working woman was perceived as complicit with higher class men, other working people could turn on her as an enemy of their class, not just an unchaste woman.<sup>156</sup>

That Holroyd adjudicated Thornton according to elite ideology also made men like Thornton class traitors. This explains the popular outcry. But those radicals who responded with *Stranger Danger* obscured the ordinariness of the original encounter. They colluded with elite men to make working class courtship a legally contentious matter, fraught with risks. The radical use of *Stranger Danger* closed the door just as firmly on the old courtship system of working people walking out together in the fields.

Melodramas enforced the new bourgeois gender norms after Thornton. They used the motif of a woman "walking

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<sup>154</sup> See Ledger, "Chartist Aesthetics", pp.46-9, noting that melodrama was used for political activism in the Anti-Poor Law movement; an 1832 Select Committee on Dramatic Literature was convened to address the incendiary effect of melodrama. As late as 1919, William Dye, A Study of Melodrama (1919), p.12, discussed melodrama's use of the "methods of the mob orator." The seduction of a working class maiden identifies class enemies, particularly when she received bad treatment as a "fallen woman" while the upper class bourgeois man lived in luxury with wife and family. In Ernest Jones' De Brassier: A Democratic Romance (1851), the arson of a debauched aristocrat's house by the woman he ruined paralleled the mob's arson of an industrialist's mansion by an artisan whom the bourgeois had put out of work. Likewise, Hoeveler, "The Temple of Morality", pp.54-5, noted melodrama attracted Jacobins like Holcroft because of its "logic of either/or and refus[al of] a middle position" (quoting Peter Brooks, "Melodrama, Body, Revolution", p.37) which pushed the action into radical intransigence.

<sup>155</sup> See Rene Branca, "Melodrama, Convention and Rape", pp.33-5: the virtuous maidens of melodrama, dressed in white, were thoroughly sexualized commodities; the action placed inordinate attention on screams for help and physical struggle as signs of women's virtue; and the villains provided male audience members displaced enjoyment of abusing the maidens. Melodrama was ambivalent on women, allowing scope for prurient interest in sexual abuse, paralleling that which some elite men had developed for watching rape trials in the late eighteenth century as a source of titillation (see Clark, Women's Silence, p.54).

<sup>156</sup> Branca, p.37: melodramas portrayed women who had lost chastity as losing the right to refuse arranged marriages. If such a woman was later vindicated as not having lost her chastity, the message of the play was still that it would have been right to turn on her if the loss of chastity had been true. See also Clark, Women's Silence, p.112, on the conservative aspect of melodrama. On the other hand, see Ledger: more politicized writers of melodrama, like Ernest Jones, were more likely to extend sympathy to the woman who lost her chastity, to acknowledge true love between people of different class backgrounds, and to blame the evil results for the lower class woman on social conventions rather than simplistic notions of ruined character (pp.51-3, 55, and 60-1).

out" with a man who was not her relative as a signal of bad character. A woman who went about unchaperoned on the stage was one whose loss of chastity would later be blamed on her.<sup>157</sup> This was a huge concession to bourgeois culture.

Thus, even at the working class level, the male gender placed the physical, moral and legal risk of courtship on the female gender through rape law. Females, through what might be dubbed the "melodramatic" legal mode of domestic torts, tried to shift the risk back to the male gender. The only other male option was the working class male melodramatic mode: playing the hero who beat back the rapacious attentions of the villain.

The melodramatic mode gave women a voice, allowing them to denounce degrading sexual propositions<sup>158</sup>--and gave the workingman, as the virtuous maiden's consort, a mode of action, punishing the class enemy in his guise as sexual predator.<sup>159</sup> But it drastically constrained what the heroines might say and the heroes might do.<sup>160</sup> Sexual creativity was thrown out the window. It also failed to discipline the upper classes to stop them from laying their predatory traps again. The guilty secret of melodrama was that the most interesting action awaited the villain's entrance onto the stage. Radicals conceded, in effect, that someone must always be the villain, so they could play the working class heroes.

The radical use of Stranger Danger played a similar role for workingmen--consoling them for the burdens of class prejudice--as Separate Spheres did for bourgeois "ladies" with respect to rewarding them with status as highly moral for the burdens of gender, but neither ideology did anything to actually increase equality. It was like the melodramatic trope of the virtuous heroine fainting away when her resistance failed to stop the villain--it provided a "form of self-defence" and may have spared her "painful memories", but it could hardly have stopped the villain from his exploitation.<sup>161</sup>

The myth of Thornton and Ashford changed the story in a manner that allowed working people to express class

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<sup>157</sup> See Branca, p.43.

<sup>158</sup> Hoeveler, pp.51 and 58-61: Holcroft's Jacobin melodramas provided a means for "sinful patriarchs" to be "admonished by the female and bourgeois voice of common sense" (p.51). Sometimes the female voice was even more common. In his "Tale of Mystery", a maidservant was the voice of the God-like "wise women who do not hesitate to speak truth to power" (pp.59-60). She provided the impetus for "confrontation with the mysterious, unknowable and hidden until there is a veritable public and private explosion and the truth is revealed in the most painful and humiliating way" (p.58).

<sup>159</sup> Ibid., pp.53 and 55: the hero's action was strictly constrained, because he had to embody the power of the individual to change unfair and evil conditions through personal "virtues and manners", to stop "the conspiracy among the powerful against the innocent or the foiled in the nick of time murder or seduction plot."

<sup>160</sup> Ibid., pp.53, 58, and 61: the resolution had to "represent[t]" "the fate of an entire class...by the actions of one family", what Lothar Fietz ("On the Origins of English Melodrama", p.86) called "reductio ad familiam" (p.53). After the public revelation, "all the characters sort themselves out by realigning into tighter and closed clan or tribal units." Despite the radical impetus to address working class interests, melodrama "vindicates the value of maintaining a rigid class system", because family level resolution does not change classed distribution of power--or gendered distribution of power (p.58).

<sup>161</sup> Branca, p.41.

resentment: in popular retellings the social distance between Ashcroft and Thornton increased so that Thornton could become the villain working people loved to hate. But something was lost: the interpersonal courtship context.

Popular discourse figured Thornton as a lustful stranger and class outsider, as "The Murdered Maid"'s aristocratic lout, "Thornville".<sup>162</sup> This could not help but increase the pathologization of courtship, for there were no longer any models of normal working class love leading to marriage, other than those which reverted to family-managed, even arranged, marriage choices.

The working classes of Mary Ashford's day were politicized, angry, and defensive; they broadly supported radicalism after the Napoleonic Wars (to which the ultra-Tory government reacted with the Six Acts of 1819),<sup>163</sup> and during the uneasy ferment and early labour organizing of the 1820s.<sup>164</sup> They provided vast crowds to demonstrate in favour of franchise reform in 1830-1.<sup>165</sup> To them, the wrongfulness of an employer "importuning" his maid for sex was obvious. Legal doctrines suggesting such a liaison equalled legal consent added more fuel to the belief that the basic realities of working class life didn't matter to the rulers. With Thornton, the rape law added to the many grievances which were destroying what social ties between classes had survived the industrial revolution to that point.

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<sup>162</sup> Clark, Women's Silence, pp.114 and 116.

<sup>163</sup> As a result of the Spa Fields riots, Dec. 2 1816, and the mobbing of the Prince Regent's carriage at the opening of Parliament on Jan. 28 1817 (his windows were broken and some thought a pellet gun had been fired), Lord Liverpool renewed William Pitt's tactics of the 1790s, suspending Habeas Corpus, prohibiting "Seditious Meetings" (all meetings over 12 persons), ordering apprehensions of all persons responsible for seditious and blasphemous printed material, and passing the "Gag Acts". After a year and a half of unrest (some fomented by agents provocateurs), Liverpool passed the Six Acts in Dec. 1819 on the grounds that a revolution was underway. They eased legal processes to hasten trials, making it illegal for civilians to train to bear arms, new powers of search and seizure, new powers of arrest for seditious writings and weapons, higher newspaper taxes, and requiring magistrate permission for any public assembly. See John Plowright, Regency England (1996); White, Waterloo to Peterloo; John Stanhope, The Cato Street Conspiracy (1962); K. Schweizer, "William Cobbett and Sir Francis Burdett", Durham University Journal (1991), pp.155-63; John Belchem, "Republicanism, Popular Constitutionalism and the Radical Platform", Social History (1981), pp.1-32; T.M. Parssinen, "The Revolutionary Party in London", Bulletin of the Institute of Historical Research (1972), pp.266-82; Naomi C. Miller, "John Cartwright and Radical Parliamentary Reform", The English Historical Review (1968), pp.705-28; J.M. Main, "Radical Westminster", Historical Studies (1966), pp.186-204. For 1790s repression, see James Measell, "William Pitt and the Suspension of Habeas Corpus", Quarterly Journal of Speech (1974), pp.468-76; J.R. Dinwiddy, "Sir Francis Burdett", History (1980), pp.17-31; and Thomas Knox, "Thomas Spence", Past and Present (1977), pp.75-98.

<sup>164</sup> See Fox, History and Heritage; Collet Dobson Collet, History of the Taxes on Knowledge (1899); Hobsbawm, Labouring Men; John Belchem, Popular Radicalism; and EP Thompson, The Making of the Working Class.

<sup>165</sup> Dudley Miles, Francis Place; Robert Storch, ed., Popular Culture and Custom; Stephen and Eileen Yeo, eds., Popular Culture and Class Conflict; Norman Gash, The Age of Peel (1973); Arthur Burns and Joanna Innes, Rethinking the Age of Reform (2003); H.W.C. Davis, The Age of Grey and Peel (1929); and M. Thomis and P. Holt, Threats of Revolution in Britain (1977).

Within radical protest, artisanal ideas were central to the analyses produced by both members of the industrial middle class and increasingly self-aware workers. In the early nineteenth century, radical politics attracted both middle-class, employing, men, and working-class, employed, men. In the 1810s and '20s, both identified the same "villains" for their lack of political power: the aristocrats, insiders of Whig and Tory parties dominating Parliament,<sup>166</sup> and the inter-connected elite, usually labelled "Old Corruption".<sup>167</sup>

Artisans were change agents for both middle and working classes.<sup>168</sup> Industrialists, the "grands bourgeois", were not numerous; their enterprises changed the worklives of large numbers of ordinary people, but they had little impact on civic government or the courts. The period between 1790 and 1820 was a time of extreme repression,<sup>169</sup> especially the period between the 1819 debacle attack by armed militia on industrial workers peacefully demonstrating for Parliamentary reform at St. Peter's Field, Manchester (derisively called "Peterloo"), and Sir Robert Peel becoming Home Secretary beginning in 1822. During these three years, 1819 to 1822, hopes of legal or administrative reform under the Tories were nil.<sup>170</sup> Given a common heritage of radical artisanal ideas, conditions were ripe for political alliances between working and middle class people against "Old Corruption".

Working people were already prone to associate the dangers of seduction of their women with aristocrats, so middle class sympathy for Ashford helped build a cross class political alliance with the bourgeois in these politically active, radical years. Both bourgeois piety and working class respectability agreed on chivalrously defending working class girls' modesty. Workers and middle class people could share their appreciation of female domesticity under Separate Spheres.

As long as they were fighting against all the "Thornvilles" conjured up to express working class resentment of the aristocracy, the alliance held. But the alliance to defend poor but honest maidens faltered when workingmen attacked "millocrats" or bourgeois for the same sexual exploitation they associated with aristocrats, or when bourgeois attacked the savagery of a Bill Sikes as if it represented typical workingmen's behaviour.

By the 1810s the average rape witness was increasingly tongue-tied, because Separate Spheres ideology made sexual knowledge in women dishonourable. Likewise, working class heroes in the melodramatic mode became domesticated: they worked hard to "uplift" their class by managing their money and their homes well, and, from the 1830s,

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<sup>166</sup> Spall, "Landlordism and Liberty"; Kemp, "Reflections on the Repeal of the Corn Laws"; Jackson, Trials of British Freedom; Gambles, Protection and Politics; Wordie, Agriculture and Politics in England.

<sup>167</sup> See Belchem, Popular Radicalism, and "Orator" Hunt (1985); Spall, "Landlordism and Liberty"; Dudley Miles, Francis Place; Joseph Baylen and Norbert Gossman, Biographical Dictionary of Modern British Radicals; Edward Royle and James Walvin, English Radicals and Reformers (1982); and O.F. Christie, The Transition from Aristocracy (1928).

<sup>168</sup> E.P. Thompson, The Making of the English Working Class; Baylen and Gossman.

<sup>169</sup> Fox, History and Heritage, p.17; John Belchem, Industrialization and the Working Class.

<sup>170</sup> Trowbridge Ford, "English Criminal Law Reform".

avoiding the New Poor Law's workhouses. By the 1850s, radical workingmen no longer struck political terror into the hearts of their "betters", as the Luddites, the Reform Act rioters, and the earliest Chartists had done.

By politicizing the working class family, and then retreating to it,<sup>171</sup> the working class conceded too much to individualism and gradualism--to liberalism, as it was coming to be defined at mid-century. They no longer targetted systemic causes of sexual exploitation of working class women--like the gender ideology of Separate Spheres which intersected with economic force to procure the poorest working class women for the sexual provisioning of higher class bachelors.

Most working class people ultimately agreed with the bourgeois: the honourable way to avoid rape was to avoid ever being alone with men; having sufficient knowledge of sexuality to recognize a sexual advance was unnecessary and harmful to women. So working class politics did not strike back when some women were disbelieved for knowing too much about sex.<sup>172</sup> No working class radicals spoke up to stoutly defend the honour of those women rape complainants.

Female sexual knowledge under Separate Spheres began to be read as a sign of the lack of appropriate protection by their male relations; women were increasingly shamed and less able to describe what had happened to them in court. Newspaper accounts became more euphemistic. Men took "indecent liberties", "committed an outrage", "effected their purpose" and "violated the person" of complainants, while women suffered "ill-health", a "distressed or fainting state" or their "person was bruised".<sup>173</sup> The reported rate of sexual crimes rose but convictions went down, especially of middle class and higher class men.<sup>174</sup>

Even Emma Reeves--the toughminded servant who persisted against not only her lustful master, Mr. Bailey, but his craven wife--told the Gloucester Magistrate only that Mr. Bailey had been "pulling her about in an indecent and brutish manner", saying "[s]he thought the magistrates would understand what she meant..." He was charged with a lesser crime,<sup>175</sup> the Magistrates did not allow women to euphemize about rape.

## E. BOURGEOIS RAPE LAW AND MALE RIGHTS TO SEX IN THE MARKETPLACE

In the 1810s, the meaning of Ashford's actions quickly changed, from courtship to illegitimate risk-taking, from

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<sup>171</sup> Hoeveler, pp.53, 58, and 61: the resolution of melodrama "reminds [the heroine's] culture that...familial codes of appropriate conduct must function in lieu of abstract and outmoded religious principles...to make social and class relations feel like familial structures, the public becomes privatized."

<sup>172</sup> Anna Clark, Women's Silence, p.67, quoting The Times, 27 Aug. 1821.

<sup>173</sup> See Kim Stevenson, "Unequivocal Victims", pp.354-5.

<sup>174</sup> Kim Stevenson, "Observations on the Law Relating to Sexual Offenses", p.7 of 10.

<sup>175</sup> R. v. Bailey, discussed in "Charge of Violation", The News of the World, Aug. 18, 1861.

typical behaviour to evidence of bad character.<sup>176</sup> Even her tombstone warned girls against "incautiously repair[ing] to a scene of amusement, without proper protection".<sup>177</sup> After what happened to Ashford, demands for ordinary folk to chaperone their daughters reached a hue-and-cry. The passage of her travail into popular myth was a harbinger of increasingly strict sexual disciplining of working class women in the Victorian age. Against a background of increasing bourgeois "gendering" of ordinary folk, rape law manifested the hard edge: punishment of women characterized as "bad girls".

What "bad girl" rape law meant for the entire body of Englishwomen was mass withdrawal from public confrontation of rapists. Female responsabilization for male sexual desires led to privatized reactions to rape; the rape law receded from its function of defending women's honour and compensating them for rapists' disrespect. Victim-blaming grew. Rape law became totally dysfunctional for women's sexual disputes with men. Instead it exposed women to searching scrutiny of their chastity.

Edward Hyde East, in A Treatise on the Pleas of the Crown (1803), explicitly denied the ideas which a decade later would become "Consent to Force": "It is no mitigation of this offense (rape) that the woman at last yielded to the violence, if such her consent was forced by death or duress."<sup>178</sup> After all, duress and physical force negated consent in contract law<sup>179</sup> and force, fraud, and incapacity caused by age or intoxication invalidated marriages.<sup>180</sup> But even East allowed

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<sup>176</sup> Edwards, Female Sexuality, pp.59, and 69-70: ordinary behaviours led to credibility testing beginning with working class women, but then was extended to women of all classes. For modern psychological research related to this phenomenon, see Mason, Riger, and Foley, "The Impact of Past Sexual Experiences", pp.1158, 1160, 1164, 1167. Women are more likely to blame victims if they believe rape myths, and don't identify with them. Identifying with victims is associated with "situational relevance": the degree to which women readers of rape scenarios find it "likely...they could be in a similar situation." See also M.J. Jenkins and P.H. Dambrot, "The Attributions of Date Rape", Journal of Applied Social Psychology (1987), pp.875-95; B. Krahe, "Victim and Observer Characteristics", Journal of Applied Social Psychology (1988), pp.50-8; and B.A. Kopper, "Gender, Gender Identity, Rape Myths Acceptance/s and Time of Initial Resistance", Sex Roles (1996), pp.81-93. Situational relevance works against raped women who are unlike the women judging their responsibility; seeing victims blamed for rapes encourages women to not be like them in the future. So women learned to avoid going outdoors alone at night after Ashford's murder.

<sup>177</sup> Clark, Women's Silence, p.110, quoting Anonymous, Broadsheet, "Confession, though not the Dying Speech of Abraham Thornton, ca. 1817", Nottingham City Library Broadsheet Collection.

<sup>178</sup> Edward Hyde East, A Treatise on the Pleas of the Crown, V.1, (London, 1803), p.44, quoted in Clark, Women's Silence, p.70.

<sup>179</sup> Abel-Smith and Stevens, pp.10 and 12-3. See also Paul Langford, Public Life and the Propertied Englishman (1991).

<sup>180</sup> Clark, p.61. She also noted that East opposed the requirement that complainants testify to ejaculation, while other judges seized upon this extra hurdle to proving rape.

evidence of a woman's bad character as a defense to rape.<sup>181</sup> This was a new impediment to women's use of rape law.

Chief Justice Sir Matthew Hale in the seventeenth century had argued against using evidence of unchastity: even a "common strumpet" had a right to "equal protection under the law".<sup>182</sup> But character evidence appeared in R. v. Clarke in 1817<sup>183</sup> and R. v. Barker in 1829;<sup>184</sup> it was even used in 1834 in R. v. Tissington against a girl between ten and twelve found to have a reputation for "general indecency."<sup>185</sup> In R. v. Hallett in 1841, eight men who raped a prostitute with violence were acquitted. Justice Coleridge told the jury:

It is well worthy of your consideration whether, although she at first objected, she not afterwards (on finding that the prisoners were determined) have yielded to them, and in some degree consented; and this question is more deserving of your attention when you come to consider what sort of person she was, what sort of house she lodged in, and that she herself told them that she would make no objection if they came one at a time.<sup>186</sup>

Consent to a "determined" man is similar to the "importuning" language of Thornton.

That "consent to force" was intimately associated with complainant character can be seen in Hallett: consent to determination was considered inherently more likely in a woman who accepted money for sex. But why this should be so is not self-evident. Commercial sex workers now refuse customers who come in groups, because of risks of violence, theft, and lack of control over the type of sex or the use of prophylactics.<sup>187</sup> Yet the judge's assessed the Hallett complainant's

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<sup>181</sup> Clark, Women's Silence, p.72, citing East, p.444.

<sup>182</sup> See 1 Hale 629, quoted in John Archbold, Pleading and Evidence in Criminal Cases (1822) at pp.259-60.

<sup>183</sup> E.R. V.171 at 633 originally 2 Stark. 240, overturning R. v. Hodgson 1811-2 E.R. V.168 765 originally Russ. & Ry. 211: a rape witness was never a compellable witness about any other sexual activity.

<sup>184</sup> E.R. V.175 at 558, originally 5 Cox C.C. at 146, allowing specific acts of unchastity to be discussed, even though the judge was not sure Hodgson allowed it.

<sup>185</sup> Clark, p.72, discussing R. v. Tissington [1843] 1 Cox C.C. 48.

<sup>186</sup> R. v. Hallett/ (1841) 173 E.R. 1036, originally 9 Car. and P. 748.

<sup>187</sup> For example, Razack, "Gendered Racial Violence". The sex workers on the strip where Pamela George worked refused men in groups; the two killers tricked George by one hiding in the trunk of the car. George only consented to one man; she was overpowered and beaten to death because the other appeared after the car had stopped. See also Laybourn, Illingworth and Bulmer v. The Queen, [indexed as R. v. Bulmer] [1987] 1 S.C.R. 782: a Vancouver prostitute agreed to sex with Laybourn, and went to a hotel room only to find two other men; she told the second and third to come back later. According to another witness who overheard from an adjacent hotel room, Illingworth told her to perform without payment, and, her voice sounding frightened, she performed sex acts with all three, without consent and without payment.

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likelihood of consenting to a gang based on her "type". The classification of her by "type", as a "public woman", was more important than the woman's testimony. In other words, because she lacked chastity, the judge believed she lacked honesty as well.

Judge Coleridge assumed the prostitute would consent to a gang of eight men at the same time, because society did not hold her own will and preferences as relevant to how her body was used sexually. She had no value as property any more, because she could not be confined to a status of lifetime sexual property to one man; therefore, there was no impediment to indiscriminate use of her body. In other words, her value was determined entirely by men. It did not matter what she wanted to do to make money through sex, for she had no value as an individual, as a woman. She was abandoned, unclaimed property.

As a prostitute, she had essentially "gone bankrupt" as a woman; the judge could not imagine she might care about avoiding any particular sex act with any particular man or men at any given time because she no longer had any exclusive sexual property right to give away anymore. The judge assigned a low value to her as a woman, and presumed she would agree to internalize that assessment of her value.

The idea that prostitutes don't care about how many men use them sexually at one time is directly at odds with the actual practice of prostitution--in which every grant of consent to every act has a precise price demanded before access is given. However unpleasant the realities of her prostitution in the Victorian Age may have been, the complainant in Hallett suffered further insult from Judge Coleridge's lack of imagination about her experience of her own life, and his arrogant assumption that he had the right to define her reality for her and disregard her own testimony.

Hallett shows the second main way that rape law upheld fraternal patriarchy, by expanding the circumstances in which male sexuality ruled sexual encounters between the genders. The first location of expanded "male sex-right"<sup>188</sup> was the marriage bed. But its expansion was not limited to legitimated, marital sex: in the nineteenth century there was tacit acceptance of extramarital sex for men.<sup>189</sup> Men expected sexual empowerment in illegitimate sex under libertinism, the

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<sup>187</sup>(...continued)

The prostitute complainant made a big distinction between sex with three men one at a time and sex with all three together: the latter circumstances altered power dynamics sufficiently to enable them to refuse to pay. However, the accuseds in Bulmer had their convictions overturned on the basis of "honest but mistaken belief in consent"--their beliefs did not have to be reasonable.

<sup>188</sup> Carole Pateman, The Sexual Contract, p.2. She took this phrase from Adrienne Rich's classic essay, "Compulsory Heterosexuality and Lesbian Existence", Signs (1980), pp.631-60, at 645, although she elaborated the meaning significantly from Rich's.

<sup>189</sup> See Jay Loses and William Brewer, eds., Mapping Male Sexuality (2000). Foucault's History of Sexuality (1978) argued that far from a simple repression of sexuality, the nineteenth century saw an explosion of interest in sex, and application of "scientific" discourses to it, which produced more interest in sex, classification of sexual "identities", and produced the centrality of sexuality to identity; he emphasized the importance in these discourses of the "confessional mode". The confessional mode has had the contradictory effect upon men, argued Larry May and James Bohman, in "Sexuality, Masculinity and Confession", Hypatia (1997), pp.138-54. Pastoral practices make men's and boys' failures to live up to

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predatory ethic treating women as sexual resources.

Libertinism informed assumptions about sexuality held by elite JPs and judges. Sir George Holroyd assumed it was legitimate for Thornton to expect Ashford, his date, to pleasure him. The ratio of Thornton is a good example of how enforcing sexual submission of wives promoted generalized sexual submission of all unclaimed women to whom men could gain access. Male desire was privileged by extending the reasoning of the marital exception to non-marital exploitative sex with these women.

At every step in Sir George Holroyd's argument that Ashford consented to Thornton--that he promised her marriage, that the violence was understood by her as evidence of his ardour, that women in general are "persuaded" by false promises and violent "importunity", and that hiding rape was the only possible motive for murder--the unspoken assumption was that unfair, deceitful and brutal means to obtain sex were justified. It was acceptable for target women like Ashford for sex. Female sexual submission to men by such women was good in itself. Holroyd's decision had to do with male access to sex in general, not anything about the relationship between Thornton and Ashford which bystanders at the Tyburn Inn and roaming about Erdington that night witnessed.

There was one piece of evidence at the Thornton trial about his motives--that he had sworn to other men that he would have sex with her--but Holroyd ignored it.<sup>190</sup> Holroyd would probably have normalized Thornton's intention anyway: he imposed no responsibility to control or manage his own desire on Thornton. On the contrary, Holroyd believed that it was right for Ashford to fulfill Thornton's desires. Ashford ought to have consented.

To Holroyd, Thornton's violence was not evidence of failure in his own duty to manage himself: rather, it placed Ashford under a duty to meet his needs. In arguing that Ashford could have consented, really what Holroyd was saying was that Ashford should have submitted--a desirous man should be sexually appeased by an unclaimed woman who fell into his clutches in conditions of relative privacy. The decision to view Ashford as having consented was based on determining that Thornton's sexual demands were justified, not on evidence of what she may have wanted in the circumstances.

There was no evidence, not even from Thornton, of a promise to marry. Nor was there evidence that Ashford wanted to marry Thornton--or any man. Yet Holroyd was extraordinarily certain about women's general

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<sup>189</sup>(...continued)

strict notions of sexual purity, including masturbation, fornication, adultery and acts of sexual aggression against women, appear inevitable; the treatment of all these aspects of sexuality as the same--attracting the same penance, not including public apology and restitution as required by even minor thefts, even when another person is victimized by them--undermines the project of teaching males to discipline themselves sexually and avoid abuse of women. These processes can be seen at work in the nineteenth century, when male masturbation was seen as equally bad as use of prostitutes, and sometimes as even worse--and therefore men were tacitly allowed prostitutes. John Robson, Marriage or Celibacy? (1995) discussed how the lower middle class letter writers to a London paper discussed the 1868 case of a West End brothel's attempt to procure an underage Belgian girl: the correspondents ended up discussing marriage, acknowledging the connection Victorians drew between it and prostitution as means of servicing male sexuality.

<sup>190</sup> Ibid., pp.2-3, evidence of Thornton's remarks as soon as he laid eyes on Ashford that he would have sex with her "or I'll die for it", pp.94-5. Holroyd's Charge made no mention of Thornton's crude remarks.

looseness/desperation to marry: he fleshed out Ashford's motivation from nothing but class, gender and location. By flattening and universalizing a simplistic stereotype of women's characters, Holroyd exalted men's (originally marital) right to sexual release into public life and the marketplace.

If Holroyd was correct, Ashford received a promise to marry from a man she had just met, while he held her down in the dirt with force<sup>191</sup>--and this convinced her to consent even though she knew he would not marry her. Holroyd assumed Thornton deliberately lied to obtain sex, to defend him against the alternative that he committed rape. But lying to get sex is a tactic which has been associated with high proclivity to rape among men in our time.

Lying to get sex is related to pro-rape attitudes: Male college students who admitted to lying--usually about their feelings for the women<sup>192</sup>--in order to get sex<sup>193</sup> were more likely to believe that sex was adversarial,<sup>194</sup> that women who said "No" did not really mean it,<sup>195</sup> and to believe other rape myths.<sup>196</sup> They were more likely to be hostile to women<sup>197</sup> and positive about the use of force in date rapes.<sup>198</sup>

In the context of domestic torts, Holroyd's facile assumption that Thornton promised to marry Ashford, but she really knew he was not serious, so that suicide was highly probable, amounted to dismissing her legal rights to a future action before it arose. A woman impregnated through a sexual transaction obtained via a promise to marry would not be able to sue, and have no option but to kill herself. He assumed Ashford knew not only that she would never marry Thornton but that she would also never see Thornton pay damages if she lost her job because of pregnancy.

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<sup>191</sup> Ibid., pp.22-3, 91, evidence at Inquest and Trial of bruises on Ashford's arms.

<sup>192</sup> Gloria Fischer, "Deceptive, Verbally Coercive College Males", Archives of Sexual Behavior (1996), pp.526-33, at 531-3.

<sup>193</sup> Fischer, 1996, had 22% of her sample lying to get sex; Fischer, "Sex Attitudes and Prior Victimization", Annals of Sexual Research (1992), pp.53-60 and C.L. Muehlenhard and P.L. Falcon, "Men's Heterosocial Skill and Attitudes Toward Women", Sex Roles (1990), pp.241-59, found 24% lying; P.J. Poppo and N.J. Segal, "The Influence of Sex and Sex Role Orientation on Sexual Coercion", Sex Roles, V.19, (1988), pp.689-701, and M. Craig, S. Kalichman and D.R. Follingstad, "Coercive Sexual Behavior among College Students", Archives of Sexual Behavior (1989), pp.421-34, found 48% lied to get sex.

<sup>194</sup> Muehlenhard and Falcon, 1994.

<sup>195</sup> C.L. Muehlenhard and L.C. Hollabaugh, "Do Women Sometimes Say No When They Mean Yes?", Journal of Personality and Social Psychology (1988), pp.872-9.

<sup>196</sup> F. Costin, "Beliefs about Rape and Women's Social Roles", Archives of Sexual Behavior (1985), pp.319-25.

<sup>197</sup> Fischer, 1996, pp.531, Table 1, and 533.

<sup>198</sup> Fischer, 1992.

Holroyd assumed trickery was normal from men to women, and that women knew it; his breathtaking cynicism about radical gender disparity speaks volumes. He was suggesting women knew when men were lying to them but went along with it anyway just in order to be able to claim they had been deceived thereafter. He assumed women were masochistic and their pain could be discounted. But as a literary critic who explored the relationship between melodrama and masochism put it, there is a "paradox of gender: it is a psychic fiction, but a political reality."<sup>199</sup>

Victim-blaming women by cynically assuming they secretly enjoy their pain and violation does not change the fact that the system of gender made their pain virtually unavoidable anyway. Whether women perversely enjoyed the trickery of marriage promises which were never intended to be kept did not change the fact that men had been given an unfair privilege to lie.

Holroyd's cynicism was also dependent on class privilege: working class men, susceptible to the political message of melodrama in an era when their ability to establish families was in doubt, could abandon women carrying their children, but they could not feel privileged by it. Those workingmen who left pregnant sweethearts did not do so with the expectation that they could fulfill their sexual desires through prostitution; they were acting in despair. They could not be sure they could purchase alternative sexual outlets out of their paypackets the way elite men certainly did.

The belief that women have a relational duty to provide sex to a stranger is still with us--among convicted stranger rapists. Modern forensic psychologists found one-third motivated by "desire for social contact" with the victims. "Involvement rapists" complimented victims, revealed personal information, asked them personal questions, kissed them, or apologized; many pretended they knew their victims. They imagined themselves gentle and caring, but they committed the most intrusive sexual acts.<sup>200</sup>

Holroyd's model of sexual relations legitimating Thornton's behaviour to Ashford is strikingly similar to legal feminist descriptions of aspects of our sexual culture today which promote public sexual street hassling of women:

The woman on the street is under the thumb of the abusive man in exactly the way that children are under the thumb of abusive parents. She is an object of his pleasure, his contempt and his disposal...It feels frightening and infantilizing.<sup>201</sup>

Holroyd's treatment of Ashford is troubling not just because it invented a new category of sexual duty for women like Mary Ashford, but because it applied this new duty without calling her chastity into question. In fact, Holroyd assumed her virginity, based on the surgeon's evidence.<sup>202</sup> This made whoredom virtually impossible for a working woman to avoid, even

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<sup>199</sup> Rosenman, "Mimic Sorrows", p.39.

<sup>200</sup> Canter et.al., 162, 165, 169-70.

<sup>201</sup> West, "The Difference in Women's Hedonic Lives", p.175. She added: "It...made me feel...like a helpless and guilty child."

<sup>202</sup> Hall, pp.12, Inquest evidence of Mr. George Freer, and 97-8, Trial Transcript. Freer's testimony

(continued...)

by keeping her virginity intact, if a man decided to impose it upon her.

Unlike current rape decisions which treat certain sexually experienced raped women as bound to fulfill male sexual desires,<sup>203</sup> Holroyd did not specifically derogate Ashford's character. Rather, Holroyd suggested that who Ashford was invited and justified such treatment from men, without promiscuity. What characteristic did Holroyd think could justify Everyman making Ashford his temporary sex provider, by any means necessary? The only identity characteristics which she could signal to strange men were her class and gender.

When Holroyd speculated that Mary Ashford had been "persuaded" by Thornton's "need", he harkened to feudal law, when a man could marry by abducting a woman and penetrating her vagina, gaining a wife who owed him ongoing pleasure.<sup>204</sup> Holroyd's "consent to force", by creating a wife-like duty, harkened back to rape as the brute's method of marrying. He extended--into casual sex, despite grievous or even lethal bodily harm--the fetishization of phallic penetration of the vagina as sign of possession, extending "the propertization of women."<sup>205</sup>

The marital rape exception was not the only exception created under feudalism: after the Statute of Westminster in 1285 defined raptus, rape was a crime, except for within marriage--or when a man was accused of raping a prostitute, "unless he was closely related to her by blood."<sup>206</sup> Spousal and prostitute exceptions can be read together to illuminate Thornton. If Mary Ashford consented to Thornton's implacable desire, accepting her duty to pleasure him, it suggests legitimation of the sex as almost marital. But extending quasi-marital care to unworthy men also suggests illegitimation of the woman, as prostitute. The Medieval Raptus reform reduced the distinction between wife and prostitute. Thornton mass marketed the sexualized female: It made the prostitute, as "public woman", Everyman's temporary wife, always under a duty to provide sex.

Ashford's working-class defenders understood this and reacted violently: they resented the implication that an

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<sup>202</sup>(...continued)

waffled on whether the damage could have been consistent with consensual sex or not. But in both testimonies, Freer insisted she had been a virgin before the attack.

<sup>203</sup> See Kwong-leung Tang, "Cultural Stereotypes", pp.682-4: an extra category of "consent", "implied consent", was used to read in a resistance requirement for a complainant in R. v. Ewanchuk 13 C.R. (5th) 330 (1998) (Alta. C. of A.). This decision was buttressed by rape myths: a sexually experienced woman was less damaged by sexual violation, and the complainant's clothing was provocative, justifying the accused believing she needed to do more than say "No" to "objectively" refuse his sexual passes. The complainant had told the accused, who was interviewing her for prospective work, that she had a baby and was living with her boyfriend; she was dressed in shorts in the hot Canadian prairie summer weather. R. v. Ewanchuk was reversed at the Supreme Court of Canada, see S.C.C. [1999] 1 S.C.R. 330 (Feb. 25, 1999).

<sup>204</sup> Stephen Pistono, "Susan Brownmiller and the History of Rape".

<sup>205</sup> Eskow, p.680, quoting the anonymous writer of "To Have and To Hold", Harvard Law Review (1986), pp.1255-74, at 1255-6.

<sup>206</sup> Pistono, p.272.

ordinary girl should be treated like a prostitute. Thornton's acquittal "excited the most undisguised feelings of disappointment in all classes of people from one end of the country to the other";<sup>207</sup> Thornton was shunned. Trying to emigrate to America,

the sailors of the vessel in which he was about to embark refused to go to sea with a character on board...likely to produce so much ill luck to the voyage, and he was compelled to conceal himself until another opportunity was afforded him to make good his escape.<sup>208</sup>

Thornton sparked public awareness that the fact-finding system of the celebrated British legal system could produce conclusions that were completely wrong. In this period, the first attempt was made by the legislature to reign in the evidentiary rules produced by common law, a development which has continued to this day. A clear split occurred between legal analysis of rape by judges and public rejection of it.

The working class people who shunned Thornton, regardless of what the courts had said, are the ancestors to the many women who listen to and affirm other women's rape narratives, while tacitly conceding that the law is not trustworthy enough to also be told them. This process was already evident in 1817.

In the Thornton period, judicial hubris led to judges defining marks and signs by which complainants could be sorted out. The assumption that judges could distinguish truthful, virtuous women from wicked, lying women by looks, clothing, sexual pasts, and independence from family chaperones, created a process which discarded too many rape narratives to obtain the loyalty of citizens. The attempt to produce evidentiary certainty and remove the possibility of false convictions, ironically produced decisions which confused the public by their distance from their understandings of ordinary sexual life. This evidentiary confusion was still an issue during feminist-inspired rape law reforms from the 1970s.

## F. THE MODERN OUTCOME OF VICTORIAN RAPE LAW DEVELOPMENT

Our sexual culture, grown from nineteenth century roots, is still incoherent. Thirty years into second wave reforms, the defense of "mistaken belief in consent"--that a man believed, by mistake, that an unconsenting woman had given her consent--is still often successful. Our sexual culture still deeply submerges female desire,<sup>209</sup> so that courts believe it possible

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<sup>207</sup> Wiener, p.205, quoting The Times, 25 Aug. 1817, quoting a Lichfield paper.

<sup>208</sup> Anonymous, A Report of the Proceedings against Abraham Thornton, (1817: British Library, London), p.171, quoted in Wiener, p.205. See also Hall, pp.56-7, Aris's Birmingham Gazette, 26 Oct. 1818 and 2 Nov. 1818, reported that Thornton had been thrown off the Independence but then later secured passage on the Shamrock from Liverpool to New York.

<sup>209</sup> Pateman, "Women and Consent", pp.160-1, discussed the infamous British case, Morgan v. DPP [1976] AC 192 (where an airforce member told his drinking buddies that his wife liked to pretend to be raped by force, so when his wife resisted, the buddies claimed they had an honest "mistaken belief in consent"), and the American case People v. Mayberry, 63 Ill 2d 1 (1976). L. Bienen, "Mistakes", Philosophy and Public Affairs (1978), pp.224-45, argued at 241 against Mayberry, that mistaken belief in

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for men to innocently misread women's non-consent as consent. This is a measure of the sexual silencing of one gender: "it is not possible, in the present state of sexual relationships between men and women, to arrive at an 'objective standard' of 'reasonable' conduct."<sup>210</sup> The silencing of females stemmed historically from conflicts between daughters and families over marriage. We have not yet moved far from this dynamic.

Second wave feminists described rape law as extortion. They argued that fear of rape by strange, deviant men (the Stranger Danger rape myth) drives women to seek protection from "good men".<sup>211</sup> Public obsession with Stranger Danger began with Thornton, underscored by increasing concern about the nature of masculinity later in the century, and culminated in "linked modern anxieties about personal security and about masculinity and male roles."<sup>212</sup>

Stranger Danger overstates risk from unknown men, and ignores risk from family or friends.<sup>213</sup> In response to fear

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<sup>209</sup>(...continued)

consent should be tested by the "objective reasonableness" of whether the mistake was one "you or I or anyone could reasonably have made..." But Pateman answered: "...[H]ow could 'you or I' make such a mistake about a woman's consent?...[I]s it the kind of slip that results from ordinary human failings?" Establishing that someone wants to have sex with "you or I" is easy if we ask and honestly listen to the response.

<sup>210</sup> Ibid., p.161.

<sup>211</sup> Robin West, "The Difference in Women's Hedonic Lives" (citations to 2000), pp.161-2, 165-8, 173-4. The experience of continual fear of rape leads women, through self-definition as a "giving self", to consent to being submissive wives in monogamous relationships (pp.165-7)--in contrast to the "liberal self" who makes choices, and knows her own preferences (pp.159-62). "How does a pervasive...fear affect women's lives? Women cannot, and do not live in a state of constant fear of male sexual violence any more than workers can live in a state of constant fear of material deprivation...One way...that women control the danger--and thus suppress the fear--is by redefining themselves as 'giving selves'...the dependent party in a comparatively protective relationship...[S]he becomes a person who gives her consent so as to ensure the other's happiness (not her own), so as to satiate the other's desires (not her own), so as to promote the other's well-being (not her own)..." (p.165).

One woman reported in D. Rhodes and S. McNeill, eds., Women Against Violence Against Women (1985), pp.228-9: "The threat of men's violence drove me into couple relationships...Being alone I felt...besieged and up for grabs. Being with one man sheltered me from unwelcome attention from men in the streets, at parties, etc." But West cautioned (p.173): "Women who give themselves to a monogamous relationship so as to avoid the danger of rape from others,...end up giving themselves within the monogamous relationship...to avoid the danger of rape by their partner", and "[b]y giving yourself...to insure your safety from danger, you lose the power to bring about your own pleasure." If a submissive begins to think of herself as a rights-bearing person, she perceives marital sex as rape: "When the woman begins to define herself as self-regarding rather than giving, the sex begins to look and feel more like rape--to feel scary--instead of feeling boring and unpleasant and deadening" (p.174).

<sup>212</sup> Wiener, p.212.

<sup>213</sup> Susan Hickman and Charlene Muehlenberg, "College Women's Fears", Psychology of Women Quarterly (1997), pp.527-47 at 527-8: despite knowing intellectually that rape by acquaintances is three times as likely as rape by strangers, college women still expressed more fear of stranger rape, especially

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of stranger rape, women restrict their behaviour,<sup>214</sup> and accept sexual subordination in marriage for male protection from criminals,<sup>215</sup> based on "a fully justified fear of acquisitive and violent male sexuality".<sup>216</sup> Susan Rae Peterson aptly summed this up as a "protection racket" or a "good cop, bad cop" routine.<sup>217</sup>

When marital rape exceptions began to fall in the U.S., opponents argued: "[T]his is what men get married for",<sup>218</sup>

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<sup>213</sup>(...continued)

when outside alone at night. See also M. Matlin, The Psychology of Women (1993); and Nicole Varelas and Linda Foley, "Blacks' and Whites' Perceptions of Interracial and Intra-racial Date Rape", The Journal of Social Psychology (1998), pp.392-400.

<sup>214</sup> M.T. Gordon and S. Riger, The Female Fear (1989); S. Riger and M.T. Gordon, "The Fear of Rape", Journal of Social Issues (1981), pp.71-92; M. Warr, "Fear of Rape Among Urban Women", Social Problems (1985), pp.238-50; N.D. Weinstein, "The Precaution Adoption Process", Health Psychology (1988), pp.355-86 and "Effects of Personal Experience", Psychological Bulletin (1989), pp.31-50; N.D. Weinstein and M. Nicolich, "Correct and Incorrect Interpretations of Correlations", Health Psychology (1993), pp.235-45; Heath and Davidson, 1988; C.C. Nadelson, M.T. Notman, M.T. Zackson and J. Gornick, "A Follow-Up Study of Rape Victims", American Journal of Psychiatry (1982), pp.1266-70; and K.L. Scheppelle and P.B. Bart, "Through Women's Eyes", Journal of Social Issues (1983), pp.63-81.

<sup>215</sup> Linda Kalof, "The Effects of Gender and Music Video Imagery", studied the effect of viewing music videos on college students' rape myth scores; when women watched her "gender and sexuality stereotyped video", "The Way You Make Me Feel" by Michael Jackson, as opposed to "The Stand" by REM, women exposed to the Jackson video--which depicted a man following a woman on a city street, dancing around her, being rebuffed; she begins to accept his attentions after she encounters a frightening group of tough men threatening gang rape--their scores on belief in adversarial sexual relationships rose over the control group of women. Male scores were higher across the board, but women viewing Jackson had their acceptance of interpersonal violence scores rise so much that they slightly exceeded the men's scores. Kalof, "Dilemmas of Femininity", The Sociological Quarterly (1993), pp.639-51, found "women reported that the man's pursuit [in the Jackson video] was unwelcome, and men reported that the pursuit was necessary to 'win her over.'" However, the resisting woman's experience of an even worse threat led women viewers to accept that relationships were naturally exploitative and adversarial. They understood the woman would be forced to accept the protective man. Stephen Theriault and Diane Holmberg, "The New Old-Fashioned Girl", Sex Roles (1998), pp.97-111, found that when they placed measures of social desirability into rape myth acceptance scales (expecting to catch out men pretending to be more feminist to appear socially desirable), they correlated women's high social desirability scores with high rape myth acceptance scores.

<sup>216</sup> West, p.162.

<sup>217</sup> Susan Peterson, "Coercion and Rape" in M. Vetterling-Braggin, F.A. Elliston and J. English, eds., Feminism and Philosophy (1977), p.360.

<sup>218</sup> Eskow, p.689, quoting the mother of a convicted wife rapist in 1984, from Russell, Rape in Marriage, p.ix.

"a woman who's still in a marriage is presumably consenting to sex", and "[m]aybe this is the risk of being married."<sup>219</sup> There was a note of panic in U.S. media coverage of the first marital rape cases after the spousal exception was removed, as if men would not marry if wives were not required to have sex. Media in 1978 claimed Greta Rideout lied about her husband raping her to promote "the feminist political crusade against traditional family values."<sup>220</sup> John Rideout's acquittal was hailed as a victory for "marital privacy".<sup>221</sup>

Rideout showed that post-marital exception courts continued to treat marriage as imposing sexual duty. In some jurisdictions marriage remained a "virtual estoppel" to charging rape, or marital rape was made a lesser offense.<sup>222</sup> Unique defences were suggested for marital rapists in England as recently as 2003.<sup>223</sup> In some US states, privileges for husbands

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<sup>219</sup> Ibid., quoting defence attorney, Charles Burt, during the first nationally publicized marital rape trial, dealing with John and Greta Rideout's marital disputes in Oregon, from Russell, p.169. Eskow also noted, quoting Russell, p.1., that male respondents expressed distaste for the idea of committing rape to sex researcher Shere Hite: "I would never think of taking it by force--except from my wife...It so appalls me that I couldn't do it."

<sup>220</sup> Benedict, Virgin or Vamp, p.60. Media called Greta adulterous, lesbian, and frigid, claimed she did not fulfill her husband's desires and provoked jealousy, Benedict, p.59. Glanville Williams, "The Problem of Domestic Rape", New Law Journal (1991), pp.205-6 at 206, claimed the Rideout case "blew up in laughter" when Greta went back to John and had consensual sex, discrediting the entire movement against the marital exception; but in fact the marriage, which was extremely violent, ultimately broke down again because of his beatings (Eskow, pp.693-4). There was nothing funny about Greta Rideout's situation, which was a classic case of battered wife syndrome.

<sup>221</sup> Eskow, pp.692-3. John Rideout tried to strike down the law allowing marital rape charges for "violat[ing] a fundamental right to marital privacy"; this failed legally, but not in the court of public opinion.

<sup>222</sup> See Eskow, pp.681-3. In 1981, 10 states had complete marital rape prosecution bans. By 1990, there were no absolute bans left, but 35 states retained limits on prosecuting marital rapists which did not apply to other accuseds, such as requiring complaint within one year instead of within six years. Some required the accused to use aggravated force, or the spouses to be no longer cohabiting. Most states passed separate statutes for rapes by marital partners, many of them stipulating this was a misdemeanour, or chargeable as either misdemeanour or felony, where all other rapes were always felonies. By 1994 there were still 13 states which gave husbands a better deal than other rapists.

<sup>223</sup> See Romney, p.871, quoting the Court of Appeal in R. v. Berry, (1988) 10 Cr App R (S) 13, at p.15: "The rape of a former wife or mistress may have exceptional features which make it a less serious offence than otherwise it would be...[T]he violation of the person and defilement that are inevitable features where a stranger rapes a woman are not always present to the same degree when the offender and the victim had previously had a longstanding sexual relationship." Ibid., pp.872-5: The Sentencing Advisory Panel, in 2002, charged to reform Berry, recommended "starting with" the presumption of equal seriousness of stranger and non-stranger rapes. But the Court of Appeal in R. v. Millberry [2003] 1 WLR 546, came up with Berry-esque chestnuts (at para. 13): "Where, for example, the offender is the husband...there can...be mitigating features...[I]t is not to be overlooked, when considering 'stranger rape', that the victim's fear can be increased because her assailant is an unknown quantity. Is he a murderer as well as a rapist? In

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were extended to common law spouses, dates or even "voluntary social companions".<sup>224</sup> "Though laws on the books look more 'woman-friendly'...women do not always find that helpful laws produce victories for women."<sup>225</sup>

The results of rape law reform have been disappointing. Findings on women reporting,<sup>226</sup> police judging reports "founded" rather than "unfounded", arrest rates, charging rates,<sup>227</sup> conviction rates,<sup>228</sup> imprisonment rates,<sup>229</sup> and sentence

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<sup>223</sup>(...continued)

addition,...when a rape is committed by a stranger in a public place,...it can also frighten other members of the public." Romney retorted: "the Court of Appeal would also do well to recognise the link between marital rape, domestic violence and homicide." Nor did the Court of Appeal recognize that marital rapes were more likely to be repeated than stranger rapes. Millberry assumed a lover-rape would be retaliating for relationship conflict, or was under "stress" because of the relationship, pp.876-7.

<sup>224</sup> Eskow, p.683, noting Delaware law on "voluntary social companions".

<sup>225</sup> Scheppele, p.124. Bachman and Paternoster, "A Contemporary Look at the Effects of Rape Law Reform", pp.573-5, found that though the discrepancy between acquaintance and stranger rapists on reporting, charging, convicting and sentencing figures had diminished since second wave inspired reform, substantial discrepancies remained. Approximately 18% of the acquaintance rapists who should have been in prison (if their risk of prison was the same as stranger rapists) were still missing in 1990--based upon reported proportions of acquaintance versus stranger rapes in official victimization statistics (they used National Crime Victimization Survey data for women's reports of rapes, and National Prisoner Statistics for the data on perpetrator-victim relationships among incarcerated rapists) which themselves probably continue to underestimate acquaintance rapes.

<sup>226</sup> Kelly, Lovett and Regan, A Gap or a Chasm?, noted convictions remained about the same as in the 1970s, while reporting had increased by about 600% reducing the 1/3 conviction rate for reported cases, to 1/18 (p.25). Sexual offences not based on samples of women who went to rape centres showed a dropping rate of likelihood to report to police, from 20% of detected cases in 2002 to 15% in 2004 (p.15). 75% of the cases reported to the centres reported to police (p.xi). Bachman and Paternoster, p.565: Only slight increases in the proportion of raped women reporting incidents to the police were noted, 10% between 1980 and 1990, compared to 4% increases for assault. Given low reporting of rape initially in the unreformed era, this is not a big enough change to redress the original underreporting of rape compared to other crimes. See also Horney and Spohn, "Rape Law Reform and Instrumental Change", p.117.

<sup>227</sup> See Polk, "Rape Reform and Criminal Justice Processing". Kelly et.al., A Gap or a Chasm?, discussed all stages of pre-trial attrition: 25% of cases reported to police were "no crimed"--the equivalent of "unfounding"--or dropped by police without being investigated; but the vast majority of all reported cases did not go past investigation. Conviction rate for all reported cases was 8%. 6% were designated by police as false accusations, but by Home Office guidelines, only 3% would have been designated false. Evidentiary problems explained 1/3 of the drops at investigation: victims with disabilities or mental health problems who could not give a clear account; offenders identified but not traced; and many cases where police and prosecutors felt victim credibility was low. Another 1/3 of cases were lost due to victims deciding not to continue; young victims' accounts, 16-25 years, were most likely to be judged false, and they were also most likely to drop out of investigations because they felt disbelieved. 14% of cases reached trial; half of convictions resulted from guilty pleas, and acquittal was more likely than conviction for those that went to trial (p.xi). "No crime" should have meant cases recorded in error, belonging to another jurisdiction, and when there is evidence that no crime took place. In fact police were including "no evidence of assault", false allegations, extra-early decisions by complainants to withdraw, cases with "ill or

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lengths, show only slight improvement. The stereotype of "real" rapes as stranger or "Blitz"<sup>230</sup> attacks remains. Recognition of higher risk from known men than strangers has been stubbornly resistant to change. Police still "unfound" rape complaints because of how long it took the victim to report,<sup>231</sup> prosecutors decline to prosecute because victim characteristics--short skirts,<sup>232</sup> drinking,<sup>233</sup> alleging rape in the past,<sup>234</sup> or any mental illness, no matter how unrelated to

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<sup>227</sup>(...continued)

especially vulnerable" victims, or suspects not identified or found (pp.38-9). Police "Insufficient evidence" included disabled, mentally ill, and drunk/drugged women with memory impairments; women without medical evidence of damage; and police judgments that the complainants were "unreliable", or that sex had occurred by consent though "obtained through fear of violence", or other parties who saw the victims and assailants before the assaults said the victims looked happy. In some cases, insufficient evidence meant that cavalier police attitudes had led to delay in interviewing the assailant, and he had fled the jurisdiction (pp.54-7). Victim withdrawals related to lack of female investigating personnel, feeling unsupported by investigators, especially when victims were young, alcohol was involved, victims were in relationships, or offenders were family members; suspect claims of consent often triggered victim withdrawals as victims began to imagine facing the suspects in court (pp.60-7). Police believed that victim withdrawal, or any inconsistency in testimony, amounted to false allegation; nurses at the rape centres felt police often showed disrespect to clients. Kelly et.al recommended that rape myths held by CJS personnel be addressed, especially blaming victims for "risk-taking" and expecting high proportions of complaints to be false (pp.80-1, and 89-90).

<sup>228</sup> Loh, "The Impact of Common Law and Reform Rape Statutes", found no increases in conviction rates for rape in King County, Washington after rape law reform. More recently, according to Kelly et.al., the conviction rate for reported rape cases actually declined post-reform, reaching "an all-time low of 5.6 per cent in 2002" (p.ix). Child victims are more likely to be believed by police and to see their assailants convicted, but the conviction rate for prosecutions in child rape were rapidly falling, from a high of 40% in 1999 to 23% in 2002, while adult rapes went from 24% of to 21% (p.26, Table 3.2).

<sup>229</sup> Bachman and Paternoster, pp.567-9: probability of imprisonment for rape doubled between 1970-1989, compared to a 9% increase for robbery and a 25% increase for assault; however, the probability was still less than two-thirds the probability of imprisonment for robbery.

<sup>230</sup> Arnold Kahn, Virginia Mathie and Cyndee Torgler, "Rape Scripts and Rape Acknowledgment", Psychology of Women Quarterly (1994), pp.53-66 at 54, describes the "blitz" rape as "a woman is attacked, usually outdoors, by a stranger who is likely to have a weapon, threaten physical violence, and inflict pain while forcing intercourse."

<sup>231</sup> Scheppele, "Just the Facts", pp.126-7: delay was especially likely when women were attacked by someone they knew, because first they "try harder to be 'good girls'" and blame themselves. Kelly et. al., p.33 noted the requirement for immediate reporting had long been removed from law, but lingered in the minds of criminal justice system personnel, especially police.

<sup>232</sup> See Stephen Schulhofer, Unwanted Sex (1998), p.28, discussing an infamous 1989 case in which a rapist was acquitted because the victim wore a lace mini-skirt without underwear, quoting "Jury: Woman in Rape Case 'Asked for It'", Chicago Tribune, Oct. 6, 1989. In the date rape case against William Kennedy Smith, a nephew of the American political dynasty's Senator Edward Kennedy, the fact that the victim had been wearing underwear she had bought from Victoria's Secret was allowed into the evidence on a defence

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delusions (like depression)<sup>235</sup>--will make juries not believe her.

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<sup>232</sup>(...continued)

argument that someone with sexy underwear tastes could not be a victim, see "Underwear OK'd as Evidence in Smith Case", Chicago Tribune, Oct. 31, 1991, p.2.

<sup>233</sup> See Karen Kramer, "Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes", Stanford Law Review (1994), pp.115-61. MacFarlane, "Historical Development of the Offence of Rape", pp.20-7, noted that drunkenness, for a brief period in the mid-nineteenth century, actually helped rape victims' cases, but only if it was deliberately induced by the assailant, and led to unconsciousness. See R. v. Camplin (1845) 1 Cox C.C. 220, a man who deliberately got a 13-year-old "insensible" with liquor "in order to excite her". Camplin allowed women not to have to show extraordinary resistance if unconscious or asleep at the time of assault; but not if the victim had been voluntarily drinking. There was strong criticism of Camplin unavailing opinions, like that of Charles S. Greaves, an architect of the consolidation of common law criminal law into statute. See McDougal, pp.23-4, noting a Greaves quote from "Appendix Mss. note by C.S. Greaves, Esquire, Q.C., on rape", pp.1081-99 of Henri Taschereau, Criminal Statute Law (1888). Greaves argued even unconsciousness did not excuse lack of resistance to the utmost: rape was equivalent to robbery, and violence was a necessary element; it would be too easy for a woman voluntarily drinking with a man in a room, and being found "in the act...what would be more easy--nay what would be more probable than she would charge the man with a rape?" (Greaves in Taschereau, at 1092-3, quoted on MacFarlane, p.26). Under the influence of scholars like Greaves, the association of drunkenness with women's lusts and propensity to lie overwhelmed concern that men plied women and girls with liquor to obtain a helpless, unconscious victim.

<sup>234</sup> Kelly et.al., pp.54-7: Cases police dropped for too little evidence included many cases of women who had made previous allegations, so that thousands of women per year joined a group of women who would no longer be believed.

<sup>235</sup> Ibid., pp.53-5. See also: "Files from Duke Rape Case Give Details but No Answers", NY Times, Aug. 25, 2006, a defence lawyer sought medical records to show the complainant had been diagnosed with depression and bipolar disorder, and reported a gang rape ten years previously which didn't lead to a charge: "'mental and emotional problems' will be used to impeach her testimony". The NY Times was circumspect about drawing conclusions from her diagnosis; but many other media denied her ability to tell the truth, prompting a feminist blogger to write: "Rape and rape alone is a crime where it's critical that we heap disdain on the victim" (Amanda Marcotte, "It would just be so much easier if they made getting raped a crime", at <pandagon.net>). The National Mental Health Association Depression in Women Fact Sheet noted one in eight women are diagnosed with depression in their lifetime; the National Institutes of Health Medline Plus Medical Encyclopedia, entry for "Rape", noted depression as a common "complication" of rape.

In the rape case against NBA star Kobe Bryant, see AP, "Rumors Regarding Bryant's Accuser's Mental Health Prompt Gag Order", Court TV News, July 25, 2003, reporting the complainant had twice attempted suicide and was prescribed medication; Robert Pugsley, a criminal law professor, said "The more these indications of instability emerge, the more difficult...for the prosecutor to persuade the jury...that this young woman did not misinterpret the event." "Bryant Defense Claims Accuser is Bipolar, Requests Medical History", Denver Post, Jan. 14, 2004, quoted defence that they would show she "was in a manic state or experiencing rapid cycling" at the time of the assault, to explain "why this young woman might have engaged in multiple acts of consensual sexual intercourse within the 72 hours preceding her physical examination", and "might be suffering from a delusion." The Post called her "a troubled, attention-seeking teen who twice tried to commit suicide to elicit sympathy from her ex-boyfriend." "Mental Health Records at Issue for Kobe Bryant Today", Denver Post, Dec. 19, 2003, paraphrased defence that "the purported

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The criminal justice system at every stage, especially sentencing, still favours men charged with raping women they know over men who rape strangers. Overrepresentation of stranger rapists in prison has narrowed only slightly since law reform.<sup>236</sup> The discrepancy between the reported proportion of acquaintance rapists and the imprisoned proportion acquaintance rapists only narrowed from 20% to 18%, while discrepancies for acquaintance robbers and assaulters almost

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<sup>235</sup>(...continued)

suicide attempts" show a woman's "pattern of engaging in extreme, dangerous, attention seeking behavior without regard to its effects on those around her." This media picture resembles nineteenth century ideas of hysteria, not modern psychology.

Jake Easton, "Why Anonymity Gone for Kobe Bryant's Accuser", RADOK News, referred to her suicide attempts as "drug overdoses", claimed she bragged about sex with Bryant at a party three days before he was charged, and quoted David Silber, a psychologist of teen violence, that "many false accusations of rape occur 'when there's loneliness, a need for attention, or a need to feel important.'" Easton cited a paper claiming 41% of rape allegations were false, based on Frank Zepezauer, "Believe Her! The Woman Never Lies Myth", Issues in Child Abuse Accusations (1994), published by the two-psychologist practice of Ralph Underwager and Hollida Wakefield, founders of the False Memory Syndrome Foundation; they have defended paedophilia (see "Interview with Ralph Underwager and Hollida Wakefield", Paidika: The Journal of Paedophilia, V.3 #1 (Winter 1993), pp.2-12). Zepezault's paper discussed a statistic from Alan Dershowitz, O.J. Simpson's lawyer and author of The Abuse Excuse (1994), from Penthouse (Sept. 1991, p.52), that the FBI found 8% false allegations in 1600 cases. He cited C.P. McDowell and N.S. Hibler, False Allegations (1985), a study of 556 allegations, 256 classified as "not conclusive", and 220 of the remaining 300 judged truthful. Based on a portion of 80 cases in which complainants recanted, McDowell and Hibler decided on 25 complainant criteria, which they then used on the 256 unclassified cases, obtaining a 60% false allegations rate. Easton also cited Eugene Kanin, "False Rape Allegations", Archives of Sexual Behavior (1994), pp.81-92, a study of 109 cases in which 41% were classified false based on recantations.

Compare Michelle Anderson, "The Legacy of the Prompt Complaint Requirement", Villanova University Legal Working Paper Series, #20 (2004): "As a scientific matter, the frequency of false rape complaints...remains unknown" because of the extremely politicized nature of the research and wildly discrepant figures. Right wing religious websites cite Kanin but no other study (for example, see "The Feminist Silver Bullet", at <[www.christianparty.net/kanin.htm](http://www.christianparty.net/kanin.htm)>).

The media publicized Kobe Bryant's accuser's name and discussed sex activities with other men, prompting The Globe and Mail to complain, in "Kobe Bryant Fans Continue to Attack Accuser: Court Does Nothing", March 29, 2004: "Lawyers employed by Kobe Bryant...have spent weeks bringing intimate details of the woman's sexual history before the courts in one of the most unscrupulous...celebrity trials of recent memory./Although Colorado's rape laws are designed to protect alleged victims from publicity the laws...collapsed under the press of high-priced lawyers and inquisitive media outlets...[T]he woman's name, photo and biography have been splashed across...tabloids and Internet sites.../Fans of the basketball player have besieged her with angry phone calls and visits, forcing her to live on the run, moving to four states in the past six months." The woman refused to testify in the criminal case in Sept. 2004, and by June 28, 2005, three men had been convicted for making threats against her and the prosecutor (see "Man Sentenced for Threatening Kobe Bryant's Accuser, Prosecutor", Court TV).

<sup>236</sup> Bachman and Paternoster, pp.570-1. American statistics for 1979 to 1986 showed that women's victimization reports identified 45% of rapists as strangers, but rapists in prison who were strangers to their victims in 1986 made up 56% of the incarcerated rapists. Women reported 41% of rapists acquaintances, but only 29% in prison were acquaintances. After law reform, in 1987-1990, women's reports moved towards higher rates of acquaintance rapists, 48% compared to 36% strangers; but in prison in 1991, stranger rapists were still overrepresented at 43% and acquaintance rapists underreported at 40%.

disappeared.<sup>237</sup> Reformed rape laws were repeatedly challenged and modified in almost all criminal jurisdictions in the U.S.<sup>238</sup> Though rape law statutes often expressly stated the goal of increasing reporting,<sup>239</sup> women's narratives were still heavily contested.

One historian called Brownmiller's Against Our Will "a propagandistic attack on heterosexuality and marriage (and by extension the family) in the guise of an attack on rape."<sup>240</sup> He had a point--if one accepted fraternal patriarchy, and could not imagine more equal family, marriage and heterosexuality, then the feminist attack on rape law did run squarely against marriage, heterosexuality, and family.<sup>241</sup> This is because the unreformed rape law pushed women to submit to sex with male acquaintances, accept compulsory heterosexuality, and pursue marriage or marriage-like arrangements, to the benefit of men. Unreformed rape law dovetailed with economic pressures forcing women into sexual relationships under the control of men.

The "good cop-bad cop" dynamic still pressures women to depend on intimate men and fear strange men. Media saturate the public with rape myths. British media, after 1970s legal reform, stopped identifying victims, but continued describing them from the defence viewpoint.<sup>242</sup> The Sun placed rape news beside semi-nude "Page three girls".<sup>243</sup> Tabloids covered increasing numbers of rapes--40% in 1978 as opposed to 25% in 1970. The 1980s featured more "lurid" details of increasingly violent rapes "in public places by strangers and/or gangs."<sup>244</sup> In the 1990s, media represented "a few high-profile cases of acquaintance rape", but were "deeply partisan,...discounting women's allegations of rape" as "seduction."<sup>245</sup>

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<sup>237</sup> Ibid., p.572.

<sup>238</sup> Ibid., p.563.

<sup>239</sup> For example in Canada, see Crim. Code, S.276 (3), "Factors that judge must consider" before admitting evidence of complainant's prior sexual activity include (b): "society's interest in encouraging the reporting of sexual assault offences".

<sup>240</sup> Pistono, p.266, quoting Michael Novak, Commentary, Feb. 1976, p.90.

<sup>241</sup> Think how much more challenging Novak would have found Brownmiller had she actually dealt with the more common forms of rape, by acquaintances, rather than concentrating as she did primarily on rape by strangers! Many of us continue to believe that heterosexuality, marriage and family do not have to be defined and lived in such a way as to make them easily confused with rape of women.

<sup>242</sup> Keith Soothill, "Editorial: Sex Crime and the Media", Criminal Behaviour and Mental Health (2004), pp.227-30, at 227-8.

<sup>243</sup> Ibid., p.228, noted that after he and other readers complained about the practice, the Sun began to juxtapose semi-nude girls to sexual harassment cases in workplaces instead.

<sup>244</sup> Ibid., p.228.

<sup>245</sup> Ibid., p.228, quoting S. Lees, Carnal Knowledge (1997), p.93.

Far from reflecting the feminist critique on acquaintance rapes, the media revitalized rape myths.

But escape to good men doesn't work: "Protection [obtained] from someone who is himself a source of danger is whimsical."<sup>246</sup> So long as wives had no right--social or legal--to refuse sex, freedom from rape within marriage was a gift from benevolent husbands, not the rightful expectation of wives as citizens. Yet female law students worried, two decades into the critique, that it hurt women to teach acquaintance rape cases: "[W]hy teach such questionable cases, when so many women are clearcut victims?"<sup>247</sup>

When Susan Estrich reflected in Law School on her rape by a stranger,<sup>248</sup> she realized victim-rapist acquaintanceship defined some rapes as "real", but others as "not real". A rape victim was validated only if there was no hint from her relationship that she owed the rapist sex. The burden of legal tests was on the women, using male standards.<sup>249</sup> Estrich met the requirements of "real rape". But other women, like Mary Ashford, were seen as provoking desire by their mere presence in public space.<sup>250</sup> Psychological research shows many men misread simple signals of friendliness from women in public space, such as smiling, as signs of sexual interest.<sup>251</sup> This is why resistance standards are still important

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<sup>246</sup> Ibid., p.174.

<sup>247</sup> Susan Estrich, "Teaching Rape Law", Yale Law Review (1992), pp.509-20, at 514: a deputation of female students confronted a male colleague on the reasons for including non-stranger cases in his materials, not knowing the entire package had been put together by Estrich.

<sup>248</sup> Estrich, "Rape", pp.1087-8.

<sup>249</sup> Ibid., p.1095.

<sup>250</sup> Brenda Geiger, Michael Fischer and Yovav Eshet, "Date-Rape-Supporting and Victim-Blaming Attitudes", Journal of Interpersonal Violence (2004), pp.406-26 at 416, 420-1: 48% of high school boys, and 15% of girls agreed girls invite rape by doing things like "flirt with their partner, invite him home, or go on a date late at night on the beach and dress in a revealing manner". Although the study discussed dating, revealing dress and being on a beach could also apply to strangers, or, like Ashford and Thornton, newly met acquaintances. See also Andrew Taslitz, "Patriarchal Stories", Southern California Review of Law and Women's Studies (1995-6), pp.387-500, which discussed how the idea of women's mere appearance has often been treated, in literature and in legal cases, as making them aggressive provocateurs to men because of men's sexual desires.

<sup>251</sup> Scheppele, "Re-Vision of Rape Law", p.1109. See also Geiger, Fischer and Eshet; E.S. Byers, "How Well Does the Traditional Sexual Script Explain Sexual Coercion?", in Byers and L.F. O'Sullivan, eds., Sexual Coercion in Dating Relationships (1996), pp.7-25; Abbey, "Misperceptions of Friendly Cues"; Johnson, Stockdale, and Saal, "Persistence of Men's Misperceptions"; J.S. Johnson and L.A. Jackson, "Assessing the Effects of Factors that Might Underlie the Differential Perception", Sex Roles (1988), pp.37-45; K. Johnson and M. Lee, "Effects of Clothing and Behavior on Perceptions", Family and Consumer Sciences Research Journal (2000), pp.331-56; R.M. Kowalski, "Nonverbal Behaviors and Perceptions of Sexual Intentions", Basic and Applied Psychology (1992), pp.427-45; and C.L. Muehlenhard, and M.L. McCoy, "Double Standard/Double Bind", Psychology of Women Quarterly (1991), pp.447-61.

in law: women are easily suspected of spontaneously consenting to sex with strangers.<sup>252</sup> Estrich found as a law student that a woman going anywhere voluntarily with a man could not be a victim of a "real rape",<sup>253</sup> and no preexisting relationship was compatible with "real rape".<sup>254</sup>

In the nineteenth century "consent to force" cases, a battered child who froze and did not hurt her assailant (Mary Hill in R. v. Saker), a woman who attracted a crowd immediately during the assault but fainted (Susan Mann in R. v. Tidy), and a woman who told the law immediately and was seen by a surgeon but then committed suicide (Amelia Deighton in R. v. Newton and Carpenter), were all found wanting as resisting women, even though they were attacked with force outdoors by strangers. A woman who went to the extraordinary length of climbing out on the window ledge of a moving train (Jenny Stevenson in R. v. Makinson) to get to a different compartment was seen as a real victim but her assailant's crime was minimized.<sup>255</sup>

Estrich learned that the legal definition of rape did not rest on the accused's behaviour; there was no working definition of rape.<sup>256</sup> The law did not punish bad tactics by men obtaining sex. As Rousseau suggested:<sup>257</sup> "no amount of force or physical struggle is inherently inconsistent with lawful sex."<sup>258</sup> Rape could educate a woman sexually: Rape in relationship could be "good" for a woman.<sup>259</sup> Estrich learned the powerful role in rape law of core rape myths: downplaying "good" women's risk of being raped, blaming female provocation, distorting relationships between victims and rapists, and

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<sup>252</sup> Estrich, "Rape", pp.2006, 2012, 2014.

<sup>253</sup> Scheppele, p.1109.

<sup>254</sup> Estrich, "Rape", p.1092.

<sup>255</sup> See R. v. Saker, The Times, Aug. 3, 1850; R. v. Tidy, The Times Nov. 25, 1876; R. v. Newton and Carpenter, E.R. V.175 887 (originally 1 Foster and Finlason 641); and R. v. Makinson, The Illustrated Police News, Jan.20, 1869.

<sup>256</sup> Estrich, "Rape", pp.1099 and 1096.

<sup>257</sup> See Pateman, "Women and Consent", p.155, quoting Rousseau, Politics and the Arts, p.85. The same quote also claimed that by using force, "He does not insult chasteness; he respects it; he serves it. He leaves it the honor of still defending what it would have perhaps abandoned."

<sup>258</sup> Estrich, "Rape", p.1096.

<sup>259</sup> Eskow, p.691, discussed the comments of a respondent, Ross, quoted in Finkelor and Yllo, License to Rape, at p.66. Ross blamed his ex-wife's "castrating personality" for him raping her, and speculated that "Subconsciously I think she kept egging me on because she wanted to be dominated." So he justified raping her as an unselfish act: "he ironically perceives himself...as her sexual savior, providing the rape she craves." In Emile, p.348, Rousseau said it was a man's sexual duty to ignore a refusal in order to fulfill a woman's sexual needs: "Must her modesty condemn her to misery? Does she not require a means of indicating her inclinations without open expression?" See Pateman, "Women and Consent", p.155.

implying gifts obligate females to give sex.

Even after reform, criminologists attacked the criminal justice system as "offender-bias[ed]": "concern with protecting men from false accusations of rape went beyond the 'not guilty until proven guilty' standard."<sup>260</sup> The special legal treatment of rape reflects continuing cultural pressure on women to sexually service men. Estrich concluded rape law did not adjudicate "crime"--socially problematic acts--but provided "law's protection of men,"<sup>261</sup> institutionalizing "unimpeded male sexual access to women".<sup>262</sup> Estrich's conclusion is supported by many legal feminists. Carol Smart argued that women's experiential knowledge of rape was "disqualified" by the legal system,<sup>263</sup> and became "subjugated knowledges".<sup>264</sup> Patricia Hughes critiqued the way that mens rea was adjudicated in rape cases for privileging "[w]hat happened in his mind, on the basis of his view of the way the world ought to work".<sup>265</sup>

Robin West was also brave enough<sup>266</sup> to discuss her own rape experiences.<sup>267</sup> West included sex in violent marriages and promiscuous dating, to which women verbally consented under such coercive conditions that their consent could not truly be considered voluntary.<sup>268</sup> West noted that one way to survive rape emotionally was to say "yes" thereafter--

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<sup>260</sup> Bachman and Paternoster, p.558.

<sup>261</sup> Estrich, "Rape", p.2000.

<sup>262</sup> Eskrow, p.679.

<sup>263</sup> Carol Smart, Feminism and the Power of Law (1989), Chapters 1 and 2.

<sup>264</sup> Scheppele, "Re-Vision of Rape Law", p.1112.

<sup>265</sup> Hughes, "From a Woman's Point of View", p.343.

<sup>266</sup> Judith Herman, Trauma and Recovery (1992), pp.29-32, contextualized the empowerment of women like Estrich and West to speak out as a result of the feminist movement. Feminism enabled women to narrate what the mainstream rendered unspeakable.

<sup>267</sup> See West, pp.165-77. Unlike Estrich, West's experience was not confined to "real rape". She discussed "domestic violence, promiscuous and threatening heterosexuality, and the fear of rape and street hassling" as gendering experiences of which she had experiential knowledge. On pp.177-80, West also discussed female college students' "consensual", but deeply exploitative and self-alienating, sexual relationships with male professors, without identifying herself as a survivor, but in very personal terms: "The pleasure...in such a relationship bears a disconcerting similarity to a cocaine high...The woman feels pleasure in making a contribution to the culture she respects...through a fusion of intellectuality and sexuality....The woman's self-respect will hit a new low for which she is...totally unprepared..." (p.179).

<sup>268</sup> *Ibid.*, p.171, quoting an anonymous woman from WAVAW, p.228: One woman described her experience in promiscuous dating, "We were controlled by men's demands....Violence was implicit in many of these sexual encounters...I remember moments of rising panic when I thought the man was actually going

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to try to gain favour as a woman unselfishly meeting male needs:

a woman will define herself as a "giving self" so that she will not be violated...[S]he consents...to control the danger both inside and outside of the relationship, and...to suppress the fear that danger engenders...She consents to serve the needs and satiate the desires of others.<sup>269</sup>

Women who say "Yes" a lot, but do not mean it,<sup>270</sup> or "Yes" when not free to say "No", include wives,<sup>271</sup> and prostitutes.<sup>272</sup> West deemphasized the distinction between never-consenting women, and women who verbally consented out of fear of rape, or rejection, by acknowledging women's socialization to submit to men's desires.

What Robin West called "the hedonic difference in the phenomenology of women's lives"--the experience of being overwhelmed not only by physical, but ideological, power<sup>273</sup>--paralleled the experience Holroyd surmised had led Mary Ashford to consent to Thornton. That is, Holroyd defined West's socialized, submissive, fearful woman who says yes out of fear of violence, as the "natural" woman. Holroyd defined normative heterosexuality the same way battered wives now learn to do, through constant everyday terror and pain: "sex just is 'that which is given to the other.'"<sup>274</sup>

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<sup>268</sup>(...continued)  
to hurt me badly."

<sup>269</sup> Ibid., p.165.

<sup>270</sup> From domestic violence, West learned (p.167) "the lesson of daily fear...to define myself as an object, the purpose of which was to buffer...another's violence....I learned not just to lie, but to be a lie, to embody lying, to have no entitlement to either truth or language."

<sup>271</sup> Ibid., p.165: the wife as "'giving self'" "embraces a self-definition and a motive for acting which is the direct antithesis of the internal motivational life presupposed by liberalism. The motivation of her consensual acts is the satisfaction of another's desires. She consents to serve the needs and satiate the desires of others."

<sup>272</sup> Margaret Baldwin, "Split at the Root: Prostitution and Feminist Discourse", Yale Journal of Law and Feminism (1992), pp.47-120, at 66-70, discussed how feminist lawyers distinguish particular women victims as "not prostitutes", because: "Our most significant work focuses on the habilitation of a woman's 'no' as probative of her lack of consent"(p.68)--and "Prostitutes, of course, say 'yes' a great deal" (p.69).

<sup>273</sup> West, p.149: "The quality of our suffering is different from that of men's, as is the nature of our joy...[W]omen often find painful the same objective event or condition that men find pleasurable...The phrases 'date-rape,' for example and 'sexual harassment,' capture these different subjective experiences of shared social realities: For the man, the office pass was sex (and pleasurable), for the woman, it was harassment (and painful); for the man the evening was a date--perhaps not pleasant, but certainly not frightening--for the woman, it was a rape and very scary indeed."

<sup>274</sup> Ibid., p.171. West applied this definition to girls involved in the sexually coercive culture of the 1960s Sexual Revolution. She discussed "promiscuous heterosexuality" after her discussion of the sex lives of battered wives; this definition of sex fits both types of sexual coercion. The implications of using this

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But why, in a culture where women's verbal statements of "No" could be ignored, should "a woman's 'yes' be more privileged, be any the less open to invalidation, than her 'no'?"<sup>275</sup> When a woman can be held to sexually consent till death through marriage, she is so subordinated that "[s]he learns to consent for the satiation of the other's desires. That becomes the meaning of 'consent'."<sup>276</sup> West attacked legal complacency about involuntary consent, consent under duress, and coerced consent; Holroyd's refusal to define extreme battery as duress invalidating consent was an earlier version of the same complacency she resisted 170 years later.

Most of the time, the legal complacency which infuriated West was an indirect and quiet process, more subtle than Holroyd's "consent to force". Courts, through evidentiary law, construct "commonsense" ideas of the "factual", defining some explanations as "making sense", framing some details as relevant and excluding others as irrelevant. The devil is in the details establishing relevance of evidence: "[M]uch misogynistic work is done in the construction of 'reality'."<sup>277</sup>

Through the nineteenth century and the first half of the twentieth, a special evidentiary regime was built for rape law. At its height,<sup>278</sup> it compared raped women's evidence to the reactions of a hypothetical "good woman", one who would

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<sup>274</sup>(...continued)

idea of sex, not only in dysfunctional marriages, but courtship, and in the 1810s rather than the 1960s, are disturbing in their own right.

<sup>275</sup> Patemen, "Women and Consent, p.162.

<sup>276</sup> West, p.168.

<sup>277</sup> Scheppele, p.126.

<sup>278</sup> See Wigmore, On Evidence (1905), pp.2055-8; Chadbourne ed., Wigmore on Evidence, (1970) pp.451-60, and 466-7, discussing corroboration requirements for rape, statutory rape and incest. The regime included especially strict rules for child witnesses: no children's testimony could count as corroboration, not as third party eyewitness testimony of attacks on another child, as separate victims of similar attacks, or even if children saw an indecent assault by one adult male on another. Wigmore also affirmed cases which did not take physical evidence as enough corroboration--R. v. O'Hara [1947] 3 D.L.R. 154 and R. v. Terrell [1947] 3 D.L.R. 523 held that used condoms, soiled handkerchiefs and clothes disarranged did not corroborate, nor vaginal bruise and bleeding, in girls too young to consent.

Glanville Williams also defended corroboration: "Corroboration--Sexual Cases", Criminal Law Review, (1962), pp.662-... at 662 argued that corroboration was required to prove sufficient resistance because "[a] woman's need for sexual satisfaction may lead to the unconscious desire for forceful penetration, the coercion serving neatly to avoid the guilt feelings which might arise after willing participation"; as late as the 2nd edition of Textbook of Criminal Law (1983), p.238, he claimed women had a propensity to lie, enjoyed rape fantasies, and had "obscure psychological reasons" for behaving the way they did, so that women's consent is "a hazy concept"--their desires lacked clarity and their intentions "vacillating, ill-defined and unreliable", women enjoyed "mastery" and making a token resistance, as proved by a quote from Lord Byron's Don Juan, Canto 1, Stanza CXVII. Williams' use of this quote to describe female psychology is akin to quoting Shakespeare's Shylock from Merchant of Venice to describe Jewish attitudes to the ethics of merchandising.

"resist to the utmost".<sup>279</sup> Thus, raped women were expected to make an immediate complaint,<sup>280</sup> and a loud outcry.<sup>281</sup> Failure

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<sup>279</sup> See Bachman and Paternoster, p.559, discussing removal of the corroboration requirements following the first reform, Michigan, in 1974. Glanville Williams, Criminal Law (1961), moderated "utmost resistance" to "active and earnest" resistance for forcible rape, but aggravated rape still required "utmost" resistance, pp.122-3. Before the twentieth century, resistance requirements had gradually increased. Hale only said "against her will" in History of the Pleas of the Crown, (1736) p.628; Edward Hyde East used "by force and against her will", Pleas of the Crown (1803), I, pp.43-4; Sir Edward Coke, The Institutes of the Laws of England (1641) p.180 and William Hawkins, Pleas of the Crown (1716), I, p.108, used both phrases. That the resistance to force had to be "desperate resistance" (MacFarlane, "Historical Development of the Offense of Rape", p.18) appeared in nineteenth century cases, such as The Queen v. Rudland, (1865) 4 F. and Finlason 495. James Crankshaw, annotator of The Criminal Code of Canada (1902), pp.275-6 defined "dread or fear of death" as the only reason for a woman not resisting (see MacFarlane, pp.18-9), but admitted to doubt: "[T]o compel a frail woman, or girl of fourteen, to abandon her reason, and measure all her strength with a robust man, knowing the effect will be to make her present deplorable condition the more wretched, yet not to preserve her virtue,--on pain of being otherwise deemed a prostitute instead of the victim of an outrage--is asking too much of virtue and giving too much to vice." Charles S. Greaves, who drafted most of the statutory consolidation acts on criminal law in England at mid-century, had no such doubts: in 1878, he insisted that violence was necessary to make carnal knowledge into rape, beyond "the violence ultra the mere connection", and there had to be evidence of "a struggle" (MacFarlane, pp.23-4, quoting Greaves, at pp.1085-6).

<sup>280</sup> Scheppelle, p.126. Blackstone, Commentaries on the Laws of England (1769), p.211, noted that "The jury rarely give credit to a stale complaint." The recent complaint requirement was removed in Canada by 1980-81-82-83, c.125, s.19, but R. v. Ay (1994) 93 C.C.C. (3d) 456 (B.C.C.A.), R. v. Heinrich (1996) 108 C.C.C. (3d) 97, R. v. M. (T.E.) (1996) 110 C.C.C. (3d) 179 (Alta. C.A.) and R. v. D. (D.) [2000] 2 S.C.R. 275, all discussed allowing the crown to lead evidence contextualizing why the first complaint was not made at the earliest opportunity, and what precipitated the complaint later, to direct the jury's attention to the victim's state of mind, age, maturity, confidence, composure, and relationship to the abuser, under the principle in R. v. McMaster [1996] 1 S.C.R. 740 para.26-27, that it is necessary for a judge to refer to the "legal principles" "where it appears that that the law is unsettled." D. (D.) set out that judges should inform the jury: i. there is no "inviolable rule" about how victims of such trauma react; ii. timing is only one factor in assessing credibility; and iii. delays cannot be used to support an "adverse inference" that the victim is not credible. That such a ruling was necessary, some 17 years after the evidentiary rule was removed, is a telling comment on present day sexual culture in Canada.

<sup>281</sup> Hale, History of the Pleas of the Crown (1736) p.632, noted that the victim's lack of an outcry and raising a pursuit after a rape led to a presumption that the prosecution was malicious, although this did not disallow an "Appeal of Rape" by her husband or kin. Glanville Williams, Textbook (1983), p.238, required outcry where a woman might be heard when the woman knew the man, because then she should not be intimidated; this was showing non-consent by "us[ing] all means open to her to repel the man." See also R. v. Hinton [1961] Qd R. 17 at p.25, discussed by Ian Leader-Elliot and Ngaire Naffine, "Wittgenstein, Rape Law and the Language Games", Monash University Law Review (2000), pp.48-72: Mansfield CJ in Hinton (p.25) required a woman to communicate non-consent not only to the man attempting sex, but to the public at large, showing "public dissent to sex." Public non-consent was why "[h]er dress, comportment, gestures, the context of the encounter,...[and] her previous sexual activities...could undermine the effects of her stated words of dissent" (p.62).

to complain as soon as required--sometimes within a matter of days<sup>282</sup>--was understood to mean the complaint "cannot possibly be true."<sup>283</sup>

As the twentieth century began, resistance evidence increasingly meant physical evidence not only of force against the victim, but marks she left on the rapist.<sup>284</sup> Nothing less proved her virtue: outcry, heroic resistance and immediate complaint were simply the "natural instinct of a proud female".<sup>285</sup> "Consent" could be a defense to other crimes, but only rape required resistance.<sup>286</sup> But there was nothing "natural" about the imaginary "good woman": nearly every raped woman would be found wanting on such a standard. So long as rape law focusses obsessively upon classifying "good" or "bad" women, it will not address rape.

Estrich noted that resistance tests, based on standards from assaults between males, judged women as "'sissies' in

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<sup>282</sup> The *Statute of Westminster* had stipulated a woman had 40 days to make her complaint, see MacFarlane, "Historical Development", p.11, note 32. See also Hale, *History*, (1736), pp.627-8 (discussing *Statute of Westminster*) and 632, the need for immediate outcry to provide evidence of true lack of consent, including inciting a pursuit. This implies complaint within minutes of the rape.

<sup>283</sup> Scheppele, p.126.

<sup>284</sup> This was the upshot of *R. v. Saker*, *The Times*, 3 Aug. 1850; see Kim Stevenson, "Unequivocal Victims". The requirement has persisted to the present: Michelle Anderson, "Reviving Resistance in Rape Law", *University of Illinois Law Review* (1998), pp.953-1013, noted "Utmost resistance", present from the late nineteenth century, continued into the 1950s and '60s in many states (pp.962-4). *Brown v. State* 106 NW 536 (Wis. 1906) at 541, acquitted because the victim did not resist enough with "hands and limbs and pelvic muscles", and her verbal protests were "inarticulate screams"; *People v. Scott* 95 NE 2d 315 (Ill. 1950) at 317 held the victim should not have submitted after a ten minute beating, when the rapes went on thereafter for five hours; *Moss v. State* 45 So. 2d 125 (Miss. 1958) at 126 disallowed the victim's "tactical surrender" to superior force. Even *People v. Yanik* 390 NYS 2d 98 (NY 1977), remitted on other grounds in 371 NE 2d 497, argued the victim's resistance must be to her "utmost power" and match the assailant's violence, "proportional to the outrage". The "earnest resistance" standard became more common past the mid-twentieth century (pp.964-5) but even it, in *State v. Waters* 135 NW 2d 768 (Wis. 1965) at 774, was held to mean "all the resistance in her power". At the time of writing, 1998, Anderson noted most American jurisdictions required "reasonable" resistance (pp.965-6): complainants had to second guess at which point a court would find it was "reasonable" to stop resisting. But Maryland asked for "utmost resistance", while Alabama, Oregon and West Virginia asked for "earnest resistance" (pp.954-5).

Even when removed, "utmost resistance" may have aftereffects. See Kathleen Mahoney, "*R. v. McGraw*", *Ottawa Law Review* (1989), pp.207-21: in *McGraw*, (8 Nov. 1988, Ont. Dist. Ct., unreported) a man sent three anonymous letters, threatening three women with a variety of sexual acts, even "if I have to rape" them; Judge Flanigan decided this was not threatening bodily harm, because the sex described in the "adoring fantasies" would not harm the women. Mahoney, pp.213-5, argued that traditional emphasis on proof of resistance through "bruises, wounds, and other indicia of force", misled the judge into ignoring the violence inherent in sexual intrusion itself.

<sup>285</sup> Estrich, "Real Rape", p.27.

<sup>286</sup> Estrich, "Rape", p.1091.

playground fights".<sup>287</sup> This is how rape law "immunizes those males whose victims are afraid enough, or intimidated enough, or, frankly, smart enough, not to take the risk of resisting physically."<sup>288</sup> It imposes unreasonable expectations on "people who have already been beaten, or who never had the power to fight in the first instance."<sup>289</sup>

The ultimate in legal scepticism about women's truthfulness led to the requirement of corroboration, either physical evidence,<sup>290</sup> or eyewitnesses.<sup>291</sup> Second wave reformers "objected to rape being singled out as the only crime with such a

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<sup>287</sup> Ibid., p.2006.

<sup>288</sup> Ibid., p.2002.

<sup>289</sup> Ibid., p.2012.

<sup>290</sup> But physical evidence was easy to discount. Indeed, it never seemed that physical evidence was sufficient. See for example the two Canadian statutory rape cases, R. v. O'Hara [1947] 3 D.L.R. 154, and R. v. Terrell [1947] 3 D.L.R. 523, in Chadbourn Wigmore On Evidence, (1970), pp.451-60, and 466-7. Medical evidence made it difficult for physical evidence to be taken seriously as signs of rape rather than sex which was forceful but to which the victim consented. This was the case in Thornton (Hall, pp.12 and 97-8). Physical evidence could also be used to "disprove" rape through junk science: MacFarlane, "The History of the Offence", pp.28-31, noted early nineteenth century medical experts, such as Dr. Farr, The Elements of Medical Jurisprudence (1805), proclaimed that a woman who became pregnant could not have been raped (because to ovulate she must have experienced pleasure, and therefore consented), as well as the "distasteful myth that 'you cannot thread a moving needle'"--that it is impossible to rape a resisting woman, p.20. That theory that conception meant consent was described by William Oldnall Russell in A Treatise on Crimes and Indictable Misdemeanors (1826) I, p.557, as "'quite exploded'", but continued to be applied in courts (MacFarlane, p.30). See also Edwards, Female Sexuality, p.122.

<sup>291</sup> See Wigmore, On Evidence, (1905), pp.2055-8, and Chadbourn, Wigmore On Evidence (1970), pp.454-64 and 736-48. Glanville Williams, The Proof of Guilt (1958), pp.146-7, called for corroboration because of "little girls who not only become willing partners in vice but are quite ready for spite or blackmail to get innocent men into trouble"; in note 19, he described one girl with "the face of an angel and a shy hesitating manner of speech" who was "in fact, according to ordinary standards, a very depraved young person." Williams' classic essay, "Corroboration", pp.663-4, quoted from the third edition of Wigmore the same passages which preface the horrifying case studies of children in Chadbourn, pp.736-48, calling for psychiatric examination to weed out children who had "made similar accusations against other men in the past". Williams worried that "'modern psychology' has not developed far enough to provide psychiatrists with sure means of exposing crafty falsehoods--at least if the witnesses are not first overcome by the use of a 'truth drug' such as pentothal." This was the reason for requiring what Williams admitted was a difficult evidence to find: eyewitness evidence. However, Williams argued that what counted as corroboration should be relaxed, so that third parties (but not mothers) could give testimony that the child was in a state of "distress" immediately after the attack was supposed to have happened, and that children abused by the same offender in separate episodes should be able to corroborate each other, pp.664-5.

requirement",<sup>292</sup> as showing "distrust of women".<sup>293</sup> The same message was sent by using Lord Chief Justice Sir Matthew Hale's dictum, that "rape was an accusation easily to be made, hard to be proved, and harder to be defended by the party accused, tho' never so innocent".<sup>294</sup> Quoting Hale was standard by the early twentieth century; some jurisdictions required it be read to every rape jury until 1975.<sup>295</sup> Some judges continue to read it in their charges.

These evidentiary rules were inappropriate: for example, immediate complaint, in acquaintance rape, required subordinated women, trained to please men, and to blame themselves for tensions in relationships, to overcome the typical urge to "try harder to be 'good girls'"<sup>296</sup> and jettison relationships. The rule thus straitjacketed women's power to resist by insisting on immediacy.

Allegiance to rape myths by members of the criminal justice system still persists after reform of the more egregious rules of evidence for rape. In 1987, legal researchers found that District Attorneys, required to present the victim's case as persuasively as possible, subjected complainants to questions as challenging as those of the defence and questioned their truthfulness.<sup>297</sup> Rape myths were not only supported, but promoted from both sides of the legal dispute.<sup>298</sup> As recently as 2001, researchers found police and prison employees frequently sexually assaulted detainees and members of the public,

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<sup>292</sup> Bachman and Paternoster, p.560.

<sup>293</sup> Estrich, "Rape", p.2006.

<sup>294</sup> Hale, History of Pleas of the Crown, p.635. Note: this statement came up after Hale discussed the legal problem of swearing a child to tell the truth under oath; on p.636, he discussed several false accusations about which other magistrates had informed him, all of which involved underaged victims.

<sup>295</sup> Eskow, p.679, noting People v. Rincon-Pineda, 538 P.2d 247 (Cal. 1975), which produced a dictum that quoting Hale to the jury was always inappropriate in a trial for rape, overturning the mandatory Hale jury instruction.

<sup>296</sup> *Ibid.*, p.627, discussing how Anita Hill, during her sexual harassment, responded by starting to "keep notes on all the work she did to show what a model employee she was."

<sup>297</sup> See Scheppelle, "The Re-Vision of Rape Law", p.1099, discussing research from Scheppelle and Bart 1983, Pauline Bart and Patricia O'Brien, Stopping Rape (1985), and Lynda Holmstrom and Ann Burgess, The Victim of Rape (1978) at 260.

<sup>298</sup> See Dyer and Morris, "Rape Case Student 'Conscious'", Guardian, Nov. 25, 2005: it was the prosecutor, Huw Rees, who stopped the trial of Ruairi Dougal when the complainant under cross-examination could not say she remembered the whole incident of drunken sex well enough to prove she had not said or done anything to communicate consent. Rees said "drunken consent is still consent" to the judge--even though not remembering everything is far from proof that she had communicated consent. Rees also ignored the wording of the Sexual Offences Act 2003 c.42 section 74 that consent means "a person consents if he [sic] agrees by choice, and has the freedom and capacity to make that choice".

and used rape myths to justify their behaviour to disciplinary bodies and courts.<sup>299</sup>

Raped women have to calculate how many other relationships will be lost if they accuse known assailants. They often conclude that confronting rapists is not worth it. But courts still ignore the socialization of ordinary women, particularly their interests in marriages--both current relationships in which they are invested and those they hope for in the future. In the end, raped wives are not advantaged over raped women with bad sexual reputations. As Catharine MacKinnon commented in 1989:

Virtuous women, like young girls, are unconsenting, virginal, rapable. Unvirtuous women, like wives and prostitutes, are consenting, whores, unrapable.<sup>300</sup>

Physically abusive men, especially battering husbands, frequently demean their victims' chastity: "the characterization of women as 'sluts'...runs like a sturdy thread through women's accounts of sexual victimization...to humiliate, to eroticize, and...for self-justification."<sup>301</sup> Some prostitutes reported they were used in threesomes by men to punish and humiliate their wives, threatened with abandonment if they did not agree to certain sexual services and scenarios.<sup>302</sup>

That rape complainants had to meet a "resistance standard [which] requires women to risk injury to themselves"<sup>303</sup> has, since the nineteenth century, created male expectations that sexual aggression is condoned. Law, by punishing women who behaved passively (although culture taught them to behave passively), immunized men who frighten women.<sup>304</sup> To a frightening extent, it still does so. If a woman did not fight back like a man<sup>305</sup>--if she acted like a woman was supposed to act--she could be silenced in a continuing and cumulative way. One rape could ensure a continuing supply of sex.<sup>306</sup>

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<sup>299</sup> Eschholz and Vaughn, "Police Sexual Violence and Rape Myths", see especially table of cases with reference to rape myths, Table 1, p.391.

<sup>300</sup> MacKinnon, Towards a Feminist Theory of the State, p.175.

<sup>301</sup> Baldwin, "Split at the Root", p.60. See also p.61, note 40, Margo St. James, founder of COYOTE, which advocates legalization of prostitution, agreed with radical feminists about the connection between whore talk and battery of wives, in "(Comment) From the Floor", Laurie Bell, ed., Good Girls/Bad Girls (1987), p.130.

<sup>302</sup> Ibid., pp.62-3, note 43, former prostitute Evelina Giobbe's comments, "Confronting the Liberal Lies about Prostitution", in Dorchen Leidholdt and Janice Raymond, eds., The Sexual Liberals and the Attack on Feminism (1990), pp.67-77, at pp.76-7.

<sup>303</sup> Estrich, "Rape", p.2001.

<sup>304</sup> Ibid., pp.1092,1091, 1093, and 2002.

<sup>305</sup> Scheppele, "Just the Facts", p.126.

<sup>306</sup> Romney, p.875, critiqued the Millberry dicta on sentencing marital rapists because the court ignored

(continued...)

Female fearfulness, weakness, and passivity have become erotic.

Wholesale rejection of claims of rape has a pedagogical effect, not only upon women, but men. The spectacle of law humiliating women teaches men that the law will interpret preferred feminine qualities to their benefit, granting them impunity to take sex. In fact, men will often be perceived as "masculine" for not allowing women to refuse them sex.<sup>307</sup> This empowers men in private life to sexually exploit well-socialized, "good" women who trust them for protection against strange men.

Men who believe rape myths have higher "proclivity to rape": when researchers have asked them if they would commit rape if they knew they would not be caught,<sup>308</sup> they obtained rates as high as 35% among ordinary college students.<sup>309</sup> When they did not label scenarios rapes, but ensured the scenarios met legal rape criteria, up to 44% of college

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<sup>306</sup>(...continued)

that "women who are raped by someone they know may have a well-founded fear that a rape might be repeated. Several studies of marital rape have also indicated that...repeat victimisation is commonplace: [the] "one-off rape" is unusual. Once a woman had been raped by her husband, the rapes continued frequently" (quoting Painter, Wife Rape, Marriage and the Law, p.55); he also noted Finkelhor and Yllo, License to Rape, p.215, Table A-20, showing 72% of 46 raped wives surveyed were raped at least twice.

<sup>307</sup> See Theriault and Holmberg, p.110: rape myth belief correlated with women's desire to appear to be socially acceptable; college women were affected by the "backlash against feminism", and affected conservatism in gender attributes to be socially desirable. Benjamin Locke and James Mahalik, "Examining Masculinity Norms", Journal of Counseling Psychology (2005), pp.279-83, found specific norms of masculinity--having power over women, being a playboy, homophobia, dominance, being violent and taking risks--correlated with rape myth beliefs and actual sexual aggression. Burt, "Cultural Myths", 1980, found traditional gender beliefs associated with high belief in rape myths; Check and Malamuth, "Sex Role Sterotyping", 1983: traditional views of sex roles caused arousal patterns similar to identified rapists; G.L. Fischer, "College Student Attitudes", Archives of Sexual Behavior (1986), pp.457-66: belief in traditional sex roles for women is related to acceptance of date rape; Koss and Dinero, "Predictors of Sexual Aggression": traits associated with masculinity predicted pro-rape attitudes in men. Caron and Carter, "The Relationships Among Sex Role Orientation", correlated rape myth acceptance with high acceptance of violence against women, low preference for egalitarianism in male-female relationships, and viewing rapists as high in masculinity.

<sup>308</sup> Malamuth, "Rape Proclivity"; Malamuth and Check, "The Effects of Aggressive Pornography"; G. Smeaton and D. Byrne, "The Effects of R-rated Violence and Erotics", Journal of Research in Personality (1987), pp.171-84; V. Greendlinger and D. Byrne, "Coersive Sexual Fantasies", Journal of Sex Research (1987), pp.1-11; Quackenbush 1989; Lonsway and Fitzgerald 1994; Rudman and Glick.

<sup>309</sup> Malamuth 1981. Rates for convicted rapists are not remarkably greater than ordinary college men. See D. Scully and J. Marolla, "Convicted Rapists' Vocabulary", Social Problems (1984), pp.530-44, and "Riding the Bull at Gilley's", Social Problems (1985), pp.2551-63; and M. Prah and M.M. Ayerakwa, "How Rape Offenders View Their Crimes", IFE Psychologia (2001), pp.193-205.

men agreed they would do the same as the men in the stories.<sup>310</sup> Rape myths may be "psychological releasers or neutralizers allowing potential rapists to turn off social prohibition against injuring or using others when they want to commit an assault."<sup>311</sup>

The more scenarios diverge from stranger rape,<sup>312</sup> the more men condone rape. The higher belief in rape myths, the more acquaintanceship leads to less perpetrator blame, lower expected trauma and reporting to the police, and greater victim blaming.<sup>313</sup> Rape myth acceptance is related to male sexual arousal to depictions of rape.<sup>314</sup> Rape myth acceptance and proclivity go up when men watch a soft pornographic movie before being tested;<sup>315</sup> these effects are even stronger if the movies depict women apparently enjoying violence, force, submission and degradation.<sup>316</sup> What this means is that systematically underperforming rape law impacts sexual psychology, behaviour and identities. With rape law obsessed with

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<sup>310</sup> Bohner, Weisbrod, Raymond, Barzvi and Schwarz; Chiroro, Bohner, Tendayi Viki and Jarvis; Bohner, Reinhard, Rutz, Sturm, Kerschbaum and Effler; Bohner, Jarvis, Friederike Eyssel and Frank Siebler, "The Causal Impact of Rape Myth Acceptance", European Journal of Social Psychology (2005), pp.819-25, 44% men in the college sample were coercive, p.822.

<sup>311</sup> M.R. Burt, "Attitudes Supportive of Rape in American Culture", Hearing, 95th Congress, 2nd Session (1978), pp.277-322 at 282. See also Abrams, Tendayi Viki, Masser and Bohner, p.111; Chiroro, Bohner, Tendayi Viki and Jarvis, p.429.

<sup>312</sup> Bettina Frese, Miguel Moya and Jesus Megias, "Social Perception of Rape", Journal of Interpersonal Violence (2004), pp.143-61, especially 147-9, 151-6. Acquaintance rape was the most distant condition from stranger rape; marital rape was intermediaten, because unlike acquaintance rape, the wife was not described as drunk or provocatively dressed. See also Chiroro, Bohner, Tendayi Viki and Jarvis; Bohner, Weisbrod, Raymond, Barzvi and Schwarz.

<sup>313</sup> See Frese, Moya and Megias, pp.151-5. These effects were found in both genders, but men had higher average levels of belief in rape myths, and a stronger negative effect from belief on sympathy for victims of acquaintance rape. See also, B. Masser, G. Tendayi Viki, and D. Abrams "Evaluating Stranger and Acquaintance Rape", Australian Journal of Psychology (2003), p.52.

<sup>314</sup> Chiroro, Bohner, Tendayi Viki, and Jarvis, especially pp.437-8; Eileen Zurbriggen and Megan Yost, "Power, Desire and Pleasure in Sexual Fantasies", Journal of Sex Research (2004), pp.288-300, at 295, Figure 2: Rape Myth Acceptance and fantasies of dominance highly positively correlated for men, negatively correlated for women; Adversarial Sexual Beliefs highly positively correlated with fantasies of dominance for men, slightly negatively correlated for women; and Attitudes towards Women scale items reflecting liberal attitudes to women's status in society, moderately negatively correlated with dominance fantasies for men, positively correlated for women.

<sup>315</sup> See Gibson and Gibson, Dirty Looks, p.12.

<sup>316</sup> *Ibid.*, p.13.

"rapists' rights",<sup>317</sup> and feminine weakness sexualized, the result is a "broad male freedom to 'seduce' women who feel powerless and vulnerable and afraid."<sup>318</sup>

Rape law originally evolved to make it easier for women to be sexually exploited within relationships which ensured access in private. The wife, continually assenting, became the model for all women a man could access in private. But the wife was by no means the only unrapeable, privately contained, sexually controlled woman. Women socially constructed as having a duty to provide sex to any men--prostituted women, or lower class women--became "rentable wives", sexual servants employable at will. In this way, the marital exception was the central feature of rape law.

## G. THE END OF THE TRADITIONAL COURTSHIP SYSTEM

Before that May evening in 1817 when Ashford and Thornton met at the country dance, neither young person was perceived as crossing moral boundaries. The "evidentiary presumption"<sup>319</sup> of the historian's trade is in favour of taking account of the usual circumstances at the time; so evidence should be required to disprove the innocence of the encounter, rather than to prove it innocent. No one expected Mary Ashford not to try to meet young men: lower class women were economically constrained to marry. Wise communities encouraged dances and fairs with informal "chaperonage" (the old socializing with the young). The community expected girls to meet prospective husbands, while the community kept close enough watch to force any beau to marry her should she become pregnant.

The first casualty of the war on women heralded by Thornton's acquittal was the relatively free and respectful courtship system which English young people had utilized for at least three centuries. A regime blaming outdoor rapes on women if they went about unchaperoned lessened young women's power to control courtship. It meant the window of

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<sup>317</sup> Eskow, p.679: Hale has "legendary status as the progenitor of rapists' rights generally". See also G. Geis, "Lord Hale, Witches and Rape", British Journal of Law and Society (1978), pp.26-44; David Lanham, "Hale: Misogyny and Rape", Criminal Law Journal, (1983), pp.148-66, which defended Hale against critics calling him a misogynist. While I do not wish to defend Hale, I think it is more important to see his misogyny as part of his cultural formation as a man of his time; his views on resistance and on the use of women's characters were better than many other seventeenth and eighteenth century theorists, and certainly not as harsh as nineteenth century judges. On the other hand, Hale was the earliest authority for the marital rape exception, see MacFarlane, "Historical Development of the Offence", pp.31-3; Robin West, "Equality Theory, Marital Rape and the Promise of the Fourteenth Amendment", Florida Law Review (1990), pp.45-80; and Jill Elaine Hasday, "Contest and Consent: A Legal History of Marital Rape", Occasional Paper University of Chicago Law (2000).

<sup>318</sup> Ibid., p.2019.

<sup>319</sup> I am applying the language of one field, Law, to another, History, to describe the attention to context, and self-censuring attitude to hindsight, which good historians apply to the task of reconstructing the mores of past actors: a good historian requires an "evidentiary burden" to be met to prove the side of the case which would require the greatest leap away from the usual experience of the past era. Nevertheless, I think the interdisciplinary intertextuality I have indulged in here is apt, and helpful to explain history to lawyers.

opportunity for female expression of independent personality--the blossoming into personhood during adolescent negotiation of marriage--was narrowed and restricted.<sup>320</sup>

Fear of rape, and experience of rape trauma, probably increased for women in the 1810s. Rape prosecutions threatened women's sexual reputation more than ever before. Increasingly harsh legal judgments of women and girls who reacted to rape in typical, ordinary ways, ensured more distress. As Estrich put it in the 1980s:

I learned, much later, that I had "really" been raped....Unlike, say, women who are "asking for it"....[S]eemingly intelligent people explained these distinctions to me...How terrible to be--what to call it--a "not real" rape victim.<sup>321</sup>

Any young woman may encounter what feminist psychiatrist Judith Lewis Herman dubbed the "traditional female misfortunes"<sup>322</sup>--spousal abuse, sexual assault, or abandonment with children. Unreasonably questioning Mary Ashford's honour sent the message, in 1817, that compliance with ordinary social rules of courtship was not enough. If a "usual tragedy" occurred, no amount of obedience would help. The social world suddenly failed women. It was as if the raped/"fallen" woman fell through a trap door and disappeared. But the new ideological black holes were not accepted without resistance. Sudden legal reinterpretation of ordinary behaviour as looseness can lead to paralysis and despair, or rage and rebellion. The balance would vary by historical era.

In the early nineteenth century, the French Revolution's new contractual analysis of men's relationships with each other was victorious against the Ancien Regime;<sup>323</sup> but contractual analysis of men's and women's relationships were limited. Bourgeois leaders did not allow men's rights to undermine women's subordination. At just this time, the rape law in Britain evolved in ways that made the lives of girls and women more frightening.

The first change occurred when some judges began making women testify much more explicitly, insisting on ejaculation.<sup>324</sup> This was based on the opinions of certain judges, not statute. But judicial opinion has more impact in rape

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<sup>320</sup> Hartman, pp.54-7.

<sup>321</sup> Estrich, "Rape", p.1088.

<sup>322</sup> Judith Herman, Father Daughter Incest (1981), p.34, summarizing evidence that child sexual abuse leads to women experiencing much higher rates of these problems, or revictimization, as adults.

<sup>323</sup> Pateman, The Sexual Contract, pp.77. 79-81.

<sup>324</sup> MacFarlane, "Historical Development of the Offence", pp.40-8, discussing the leading case of R. v. Hill (1781) 1 East P.C. 439, followed by R. v. Parker (1812) 1 Russell 560. In 1721, the court decided to reindict the accused on a misdemeanour because it could not decide if emission was really necessary in R. v. Duffin 1 East P.C. 437. On the other hand, some judges continued to decide cases based on penetration, not emission of semen, see R. v. Sheridan (1768) 1 East P.C. 438 and especially R. v. Russen (1777) 1 East P.C. 438. In Russen, a schoolgirl was shown to have a tiny vaginal opening and an intact hymen but claimed both penetration and emission by her teacher (probably indicating slight penetration followed by ejaculation on her body), and he was convicted. But in Hill, only four years after Russen, a panel of ten

(continued...)

than other areas of criminal law. When legislatures repealed statutes requiring corroboration and resistance in the 1970s and '80s, prosecutors and judges continued to impose them:<sup>325</sup> "In the law of rape, supposedly dead horses continue to run."<sup>326</sup>

But the most harmful evidentiary change in the early nineteenth century was demanding the complainant show sex had been "against her will" by showing she exerted her will through resistance. This change persisted into our era and affects the law even after our recent reforms,<sup>327</sup> in defiance of the plain meanings of the black letter language of the reformed

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<sup>324</sup>(...continued)

judges decided seven to three there must be evidence of ejaculation because the law had changed in recent years. The variability of opinion is only slightly less extraordinary than the fact, as MacFarlane put it, "that the issue became a live one in the first place" since "[t]he wrong sought to be prohibited by the law was unwanted sexual penetration of a woman by a man. Once penetration was accomplished, the evil sought to be avoided had occurred" (p.41). As early as 1803, in East's Pleas of the Crown, p.436-7, some lawyers were noting that "all further enquiry were unnecessary after satisfactory proof of the violence...perpetrated by actual penetration of the unhappy sufferer's body. The quick sense of honour, the pride of virtue, which nature...hath implanted in the female heart...is already violated past redemption, and the injurious consequences to society are in every respect complete." But in the 1820s, treatise writers treated the requirement as settled law: see Russell, On Crimes and Misdemeanours, (1826), p.560, and J.F. Archbold, Pleading and Evidence in Criminal Cases (1822), p.260. MacFarlane said this judicial overreaching which compelled Parliament to act: The common law had taken a turn which made many rapes "impossible to prove, and the courts were not signalling an intention to retreat from this position". Peel's Act of 1828 began the process of Parliament not only stipulating appropriate sentences, but reigning in the courts on evidentiary matters, to preserve the administration of justice in good repute. But in 1831, only three years after the Act, R. v. Russell (in Henry Roscoe, The Law of Evidence in Criminal Cases (1852), p.861) the court decided ejaculation had to be proved, because: though "[i]t is not necessary specifically to prove it,...the circumstances must be such as infer that that fact, and everything else essential to carnal knowledge, took place. The Statute did not intend to make less necessary to complete the offence than before...The jury, therefore, must be satisfied that the emission occurred, to convict." In 1832, though, R. v. Reekspear 1 Mood. 341 E.R. V.168 1296, and R. v. Cox 5 Car. & P. 297 E.R. V.172 985, upheld the statute and did not require emission to be proved. MacFarlane concluded: "It was evident that a tension was starting to develop between the courts and the legislature" which "continued well into the twentieth century and...continues even today" (p.48). Legislatures have continued to attempt to restrain courts ever since.

<sup>325</sup> Scheppelle, "Just the Facts", at pp.124-6.

<sup>326</sup> Susan Estrich, "Rape", p.1091.

<sup>327</sup> Scheppelle, p.124, notes 1 and 3; see also pp.130-2, discussing Anita Hill's lack of complaint about sexual harassment by Clarence Thomas at the time it happened. For example, Senator Leahy actually phrased a question to Hill in this form: "how she could have allowed this 'reprehensible conduct to go on right in the headquarters' of the agency charged with enforcing sexual harassment laws", p.132 quoting Nomination of Clarence Thomas to Associate Justice of the Supreme Court of the United States: Hearings of the Senate Judiciary Committee, 102d Cong. 2d Sess., Federal News Service, Oct. 11, 1991. Even the phrasing of the question suggests the insistence on resistance by the subordinate female, on pain of being made grammatically into the only responsible party in a sexual encounter with a man.

statutes, especially in Canada.<sup>328</sup> Our recent resistance requirements began with "consent to force" in Ashford's rape and murder.

But the scariest change for raped women was not strictly legal--the solidarity raped girls and women could expect from other women diminished. After the 1810s, there was a shift in the rape records Clark sampled for London and rural Yorkshire between 1770 and 1840: rape victims were increasingly blamed, silenced, and rejected. That a rape would not be met with comforting from other women, but victim blame, was the real innovation and sting of "stranger danger".<sup>329</sup> How rape victims imagine other women responding has a direct impact on their mental health. But our culture's "scripts" about rape do not reflect raped women's realities: they construct women as provocative, and men's sexual desire as overwhelming. The only script for a "real rape"--a crime which is the responsibility, not of the victim, but a "real rapist"--attributes rape to crazy or deviant men.<sup>330</sup>

Whether a woman can imagine validation impacts what she says about the event.<sup>331</sup> Support from others can protect her from scripts damaging to her self esteem (provocative woman and overwhelming male desire scripts) or loss of hope

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<sup>328</sup> Canadian statute law on sexual assault, since 1993, clearly removes any resistance requirement to show non-consent. *Crim. Code, S.265 (3)* defines four situations in which consent may not be found to an assault, though "the complainant submits or does not resist": (a) "application of force to the complainant or a person other than the complainant"; (b) "threats or fear of the application of force" to C. or another; (c) "fraud"; and (d) "the exercise of authority". *S.273.1 (1)* stipulates, for sexual assault, that "consent means...the voluntary agreement of the complainant to engage in the sexual activity in question"; (2) defines five situations in which consent cannot be found to sexual activity, all derived from case law. These include: (a) consent was "expressed by the words or conduct of a person other than the complainant" (reflecting *Morgan v. DPP* [1976] A.C. 182, when the husband told other men his wife would pretend to not consent because she was "kinky"); (b) the C. "is incapable of consenting" (reflecting drunkenness cases); (c) the A. "induces" the C. "to engage in the activity by abusing a position of trust, power, or authority" (reflecting cases in which step-fathers, teachers, or employers claimed they received consent from young people in their care or employ); (d) the C. "expresses, by words or conduct, a lack of agreement..."; and (e) the C., "having consented..., expresses by words or conduct, a lack of agreement to continue to engage in the activity" (reflecting *R. v. Pappajohn* [1980] 2 S.C.R. 120, a case of sexual activity in ambiguous circumstances, where the accused might have believed the first activity was consented to, but then proceeded to more sex with bondage, from which the C. escaped). *S.273.2* denies mistaken belief in consent where (b) the A. "did not take reasonable steps, in the circumstances...to ascertain that the complainant was consenting". *S.274* removed the corroboration requirement; *S.275* removed rules of recent complaint; and *S.278* removed the spousal exception. Yet, long after the passage of these statutes, in cases such as *R. v. Ewanchuk* [1999] 1 S.C.R. 300, *R. v. Esau* (1997) 116 C.C.C. (3d) 289 (S.C.C.), *R. v. Malcolm* (2000) 35 C.R. 5th 365 (Man. CA), *R. v. Park* [1995] 2 S.C.R. 836, *R. v. Edmondson* (Sept. 4, 2003, Melfort, Sask. and [2005] SkCA 51) and *R. v. Kindrat and Brown* (July 10, 2003, Melfort, Sask.), issues of lack of sufficient resistance, complainant drunkenness, and even the importance of the age of consent were raised, much as if the laws had not been changed.

<sup>329</sup> Clark, *Women's Silence*, pp.6-7, 21-30.

<sup>330</sup> Scheppele, pp.142-3.

<sup>331</sup> *Ibid.*, pp.126-7.

of ever feeling safe again (maniac script). In the absence of support, a rape victim raped by a "normal" man--the overwhelming majority<sup>332</sup>--will not be able to use the maniac script and will tend to relate to one of the other two scripts to process her experience. So the rape was her fault because she was provocative, or a manifestation of natural male sexual desire. She may distort her narratives into a shameful secret.<sup>333</sup> She may decide it is the best she can expect.

...[I]f violence is 'not supposed to happen' or is 'not supposed to happen to me,' then it may be hard to narrate the violence credibly because she must first explain to herself why this particular 'I' was singled out for the violence...and why this particular 'him' did this...[A] woman must narrate into some powerful cultural headwinds, forces of opposition that appear natural, unless she can cast her experience in the light of an obvious, socially comprehensible narrative.<sup>334</sup>

Raped women behave differently from commonsense expectations, largely due to rape myths: the most powerful effects of discriminatory myths occur through internalization by the targeted group. If a raped woman tries to fit her experience into the rape script about imperative male sexuality, she may submit to further sexual exploitation, a violent love affair, or even marriage with a man who degraded her.<sup>335</sup> She may blame herself for the man's "uncontrollable" sexual feelings:

...I was feeling coerced and not doing it willingly most of the time....But...I'm not sure it was done by him. It was really my own upbringing and the things that I'd been taught...He couldn't have really raped me. I was allowing my own body to be violated, and that's not rape. My allowing it is what makes it not rape.<sup>336</sup>

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<sup>332</sup> Ibid., p.143, notes "the evident social competencies of many men who harass, beat, rape or assault women." See also J. Check and N. Malamuth, "An Empirical Assessment of Some Feminist Hypotheses", International Journal of Women's Studies (1985), pp.414-20, at 415.

<sup>333</sup> Ibid., pp.126-7: "The very fact of delay or change is used as evidence that the delayed or changed stories cannot possibly be true. But abused women frequently have exactly this response: they repress what happened; they cannot speak; they hesitate, waver, and procrastinate; they hope the abuse will go away; they cover up for their abusers; they try harder to be 'good girls'; and they take the blame for the abuse upon themselves."

<sup>334</sup> Ibid., p.142.

<sup>335</sup> Eskow, pp.692-3, discussed one of the first spousal rape cases which received media attention in the US, Oregon's 1978 Rideout case. The wife, Greta Rideout, was ridiculed in the press when, a year after John's acquittal, she went back to him. Yet this was not really surprising: the rape had occurred during a physically violent marriage. The press did not report that John began physically assaulting her again, they divorced, she obtained a restraining order against him, and he ended up serving a term for violating the restraining order. In other words, "[t]he Rideouts were a classic example of a couple trapped in a domestic violence cycle. Greta's post-trial reconciliation with John is not evidence of a rape hoax, but rather the classic behavior of a battered woman." See also Robin West, Progressive Constitutionalism (1994), p.163: "Eventually her desires become a function not of her pleasures but of his pleasures; she wants literally to please him rather than herself because to please herself is too dangerous."

<sup>336</sup> Ibid., p.690, quoting Finkelhor and Yllo, p.86.

Belief in husbands' rights still lessens reporting in spousal rape cases.<sup>337</sup> A woman may "'consen[t]" to sexual enslavement "in a comparatively protective relationship."<sup>338</sup> Rapes within relationships

can feel...mystical...a transcendental, transformative experience. Self-objectification can feel beautiful. It feels palpably meaningful to enrich the life of someone who is admirable...by merely being, and by giving what you are. The gift of self can feel more significant, universal, transcendental, and religious than the paltry competition for status...<sup>339</sup>

Victims of spousal rape often describe their experiences as not quite rape: "It was almost like rape", "He pinned me down like he was raping me", or "It was just like a rape, except I was on [my own] bed."<sup>340</sup> Raped wives are more likely to recant accusations and return to their husbands.<sup>341</sup>

Martin Wiener noted that Victorian images of women as victims of male violence were double-sided, not easily understood as purely advance or regression from the seventeenth century demonization of lewd and unfaithful wives.<sup>342</sup> Seeing women as easy prey for male victimization reflected a kind of new respect for femininity--and it certainly lowered the rate of execution of women who killed husbands.<sup>343</sup> But it also led to representations of female sexuality which idealized it as so passive that it caused "a loss of agency" in reality.<sup>344</sup> "Innocent" victims may be more trapped in victimization than "bad girls"; the association of sexual coercion with marital intimacy may control women's sexuality more effectively--through bonds of "love"--than would be possible through punitive denunciation of demonized "bad girls" alone.

It is distressing--but understandable--when raped women normalize exploitative sexual objectification. If a woman constructs sexual submission as fulfillment of her marital duty, she can live with bargaining away her "self-sovereignty"

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<sup>337</sup> Ibid., p.689.

<sup>338</sup> Robin West, "The Difference in Women's Hedonic Lives", p.165.

<sup>339</sup> Ibid., p.179. Here, she was referring to consensual relationships between postsecondary female students and male professors, and how the students may feel they are "giving to the culture" of the field by meeting the needs of an intellectually superior man.

<sup>340</sup> Eskow, p.690, quoting quoting Russell, Marital Rape, p.53.

<sup>341</sup> Ibid., p.693.

<sup>342</sup> Wiener, pp.185-7, 193, 204.

<sup>343</sup> Ibid., pp.198-201.

<sup>344</sup> Ibid., p.211.

in return for "survival".<sup>345</sup> If a raped woman has no female affirmation, is it any wonder, in a misogynistic culture, if she develops an abject identity?

...[O]ne of women's most disabling problems is that women lie...We tell others we are happy when we are not; we tell others that our marriages are good when they are in fact brutal; we tell others we are orgasmic when we are not; we tell others we are sexually fulfilled when we are deprived. We smile on the street...when we are being threatened and feeling pain...[W]e lie...to fulfill the politically dictated expectations of others...We lie so often we lack the sense of internal identity necessary to the identification of a proposition's truth or falsity. We lie so often that we lack a self who lies...Our lives are themselves lies.<sup>346</sup>

If a raped woman assimilates her experience with a respectable man according to cultural narratives, she will not immediately complain. She will deny that rape happened, and may even say so in private.<sup>347</sup> Later, she may decide that the experience only makes sense as violation.<sup>348</sup> But by then, that she did not immediately tell a story of abuse<sup>349</sup> can be used to discredit her. Her earlier version makes her revised narrative undecipherable to a legal system which insists on coherent, unchanging, clear and immediate, complaints.<sup>350</sup>

People attempt to make sense of the world by developing hypotheses that make reality appear morally correct. A "just world hypothesis", that "good things happen to good people and bad things happen only to bad people", is common. If women practice certain virtues, the "just world hypothesis" suggests they will be appropriately rewarded. The "just world hypothesis" is fundamental to women's belief in rape myths<sup>351</sup>--especially those that blame the victim for the rape.<sup>352</sup>

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<sup>345</sup> Eskow, p.683, quoting Robin West, Progressive Constitutionalism, p.63.

<sup>346</sup> West, pp.196-7, discussing Adrienne Rich's observation in On Lies, Secrets, and Silence (1979).

<sup>347</sup> Scheppele, "Just the Facts", pp.138-9.

<sup>348</sup> Ibid., p.140. She included, among the factors that may make women more able to narrate rape as violation, "therapy" and "becoming overtly feminist" as well as "getting enough emotional distance."

<sup>349</sup> Ibid., pp.143-4.

<sup>350</sup> Ibid., pp.127 and 151, noted that the mainstream legal view follows positivistic assumptions that "the truth is singular, immediately apparent, and permanent"; see also pp.128-31, 133-5 discussing how revision of narratives played out in Anita Hill's testimony against Judge Clarence Thomas during his Senate Confirmation Hearings, and pp.145-8 relating to other sexual harassment cases.

<sup>351</sup> H. Sinclair and Lyle Bourne, "Cycle of Blame or Just World?", Psychology of Women Quarterly (1998), pp.575-88, at 584-7, explored male and female patterns for making sense of fictional rape case verdicts presented in scenarios, relating them to rape myth acceptance and also degrees of empathy for the rape victims. They found that when men were told the verdict was not guilty, their rape myth acceptance scale scores rose, and when told the verdict was guilty, their acceptance of rape myths was reduced. However, for the women, the verdict of guilty led to higher rape myth acceptance, and not guilty to lower

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Rape victims who deny that their experiences were rape had more intimate relationships with their rapists than those who acknowledge their rape.<sup>353</sup> Wives who believe in marital duty often take rape as evidence of failure to meet their husbands' needs rather than abuse of their rights, because their usual sex has long been "rape-like".<sup>354</sup> "Acceptance of interpersonal violence and beliefs that sexual relationships are inherently exploitative correlate highly with rape myth acceptance."<sup>355</sup> Rape myths have a direct effect on the rape victim's prospects for achieving voice in the discourse of moral disapprobation and behavioural deterrence which is the domain of law.

Rape mythology turns attention away from how the majority of victims are raped, discounting acquaintance rapes. The result is to divert attention from the system that rape functions to normalize: the system of male control of female sexuality within heterosexuality and marriage. They obfuscate the link between distrust of women's testimony in rape cases, and society's enforcement of cooperation with men's sexuality on women in courtship. But the link is there. It has been demonstrated. Rape myths function within a systemic gender ideology to promote women's consent to lifelong sexual and domestic service to men.

Rape law, by legitimizing rape myths, affects women's culture. Rape myths not only silence raped women, but

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<sup>351</sup>(...continued)

rape myth acceptance. Men had higher rape myth acceptance over all conditions, and were more easily influenced by the confirmatory effect of fictional legal verdicts; but to explain the rise in women's rape myth acceptance when verdicts were guilty, Sinclair and Bourne suggested women, because of more fearfulness of rape happening to themselves, had more of a need to distance themselves from other women who they saw as confirmed victims of rape. If rape had to be real, they would prefer to think that its victims must be bad women unlike them.

See also Hickman and Muehlenhard, pp.527-47, at 541-2, explains why women who say that they know acquaintance rapes are more common than stranger rapes, nevertheless assess their own risks of acquaintance rape lower than that of other women and express more fear related to stranger rape scenarios than acquaintance rape scenarios: they appeared to believe in "Unique invulnerability"--lower risks to self than to peers--based on "fundamental assumptions that the world is benevolent and meaningful and that the self is worthy", that "bad things do not happen to good people, so the worthy self is not in danger." See also Scheppele, p.142.

<sup>352</sup> Sinclair and Bourne, pp.578, note that women are much lower on most aspects of rape myths except for victim-blaming, where women's acceptance rises to nearly as high as men's. See also: P. Gilmartin-Zena, "Gender Differences in College Students' Perceptions", Free Inquiry in Creative Sociology (1994), pp.2-12; T.H. Frieze, "The Female Victim", in G.R. VandenBos and B.K. Bryant, eds., Cataclysms, Crises and Catastrophes (1987), pp.113-46; I.H. Frieze and M.C. McHugh, "When Disaster Strikes", in C. Tavris, eds., Everywoman's Emotional Well-Being (1986), pp.349-70; L. Ledray, Recovering from Rape (1986); and Sanday, A Woman Scorned.

<sup>353</sup> Mason, Riger and Foley, "The Impact of Past Sexual Experiences", p.1159.

<sup>354</sup> Eskow, p.686, noted wives often believe that they earn protection from husbands by providing "coercive sex without force or threat", "unwanted sex, or sex where women are passive and servicing their husbands".

<sup>355</sup> Mason et. al., p.1160.

most women. Rape myths encourage lack of disclosure so that rape laws fit cultural institutions of compulsory heterosexuality: rape mythology is central to rape law, not an unfortunate accretion to it. The Victorian system of rape mythology upheld specific nineteenth century forms of gendered and classed power.

Modern researchers identify empathy from other women as crucial for rape victims to resist rape myths<sup>356</sup> and to heal.<sup>357</sup> But if other women believe rape myths they distance themselves from victims.<sup>358</sup> Rape myths divide women, isolating some from the solidarity of others; rape myths divide women into good or bad women. Rape myths, especially ones which suggest "no one will believe me", define a sexual paranoia peculiar to women. That sexual paranoia is still all too real. It is a burden on present day women which must be removed.

## H. CONCLUSION: USEFUL FEMINIST LEGAL HISTORY

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<sup>356</sup> B.L. Shapiro and J.C. Schwartz, "Date Rape", Journal of Interpersonal Violence (1997), pp.407-20.

<sup>357</sup> E.B. Kubany, F.R. Abueg, J.A. Owens, J.M. Brennan, A.S. Kaplan and S.B. Watson, "Initial Examination of a Multidimensional Model of Trauma-Related Guilt", Journal of Psychopathology and Behavioral Assessment (1995), pp.353-76: Lack of empathy and validation by others is associated with self-blame and guilt which leads to Post Traumatic Stress Disorder, depression, poor self-esteem, shame, fear of social situations and suicidal ideation. R.C. Davis, E.R. Brickman and T. Baker, "Effects of Supportive and Unsupportive Responses of Others", American Journal of Community Psychology (1991), pp.443-51, and S.E. Ullman, "Social Reactions, Coping Strategies, and Self-Blame", Psychology of Women Quarterly (1996), pp.505-26: negative responses to disclosures are associated with strong negative effects on psychiatric symptoms. See also: Bechhofer and Parrot, "What is Acquaintance Rape?"; Shapiro and Schwarz, "Date Rape"; and G.E. Wyatt, "The Sociocultural Context of African American and White American Women's Rape", Journal of Social Issues (1992), pp.77-91.

<sup>358</sup> Gerd Bohner, "Writing about Rape: Use of Passive Voice and Other Distancing Text Features", British Journal of Social Psychology (2001). pp.515-29, at 516-7, 519 examined the stories students wrote describing what they had seen one of two silent videos depicting rape which either could or could not be interpreted in terms of rape myths. When they could be interpreted in terms of rape myths, the use of passive voice climbed, and passive voice was always used more frequently to describe the actual rape than other actions in both videos. Use of passive voice was associated with rape myth acceptance and perception of victim responsibility and reduced responsibility of the assailant. Passive voice obscures the agency of the actor and places the object of action in the foreground, and the English "'get'-passive" is particularly associated with the implication that the object of action is responsible; "the passive allows for an interpretation of actions as 'occurrences'". See also J. Penelope, Speaking Freely (1990) and S. Lamb, "Acts without Agents", American Journal of Orthopsychiatry (1991), pp.250-7 (a study of psychological journal articles). N.M. Henley, M. Miller and J.A. Beazley, "Syntax, Semantics, and Sexual Violence", Journal of Language and Social Psychology (1995), pp.60-84 found that American media used the term "raped" in the passive form 70% of the time. For other specific aspects of victim-blaming, see: C.A. Scronce and K.J. Corcoran, "The Influence of the Victim's Consumption of Alcohol", Violence Against Women (1995), pp.241-5; L. Cassidy and R.M. Hurrell, "The Influence of Victim's Attire", Adolescence (1995), pp.319-24; J.E. Workman and R.L. Orr, "Clothing, Sex of Subject, and Rape Myth Acceptance", Clothing and Textiles Research Journal (1996), pp.276-84; S.M. Fulero and C. DeLara, "Rape Victims and Attributed Responsibility", Victimology: An International Journal (1976), pp.551-63; and A.R. Gold, P.G. Landerman and K.W. Bullocks, "Reactions to Victims of Crime", Social Behavior and Personality (1977), pp.295-304.

We have now examined the history of rape law in a deeply historical way, framing the cases with social and cultural context. Our findings were illuminated by comparing historical cases to feminist analysis grounded in contemporary experiences of women. This process allows us to connect the experiences of women to legal doctrine in a way that illuminates mechanisms of oppression.

By exploring the assumptions behind a bizarre legal doctrine like "consent to force", we ended up with an analysis that takes everyday, normal cultural institutions--like marriage--and reveals they are compatible with women living lives of horror. Young women still grow up in a fog of sexual paranoia and jump into relationships with men believing they will be protected, only to find themselves being treated like servants and living lies. This does not always happen, because of human goodness and luck. But we deserve a sexual culture which promotes choice and interpersonal safety, and which does not depend on men's voluntary benevolence and romantic luck for success. Rape and sexual exploitation is too commonly experienced by ordinary "good" women--faithful wives and blameless virgins.

Looking at rape cases in deep historical context allows us to pierce the veils around the use of marriage and courtship rituals to control the sexuality of each new generation of young women. It shows that fear of strange men, bad economics for single women earners, and fear of being marked as sexually tainted and/or sexually rejected, has been perennially used to panic women into heterosexual couple relationships. The problem is not that young women get married, that they enter couple relationships before they know themselves as sexual beings--and that society preempts them educating themselves to a point where they can make informed decisions. Too many women still lose their selves in relationship with men.

Feminist legal history reveals the underlying similarity of political purpose which is served in different times by rape law, despite marked differences in style--for instance, between Victorian damsels terrified of being seen as less than totally sexually innocent, and the current crop of young nubile women flamboyantly packaged as sexual playthings. A mostly male judiciary, using an historically male evidentiary regime, continues to use rape law to manage women's sexuality.

Our anorexic girls flashing skin have the same panicked "deer in the headlights" look in their eyes as did nineteenth century debutantes swathed from neck to ankle. We still live in a world, under a legal system, which is afraid to let its young women make their own sexual choices. We are still on the path which began when Stranger Danger was shoved down the throats of the common people and the sexual ethic which produced North West European marriage pattern was lost. In both eras, now and then, too many young women judge themselves by their market value in a courtship system, instead of recognizing that they are valuable economic partners and can demand that young men please them, to earn their cooperation to form new families.

The history we have surveyed shows that the purpose of rape law since the nineteenth century was never to punish men who have sex without caring about the consent of their female partners--it was to provide a steady stream of brides who would conform to whatever sexual requirements were imposed upon them, and whores readily available to do the same for cash. There is no real distinction between "good girls" and "bad girls" under the rape law, only the cruelty of punishing some women to manipulate others into sexual compliance.

Feminist legal history of rape is not written to be consumed in a detached scholarly spirit. Threat of sexual

violence--and living under suspicion of provoking sexual violence--has long infected and continues to infect the everyday sexual life of orderly, well-behaved females. This is a profoundly disturbing conclusion. Feminist legal history leads to that conclusion. It does not allow us a "comfort zone", or an illusion of a "safe place". It is meant to motivate us to act for change.

It is hard for women to give up the image of the knight in shining armour who will defend our honour and repay our loyalty with protection. The pain of exploded romantic ideals is unfortunate, and can be mourned by even the most toughminded feminist scholar. But the pain is necessary. It represents the first step. The pain of losing our romantic illusions motivates imitation of the first wave feminist ladies, who defied Victorian conventions and renegotiated their own marriages to create homes worthy for real women to live in.

Women's oppression is a difficult historical subject. It presents a pattern of both "endless variety" and "monotonous similarity"<sup>359</sup>--women were rendered second-class citizens and subordinated to men over and over, but in an endless variety of ways. Discovering how the rape law operated alongside marriage and courtship customs unlocks historically unique gender formations. Combined with feminist analysis, it takes us beyond piling up horrific atrocities, or identifying the same unfair bargain under distinct historical masks. It suggests the necessity for women to take control of the rape law and agitate for it to change in real and substantial ways, to promote the sexual autonomy of women.

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<sup>359</sup> Hartman, p.178, quoting Anthropologist Gayle Rubin, "The Traffic in Women: Towards a Political Economy of Sex" in Rayna R. Reiter, ed., Towards an Anthropology of Women (1975), p.160.

# CONCLUSION: THE PURPOSE OF DYSFUNCTIONAL RAPE LAW IN A HIERARCHICAL SOCIETY

James Fitzjames Stephen, in his argument against John Stuart Mill's proposed equality of the sexes, proclaimed: "Follow the matter a step further to the vital point of the whole question--marriage."<sup>1</sup> Equally, marriage is the crux of the chapter in the history of rape law heralded by Thornton in 1817 and existing almost to our day.

Our period of rape history is at the end of what might be called an "industrial" period of rape law--the end of a sort of "long nineteenth century" of adjudication of rape. This period is marked by heroic resistance requirements for female complainants to prove lack of consent, character assassination of the victim based on evidence of past unchastity, and privileging the unreasonable beliefs of some men, that a wide variety of innocuous details of behaviour and appearance amount to evidence of a woman's consent to sex which even clear negative words cannot undermine.

From Sir George Holroyd's outrageous suggestion that battery could lead a woman to "consent to force" out of sympathy for male ardour, in Thornton in 1817, common law judges have continued to discount women's testimony about refusing sex on the basis of male ideas of what "all women" are like. These beliefs have involved assertions that all women are willing to do demeaning and painful things, no matter what the circumstances. No matter how damaging the sex, such men expect still to be listened to in court when they suggest that they should be judged on the basis of their own assumptions that "women are like that".

In industrial rape law, it has become difficult to see the real women for the mythic ones--the masochists who like it rough, the fantasists who like to say No when they mean Yes just to play games,<sup>2</sup> the little girls who want to have sex on the hood of a truck on a dirt road in Saskatchewan with three drunk men,<sup>3</sup> the women who want to be woken up to sex in their own bed with someone other than their partners,<sup>4</sup> the dancers who want to be penetrated on top of a pinball machine in front of a crowd,<sup>5</sup> the prostitutes who want to be surprised by gangs and work for nothing,<sup>6</sup> the ex-wives who want to be

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<sup>1</sup> J.F. Stephens, Equality, Liberty, Fraternity, p.195.

<sup>2</sup> See Morgan v. DPP [1976] AC 192.

<sup>3</sup> Like the facts in R. v. Edmondson (Sept. 4, 2003 Melfort Sask.) and 2005 SKCA 54, and R. v. Kindrat and Brown (July 10, 2003 Melfort Sask.)

<sup>4</sup> As in R. v. Esau (1997) 116 C.C.C. 3d 289.

<sup>5</sup> The scenario in the 1987 movie, "The Accused".

<sup>6</sup> See R. v. Bulmer, [1987] 1 S.C.R. 782.

battered again and then have sex,<sup>7</sup> the young women applying for work who want job interviews to veer from talking about cabinetmaking to simulated intercourse.<sup>8</sup> But what could possibly be the point of a discourse making up pretend women like this?

How does marriage relate to the argument that ordinary women, like Ashford, can be expected to easily consent to degrading violent sex outdoors when bullied by men to meet their desires? By imposing a rule that women could be subjected to great violence, and still not be legally vindicated for suffering rape, "consent to force" activated what second wave feminist Susan Rae Peterson aptly called a "Protection Racket":<sup>9</sup> scaring women out of public space made them more ready to enter highly privatized, secluded domestic lives in marriage. It also made it much more difficult for them to feel secure trying to maximize what economic opportunities were available--because these generally required moving through public space. This even more effectively forced them into marriage as an economic survival strategy.

More broadly, rape law caused a change in the practices of courtship which provided men with more quasi-legitimated premarital and extramarital sexual outlets at the same time as it reenforced the principle of hierarchy when it came to gender, even though the eighteenth century revolutions had shaken it between men. Arranged marriages controlled by parents were supplanted by male freedom to choose on the basis of individual preferences--with the assurance that the women from among whom they might pick would be socialized to please men and adjust to their requirements, sexually as well as in other matters of everyday life. Companionate marriage meant men could pick women trained to be affectionate to them. The practice of keeping a family to provide a haven in a harsh world was expediated.

By establishing one venue where hierarchy would continue to reign, marriage provided compensation to men for the loosening of other types of social hierarchy--by which some elite men lost entrenched privileges, and all men, even those making new fortunes, had been made to confront much more social instability and anxiety. To such men, coming home provided respite because "marriage...confers upon one of the parties authority over the other":

The power exists and is exercised, but as the right to exercise it is undisputed, it acts smoothly, and the parties concerned are seldom unpleasantly reminded of its existence...[M]atters go well, not because the master of the house has no powers, but because no one questions them, and he wishes to use them for the general comfort of the society.<sup>10</sup>

From being feared as the worst agents of disorder, because of their sexual power to reach across social boundaries

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<sup>7</sup> R. v. Sansregret [1985] 1 S.C.R. 570.

<sup>8</sup> R. v. Ewanchuk, (1998) 57 Alta. LR 3d 325 and [1999] 1 S.C.R. 330.

<sup>9</sup> Peterson, "Coercion and Rape: The State as a Male Protection Racket" in Vetterling Braggin et al., pp.360-71.

<sup>10</sup> *Ibid.*, pp.205-6.

through adultery, as in the seventeenth century,<sup>11</sup> subordinated women became idealized as "naturally" loving and giving. The wife became the great prize for every individual man, to compensate him for struggle and competition in the marketplace. She was not herself susceptible to sexual desires, but she was sexually desirable and could satisfy her husband's sexual needs unproblematically.<sup>12</sup>

The "angel in the home" could be counted on to make life more pleasant because she would naturally study the needs and desires of her man and put them first:

I say the wife ought to give way. She ought to obey her husband...just as, when the captain gives the word..., the lieutenant carries out his orders at once, though he may be a better seaman...<sup>13</sup>

The angel was an angel of self-denial. She provided unwavering obedience because she understood that rights were not a good thing for her--indeed that they were evil:

[T]o regard this as a humiliation, as a wrong, as an evil in itself, is a mark not of spirit and courage, but of a base, unworthy, mutinous disposition--a disposition utterly subversive of all that is most worth having in life. The tacit assumption...is that it is a degradation ever to give up one's own will to the will of another, and to me this appears the root of all evil, the negation which renders any combined efforts possible.<sup>14</sup>

As prizes, wives were available to nearly every man--so long as he was adequately economically productive.<sup>15</sup> The new gender ideology therefore seemed to work in harmony with progressive forces like liberalism and modest democratization, because the greatest and most gratifying of commodities was widely available to men. Thus, gender subordination sweetened ostensible equality between men with an area of life where their command could still be supreme--the private home. At least, a brutal rape law sequestering women and goading them into marriage did so for men above a certain level of economic power.

For those men below that level, neither their command over women in the home nor the safety of their women in

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<sup>11</sup> Generally, Wiener, "Alice Arden to Bill Sikes". See also Derek Wilson, All the King's Women (2003), and Joy wiltenburg, Disorderly Women and Female Power (1992).

<sup>12</sup> Mary Poovey, The Proper Lady and the Woman Writer (1984); Hannah More, Strictures on Female Education (1799); Rousseau, Emile (1765) and discussions of it, especially Pateman, "Women and Consent".

<sup>13</sup> Stephen, Liberty, p.197.

<sup>14</sup> Ibid.

<sup>15</sup> That is, according to the arrogant assumptions of bourgeois thinkers following in the tradition of Gregory King in 1696, George Burnett, ed., Two Tracts by Gregory King, and D.V. Glass, "Gregory King's Estimate", and Numbering the People, the poor could be assumed to be "lessening the wealth of the nation". Analyses based on actual contribution to making goods might rate the working man higher in productivity than many bourgeois, yet he could still have trouble providing for a wife and family.

everyday life was assured. Indeed, they felt threatened to a greater extent than ever before. But that was okay, because even the unsafety of women consorts and relations of men below the threshold of full citizenship served the interests of the men who mattered--bourgeois and above.

For the bourgeois man, a rape law which threatened women who had to work outside the home also provided them with "angels in the streets", women who could be approached and commanded to give satisfaction without recourse. What power economic disparity did not give the bourgeois man through his heavy pockets--and the poverty of the recipient of his casual attentions--the law provided by judging nearly any degree of force applied against such women, even little girls, as acceptable. Of course, the existence of these women--and the emasculated men who could not afford wives, or could not keep them at home--implied another form of hierarchy still functioning, that of social class.

Class was a new form of hierarchy. It extended the right of command of bourgeois men, problematically in the factories vis a vis other working class men--but then one could admonish them to improve their lots by pulling themselves up by the bootstraps. That it also extended the right of command over working class women was less problematic: to the extent that it did so within the institution of domestic service, it was unproblematic in terms of gender. These workers were special cases, like the bourgeois man's own wife or children--almost private property of the Master.<sup>16</sup> In the marketplace, as whores, they certainly were problematic--but not for their customers, for the women themselves could be blamed for losing their value as women when they lost their chastity.

If one accepted that any man could succeed, and any woman keep her chastity, then it was possible to live with a sense of innocence as a liberal bourgeois man. The second proposition was illustrated increasingly in the courts, where rape cases were subjected to increasingly dramatic winnowing in the process to conviction, largely by sorting out "unchaste" from decent women. The inequality which was obvious all around in industrial England could be made to seem due to personal moral differences, and thus justifiable. If only the natural followers could accept their "place" in the order of the world, the entire country could become great under the firm hands of the natural leaders: "A nation in which every one held the position for which he was best-fitted, and in which every one was aware of that fact...would have solved one of the great problems of life."<sup>17</sup>

J.F. Stephen believed that social peace was achievable, without restricting the privileges of bourgeois men, if natural inferiors in society accepted the leadership of their betters:

No peace is possible for men except upon one of two conditions. You may purchase absolute freedom by the destruction of all power, or you may measure the relative powers of the opposing forces by which men act and are acted upon, and conduct yourself accordingly. The first of these courses is death. The second is harmonious and well-regulated life; but the essence of life implies a conflict of forces, and the

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<sup>16</sup> Davidoff, "Mastered for Life", Journal of Social History, (1974), pp.406-28; P. Hollis, Women in Public; Pateman, The Sexual Contract.

<sup>17</sup> J.F. Stephens, Liberty, p.208. Shockingly, for someone who still professed to be a Liberal, Stephen suggested the best extant example of such a nation might be India, with its caste system.

conflict of forces is the negation of liberty insofar as either force restrains the other.<sup>18</sup>

Submission to the more powerful was the only wise course of action. In the case of women, Stephen claimed most followed this wise course. J.S. Mill was wrong about the need for feminism to redress the situation of women in the bourgeois family--which Mill memorably described as "a chronic state of bribery and intimidation combined"<sup>19</sup>--for "the actually existing generation of women do not dislike their condition."<sup>20</sup>

Of all rape myths, this is probably the uber-myth, the source of all the other myths: because women marry men, they must like their situation in marriage--women show tacit consent by forming families, no matter how brutal the consequences for women or their children of not marrying may be.

After Thornton, rape law maximized male access to sex with women, especially in two ways: first, law served notice to women that the traditional courtship system, which had allowed them a limited measure of sexual freedom before marriage; then, they were warned that reliance on traditional courtship would thereafter condemn them as unworthy of protection, should their male partners overstep the women's limits. This meant that women's ability to impose conditions on their beaux while courting would have gone down. This would lead them to contract marriages with less knowledge of the sexual interests of their husbands-to-be, and without having exposed their future husbands to sexual situations in which maximizing the pleasure of women was more important than immediate penetration.

Overstepping the limits was problematic for working class women like Ashford if it meant rape, of course, but it was even more important, in those economically stressful times, that the law not allow men to abandon them when they became pregnant before marriage. This last the law explicitly determined not to do, not only through rape law, but also through strictly restricting seduction and other torts, and especially through the draconian *New Poor Law* of 1834. The combined effect of interlinked legal developments around prenuptial conception was to destroy the North West European marriage pattern.<sup>21</sup> This contributed to social disorganization among commoner communities, family breakdown, increased illegitimacy, infanticide, and poor health in illegitimate young--and all of these directly decreased the economic power of working class people and accelerated their proletarianization.<sup>22</sup>

Another way that Thornton maximized male access was by encouraging men to treat working class women in public space as prostitutes--and through the law refusing to do anything about such harassment, it no doubt directly

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<sup>18</sup> Ibid., p.118.

<sup>19</sup> Ibid., p.189, quoting Mill, The Subjection of Women.

<sup>20</sup> Ibid.

<sup>21</sup> See Hartman; Wrigley and Scholfield; and the titles by Laslett.

<sup>22</sup> Charles Tilly, "Demographic Origins of the European Proletariat", in Levine, Proletarianization, pp.1-85.

encouraged some working women to prostitute. How else could they manage such dangerous encounters if not by jollying the men along and trying to profit by it? Ideological work is often done by the internalization of shame by the targets of negative, discriminatory ideas. Women may respond to bad treatment by learning to expect it; they may work out various strategies to manage their situations, but usually these strategies work within limits established by the ideologies of the rulers.

In the midst of discussing why women are and should be satisfied with the gender system of Victorian England, Stephen began to discuss slaves and servants. It is not at first clear what this discussion has to do with gender inequality. Stephen noted that while a master had an incentive to treat the slave well and desist from beating, maiming or killing his own property, the servant could be

turned out of the house on the spot, and another can be hired as easily as you would call a cab. To refuse the dismissed person a character may very likely be equivalent to sentencing him to months of suffering and a permanent fall in the social scale. Such punishments are inflicted without appeal, without reflection, without the smallest disturbance of the smooth surface of ordinary life.<sup>23</sup>

Suddenly it is clear why Stephen discussed slave and servant: like rape law, he threatened the preferred women in his society--the bourgeois wives, explicitly compared to property--to the merely rentable, casual "servant", for whose life the bourgeois male assumed no responsibility whatever. The slave should be grateful--the owner could maim or kill her, but chooses not to do so, as long as she is valuable property to him; but the mere visiting servant can be entirely marginalized from the ability to earn a living without the master thinking twice about it.

The industrial rape law frightened "good"--bourgeois, chaste, married--women by pointing out dire consequences, to the working woman, the servant or prostitute, of being judged as lacking in chastity. Stephen wanted to distinguish this from the coercion of Mill's "bribed and intimidated" women--but an open threat is apparent in Stephen's text. If good women were satisfied with marriage, why would Stephen threaten them with the slow death of poverty and starvation meted out to working women without character? Applying psychological pressure encouraged women to marry and obey husbands, but it is not consistent with arguing that marriage is the best situation for inferior persons, and that women should be happy to acknowledge their inferiority and accept dependance on their superiors.

The problems of "un-owned", wild, public woman were used extensively to encourage/police the loyalty of good girls. Class was used to enforce gender rules--by making unfeminine behaviour threaten to de-class bourgeois women--and gender was used to enforce class. The working class was distinguished by its lack of domesticated women, and its lack of men who could adequately provide. One of the places where this disciplinary social theatre was acted out was the rape law.

Public women disciplined bourgeois women, at the same time that they provided outlets when lifestyle demands made legitimate bourgeois marriage require more financial stability than a young amorous man could immediately acquire; definitions of bourgeois identity required scapegoating workers for their lack of private family life or the "dysfunctional" families they created when their woman were working. Criticism of gender dysfunctionality hit working class people in a tender spot and turned them inward, trying to answer and disprove the insult. It distracted workers from the role in high

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<sup>23</sup> Stephen, *Liberty*, pp.207-8.

politics which they had played so effectively before 1832.<sup>24</sup>

Though so much else from the Victorian class system has degraded and withered away, building middle class respectability by drawing a contrast to the supposedly "dysfunctional" families of "othered" groups is still a part of our culture--and our rape law. It is exposed in cases which minimize the rapes of racialized women by reference to their group's supposedly deviant values, understood to make their pain less real, or even make their rapes their own fault.<sup>25</sup>

Gender ideology made law treat women as sexual property; the propertization of women made the ideology also impose class distinctions, for it made the value of women as embodied female sexual resources vary directly according to the property held by their families. This happened in rape law, but also through domestic torts. It resulted in discrimination on the basis of class just as it did gender discrimination.

Stephen claimed he was in favour of ameliorating excesses of male violence, but he suggested reforms only within technical limits of legal efficiency: "As to acts of violence against women, by all means make the law on this head as severe as it can be without defeating itself."<sup>26</sup> The sincerity of this vague and noncommittal disavowal of male violence must be seriously doubted, however, since Stephen glorified male resolve, demandingness, and even violence as the height of masculinity. But he worried that true manliness, based on force, had been declining,

...that people are more sensitive, less enterprising and ambitious, less earnestly desirous to get what they want, and more afraid of pain, both for themselves and others, than they used to be...[A]ll other gains, whether in wealth, knowledge, or humanity, afford no equivalent...I do not myself see that our mechanical inventions have increased the general vigour of men's characters...The greater part...appears to me to be a mere increase of nervous sensitivity in which I feel no satisfaction at all.<sup>27</sup>

Stephen's real men, not afraid of inflicting pain on others as well as on themselves, are the type of men indemnified by Holroyd in Thornton. Strength of character was the tenacity to get what one wants, uncontaminated by sensitivity; Stephen equated concern with other's pain as degeneracy. Such men would be locked into denial of the harm done to women by rape. Indeed, such men could look upon themselves raping women as merely showing vigour and resolve.

The imposition of masochistic sexual culture on women as a result of consent to force doctrine was the other side of Stephen's glorification of the morality of male violence in the service of an overweening masculine need to be always in command, and to bully others to do their bidding. This masculine self-image would despise women who were unable to avoid being physically overpowered by stronger and bigger men; these were the sort of men who would be unable to define reasonable limits to women's resistance to rapists, even for little girls like Mary Hill in R. v. Saker. These were the

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<sup>24</sup> Belchem, Popular Radicalism; Jackson, Trials of British Freedom; Miles, Francis Place; Clark, "The Rhetoric of Chartist Domesticity".

<sup>25</sup> See Nahanee; Razack, "Gendered Racial Violence and Spatialized Justice".

<sup>26</sup> Ibid., p.198.

<sup>27</sup> Ibid., p.199.

kinds of men who would validate women's resistance and lack of consent only if they climbed out windows and risked death to avoid amorous men.

It is clear that these Victorian bourgeois ideas of masculinity would promote victim blaming of women for rape. They are also seriously unbalanced, extreme ideas in and of themselves--ideas which would promote these men to run headlong into foolhardy and cruelly exploitative adventures. What such ideas implied about men's military and Imperial activities can be imagined. To take honour in always carrying through one's own plans and always obtaining one's desires entails cultivating an extreme form of tunnel vision--and not allowing anyone else's ideas to correct one's mistaken perceptions.

The creation of a naturalized ideal of women as selfless, passionless, and totally responsive helpmates of men--what Robin West would later call a "giving self"<sup>28</sup>--meant creating a new identity for women, complementary to the extreme intransigence of the heroically selfish individualistic bourgeois man. Such idealization of women offered compensation to women privileged enough to avoid working outside the home for the previous centuries of misogynistic insult. As Martin Weiner suggested from his reading of changes in the literature of domestic violence, however, such an ideal risked creating a lack of agency in reality.<sup>29</sup>

Just as in the culture broadly, so in the rape law, the logical outcome of the pressure exerted on women was to increase the number of women who would agree to submit sexually to demanding men, both in private through marriage and in public through prostitution. This occurred despite rape law's ostensible requirement that women prove lack of consent by copying the most extreme male style of intransigent physical resistance to domination. The resistance asked of women by rape law was so extreme that it was often physically impossible. Making resistance so difficult loaded the dice in favour of the other option to seeking to defend sexual autonomy through rape law: that is, in favour of sexual submission to men--in marriage if possible, or in prostitution if necessary. Opportunities for male-controlled sex were maximized by making it not feminine to fight, and not masculine to give up and not impose one's will in every area of life. The purpose of industrial rape law was not to punish violation of either men's property rights in women or women's rights to sexual autonomy, but the facilitation of a regime of forced sale of women or their forced provisioning of sexual services to men.

Marriage is implicated in the industrial rape law regime by its centrality to the economy of incentives and disincentives for women's sexuality. Within this regime, rape law provided the rough work of policing the margins. Rape law was the brick inside the velvet glove. But this was not the only way that marriage was implicated in industrial rape law. Marriage to rapists was often the direct result of the dysfunctional rape law system, especially when pregnancy increased the economic stakes. The processing of rapes, through rape law supplemented by seduction torts, bore out the Hobbesian

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<sup>28</sup> West, "The Difference in Women's Hedonic Lives".

<sup>29</sup> Weiner, "Alice Arden to Bill Sikes".

picture of rape leading to women's agreement to marriage for the protection of children.<sup>30</sup>

The unpleasant realities of the industrial rape law system raise many questions which would warrant further study. For example, what happened to the marriages which women who tried to claim seduction contracted with men who raped them? Much further work on seduction files would be valuable, as would work on the majority of rape files which never made it to court at all, in the archives of magistrates' notes and preliminary court documents in manuscript sources.

In addition, the way that rape law interacted with class requires much further study. We need to get more information on cross-class incidents and how they were dealt with, since they loomed so large in the nineteenth century imagination. We also need to know much more about the specific implications of rape law ideology for working class men. How did working class men react at the grassroots level to middle class feminists who tried to engage them in campaigns for moral purity? How did working class men who were not at the very top of the intra-working class hierarchy of skill manage the challenges to their identity implied by the ideal of the male provider, when they could not afford to keep their wives at home? How did unskilled working class men relate to prostitutes, who may have been the only women available to them in times of dearth, when they did not have the spending power to feel empowered by frequent consumption of them?

Most importantly, we need much more investigation of the actual lived experiences of raped working class women in their own words--especially in the past, but also for today. Did women realize that if they cooperated with pressure to "informally resolve" leading to pregnancy through marriage to the rapist acknowledge that they were living with the source of sexual danger, or did they continue to imagine that safety from rape could be obtained by avoiding dangerous strangers?

What were--and what are--the reasons for men's and women's extraordinary levels of attachment to rape myths, even in the face (in the last generation) of extensive corrective information about the prevalence of acquaintance rape? What combinations of compensation and ideological disciplining are offered by the myths to women? How were women who were faced with extraordinary pressures to submit to sexual exploitation in their employment affected by living with the ongoing intrusion on their sexual autonomy that resulted?

This survey of easily available reported rape cases and secondary sources about nineteenth century rape has been productive of insight, but this thesis is merely scratching the surface. Much more work can and should be done. Even so, it is clear that many of the negative results of rape law enforced and depended on a "divide and conquer" strategy used against women. The most powerful way to combat the ideology promoted by bad rape law is to counter the division of women into "good" and "bad girls". The promotion of solidarity among women is still a powerful strategy, especially when it extends across class, race, and other social boundaries which are used to marginalize some women for the purposes of allowing them to be targetted for sexual violence or commercial sex.

The positive side of looking at nineteenth century rape law involves realizing that nineteenth century women themselves critiqued and resisted gender ideology compelling the sexual submission of women to men. It has become abundantly clear to historians of women that first wave feminists recognized sexuality as an issue of discrimination. This knowledge needs to be spread more widely. We can adapt and follow their examples.

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<sup>30</sup> cf. the discussion in Pateman, The Sexual Contract.

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