

RECOGNIZING ACQUAINTANCE RAPE IN POTENTIALLY CONSENSUAL SITUATIONS: A RE-EXAMINATION OF THOMAS HARDY'S *TESS OF THE D'URBERVILLES*¹

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As a Victorian male novelist writing about women, Thomas Hardy has been regarded as "an irresistible paradox."² Indeed, Hardy's attempts to voice the problems of women have been widely celebrated: "It is a man, Thomas Hardy, who gave to a woman character the words: 'It is difficult for a woman to define her feelings in language, which is chiefly made by men to express theirs.'"³

Hardy expressed surprise at the response to his classic novel, *Tess of the d'Urbervilles*:

This novel being one wherein the great campaign of the heroine begins after *an event* in her experience which has usually been

1. THOMAS HARDY, *TESS OF THE D'URBERVILLES* (David Skilton ed., Penguin Books 1978) (1891). All footnotes referring to the text of *Tess* contain chapter numbers so that the reader can consult any edition of Hardy's novel.

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2. Elaine Showalter, *The Unmanning of the Mayor of Casterbridge*, in *CRITICAL APPROACHES TO THE FICTION OF THOMAS HARDY* 99, 99 (Dale Kramer ed., 1979); see Linda R. Hirshman, *Brontë, Bloom, and Bork: An Essay on the Moral Education of Judges*, 137 U. PA. L. REV. 177, 209 (1988) ("Victorian England is widely acknowledged as the paradigm of patriarchal society—law, education and social custom combining to cut women off from all but the most meager opportunities for autonomous life . . .").

3. Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature, and Feminism*, 99 YALE L.J. 1913, 1931 (1990) (citing THOMAS HARDY, *FAR FROM THE MADDING CROWD*, ch. 51 (New Wessex ed., 1974)); see *id.* at 1931-32 (praising Hardy's depiction of the character Sue Bridehead in *Jude the Obscure* as one who rejects the notion that marriage is a "license[]" for men to have sex on demand); Showalter, *supra* note 2, at 99 ("Hardy's remarkable heroines, even in the earlier novels, evoked comparisons with Charlotte Brontë, Jane Austen, and George Eliot . . ."). But see Margaret R. Higonnet, *A Woman's Story: Tess and the Problem of Voice*, in *THE SENSE OF SEX* 14-31 (Margaret R. Higonnet ed., 1993) (discussing the shortcomings of a male narrator's voice translating the language of women); Showalter, *supra* note 2, at 101 (citing A.O.J. COCKSHUT, *MAN AND WOMAN: A STUDY OF LOVE AND THE NOVEL 1740-1940*, at 129 (1978)) (noting the view that there were "unbridgeable gaps" between Hardy's ideas and feminist perspectives which rendered "the attempt to turn Hardy into a feminist . . . altogether vain").

treated as fatal to her part of protagonist . . . it was quite contrary to avowed conventions that the public should welcome the book, and agree with me in holding that there was something more to be said in fiction than had been said about the shaded side of a well-known catastrophe.⁴

The "event" referred to in the above quoted passage has been commonly referred to as the "seduction" of Tess Durbeyfield.⁵ Under this interpretation, *Tess* deservedly has won praise for refuting the notion of the ideal pure woman and criticizing society's harsh view of premarital sex.⁶ However, a re-examination of *Tess* reveals that these interpretations are incorrect insofar as they misconstrue, as seduction, the acquaintance rape of Hardy's heroine.

Similar problems exist today in dealing with the sexual abuse of women.⁷ Society, the law, and victims commonly treat incidents of acquaintance rape as consensual sexual encounters.⁸ An examination of the "event" in *Tess* illustrates that many women do not see themselves as victims because "what happened to them did not match the legal definition of rape."⁹

4. HARDY, *supra* note 1, at 37 (excerpt from Hardy's preface to the later editions of the novel).

5. See JAGDISH CHANDRA DAVE, *THE HUMAN PREDICAMENT IN HARDY'S NOVELS* 152-53 (1985) (noting that Tess was treated inhumanely by her community as a result of being seduced); Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction," 93 COLUM. L. REV. 374, 377 (1993) (referring to Tess as one of "the great novels of seduction"); Dianne Fallon Sadoff, *Looking at Tess: The Female Figure in Two Narrative Media*, in *THE SENSE OF SEX*, *supra* note 3, at 149 (examining how critics of Tess consistently refer to the "event" as a seduction through their interpretation of Hardy's language); see also Leon Waldoff, *Psychological Determinism in Tess of the d'Urbervilles*, in *CRITICAL APPROACHES TO THE FICTION OF THOMAS HARDY*, *supra* note 2, at 135, 137 (favoring the view that the "event" is to be interpreted as a seduction). Indeed, this interpretation even carried over to Roman Polanski's film production of Hardy's novel. Sadoff, *supra*, at 150 ("Situating itself within a film industry, Polanski's *Tess* displays Hollywood's myths of woman in positions of pain as seductive, perverse, and marketable.").

6. See Showalter, *supra* note 2, at 99 ("[A]fter the publication of *Tess of the d'Urbervilles*, for example, Hardy received letters from wives who had not dared to tell their husbands about their premarital experience . . ."); *id.* at 100 ("He took heart from letters from mothers who were 'putting "Tess" into their daughters' hands to safeguard their future', and from 'women of society' who said his courage had 'done the whole sex a service.'").

7. See Kim Lane Scheppele, *The Re-Vision of Rape Law*, 54 U. CHI. L. REV. 1095 (1987) (reviewing SUSAN ESTRICH, *REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO* (1987)) (arguing that, although rape is seen as a heinous crime within legal and social parameters, the legal system still approaches it with a certain degree of apathy).

8. See Allison West, *Tougher Prosecution When the Rapist is Not a Stranger: Suggested Reform to the California Penal Code*, 24 GOLDEN GATE U. L. REV. 169 (1994) (stating that society's perception of date rape tends to be one in which the victim, knowing the rapist, must have impliedly consented); Karen Andrews, Comment, *The Admissibility of Other Crimes Evidence in Acquaintance-Rape Prosecutions*, 17 S. ILL. U. L.J. 341 (1993) (discussing how acquaintance rape is typically not viewed as "real" rape and therefore is perceived as much more consensual since the victim and the attacker know each other).

9. Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 907 (1989).

The purpose of this Article is to explore the links between the misinterpretation of *Tess* and the nonrecognition of acquaintance rape. Hardy's novel is a particularly useful medium for this analysis because it allows the reader to experience a controversial incident with all of the insight into the human condition that literature has to offer. Because of the myths commonly connected with alleged acquaintance rape situations, individuals often find it difficult to form opinions about rape without being affected by stereotypes or personal prejudices.¹⁰ Therefore, literature generally allows for freer thought of complex issues by "presenting artificial, but concrete, universes in which premises may be worked out in conditions conducive to empathy but ambiguous enough to allow for the formation of moral judgment."¹¹

The convergence of the fields of law and literature is not new.¹² However, only since approximately 1973 has law and literature emerged as a distinct field in legal education.¹³ Its subject matter ranges from the study of literary works on legal themes to the interpretation of legal texts with literary techniques.¹⁴

10. See Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN'S L. REV. 979, 984-1026 (1993) (refuting common myths of acquaintance rape, such as those related to its frequency, victims' appearances, characteristics of rapists, and false allegations by victims).

11. Hirshman, *supra* note 2, at 179. E.g., James Boyd White, *What Can a Lawyer Learn from Literature?*, 102 HARV. L. REV. 2014, 2028 (1989) (reviewing RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988)) (asserting that literature's greatest avail is its ability to teach readers how to put their "habitual methods of thought in question, how to think about, criticize, and inform them"). Professor White maintains:

Reading texts composed by other minds in other worlds can help us see more clearly (what is otherwise nearly invisible) the force and meaning of the habits of mind and language in which we have been brought up, as lawyers and as people, and to which we shall in all likelihood remain unconscious unless led to perceive or imagine other worlds.

Id. at 2023.

12. See POSNER, *supra* note 11, at 12-13 (discussing the growth of the law and literature movement as dating back to nineteenth century works which commented on the way writers such as Shakespeare and Dickens depicted the legal system); White, *supra* note 11, at 2015 n.3 (noting that law and literature "is not really a new movement, but a return to a sense of law as a humanistic discipline that has its modern roots at least as early as the Renaissance").

13. See POSNER, *supra* note 11, at 12 (naming James Boyd White as the pioneer of the law and literature movement); David Ray Papke, *Problems With an Uninvited Guest: Richard A. Posner and the Law and Literature Movement*, 69 B.U. L. REV. 1067 (1989) (noting the rapid advance of the law and literature movement in the past decade).

14. See, e.g., Marijane Camilleri, Comment, *Lessons in Law From Literature: A Look at the Movement and a Peer at Her Jury*, 39 CATH. U.L. REV. 557 (1990) (discussing the emergence of the law and literature movement as a response to the perceived limitations in legal analysis); Hirshman, *supra* note 2, at 179 (suggesting that the rejection of interpretivism in judicial decision-making requires law to return to the humanities, and law and literature, to develop appropriate moral judgments).

Some of the field's scholars caution against the "damage" done to literature when "press[ed] into the service of political debate."¹⁵ However, this view has been criticized as one which preserves patriarchal ideologies and standards.¹⁶ A call has recently been made for studies in law and literature which "cast[] light upon the conditions of women and evoke[] understanding of the ways in which patriarchy assaults women's rights and choices."¹⁷

Hardy described his novel "as an attempt to give artistic form to a true sequence of things."¹⁸ However, Hardy's depiction of the "event" ambiguously presents a woman's situation through inferences and innuendos, with very few explicit references.¹⁹ Hardy lets the reader know what happened to Tess but does not give her the words to define her experience.²⁰ It has been suggested that perhaps even Hardy had difficulty defining an event which was so contrary to the conventional thought of his time. Novelist Virginia Woolf noted, for example, that "[i]t is as if Hardy himself were not quite aware of what he did, as if his consciousness held more than he could produce, and he left it to his readers to make out his full meaning and to supplement it from their own experience."²¹

15. POSNER, *supra* note 11, at 356; *id.* at 357 (stating that "what literature speaks to are the eternal problems of the human condition, not the specific manifestations of those problems in the politics of our century").

16. See Heilbrun & Resnik, *supra* note 3, at 1930 (concluding that Posner's limited view of law and literature "was designed exclusively for the defense of the free-market, 'disinterested,' reasonable world of manly law," which effectively excludes the voice of women); see also White, *supra* note 11, at 2015 n.3 (criticizing Posner's analysis of studies in law and literature since "th[e] movement is characterized by diversity and individuality and hence cannot be adequately talked about in . . . language . . . that assumes that everyone operates from the same premises and in the same manner").

17. Heilbrun & Resnik, *supra* note 3, at 1927.

18. HARDY, *supra* note 1, at 35 (explanatory note to the first edition).

19. See F.B. PINION, THOMAS HARDY: ART AND THOUGHT 125-35 (1977) (describing how Hardy set out to create a "pure woman" through the character of Tess but is to blame for the controversy and confusion surrounding the "event" and its aftermath because of his unwillingness to consistently allow Tess to describe her feelings). But see PAMELA L. JEKEL, THOMAS HARDY'S HEROINES: A CHORUS OF PRIORITIES 169 (1986) (suggesting that Hardy deliberately obscured the question of whether Tess was raped or seduced because he intended to show that what actually occurred was unimportant to him as it should have been to society).

20. The language of text has a significant effect on the reader's interpretation of a literary piece:

The process of reading a literary text is thus one of perpetual attunement and judgment, in which one is driven by an insistence upon the particulars of language, form, and context to respect what is external to the self, yet in which one must respect and assert the self as well. This experience of reading is not coercive or uniform in character, and will naturally be different for different readers. Indeed there is nothing automatic in the process at all: it is perfectly possible for someone to misread a text, or to fail to respond to it, or put even the greatest literature to base or trivial purposes.

White, *supra* note 11, at 2020; see *infra* part II.B (discussing Tess's own misperception of the act).

21. PETER J. CASAGRANDE, TESS OF THE D'URBERVILLES: UNORTHODOX BEAUTY 26 (1992) (quoting Virginia Woolf from *The Novels of Thomas Hardy*, in THE COMMON READER, SECOND

The gaps that Hardy created in both the format of his novel and the ambiguity of Tess's speech lead to a participatory form of reading in which the reader is forced to interpret the novel based on his or her personal feelings and experiences. The most prevalent gap in *Tess* is the omission of the scene where the "event" occurs. Although at the time *Tess* was written public distaste caused the scene to be omitted from the novel,²² its absence calls upon the reader to fill in a highly controversial gap. At this juncture, readers misinterpret the "event" as a seduction, rather than interpreting it as a rape.

Part One of this Article reviews the text of *Tess* to establish that Tess was actually raped by her alleged seducer, Alec d'Urberville. Part Two explains how the failure to distinguish between seduction and rape in potentially consensual situations creates distorted views of appropriate sexual conduct. Finally, Part Three examines both the consequences of this nonrecognition for Tess, as well as the extent to which rape alters all women's lives.

I. THE RAPE OF TESS DURBEYFIELD

A. *Summary of the Novel*

Tess's plight begins when, discovering that her poor and troubled father is a descendant of the noble d'Urberville family,²³ she is sent to the home of her newly discovered wealthy relatives to claim kin.²⁴ At this point in the novel, Tess is depicted as an intelligent,²⁵ dignified,²⁶ practical,²⁷ yet inexperienced,²⁸ sixteen year old.

SERIES 245, 248 (1932)).

22. See CASAGRANDE, *supra* note 21, at 53.

23. HARDY, *supra* note 1, at 43-45 (ch. I). A clergyman accidentally discovered that the Durbeyfields are the direct descendants of the d'Urbervilles. *Id.* at 43 (ch. I).

24. HARDY, *supra* note 1, at 74-75 (ch. V). Prior to this, Tess's father, John Durbeyfield, earned his living in the "haggling business." *Id.* at 74 (ch. V). Upon learning of his noble heritage, he became so intoxicated that he was unable to make a 30 mile trip to deliver a load of beehives to the local retailers. *Id.* at 67 (ch. IV). In an attempt to make the delivery for him, Tess was involved in a collision which accidentally killed the family horse. *Id.* at 71 (ch. IV).

John Durbeyfield's poor physical condition and the loss of the horse left him unable to support his wife and seven children. *Id.* at 74 (ch. V). Tess blamed herself for her family's predicament and, despite her better judgment, allowed her mother to convince her to ask the d'Urbervilles for help. *Id.* at 74 (ch. V). "Every day seemed to throw upon her young shoulders more of the family burdens, and that Tess should be the representative of the Durbeyfields at the d'Urberville mansion came as a thing of course." *Id.* at 76 (ch. V). It is clear, however, that Tess was reluctant to go to the d'Urberville mansion to ask for help.

25. Tess, having passed the "Sixth Standard in the National School under a London-trained mistress," was considered well educated for her village. HARDY, *supra* note 1, at 58 (ch. III). She hoped to become a teacher at the local school. *Id.* at 88 (ch. VI).

26. Tess's pride is unmistakable. In the scene in which she first appears, Tess is embarrassed when her drunken father acts foolishly in front of a crowd of her peers. HARDY, *supra* note 1, at 51 (ch. II). She then quickly regains her composure and refuses to remain with

Upon her arrival at the d'Urberville estate, The Slopes, Tess has her first encounter with her villainous "cousin,"²⁹ Alec d'Urberville. Alec, instantly attracted by Tess's beauty and physical maturity,³⁰ is barely able to restrain himself from her. As he walks with Tess, "he incline[s] his face towards her as if—but, no: he [thinks] the better of it, and *let[s] her go*."³¹ Although Alec decides not to force himself upon Tess, his "let[ting] her go" indicates that he is not concerned with her lack of consent to his advances.

During their next meeting, Alec is not so considerate. Alec arranges for Tess to live and work at The Slopes to tend to his aged mother's fowl farm.³² Tess is reluctant to live at The Slopes, but, for the sake of her family, is persuaded to accept Alec's offer.³³ While driving Tess from her village to The Slopes, Alec drives the horses recklessly until she allows him to kiss her.³⁴ In this scene, it is evident that Tess's tears do not prevent Alec from having his way with her.³⁵ It is also noteworthy that Tess's reaction is to feel shameful for being taken advantage of in her helpless state.³⁶ She thwarts Alec's next attempt to kiss her by tricking him into letting her off the carriage and walking the remaining distance to The Slopes.³⁷

the group unless they stop making jokes about him. *Id.*

27. Tess is the only family member who recognizes the urgency of getting the beehives to the market before the demand for them subsides. HARDY, *supra* note 1, at 67-68 (ch. IV).

28. Early in the novel, Tess is described as "a mere vessel of emotion untinctured by experience." HARDY, *supra* note 1, at 51 (ch. II).

29. As it turns out, Alec is actually aware that he and Tess are unrelated since Alec's father had falsely adopted the name d'Urberville prior to settling in the South of England. HARDY, *supra* note 1, at 78 (ch. V). Tess, on the other hand, is truly a descendant of the d'Urbervilles. *Id.*

30. "She had an attribute which amounted to a disadvantage just now; and it was this that caused Alec d'Urberville's eyes to rivet themselves upon her. It was a luxuriance of aspect, a fullness of growth, which made her appear more of a woman than she really was." HARDY, *supra* note 1, at 82 (ch. V).

31. HARDY, *supra* note 1, at 82 (ch. V) (emphasis added).

32. HARDY, *supra* note 1, at 85 (ch. VI).

33. HARDY, *supra* note 1, at 87-88 (ch. VI).

34. HARDY, *supra* note 1, at 96-97 (ch. VIII).

35. 'But I don't want anybody to kiss me, sir!' she implored, a big tear beginning to roll down her face, and the corners of her mouth trembling in her attempts not to cry. 'And I wouldn't ha' come if I had known!'

He was inexorable, and she sat still, and d'Urberville gave her the kiss of mastery. HARDY, *supra* note 1, at 96 (ch. VIII).

36. "No sooner had he [kissed her] than she flushed with shame, took out her handkerchief, and wiped the spot on her cheek that had been touched by his lips." HARDY, *supra* note 1, at 96-97 (ch. VIII).

37. Tess cleverly pretends that her hat has blown off in order to get Alec to stop the carriage. His efforts to get her to remount the carriage fail:

'No, sir,' she said, revealing the red and ivory of her mouth as her eye lit in defiant triumph; 'not again, if I know it!'

'What — you won't get up beside me?'

'No; I shall walk.'

Tess learns to enjoy the independence of her new job,³⁸ despite the need to continually fend off the advances of the lustful Alec. On one occasion, while she is alone in Mrs. d'Urberville's bedroom tending to the fowl,³⁹ Tess narrowly escapes an unusual encounter with Alec:

[T]urning round the girl had an impression that the toes of a pair of boots were visible below the fringe of the curtains. Thereupon her whistling became so disjointed that the listener, if such there were, must have discovered her suspicion of his presence. She searched the curtains every morning after that, but never found anybody within them. Alec d'Urberville had evidently thought better of his freak to terrify her by an ambush of that kind.⁴⁰

Whether Alec intended to attack or merely to frighten Tess, her life at The Slopes is clearly filled with apprehension.

Tess spends the next couple of months caring for Mrs. d'Urberville's fowl and taking weekly trips into the local market with her fellow villagers.⁴¹ It is on the night of one such excursion that the controversial "event" occurs.

On this evening, Tess has the misfortune of running into Alec at the market.⁴² She is fatigued and agitated because she has worked a full day, walked three miles into town, and spent considerable time waiting for her group to accompany her on the walk home.⁴³ Alec offers to drive her home, but Tess declines.⁴⁴ After finally beginning her journey home, Tess is forced to leave the group when some of the women she is walking with unfairly begin a heated argument with her.⁴⁵

"Tis five or six miles yet to Trantridge."

"I don't care if 'tis dozens. . . ."

"You artful hussy! Now, tell me — didn't you make that hat blow off on purpose? I'll swear you did!"

Her strategic silence confirmed his suspicion.

Then d'Urberville cursed and swore at her, and called her everything he could think of for the trick.

HARDY, *supra* note 1, at 97-98 (ch. VIII).

38. HARDY, *supra* note 1, at 102 (ch. IX).

39. HARDY, *supra* note 1, at 104 (ch. IX).

40. HARDY, *supra* note 1, at 104 (ch. IX).

41. HARDY, *supra* note 1, at 105 (ch. X).

42. HARDY, *supra* note 1, at 106 (ch. X).

43. HARDY, *supra* note 1, at 109 (ch. X).

44. HARDY, *supra* note 1, at 109 (ch. X).

45. Several women began laughing at another woman who was spilling syrup down her back as she walked; however, when Tess joined the laughter, jealousy prompted all the women to turn on her. HARDY, *supra* note 1, at 111-12 (ch. X).

After overhearing the quarrel,⁴⁶ Alec persuades Tess to accept a ride home with him:

At almost any other moment of her life she would have refused such proffered aid and company, as she had refused them several times before; and now the loneliness would not of itself have forced her to do otherwise. But coming as the invitation did at the particular juncture when fear and indignation at these adversaries could be transformed by a spring of the foot into a triumph over them, she abandoned herself to her impulse, climbed the gate, put her toe upon his instep, and scrambled into the saddle behind him.⁴⁷

And with this decision, the tragedies of Tess's life begin. As one of her adversaries commented as Alec and Tess sped away, "Out of the frying-pan into the fire!"⁴⁸

Taking advantage of this rare opportunity to be alone with Tess, Alec passes the road which goes back to The Slopes and purposely gets lost in a nearby wooded area called The Chase.⁴⁹ Until this point, despite Alec's advances, the relationship between Tess and Alec generally has been one of employer and employee. An exchange between Alec and Tess reveals that Tess merely has been tolerating Alec's persistence because she is at his mercy as his employee.⁵⁰ During the ride to The Slopes, Alec continuously questions Tess about her feelings for him⁵¹ until she finally ignores him and falls asleep.⁵²

Just then, Tess is awakened by Alec's attempt to steady her on the horse by putting his arm around her waist.⁵³ In an action which

46. "Having heard their voices while yet some way off he had ridden creepingly forward, and learnt enough to satisfy himself." HARDY, *supra* note 1, at 112 (ch. X).

47. HARDY, *supra* note 1, at 112-13 (ch. X).

48. HARDY, *supra* note 1, at 113 (ch. X).

49. HARDY, *supra* note 1, at 114-16 (ch. XI).

50. "Tess, why do you always dislike my kissing you?"

'I suppose — because I don't love you.'

'You are quite sure?'

'I am angry with you sometimes!'

'Ah, I half feared as much.' Nevertheless, Alec did not object to that confession. He knew that anything was better than frigidity. 'Why haven't you told me when I have made you angry?'

'You know very well why. Because I cannot help myself here.'

HARDY, *supra* note 1, at 114 (ch. XI).

51. 'I haven't offended you often by love-making?'

'You have sometimes.'

'How many times?'

'You know as well as I — too many times.'

HARDY, *supra* note 1, at 114 (ch. XI).

52. Hardy once again emphasizes that Tess is fatigued, agitated, and "inexpressibly weary."

HARDY, *supra* note 1, at 115 (ch. XI).

53. HARDY, *supra* note 1, at 115 (ch. XI).

demonstrates her gut reaction to him, Tess is put "on the defensive, and with one of those sudden impulses of reprisal to which she was liable she gave him a little push from her."⁵⁴ Alec is infuriated by this response, but does not abandon his attempts to have his way with her:

'Good God!' he burst out, 'what am I, to be repulsed so by a mere chit like you? For near three mortal months have you trifled with my feelings, eluded me, and snubbed me; and I won't stand it!'

'I'll leave you to-morrow, sir.'

'No, you will not leave me to-morrow! Will you, I ask once more, show your belief in me by letting me clasp you with my arm? . . . Mayn't I treat you as a lover?'

She drew a quick pettish breath of objection, writhing uneasily on her seat, looked far ahead, and murmured, 'I don't know — I wish — how can I say yes or no when —'

He settled the matter by clapping his arm round her as he desired, and Tess expressed no further negative.⁵⁵

Upon learning that Alec purposely got lost, Tess breaks the silence of her toleration:

'How could you be so treacherous!' said Tess, between archness and real dismay, and getting rid of his arm by pulling open his fingers one by one, though at the risk of slipping off herself. 'Just when I've been putting such trust in you, and obliging you to please you, because I thought I had wronged you by that push!'⁵⁶

This passage reveals that, as usual, Tess has been tolerating Alec's manipulation merely to pacify him while under his control. It also indicates that these circumstances have become frightening to Tess.

Unable to endure him any longer, Tess demands that Alec let her off the horse to find her own way home.⁵⁷ Alec agrees on the condition that Tess allows him to get his bearings and then give her directions.⁵⁸ First, however, Alec makes a final calculated effort to win Tess's affections by informing her that he has just sent her family a horse and new toys.⁵⁹ Tess is moved by this news but does not allow it to affect her perception of him:

'O how very good of you that is!' she exclaimed, with a painful sense of the awkwardness of having to thank him just then.

54. HARDY, *supra* note 1, at 115 (ch. XI).

55. HARDY, *supra* note 1, at 115-16 (ch. XI).

56. HARDY, *supra* note 1, at 116 (ch. XI).

57. HARDY, *supra* note 1, at 116 (ch. XI).

58. HARDY, *supra* note 1, at 116 (ch. XI).

59. HARDY, *supra* note 1, at 117 (ch. XI).

....

'I almost wish you had not — yet, I almost wish it!'

'Why, dear?'

'It — hampers me so.'

'Tessy — don't you love me ever so little now?'

'I'm grateful,' she reluctantly admitted. 'But I fear I do not—'⁶⁰

Thereafter, a completely distressed Tess falls asleep in tears while waiting for Alec who has left to find directions home.⁶¹

Alec is last seen leaning over Tess and, in a scene that is not included in the novel, the fateful "event" takes place.⁶² Hardy leaves the reader with this final image: "Everything was blackness alike. D'Urberville stooped; and heard a gentle regular breathing. He knelt and bent lower, till her breath warmed his face, and in a moment his cheek was in contact with hers. She was sleeping soundly, and upon her eyelashes there lingered tears."⁶³

A few weeks later, Tess flees from The Slopes and returns to her village.⁶⁴ The community deems Tess an improper woman⁶⁵ because rumors of Alec's reputation as a "reckless gallant"⁶⁶ combine with Tess's abrupt return and subsequent pregnancy. Unbeknownst to Alec, she gives birth to a child who shortly becomes ill and dies.⁶⁷ Tess, changed by her experiences,⁶⁸ regains hope that she can escape her past when she takes a job as a dairymaid miles from her own village.⁶⁹

Unable to avoid the consequences of her status as an unchaste woman, Tess's life becomes consumed by recurring tragedies. Despite her intention to live in seclusion at the dairy farm,⁷⁰ Tess falls deeply in love with the farmer's gentleman pupil, Angel Clare.⁷¹ She is troubled by this relationship because, as an unchaste woman, she feels

60. HARDY, *supra* note 1, at 117 (ch. XI).

61. HARDY, *supra* note 1, at 118 (ch. XI).

62. HARDY, *supra* note 1, at 119 (ch. XI).

63. HARDY, *supra* note 1, at 119 (ch. XI).

64. HARDY, *supra* note 1, at 123-24, 129 (ch. XII).

65. "The people who had turned their heads turned them again as the service proceeded; and at last observing her they whispered to each other. She knew what their whispers were about, grew sick at heart, and felt that she could come to church no more." HARDY, *supra* note 1, at 134 (ch. XIII).

66. HARDY, *supra* note 1, at 132 (ch. XIII).

67. HARDY, *supra* note 1, at 139-46 (ch. XIV).

68. "Almost at a leap Tess thus changed from simple girl to complex woman. Symbols of reflectiveness passed into her face, and a note of tragedy at times into her voice." HARDY, *supra* note 1, at 150 (ch. XV).

69. HARDY, *supra* note 1, at 150-51 (ch. XV).

70. HARDY, *supra* note 1, at 151 (ch. XV).

71. "Tess and Clare unconsciously studied each other, ever balanced on the edge of a passion, yet apparently keeping out of it. All the while they were converging, under an irresistible law, as surely as two streams in one vale." HARDY, *supra* note 1, at 185 (ch. XX).

herself unworthy of his affections.⁷² After a lengthy struggle with her conscience and several failed attempts to tell Angel about her past,⁷³ Tess marries Angel.⁷⁴ On the night of their wedding, Angel confesses to Tess that he had a prior sexual relationship with a stranger.⁷⁵ Confident that he will sympathize with her experience with Alec, Tess tells Angel about her past.⁷⁶ Once again, the novel excludes the details of her story, which include the events of the night at The Chase.

Much to Tess's surprise, Angel is unable to accept Tess in this new light.⁷⁷ Under the impression that he had married a pure and chaste woman, Angel cannot bear the social implications of his situation.⁷⁸ In an act which reveals the limitations of his character, Angel leaves England to begin an agricultural venture in Brazil.⁷⁹ Tess, completely devastated, returns to her family with nothing but some money and instructions to contact Angel only if she gets sick or needs assistance.⁸⁰

Tess, convinced that she has again humiliated her family, gives them half of her money and leaves home.⁸¹ On the verge of poverty and starvation, Tess is forced to take a job doing difficult field work for a cruel man⁸² who recognizes her as an acquaintance of Alec

72. [W]hy should she, who could never conscientiously allow any man to marry her now, and who had religiously determined that she never would be tempted to do so, draw off Mr. Clare's attention from other women, for the brief happiness of sunning herself in his eyes while he remained at [the dairy]?

HARDY, *supra* note 1, at 194 (ch. XXII).

73. While trying to tell Angel about her sexual past, Tess instead confesses that her last name is really d'Urberville. HARDY, *supra* note 1, at 252-53 (ch. XXX). Also, when Tess slips an explanatory letter under Angel's door, she accidentally slips it under the carpet, where it remains undetected. HARDY, *supra* note 1, at 275-77 (ch. XXXIII).

74. HARDY, *supra* note 1, at 279 (ch. XXXIII).

75. HARDY, *supra* note 1, at 292 (ch. XXXIV).

76. HARDY, *supra* note 1, at 292-93 (ch. XXXIV).

77. 'Forgive me as you are forgiven! I forgive you, Angel.'

'You — yes, you do.'

'But you do not forgive me?'

'O Tess, forgiveness does not apply to the case. You were one person; now you are another. My God — how can forgiveness meet such a grotesque — prestidigitation as that!'

HARDY, *supra* note 1, at 298 (ch. XXXV).

78. "Don't, Tess; don't argue. Different societies, different manners. You almost make me say you are an unapprehending peasant woman, who have never been initiated into the proportions of social things. You don't know what you say." HARDY, *supra* note 1, at 302 (ch. XXXV).

79. HARDY, *supra* note 1, at 339 (ch. XL).

80. HARDY, *supra* note 1, at 324-25 (ch. XXXVII).

81. HARDY, *supra* note 1, at 330 (ch. XXXVIII).

82. HARDY, *supra* note 1, at 367 (ch. XLIII).

d'Urberville.⁸³ She remains with her abusive employer with the faith that Angel will come back to her.⁸⁴

Some time later, when returning from an aborted effort to contact Angel's family to determine his whereabouts, Tess sees Alec d'Urberville for the first time since she left The Slopes.⁸⁵ Alec, who had since given up his evil ways to become a preacher,⁸⁶ is unable to contain his lust for Tess and abandons his newfound religion in pursuit of her.⁸⁷ He denounces Angel for abandoning her and at first offers to make up for the misfortune she suffered at his own hand.⁸⁸ However, he soon becomes threatening as Tess continues to refuse him.⁸⁹

Upon learning that her parents are ill, Tess returns home.⁹⁰ Her father soon dies, whereupon the family's interest in its property also expires,⁹¹ forcing them to find another place to live.⁹² All along,

83. HARDY, *supra* note 1, at 350 (ch. XLI).

84. HARDY, *supra* note 1, at 360-426 (chs. XLIII-XLIX).

85. HARDY, *supra* note 1, at 380 (ch. XLIV).

86. HARDY, *supra* note 1, at 386-87 (ch. XLV).

87. HARDY, *supra* note 1, at 402-03 (ch. XLVI).

'Tess, my girl, I was on the way to, at least, social salvation till I saw you again!' he said freakishly shaking her, as if she were a child. 'And why then have you tempted me? I was firm as a man could be till I saw those eyes and that mouth again — surely there never was such a maddening mouth since Eve's!' His voice sank, and a hot archness shot from his own black eyes. 'You temptress, Tess; you dear damned witch of Babylon — I could not resist you as soon as I met you again!'

'I couldn't help your seeing me again!' said Tess, recoiling.

'I know it — I repeat that I do not blame you. But the fact remains.'

Id. at 402 (ch. XLVI).

88. HARDY, *supra* note 1, at 394-96 (ch. XLVI).

'You will not marry me, Tess, and make me a self-respecting man?' he repeated, as soon as they were over the furrows.

'I cannot.'

....

'[T]hat being prevented, I should like to do some good to you and your husband, whoever he may be . . . Though, if I could know your husband, I might more easily benefit him and you. Is he on this farm?'

'No,' she murmured. 'He is far away.'

'Far away? From *you*? What sort of husband can he be?'

'O, do not speak against him! It was through you! He found out —'

'Ah, is it so! . . . That's sad, Tess!'

Id. at 395-96 (ch. XLVI).

89. 'Did I not ask you flatly to be my wife — hey? Answer me.'

'You did.'

'And you cannot be. But remember one thing!' His voice hardened as his temper got the better of him with the recollection of his sincerity in asking her and her present ingratitude, and he stepped across to her side and held her by the shoulders, so that she shook under his grasp. 'Remember, my lady, I was your master once! I will be your master again. If you are any man's wife you are mine!'

HARDY, *supra* note 1, at 412 (ch. XLVII).

90. HARDY, *supra* note 1, at 425-26 (ch. XLIX).

91. HARDY, *supra* note 1, at 433-34 (ch. L).

92. HARDY, *supra* note 1, at 438 (ch. LI).

Alec assures Tess that Angel will never return and renews his offers to assist Tess and her family.⁹³ Tess refuses, but, at this point, her faith in Angel's return begins to wane.⁹⁴

In an act which forces the very soul from her body, Tess takes up with Alec and allows him to support her family.⁹⁵ Almost simultaneously, Angel returns from Brazil, in a decrepit physical state,⁹⁶ in search of Tess.⁹⁷ Still struggling with unanswered questions of morality, he decides that, although he cannot outrightly accept Tess, he has treated her unfairly.⁹⁸ He locates Tess at the inn where she resides with Alec and begs for her forgiveness.⁹⁹ Tess resignedly informs Angel that it is too late¹⁰⁰ and the two separate.

Overwhelmed by grief and tragedy, Tess blames Alec for the second loss of her husband, and, in a heated argument, she stabs and kills

93. "About the children — your brothers and sisters," [Alec] resumed. 'I've been thinking of them.' Tess's heart quivered — he was touching her in a weak place. He had divined her chief anxiety." HARDY, *supra* note 1, at 432 (ch. L). Offering to put Tess's family up at The Slopes, Alec mocked her for waiting for "that nice husband." *Id.* at 438 (ch. LI).

94. "Tess remained where she was a long while, till a sudden rebellious sense of injustice caused the region of her eyes to swell with the rush of hot tears thither. Her husband, Angel Clare himself, had, like others, dealt out hard measure to her, surely he had!" HARDY, *supra* note 1, at 440 (ch. LI).

95. The novel does not include a scene where Tess returns to Alec. The scene prior to her returning depicts Tess and her family stranded outdoors with all their belongings and virtually no money. HARDY, *supra* note 1, at 446-47 (ch. LII). Alec approaches Tess to see if she will now accept his help:

'Now command me. What shall I do?'

'Go away!' she murmured.

'I will — I'll look for your mother,' said he blandly. But in passing her he whispered: 'Mind this; you'll be civil yet!'

Id. at 449 (ch. LII).

The next scene with Tess takes place when Angel finds her in an inn, living with Alec. HARDY, *supra* note 1, at 465 (ch. LV).

96. [S]o reduced was that figure from its former contours by worry and the bad season that Clare had experienced, in the climate to which he had so rashly hurried in his first aversion to the mockery of events at home. You could see the skeleton behind the man, and almost the ghost behind the skeleton.

HARDY, *supra* note 1, at 454 (ch. LIII).

97. HARDY, *supra* note 1, at 454 (ch. LIII).

98. HARDY, *supra* note 1, at 421 (ch. XLIX).

99. HARDY, *supra* note 1, at 463-66 (ch. LV).

100. HARDY, *supra* note 1, at 466-67 (ch. LV).

'Too late, too late!' she said, waving her hand in the impatience of a person whose tortures cause every instant to seem an hour.

....

'I waited and waited for you,' she went on, her tones suddenly resuming their old fluty pathos. 'But you did not come! And I wrote to you, and you did not come! He kept on saying you would never come any more, and that I was a foolish woman. He was very kind to me, and to mother, and to all of us after father's death. He —'

'I don't understand.'

'He has won me back to him.'

Id. at 466 (ch. LV).

Alec.¹⁰¹ She then finds Angel and hides with him for several days.¹⁰²

During their attempt to escape, husband and wife come to the site of Stonehenge where, sleeping on a sacrificial alter, Tess is apprehended by the police,¹⁰³ and eventually is hanged.¹⁰⁴ As Hardy remarked, "Justice' was done, and the President of the Immortals, in Aeschylean phrase, had ended his sport with Tess."¹⁰⁵

B. *Issues Presented*

By omitting the scene at The Chase on the night of the "event," Hardy presents the reader with several questions that are never directly answered in the novel: What occurs after Alec is last seen stooping over Tess, and what is Tess's reaction to being awakened by Alec? Does it not seem likely that, as before, she becomes defensive and pushes him away? As on the day Alec drove Tess from her village to The Slopes, does Alec proceed with his sexual advances despite Tess's tears? Even if, out of guilt for the kindness he showed her family, she tolerates a kiss from him, does she consent to sexual intercourse? Does it seem likely that she consents to sexual intercourse with a man whose advances she has rejected for months?

Certain references in the book support the theory that Tess was raped.¹⁰⁶ Hardy leaves the reader with a clue before the scene at The Chase ends: "One may, indeed, admit the possibility of a retribution lurking in the present catastrophe. Doubtless some of Tess d'Urberville's mailed ancestors rollicking home from a fray had dealt the same measure even more ruthlessly towards peasant girls of their time."¹⁰⁷ In another compelling instance, Tess's co-workers discuss the conception of her child: "A little more than persuading had to do wi' the coming o't, I reckon. There were they that heard a sobbing one night last year in The Chase; and it mid ha' gone hard

101. HARDY, *supra* note 1, at 468-70 (ch. LVI).

102. HARDY, *supra* note 1, at 473-84 (chs. LVII-LVIII).

103. HARDY, *supra* note 1, at 484-87 (ch. LVIII).

104. HARDY, *supra* note 1, at 489 (ch. LIX).

105. HARDY, *supra* note 1, at 489 (ch. LIX).

106. Based on explicit references made by Hardy, some critics acknowledge that Tess was raped by Alec. See, e.g., CASAGRANDE, *supra* note 21, at 53-54 (describing the scene at The Chase as the "rape of a virgin"); PINION, *supra* note 19, at 128 (stating that, although Alec wished to seduce Tess, the event which unfolded at The Chase was rape, not seduction). But see JEKEL, *supra* note 19, at 169 (arguing that Hardy intentionally obscured the question of whether Tess was raped or seduced because the distinction should have been unimportant to both Angel Clare and society); DAVID LODGE, *LANGUAGE OF FICTION* 177 (1966) (stating that Tess was seduced, not raped).

107. HARDY, *supra* note 1, at 119 (ch. XI).

wi' a certain party if folks had come along.'"108 Another reference is made when, on Tess's return from The Slopes, she encounters a man painting the text of scripture on the roadside. Of him she asks, "[S]uppose your sin was not of your own seeking?"109 Later, after hearing Tess's story, Angel admits to her, "You were more sinned against than sinning, that I admit."110 However, one who evaluates the rape based only on the facts leading up to the "event" at The Chase would not be privy to such conclusive remarks. Because of prevailing misconceptions about acquaintance rape, Tess's rape unfortunately is misinterpreted as seduction by Hardy's readers,¹¹¹ Tess's community,¹¹² and Tess herself.¹¹³

II. CONNECTIONS BETWEEN THE NONRECOGNITION OF ACQUAINTANCE RAPE AND THE MISINTERPRETATION OF *TESS*

A. *Distinguishing Acquaintance Rape from Seduction*

The regulation of sexual conduct has been a pressing concern in almost every known legal system.¹¹⁴ Early attempts to control unwanted sexual conduct often treated the seduction or rape of an unmarried woman as a single offense.¹¹⁵ As this violation was considered an offense against the family or household, rather than an injury to the victim, the consent of the woman was often irrelevant.¹¹⁶ At most, the woman's consent or desire mitigated the penalty imposed upon the man.¹¹⁷ Absent the consent of the party with control over the woman's sexual conduct, a violation occurred

108. HARDY, *supra* note 1, at 140 (ch. XIV).

109. HARDY, *supra* note 1, at 128 (ch. XII).

110. HARDY, *supra* note 1, at 302 (ch. XXXV).

111. *E.g.*, LODGE, *supra* note 106, at 177 (stating that the "event" was seduction).

112. *See supra* note 65 (suggesting that society disapproved of Tess).

113. *See supra* note 81 and accompanying text (describing Tess's feelings of humiliation after the "event").

114. *See* JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* 1 (1987) (asserting that every society imposes restrictions on sexuality because it is a source of conflict and disruption); Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 777 (1988) (contending that our legal system has historically preoccupied itself with the regulation of sexual conduct).

115. *See* BRUNDAGE, *supra* note 114, at 48, 249 (discussing the treatment of rape in both secular and canonical law). Under early Roman law, the offense of *raptus* was so ambiguous that "[t]he importunate suitor who eloped with his sweetheart against her father's wishes was subject, in theory at least, to the same punishment as the genuine rapist with a knife in the back alley." *Id.* at 48.

116. *See* BRUNDAGE, *supra* note 114, at 48, 249. Similarly, in ancient Judaism, the concern with nonmarital relations was with the "man for stealing the woman's virginity, thus decreasing her value on the marriage market." *Id.* at 55; *see* Deut. 22: 13-21 (imposing a fine on the rapist to be paid to the family of the victim).

117. BRUNDAGE, *supra* note 114, at 48.

and, in some instances, the aggrieved party could seek either criminal charges or civil damages.¹¹⁸

In recent history, rape has been defined as carnal knowledge of a woman, other than one's wife, by force, or the threat of force, and against her will.¹¹⁹ Thus, nonconsent by the victim is generally an element of the crime.¹²⁰ Attempts to define the level of force and nonconsent required for rape convictions,¹²¹ and the failure to meet those legal requirements, are the core of the problem.¹²²

Incidents of rape generally go unrecognized and, therefore, unpunished because the requirements of proving rape evolve from "the judicial imposition of male standards of conduct—school boy rules."¹²³ Standards of conduct that do not incorporate women's sense of consent, force, or violation prevent certain rapes from being

118. BRUNDAGE, *supra* note 114, at 48, 55.

119. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 210; ESTRICH, *supra* note 7, at 8 (1987); CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM 21 (1992).

120. See ESTRICH, *supra* note 7, at 29 (noting that female nonconsent has traditionally been a key element in the crime of rape); SPOHN & HORNEY, *supra* note 119, at 23 ("Under common-law rape statutes, which included the phrase 'by force and against her will,' nonconsent by the woman was an essential element of the crime."); Chamallas, *supra* note 114, at 797 & n.93 ("Consent plays a pivotal role in the law of rape because most states define rape as sexual intercourse without the consent of the woman.").

121. In the seventeenth century, English Lord Chief Justice Matthew Hale warned of false accusations of rape. He cautioned that rape is a charge "easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635; ESTRICH, *supra* note 7, at 5; SPOHN & HORNEY, *supra* note 119, at 24.

This distrust led to standards requiring the victim to demonstrate nonconsent by showing she exhibited the "utmost resistance" to her attacker. As stated by the Supreme Court of Nebraska in 1889:

[V]oluntary submission by the woman while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of the crime of rape. . . .

[I]f the carnal knowledge was with the voluntary consent of the woman, no matter how tardily given, or how much force had theretofore been employed, it is no rape.

ESTRICH, *supra* note 7, at 29 (quoting *Reynolds v. State*, 42 N.W. 903, 904 (Neb. 1889)). In 1906, the Wisconsin Supreme Court defined this level of resistance as, "the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person." SPOHN & HORNEY, *supra* note 119, at 23 (quoting *Brown v. State*, 106 N.W. 536, 539 (Wis. 1906)).

122. See ESTRICH, *supra* note 7, at 29 ("[T]he law of rape is striking in the extent to which nonconsent defined as resistance has become the rubric under which all of the issues in a close case are addressed and resolved."); SPOHN & HORNEY, *supra* note 119, at 23 (stating that police and rape counselors contend that resistance by a rape victim increases the likelihood of serious injury while feminists and legal scholars criticize rape law for requiring rape victims to prove a "level of resistance demanded of no other victim of violence") (citation omitted).

For a brief discussion of law reforms made in response to these challenges, see *infra* notes 191-99 and accompanying text.

123. GREGORY M. MATOESIAN, REPRODUCING RAPE 16 (1993) (citing ESTRICH, *supra* note 7, at 82); see ESTRICH, *supra* note 7, at 31 ("The people actually 'describing' women's responses were of course always men; at the time these cases were decided, women were not permitted to practice law in many states. . . ."); Chamallas, *supra* note 114, at 797 ("Despite [the] seemingly straightforward definition of rape, feminists argued that nonconsensual sexual abuse often went unpunished because the notion of consent was manipulated in a sexist fashion.").

perceived by the law, the victim, or society as a legally provable rape.¹²⁴ The effect of this "convergence between the law and patriarchal culture" is to legitimize the crime of rape by transforming it into consensual sex.¹²⁵

The influence of these constraints tends to vary with the relationship between the victim and the offender. A distinction has been made between rapes committed by the classic "armed stranger jumping from the bushes," as opposed to rapes committed by a friend, acquaintance, date, or relative of the victim.¹²⁶ Though the latter occurs with greater frequency,¹²⁷ it is the least likely to be reported.¹²⁸ Victims of acquaintance rape often fail to report the crime because, though they acknowledge the incident, they believe they will not successfully prove the rape.¹²⁹ Others simply fail to see

124. See CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* 88 (1987) (explaining how only extreme violence and coercion may sometimes win a rape conviction); MATOESIAN, *supra* note 123, at 16-17 (asserting that society's insistence that rape can only be substantiated with clear evidence is the legitimization of a male dominant system).

125. MATOESIAN, *supra* note 123, at 16-17; see *Developments in the Law, Religion and the State*, 100 HARV. L. REV. 1606, 1648-49 & n.38 (1987) (recognizing that, in the context of rape law, failure to apply the law from the perspective of the group the law aims to protect means that actions deemed acceptable by the "dominant" group will be permitted despite the harm suffered by the protected group).

126. ESTRICH, *supra* note 7, at 8 (asserting that rape may be perpetrated by respected members of society who would seem unlikely suspects).

127. See MATOESIAN, *supra* note 123, at 7-8. A 1988 study revealed that 17% of female victims were raped by strangers, while approximately 83% of rape incidents involved "acquaintances, dates, boyfriends, lovers, husbands, friends, relatives, or authority figures." *Id.* at 8. Similarly, an earlier 1987 study found that 84% of victims were acquainted with their assailants. *Id.* at 7.

128. The Uniform Crime Reports, issued by the FBI, revealed that 106,590 forcible rapes occurred in 1991. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T. OF JUSTICE, *UNIFORM CRIME REPORTS* 107 (1991). However, these statistics are based on only those rapes and attempted rapes that are officially reported. A recent study conducted by the Bureau of Justice Statistics found that over 50% of rapes and assaults are not reported to police officials. *Id.*; see *Most Women Victims Know Assailants* ORLANDO SENTINEL, Jan. 31, 1994, at A4 (stating that two thirds of attacks on women are by acquaintances); see also Neil A. Lewis, *Crime Rates Decline; Outrage Hasn't*, N.Y. TIMES, Dec. 8, 1993, at B6 (reporting criticism by women's groups that rape statistics are unreliable due to women's reluctance to report sexual assaults). Other research has indicated that incidents of rape victimization may be 24 times higher than the Uniform Crime Reports reveal. MATOESIAN, *supra* note 123, at 5-6. Even the FBI acknowledges that rape is underreported. ESTRICH, *supra* note 7, at 10.

Studies show that a large portion of underreported rapes are acquaintance rapes. The 1987 study discussed *supra* at note 127 revealed that, of the acquaintance rape incidents, only five percent were reported to the police. MATOESIAN, *supra*, note 123, at 7-8. Susan Estrich has referred to acquaintance rape cases as "simple rape." ESTRICH, *supra* note 7, at 4.

If the acquaintance rapes are considered — the cases where a woman is forced to have sex without consent by only one man, whom she knows, who does not beat her or attack her with a gun — then rape emerges as a far more common, vastly under reported, and dramatically ignored problem.

Id. at 10.

129. The relationship between the victim and the accused rapist has been found to affect greatly the manner in which officials investigate and prosecute cases.

Studies have shown that police investigate reports of rape by a stranger much more thoroughly than reports of rape by a friend or acquaintance and are more likely to

themselves as victims of rape.¹³⁰ As discussed in part II.B, *infra*, it seems likely that Tess did not perceive herself to be a rape victim.

Susan Estrich, a leading scholar in the field of acquaintance rape, highlights the issue.¹³¹ The problem, she reasons, lies in the definition of force required to prove rape in potentially consensual situations.¹³² While force is the vital legal element of making an acquaintance rape a criminal act, "force—even force that goes far beyond the physical contact necessary to accomplish penetration—is not itself prohibited. What is required, and prohibited, is force used to overcome female nonconsent. The prohibition of 'force' or 'forcible compulsion' ends up being defined in terms of a woman's resistance."¹³³

In *State v. Alston*, the Supreme Court of North Carolina found that the victim did not consent to sexual intercourse but held that there was not enough evidence to satisfy the requirement of force.¹³⁴ The

disbelieve reports of rape by an acquaintance. The prior relationship between the victim and the defendant also has been shown to affect the prosecutor's decision to file charges or not, the decision to dismiss the charges rather than prosecute fully, and the likelihood that the defendant will be convicted.

SPOHN & HORNEY, *supra* note 119, at 19; *see generally* ESTRICH, *supra* note 7, at 15-26 (claiming that the inadequate response of the system deters women from reporting the crime of rape).

130. *See* ESTRICH, *supra* note 7, at 12 ("[M]ost women forced to have sex by men they know see themselves as victims, but not as legitimate crime victims."); MACKINNON, *supra* note 124, at 88 (asserting that victims of acquaintance rape often do not perceive themselves as having been raped, although force is involved).

131. *See* ESTRICH, *supra* note 7, at 60-69 (criticizing the use of force as a standard to determine the occurrence of rape).

132. ESTRICH, *supra* note 7, at 60.

133. ESTRICH, *supra* note 7, at 60. *But see infra* note 193 and accompanying text (discussing rape law reforms which have eliminated or alleviated the requirement of proving victim's resistance).

While some rape law reform efforts have removed or mitigated the standard, level, or burden of proving resistance, in acquaintance rape cases, these requirements are still considered especially relevant. *See* SPOHN & HORNEY, *supra* note 119, at 163-64 (citing research indicating the limitations of reforms that are not implemented in a uniform manner). In one study, the officials in the jurisdictions studied "were still substantially affected by corroboration and resistance factors in judging the likelihood of a jury conviction." *Id.* at 167. Interviews revealed that many state prosecutors "believed, in fact, that jurors are unlikely to convict a man accused of raping an acquaintance in the absence of these factors." *Id.*

134. 312 S.E.2d 470 (N.C. 1984) (*cited in* ESTRICH, *supra* note 7, at 61). In *Alston*, the alleged rape incident occurred approximately one month after the end of a violent and abusive six month relationship between the victim and the defendant. *Id.* at 471. The victim testified that their previous consensual sexual relations involved violence. *Id.*

On the day of the incident, the defendant met the victim at her school, told her she was not going to class that day, grabbed her arm, and threatened to "fix" her face." *Id.* at 471-72. The victim told him she would walk with him if he released her arm. *Id.* The two walked together, whereupon the defendant demanded he had a "right to make love to her," and led her to a friend's house. *State v. Alston*, 312 S.E.2d 470, 472 (N.C. 1984). The defendant undressed the victim, ordered her to lie on a bed, pushed her legs apart, and had intercourse with her. *Id.* at 472-73. The victim cried but did not physically resist. *Id.*

The court, looking at the "totality of the circumstances," found that "there was no substantial evidence that threats or force by the defendant on [that day] were sufficiently related to sexual

victim did not physically resist, but merely cried, and the court found that the victim's "general fear" of the defendant was insufficient to show that the defendant used the requisite amount of force for a rape conviction.¹³⁵

Susan Estrich notes the difficulty in understanding how judges justified the paradox that where there was no consent, but no fight, there was no force:

Apparently, they could not understand the woman's reaction . . . She did not fight; she cried. It is the reaction of "sissies" in playground fights. It is the reaction of people who have already been beaten, or never had the power to fight in the first place. It is, from my reading, the most common reaction of women to rape.¹³⁶

Furthermore, in light of the prevalence of male views in standards used to judge a "reasonable woman," it becomes evident that this woman is "one who does not scare easily, one who does not feel vulnerable, one who is not passive, one who fights back, not cries. The reasonable woman, it seems, . . . is a real man."¹³⁷

In *Tess*, the exact manner in which Alec awakened Tess at The Chase, and Tess's subsequent reaction to Alec, are unknown to the reader. Though one can speculate that, as before, Tess pushed Alec away from her,¹³⁸ it seems clear that Tess cried that night at The

conduct to cause [the victim] to believe that she had to submit to sexual intercourse with him or suffer harm." *Id.* at 476. The court also held that the victim's general fear of the defendant was insufficient to prove the requisite amount of force needed for the rape conviction. *Id.*; see *infra* note 135 and accompanying text (holding that there was no substantial evidence in this case to prove a fear inducing force or threat of force).

135. *Alston*, 312 S.E.2d at 476. The court concluded that the evidence showed that the act of sexual intercourse was against the victim's will. "It was not sufficient, however, to show that the act was accomplished by actual force or by a threat to use force unless she submitted to sexual intercourse." *Id.* at 476.

The "general fear" rationale used in *Alston* was later applied to reverse the conviction of a defendant charged with raping his fifteen year old daughter. *State v. Lester*, 321 S.E.2d 166 (N.C. Ct. App. 1984), *aff'd*, 330 S.E.2d 205 (N.C. 1985). The *Lester* court found *Alston* controlling and noted that, "[a]s *Alston* makes clear, the victim's fear of defendant, however justified by his previous conduct, is insufficient to show that defendant forcibly raped his daughter on [the specific dates in question]." *Id.* at 168.

Subsequently, however, the Supreme Court of North Carolina limited *Alston* to factually similar situations and expressly overruled the *Lester* court's application of the "general fear" theory to sexual activity between a parent and minor child. *State v. Etheridge*, 352 S.E.2d 673, 680 (N.C. 1987) (rejecting defendant's contention that, under *Alston* and *Lester*, "both actual and constructive force were conspicuously absent from the incident of anal intercourse as described by his son"); see *Powe v. State*, 597 So. 2d 721, 727 (Ala. 1991) (discussing *Alston* and its progeny). Seemingly, however, the *Alston* "general fear" rationale would still be applicable to circumstances evident in many acquaintance rape cases, making their prosecution more difficult.

136. ESTRICH, *supra* note 7, at 62.

137. ESTRICH, *supra* note 7, at 65.

138. HARDY, *supra* note 54 and accompanying text.

Chase.¹³⁹ Thus, unless Tess resisted Alec in a violent manner, she would seemingly face many of the problems that are encountered with respect to the use of male-oriented standards to evaluate the conduct of an acquaintance rape victim.¹⁴⁰

Thus, it appears that in potentially consensual situations, a man is free to proceed despite the woman's verbal nonconsent.¹⁴¹ Accordingly, where a man intentionally creates a situation which is threatening to a woman, "the force standard continues to protect, as '*seduction*,' conduct which should be considered criminal."¹⁴² Where the law fails to recognize this distinction, acquaintance rapes go unpunished.

This point is particularly applicable to Tess's situation. The circumstances of the evening at The Chase could be viewed as potentially consensual in that they are easily susceptible to the interpretation that two young lovers satisfied their lustful desires while lost in a secluded wooded area. However, as the reader knows, Alec intentionally placed Tess in an intimidating situation by purposely getting lost in the woods.¹⁴³ Thus, if Tess's level of resistance did not fit within the generally accepted definitions of force or nonconsent, it is likely that the acquaintance rape of Tess could easily be misinterpreted by the law, society, and even Tess, as a seduction.

This legitimization by the law creates distorted views of appropriate sexual conduct.¹⁴⁴ In a discussion on the language of law as a system whereby actions are defined and "cultural practices organized,"¹⁴⁵ one commentator noted that:

[L]aw can pronounce definitively what something is or is not and how a situation or event is to be understood. The concepts, categories, and terms that law uses . . . ha[ve] a particularly potent ability to shape popular and authoritative understandings of situations. Legal language does more than express thoughts. It reinforces certain world views and understandings of events. Its terms and its reasoning structure are the procrustean bed into which supplicants before the law must express their needs. Through its definitions

139. See *supra* notes 63, 108 and accompanying text (stating clearly that Tess cried at The Chase).

140. See *supra* note 124 and accompanying text (discussing the imposition of male standards on female victims).

141. ESTRICH, *supra* note 7, at 63.

142. ESTRICH, *supra* note 7, at 69 (emphasis added). See also *supra* notes 5-6 and accompanying text (discussing the misconceptions of Tess's rape as seduction).

143. HARDY, *supra* note 1, at 116 (ch. XI).

144. Attempts to control sexual behavior serve as "a value generating force when those who create or are governed by it perceive in the law an underlying vision of appropriate sexual conduct." Chamallas, *supra* note 114, at 777.

145. Finley, *supra* note 9, at 888.

and the way it talks about events, law has the power to silence alternative meanings—to suppress other stories.¹⁴⁶

Together, legal institutions and society act upon the individual to “conform[] to social conventions and impos[e] bounds on the universe of possible social activities and human choices.”¹⁴⁷ As such, the limited way in which law and society perceive incidents of acquaintance rape acts to limit directly the range of options available to victims of this crime.¹⁴⁸

B. *Misinterpretation of the Novel*

The trouble with identifying an acquaintance rape such as Tess's stems from trying to label the act as “rape,” as defined by law and as perceived by society. Indeed, even the most liberal interpretations of *Tess* in the nineteenth century viewed Tess as a “fallen woman” and reasoned that she was “one of nature's unfortunates. Innately mute and trusting, passive and yielding, she suffered a weakness of will and reason and was not, therefore, responsible for her actions.”¹⁴⁹

A later critic, considering the possibility that Tess may have been raped, discounts the notion with the following remarkable analysis:

It is worth noting that Tess's remaining with Alec ‘some few weeks’ . . . after the night in the Chase seems to fit better with the idea of seduction than with rape. In a cancelled version of the scene in which Tess returns to [her village] and Alec insists on giving her a farewell kiss, Hardy had written that ‘only a month had elapsed since she had ceased to defend herself against him.’ That she had ‘ceased to defend herself’ (presumably after his long pursuit of her, not merely after the loss of innocence) suggests an actual though reluctant acquiescence.¹⁵⁰

Under this interpretation, a woman's ceasing to defend herself is equated with consent or seduction. Regardless of when the cessation occurred, this reasoning is, at best, provincial. Since the reader knows that Tess fended off Alec up to the last moment before she fell asleep, it seems that the soonest she could have “ceased to defend herself” is after Alec had forced himself upon her. Besides, when one is defending oneself, any actual or reluctant acquiescence is merely defeat.

146. Finley, *supra* note 9, at 888.

147. MATOESIAN, *supra* note 123, at 190.

148. MATOESIAN, *supra* note 123, at 191.

149. ROSEMARIE MORGAN, *WOMEN AND SEXUALITY IN THE NOVELS OF THOMAS HARDY* 84 (1988) (arguing against nineteenth century criticism of the novel that viewed Tess as a “fallen woman”).

150. Waldoff, *supra* note 5, at 138.

Additionally, the fact that Tess remained at The Slopes for a few weeks after the evening at The Chase does not support the theory of seduction. Victims of acquaintance rape often do not consider themselves as having been raped.¹⁵¹ Thus, all of Tess's subsequent actions must be viewed in light of the fact that she probably had an impaired conception of what Alec had done to her. Perhaps she, an inexperienced girl of sixteen,¹⁵² thought that forced sex was the norm.¹⁵³ Maybe she refused each time and then submitted simply to get it over with. Perhaps she thought that she had no choice but to grow fond of him.

An exchange with Alec on the day he unsuccessfully attempts to prevent Tess from leaving The Slopes demonstrates her inexperience and Alec's indifference to it:

'I didn't understand your meaning till it was too late.'

'That's what every woman says.'

'How can you dare to use such words!' she cried, turning impetuously upon him, her eyes flashing as the latent spirit . . . awoke in her. . . . 'Did it never strike your mind that what every woman says some women may feel?'¹⁵⁴

In the few times Tess contemplates the "event" in the novel, she refers to herself as having a "weakness."¹⁵⁵ She does not comprehend that the inability to successfully defend oneself when overpowered does not constitute weakness. Was her weakness one of passivity? Did she feel the same unwarranted shame she felt on the day Alec forced a kiss on her in the carriage?¹⁵⁶

151. See *supra* note 121 and accompanying text (asserting that women often refuse to see themselves as victims).

152. Tess explains to her mother why she left The Slopes, and blames her mother for her naivety:

'How could I be expected to know? I was a child when I left this house four months ago. Why didn't you tell me there was danger in men-folk? Why didn't you warn me? Ladies know what to fend hands against, *because they read novels that tell them of these tricks*; but I never had the chance o' learning in that way, and you did not help me!'
Her mother was subdued.

'I thought if I spoke of his fond feelings and what they might lead to, you would be hontish wi' him and lose your chance [at marriage],'¹⁵⁴ she murmured, wiping her eyes with her apron.

HARDY, *supra* note 1, at 131 (ch. XII) (emphasis added).

153. See MACKINNON, *supra* note 124, at 88. In discussing that women who do not report rape may be accustomed to violent, forced sex, MacKinnon explains that "[m]aybe they [had forced sex] for years and put up with it, maybe they tried to get it over with, maybe they were coerced by something other than battery, something like economics, maybe even something like love." *Id.*

154. HARDY, *supra* note 1, at 125 (ch. XII).

155. HARDY, *supra* note 1, at 125 (ch. XII); see also *id.* at 135 (ch. XIII) (referring to rainy weather as an "expression of irremediable grief at her weakness").

156. See HARDY *supra* note 35 and accompanying text (stating clearly that Tess does not want anyone to kiss her).

Furthermore, at one point, Tess refers to the fact that she may have developed feelings for Alec: "If I had gone for love o' you, if I had ever sincerely loved you, if I loved you still, I should not so loathe and hate myself for my weakness as I do now! . . . My eyes were dazed by you for a little, and that was all."¹⁵⁷ Though this passage could be cited to support the position that Tess was seduced by Alec, it more likely refers to Alec and Tess's relationship at The Slopes immediately following the "event." Prior to the evening at The Chase, Tess did not express even the slightest interest in Alec. As discussed above, why Tess remained at The Slopes for a few weeks after the evening at The Chase is unclear. If Tess developed an interest in Alec, the fact that she may have had consensual relations with Alec after the "event" does not mitigate the fact that their first encounter could have been a rape. Also, Tess may have had feelings for Alec before the "event." Considering that acquaintance rape victims are often close to their attackers,¹⁵⁸ these feelings would not be unusual, and certainly would not preclude a finding that Tess was raped at The Chase.

As may be common with women who do not realize that they have been raped, Tess partially blames herself for what has happened. When Tess and Alec meet again later in the novel, Tess allows herself to feel that she is doing something wrong by merely looking at Alec:

'Don't look at me like that!' he said abruptly.

Tess, who had been quite unconscious of her action and mien, instantly withdrew the large dark gaze of her eyes, stammering with a flush, 'I beg your pardon!' And there was revived in her the wretched sentiment which had often come to her before, *that in inhabiting the fleshy tabernacle with which nature had endowed her she was somehow doing wrong.*¹⁵⁹

So we see that Tess, conscious of the fact that men find her physically attractive, incorrectly shifts the blame to herself instead of holding Alec accountable for his lack of control. As Hardy described, "this encompassment of her own characterization, based on shreds of convention, peopled by phantoms and voices anti-pathetic to her, was a sorry and mistaken creation of Tess' fancy—a cloud of moral hobgoblins by which she was terrified without reason."¹⁶⁰

As the novel reveals, once Tess's misconception of what happened between her and Alec combines with the community's view of her as

157. See HARDY, *supra* note 1, at 125 (ch. XII).

158. See *supra* note 127 (citing a recent study indicating women most often know their attackers).

159. HARDY, *supra* note 1, at 388 (ch. XLV) (emphasis added).

160. HARDY, *supra* note 1, at 135 (ch. XIII).

a seduced, fallen woman, the nonrecognition of Tess's acquaintance rape has unfortunate consequences. Moreover, when Hardy's readers fail to recognize the rape, their misinterpretation of *Tess* creates distorted views of what constitutes appropriate sexual conduct.

III. CONSEQUENCES

A. *Tess's Tragedies*

"Rape profoundly alters women's sense of themselves and the world around them."¹⁶¹ As Hardy demonstrated, the consequences of rape are no less tragic to a poor country girl. In an uncharacteristically perceptive moment, Angel acknowledges the value of even a dairymaid's life: "Tess was no insignificant creature to toy with and dismiss; but a woman living her precious life—a life which, to herself who endured or enjoyed it, possessed as great a dimension as the life of the mightiest to himself."¹⁶² Immediately after the rape, Tess quickly transforms from an independent, hopeful, assertive, and responsible girl to a reclusive version of her former self.¹⁶³

In addition to producing drastic changes in the victim's personality, rape causes victims to reorder their lives.¹⁶⁴ This phenomenon holds true for Tess. She noticeably perceives the rape as a painful strand which twists through every aspect of her life.¹⁶⁵ As Hardy indicated, the woman's future will always be measured in terms of her past.¹⁶⁶ Tess must contemplate her newfound love for Angel in light of her past experiences: "Whither does this new current tend to carry me? What does it mean to my future? How does it stand towards my past?"¹⁶⁷ As is revealed throughout the novel, no current seems strong enough to carry Tess away from her past.

Up to the point that Tess tells Angel about Alec, it seems the only chance she has at happiness is to live a lie that she was not raped. As revealed by Tess's reaction to her mother's advice not to disclose her

161. Brande Stellings, *The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship*, 28 HARV. C.R.-C.L. L. REV. 185, 185 (1993).

162. HARDY, *supra* note 1, at 214 (ch. XXV).

163. See HARDY, *supra* notes 64 and 69 (discussing how Tess could no longer retain her more positive characteristics).

164. Stellings, *supra* note 161, at 198-99 (discussing rape as a cause for women to make alterations in their daily lives, such as choosing not to use public transportation or go to the movies after dark).

165. HARDY, *supra* note 1, at 239 (ch. XXVII) (stating that "her life was so distinctly twisted of two strands, positive pleasure and positive pain").

166. HARDY, *supra* note 1, at 185 (ch. XX).

167. HARDY, *supra* note 1, at 185 (ch. XX). See also *supra* notes 72-78 and accompanying text (narrating the struggle Tess has as a result of the past).

past to Angel, it is evident that this deception is not as easy for Tess as it is for others: "That haunting episode of bygone days was to her mother but a passing accident. . . . Silence seemed, on the face of it, best for her adored one's happiness: silence it should be."¹⁶⁸

The effect of being forced to hide from one's past is apparent. Even during the brief period of Tess's happiness at the dairy farm "[a] spiritual forgetfulness co-existed with an intellectual remembrance. She walked in brightness, but she knew that in the background those shapes of darkness were always spread. They might be receding, or they might be approaching, one or the other, a little every day."¹⁶⁹

Her inability to assert herself against Angel and his condemning ways depicts the extent to which this silence takes its toll on Tess. As Angel notes,

There was, it is true, underneath, a back current of sympathy through which a woman of the world might have conquered him. But Tess did not think of this; she took everything as her just deserts, and hardly opened her mouth. The firmness of her devotion to him was indeed almost pitiful; quick-tempered as she naturally was, nothing that he could say made her unseemly; she sought not her own; was not provoked; thought no evil of his treatment of her.¹⁷⁰

Eventually, the effect of having no one acknowledge the fact that she was a victim becomes clear. For Tess, Alec's conversion epitomizes the unjust suffering she endured: "As soon as she could reflect it appalled her, this change in their relative platforms. He who had wrought her undoing was now on the side of the Spirit, while she remained unregenerate."¹⁷¹ One does not fully realize the anger and bitterness felt by Tess until Alec confronts her again. In a particularly disheartening moment, Tess realizes that she can never escape the onus of her past: "[T]he break of continuity between her earlier and present existence, which she had hoped for, had not, after all, taken place. Bygones would never be complete bygones till she was a bygone herself."¹⁷²

168. HARDY, *supra* note 1, at 256 (ch. XXXI).

169. HARDY, *supra* note 1, at 260 (ch. XXXI).

170. HARDY, *supra* note 1, at 312 (ch. XXXVI).

171. HARDY, *supra* note 1, at 384 (ch. XLV). *See also id.* at 387 (ch. XLV) ("You, and those like you, take your fill of pleasure on earth by making the life of such as me bitter and black with sorrow; and then it is a fine thing, when you have had enough of that, to think of securing your pleasure in heaven by becoming converted!").

172. HARDY, *supra* note 1, at 385 (ch. XLV).

As previously noted, the limited way in which law and society perceive incidents of acquaintance rape directly limits the range of options available to victims of such crimes.¹⁷³ For Tess, the extent of this limitation is exemplified by her return to Alec at the end of the novel. One critic viewed this development as evidence supporting the theory that Tess had been seduced by Alec.¹⁷⁴ Rather, since she resorted to this act only after her family was expelled from their land due to her reputation,¹⁷⁵ it indicates the extent to which Tess's life has been altered by the rape. Having exhausted every option, Tess simply gives up the struggle to regain her autonomy. It is plausible that, in light of her utter frustration with society's harsh judgment, she returns to Alec because he is the only one who knows the truth about what he did to her.

The most tragic consequence of Tess's ordeal is her degeneration to a murderer and her subsequent hanging. Moments before Tess is captured, Angel reveals that he feels Tess will also be condemned in the afterlife: "Tell me now, Angel, do you think we shall meet again after we are dead? I want to know?" He kissed her to avoid a reply at such a time.¹⁷⁶ In creating a world where the victim ends up as an outlaw, Hardy suggests a sense of serious injustice in the legal system and the society in which it functions.

B. Victim's Rights

The extent to which rape affects women's lives is a significant issue. Feminists and civil rights advocates maintain that rape and sexual violence affect women's lives to the degree that it also constitutes an act of sex discrimination depriving women of "[t]he right . . . to be self-governing and equally participating members of society."¹⁷⁷

173. MATOESIAN, *supra* note 123, at 191 (illustrating that the options of choice and action are limited by social structure).

174. "The renewed relationship seems to make the most sense as an extension of an initial seduction. Would she have become his mistress earlier and been willing to resume the relationship years later if he had raped her?" Waldoff, *supra* note 5, at 138.

175. 'Father's was the last life on the property, and when that dropped we had no further right to stay. Though we might, perhaps, have stayed as weekly tenants — if it had not been for me.'

'What about you?'

'I am not a — proper woman.'

D'Urberville's face flushed.

'What a blasted shame! Miserable snobs! May their dirty souls be burnt to cinders!'

he exclaimed in tones of ironic resentment.

HARDY, *supra* note 1, at 438 (ch. LI).

176. HARDY, *supra* note 1, at 486 (ch. LVIII).

177. Stellings, *supra* note 161, at 189; Cass R. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826, 828 (1988) (reviewing MACKINNON, *supra* note 124, and restating that MacKinnon's view of gender inequality, which describes inequality in terms of social subordination of women

Congress has addressed these contentions through legislation which creates a civil rights cause of action for victims of crimes motivated by gender, including rape victims.¹⁷⁸ One purported goal of this legislation is to "serve a national psychic purpose" in influencing the public's perception of the seriousness of violence against women by dealing with it on a federal level.¹⁷⁹

The civil rights cause of action is based on the concept that, due to the inherent nature of the female body and the frequent occurrence of rape, rape is not an isolated deviation from social norms, but an ongoing subordination of women.¹⁸⁰ The rubric that "'things which are different in fact [are not required to] be treated in law as though they were the same'"¹⁸¹ justifies, in some circumstances, allowing

rather than mere arbitrary or irrational differentiation, would include issues such as rape); *Recent Cases, Title VII — Bona Fide Occupational Qualification Defense — Necessity of Sex Discriminatory Policy Should Be Evaluated According to a Totality of the Circumstances Test*, *Torres v. Wisconsin Department of Health and Social Services*, 859 F.2d 1253 (7th Cir. 1988), 102 HARV. L. REV. 2048, 2053-54 (1989) (urging that a broader concept of sex discrimination, which incorporated sexual domination and women's inherent vulnerability to sexual violence, should include rape as a fundamental issue of gender inequality).

178. The Violence Against Women Act, first introduced by Senator Biden (D-DE) in 1990, S. 2754, 101st Cong., 1st Sess. (1990), was signed into law by President Clinton as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40001, 108 Stat. 1796. Among its provisions, the law provides for civil remedies for victims of gender motivated crime. See *id.* § 40302; see also Robert Shepard, *Female Agenda Takes Long Way to Become Law*, CHI. TRIB., Sept. 25, 1994, § 6, at 1 (describing the civil rights cause of action created by the Violence Against Women Act which enables victims of gender motivated crimes to obtain compensation from their attackers).

While the newly enacted crime bill has been recognized for its efforts to combat rape and domestic violence, Shepard, *supra*, some prognosticators have questioned its potential effectiveness. Specific provisions in the Violence Against Women Act are closely tied to state rape laws. *National Press Club Luncheon Speaker Catharine A. MacKinnon, Professor, University of Michigan Law School National Press Club Ballroom*, FED. NEWS SERVICE, Nov. 22, 1993, available in LEXIS, NEWS Library, CURNWS File, (stating that "if existing state laws worked, we wouldn't need this bill"); see also Alice Vachss, *Rape and Denial: a Federal Nonsolution; Proposed Violence Against Women Act*, 209 NEW REPUBLIC 14 (1993) (predicting that passage of a federal civil rights law will do little to protect women from violence at the state and local levels). By closely tying the definition and elements contained in the bill to state law, the Act "threatens to repeat the errors and omissions of state criminal laws." Wendy Rae Willis, *The Gun is Always Pointed: Sexual Violence and Title III of the Violence Against Women Act*, 80 GEO. L.J. 2197, 2204-16 (1992) (discussing the possibility that the Act may fail to effectuate actual change).

Class-based violence against women has been analogized to other federal remedies for civil rights violations, including race-based violence and sexual discrimination in the workplace. See Willis, *supra*, at 2200. This type of federal regulation is exemplified by the passage of the Ku Klux Klan Act of 1871 which demonstrates the federal government's "willingness to reach private conduct and its recognition that private acts of terror threaten the public role of the citizen." Stellings, *supra* note 161, at 209-10 (citing Civil Rights Act of 1871 (codified at 42 U.S.C. § 1985(3)(1988))).

179. Willis, *supra* note 178, at 2202.

180. See Sunstein, *supra* note 177, at 828 (describing the dominance approach of gender inequality).

181. See Stellings, *supra* note 161, at 190 (citing *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981)). But see Gene R. Nichol, Jr., *Constitutional Perils — Real and Otherwise*, 1984 DUKE L.J. 1002, 1006 & n.28 (reviewing OUR ENDANGERED RIGHTS — THE ACLU REPORT ON CIVIL

natural differences between men and women to legitimize gender discrimination. However, this reasoning is faulty because it treats rape as an "accident of nature" rather than as male aggression against women expressed sexually.¹⁸² Furthermore, "[t]hat violence against women is sexualized is no accident or mere inevitability of nature: women are raped because our society views women as appropriate targets of such aggression by virtue of their femaleness, and because our legal system as a whole permits it."¹⁸³

Advocates of civil remedies for rape victims urge that the effect of discrimination against women as a class must be recognized.¹⁸⁴ Rape extensively alters a woman's life. Additionally, for all other women who live in fear of being raped,¹⁸⁵ the restriction on their behavior and alteration of their every day lives both threaten and limit women's autonomy.¹⁸⁶ In essence, "the failure to recognize rape, and the threat of it, as a problem of sex discrimination . . . overlooks the way it both represents and maintains a system of subordination."¹⁸⁷

LIBERTIES TODAY (Norman Dorsen ed., 1984) and conceding that *Michael M.* "is indeed a regrettable step backwards in the Supreme Court's treatment of sex discrimination").

182. Stellings, *supra* note 161, at 191. *But see* Cathy Young, *Gender Poisoning: In the Bobbitt Era, Facing the Real Truth About Male Violence*, WASH. POST, Jan. 16, 1994, at C5 (questioning the categorization of rape as a gender motivated crime). The author states that up to 10% of rape victims outside prisons are male and that violent behavior is a gender neutral problem. While 1.8 million American women suffer from violent attacks each year by their partners, over 2 million men are assaulted annually by their wives or girlfriends. *Id.* (citing a 1985 National Family Violence Survey); Stellings, *supra* note 161, at 187 n.5 (citing a letter from the United States Department of Justice opposing a civil rights cause of action for rape victims due to the belief that principle motivation for rapists is a "desire for control and power, rather than a hatred for women").

183. Stellings, *supra* note 161, at 193. *See* MATOESIAN, *supra* note 123, at 11 (examining the relationship among male aggression, gender inequality, and rape); *see also* HUBERT S. FEILD & LEIGH B. BEINEN, *JURORS & RAPE* 7 (1980) (stating that an individual's chances of being arrested, prosecuted, and found guilty of any offense, including rape, are four in one hundred).

184. *See* Stellings, *supra* note 161, at 194-96 (arguing that failure to identify rape as a discrimination issue can result in merely focusing on the sex act itself and not the effects rape has on women as a class).

185. Stellings, *supra* note 161, at 198 (estimating that since "one in five women will be raped, all women must conduct their lives in ways designed to minimize the risk of rape").

186. Stellings, *supra* note 161, at 199; Sandy Spaulding, *Hurting Women Isn't Unusual; It's the Norm*, SAN JOSE MERCURY NEWS, Feb. 10, 1994, at 10B (describing a letter by the National Organization for Women responding to criticism of the Violence Against Women Act and urging that women "are tired of altering [their] behavior because a rapist may be lurking around the next corner"); *see also* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 454-55 & n.95 (1990) ("Less obvious, but just as significant, is the effect of pervasive racial and sexual violence and coercion on individual members of subordinated groups who must learn the survival techniques of suppressing and disguising rage and anger at an early age.").

187. Stellings, *supra* note 161, at 187-88.

Attempts to define a woman's right to choose abortion as an equal protection issue, rather than a privacy right, employ similar principles.¹⁸⁸ So viewed, the proper way to define the violation of such a right creates a problem which "stresses issues of discrimination and views a prohibition on abortion as an involuntary cooptation of women's bodies in the service of third parties."¹⁸⁹ Consequently, "a society that denies women the freedom to control their role in the reproductive cycle strips them of the autonomy necessary for real citizenship. Their sexuality, enforced by law, determines their fate."¹⁹⁰ Similarly, by examining rape under this broad concept of discrimination, the acts which violate a woman's right not to have sex forced upon her also deny her the right to control her social, economic, and emotional fate. This is especially true for rape victims, such as Tess, who are impregnated by their attackers.

Some of the problems with defining and proving rape, discussed in this article, are currently being addressed by a rape law reform movement.¹⁹¹ The focus of these reforms include changes that: incorporate behavior other than vaginal penetration,¹⁹² redefine the level of resistance required for victims to meet nonconsent requirements,¹⁹³ eliminate requirements of corroboration of victim's testimony,¹⁹⁴ and prohibit the introduction of evidence of a victim's prior sexual conduct.¹⁹⁵

While the consequences of the rape law reform movement are beyond the scope of this Article, highlighting some of the resulting substantial changes is important. Of particular relevance are changes made with respect to the level of resistance required to show the victim's nonconsent.

[A] number of states eliminated resistance by the victim as an element of the crime to be proved by the prosecutor. Pennsylvania law states explicitly that "the alleged victim need not resist the act

188. Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 617 & nn.75-76 (1990).

189. *Id.* at 617.

190. See Hirshman, *supra* note 2, at 222 (referring to Hester Prynne's experience in Nathaniel Hawthorne's *The Scarlet Letter*).

191. SPOHN & HORNEY, *supra* note 119, at 20-29 and accompanying text (reviewing modifications in state rape laws).

192. SPOHN & HORNEY, *supra* note 119, at 22 (stating that some states have replaced the element of vaginal penetration for a gender-neutral series of graded offenses); ESTRICH, *supra* note 7, at 831 (discussing Washington and Michigan's redefinition of rape).

193. SPOHN & HORNEY, *supra* note 119, at 23-24 (naming the nonconsent standards in several states).

194. SPOHN & HORNEY, *supra* note 119, at 24-25 (noting that several states eliminated the corroboration requirement).

195. SPOHN & HORNEY, *supra* note 119, at 25-29 (discussing the installation and application of rape shield laws).

. . . ." Other states attempted to remove the ambiguity in the consent standard and to obviate the state's burden of proving an absence of consent by specifying the circumstances which constitute force—using or displaying a weapon, . . . injuring the victim, and so on. Still other states retained the concept of consent but defined it more clearly. Illinois, for example, defined consent as "a freely given agreement to the act of sexual penetration or sexual conduct in question" ¹⁹⁶

These changes serve the dual purpose of reducing the risk of danger to which victims must subject themselves during an attack ¹⁹⁷ and removing a "significant legal obstacle to prosecution and conviction in rape cases." ¹⁹⁸ Moreover, they serve to redefine legal and societal concepts of criminally punishable sexual conduct. ¹⁹⁹

CONCLUSION

While we must recognize every effort made in the fields of rape law reform and victim's rights, we must also recognize the limitations of these methods. Criminal law alone can not address the issues of acquaintance rape; ²⁰⁰ official reports of rape incidents do not reflect the reality of its occurrence, ²⁰¹ and rape law reform has been somewhat ineffectual. ²⁰² Moreover, the provisions of civil rights legislation purportedly mirror the shortcomings of state rape laws. ²⁰³ Even the most valiant of efforts in the areas of civil rights and sex discrimination contribute little to the victim if the rape remains unrecognized.

196. SPOHN & HORNEY, *supra* note 119, at 23-24 (citing 18 PA. CONS. STAT. ANN. § 3107 (1983) and ILL. ANN. STAT. ch. 38, para. 12-17 (Smith-Hurd 1993)).

197. ESTRICH, *supra* note 7, at 58.

198. SPOHN & HORNEY, *supra* note 119, at 162.

199. MATOESIAN, *supra* note 123, at 17-18.

200. See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1181 (1986) ("It may be impossible—and even unwise—to try to use the criminal law to change the way people think . . .").

201. See FEDERAL BUREAU OF INVESTIGATION, *supra* note 128 (discussing the statistics on unreported rape incidences).

202. See ESTRICH, *supra* note 7, at 91 ("[C]hanging the words of statutes is not nearly so important as changing the way we understand them."); MATOESIAN, *supra* note 123, at 18 ("In essence, the instrumental impact of rape reform on case outcome has been minimal.") (citation omitted); SPOHN & HORNEY, *supra* note 119, at 163 ("Eliminating the legal requirements for corroboration and resistance does not mean that those factors will no longer play a role in decisions."). See also *supra* note 133 and accompanying text (showing that the reforms on rape do not always solve the problems because in practice the reforms do not affect the thinking of actors in the criminal justice system).

203. See *supra* note 178 (noting that definitions and elements of the Violence Against Women Act are closely tied to state rape laws). But see Violent Crime Control and Law Enforcement Act of 1994, *supra* note 178 § 40302(e)(2) (providing that an injured party can seek civil damages against a perpetrator of a gender motivated crime of violence whether or not the alleged act resulted in a criminal charge).

In light of these limitations, a critical step in the area of rape law reform begins with informing individual members of society of the realities of acquaintance rape. "When juries refuse to convict for rape, when judges acquit in cases of brutal attacks and cite ambiguity on the issue of consent, the law alone is not what needs to be changed."²⁰⁴ From judges and legislators to police officials and jurors, the public needs to re-evaluate this controversial issue. Attempts to change society's perception of this crime are essential steps in the process of rape law reform.

Thus, literature may offer a solution where other methods of informing the public about this crime fall short. "What literature has most to teach us is how to put our habitual methods of thought in question, how to think about, criticize, and reform them."²⁰⁵ With a closer examination of *Tess*, readers will draw upon its insight into a woman's situation when called to distinguish between consensual sexual relations and acquaintance rape. Hardy's attempt to educate society of the plight of the acquaintance rape victim through his novel makes *Tess* significant as a vehicle for legal reform.

Many forces are at work in the areas of rape law reform and victim's rights. Hardy's novel, *Tess of the D'Urbervilles*, makes an invaluable contribution to this task—one reader at a time.

204. FEILD & BEINEN, *supra* note 183 at 7. As noted by Senator Joseph Biden, proponent of the Violence Against Women Act, "To change the course of this violence, we must change not only our laws, but our attitudes, as well." Anne Reifenberg, *Brady Bill Dies in Senate; Chamber Passes Anti-Crime Package That Increases Police*, DALLAS MORNING NEWS, Nov. 20, 1993, at 1A.

205. White, *supra* note 11, at 2028.

