

## “Marriage is No Protection for Crime”: Coverture, Sex, and Marital Rape in Eighteenth-Century England

*Lisa Forman Cody* 

**Abstract** If coverture justified patriarchal control and legally erased many aspects of wives’ separate existence, did this mean that husbands in eighteenth-century England also enjoyed absolute authority over their wives’ sexual bodies? This article examines how contemporaries described the sexual boundaries between spouses and what wives could do when they had been violated by their husbands. Wives had few legal protections and limited social and economic resources to escape unwanted marital sex, but the small number who could afford the high costs turned to the ecclesiastical courts to legally separate from their husbands. The five case studies from the ecclesiastical courts explored here are exceptional, first, because sexual problems were at their core, and second, because unusual collateral evidence survives describing attorneys’ and judges’ opinions about spouses’ bodily rights within marriage. Whether they were seeking relief from reproductive toil, venereal infection, threat of sexual violence, or trauma from marital rape, these wives wanted to escape their husbands—but they faced hurdles. Because English ecclesiastical law did not explicitly identify sexual discord as justifying marital separation, the women’s attorneys had to demonstrate that unwanted sexual relations were acts of cruelty. By invoking bodily safety, decorum and propriety, and sensibility and sympathy, advocates argued against husbands’ absolute conjugal authority. The author considers how broader transformations in beliefs about gender and sexuality may have resulted in giving wives slightly more room for protection by the second half of the eighteenth century, particularly when they faced the threat of marital rape or venereal infection.

**A** dam’s rib, a stream that joins a river, two flesh made one: these traditional metaphors symbolized both the carnal fusion between spouses and wives’ divinely ordained subordination under their

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husbands.<sup>1</sup> Serving as more than florid descriptions, these bodily and organic symbols provided the natural rationale for women's legal status in marriage as *femes covertes*. Coverture gave husbands both control of their wives' property, household decisions, and children and the right to discipline and corporally punish their wives.<sup>2</sup> To be clear, coverture was more debilitating than merely presuming women's inferiority to men. It was designed to be the near-complete absorption of a wife's identity into that of her husband. For example, jurist Sir William Blackstone explained that a husband "cannot grant any thing to his wife . . . for the grant would be to suppose her separate existence."<sup>3</sup> Though there were important exceptions whereby some wives carried on business in their own names and others had their property protected in equity courts,<sup>4</sup> ultimately eighteenth-century English marriage was legally imagined to be an asymmetrical union, a state in which the "husband and wife are one and that one is the husband."<sup>5</sup>

If coverture legally erased wives' "separate existence,"<sup>6</sup> did this also mean that husbands possessed absolute authority over their wives' sexual bodies? Once wed, did a woman have a right to say no to sex? When a husband forced his wife into intercourse, was it considered rape?<sup>7</sup>

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<sup>1</sup> For the river metaphor, see *The Lawes Resolutions of Womens Rights: Or, The Lawes provision for women* (London, 1632), 124–125; for Adam's rib, Genesis 2:22; for two flesh made one, Genesis 2:24.

<sup>2</sup> Mary Astell, *Some Reflections upon Marriage* (London, 1700), 27–31; [John Baldwin], *Liberty Invaded: Or, the Remarkable Case of an English Lady* [. . .] (London, 1750–51), 92–95; John Stuart Mill, *The Subjection of Women* (London, 1869); Carol Pateman, *The Sexual Contract* (Stanford, 1988); Elizabeth Foyster, *Marital Violence: An English Family History, 1660–1857* (Cambridge, 2005); Frances E. Dolan, *Marriage and Violence: The Early Modern Legacy* (Philadelphia, 2008).

<sup>3</sup> William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford, 1765–69), 4:430.

<sup>4</sup> Susan Staves, *Married Women's Separate Property in England, 1660–1833* (Cambridge, MA, 1990); Margot Finn, "Women, Consumption and Coverture in England, c. 1760–1860," *Historical Journal* 39, no. 3 (1996): 703–26; Tim Stretton, *Women Waging Law in Elizabethan England* (Cambridge, 1998); Tim Stretton and Krista J. Kesselring, eds., *Married Women and the Law: Coverture in England and the Common Law World* (Montreal, 2013); Amy Louise Erickson, *Women and Property in Early Modern England* (London, 1993); Amy Louise Erickson, "Coverture and Capitalism," *History Workshop Journal* 59, no. 1 (2005): 1–16; Joanne Bailey, "Favoured or Oppressed? Married Women, Property, and 'Coverture' in England, 1660–1800," *Continuity and Change* 17, no. 3 (2002): 351–72.

<sup>5</sup> Susan B. Anthony's 1873 gloss on Blackstone, who she "summed up in the fewest words possible": Susan B. Anthony, "Is It a Crime for a Citizen of the United States to Vote?," in *The Selected Papers of Elizabeth Cady Stanton and Susan B. Anthony: Against an Aristocracy of Sex, 1866 to 1873*, ed. Ann D. Gordon, 6 vols. (New Brunswick, 1997–2013) 2:554–84, at 572.

<sup>6</sup> Blackstone, *Commentaries on the Laws of England*, 4:430.

<sup>7</sup> For the broader history of rape, criminal prosecution, and cultural attitudes during the long eighteenth century, see Anna Clark, *Women's Silence, Men's Violence: Sexual Assault in England, 1770–1845* (London, 1987); Miranda Chaytor, "Husband(ry): Narratives of Rape in the Seventeenth Century," *Gender and History* 7, no. 3 (1995): 378–407; Laura Gowing, *Common Bodies: Women, Touch, and Power in Seventeenth-Century England* (New Haven, 2003), esp. 90–101; Garthine Walker, "Rape, Acquittal, and Culpability in Popular Crime Reports in England, c. 1670–c. 1750," *Past and Present*, no. 220 (2013): 115–42; J. M. Beattie, *Crime and the Courts in England, 1660–1800* (Princeton, 1986), 14–32; Randolph Trumbach, *Sex and the Gender Revolution*, vol. 1, *Heterosexuality and the Third Gender in Enlightenment*

These are difficult questions to answer given the nature of surviving sources. Eighteenth-century culture was rich with salacious gossip, novels centered on sexual seduction, innuendo-laden visual satires, and explicit and sometimes violent portrayals of sex in pornography and erotica, but contemporaries could read surprisingly little about spousal sex.<sup>8</sup> Letters and diaries mentioning conjugal relations survive, but rarely elaborate upon sexual dynamics.<sup>9</sup> And while legal resources such as the published proceedings of London's Old Bailey provide detailed evidence about interpersonal relations, it and other courts left little record of sexual conflict within marriage. This was in part because there were no eighteenth-century laws against conjugal sex, except in the rarely prosecuted crimes of bridal abduction, bigamy, incest, and sodomy. There was no common-law remedy for the spouse who wanted to say no or who had been forced into intercourse. Even England's ecclesiastical courts, which oversaw spousal disputes, did not explicitly identify marital rape or nonconsensual sex as a cause for either annulment or separation.

The apparent legal invisibility of marital rape both in common and ecclesiastical law did not mean, however, that the concept itself was entirely unimaginable in the eighteenth century. Manuscript case notes, legal diaries, and published jurisprudence record ecclesiastical practitioners explicitly discussing unwanted marital sex. In the five marital causes examined here, advocates contested whether wives could say no to sex in cases of venereal disease, threats of sexual violence, physical restraint, or sexual assault. With no explicit prohibitions against such sexual behavior, advocates on both sides turned to other branches of law, moral and religious principles, sentimental depictions of marriage, personal innuendos about disputants and one another, and the well-timed sarcastic remark or fresh piece of gossip. Surprisingly, wives' defenders even used words like *rape*, *ravish*, and *consent* to describe sexual conflict. Though husbands often won these legal battles, they did not always. Whether wives prevailed or not, these records register unexpected evidence that husbands' carnal rights and wives' absolute sexual subjugation were debated.

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London (Chicago, 1998), 301–24; Simon Dickie, "Fielding's Rape Jokes," *Review of English Studies* n.s. 61, no. 251 (2010): 572–90.

<sup>8</sup> David M. Turner, *Fashioning Adultery: Gender, Sex, and Civility in England, 1660–1740* (Cambridge, 2002); Karen Harvey, *Reading Sex in the Eighteenth Century: Bodies and Gender in English Erotic Culture* (Cambridge, 2004); Vic Gattrell, *City of Laughter: Sex and Satire in Eighteenth-Century London* (New York, 2006); [Edmund Curll], *The Cases of Polygamy, Concubinage, Adultery, Divorce &c.* (London, 1732); [Samuel Bladon], *Trials for Adultery: or, the History of Divorces*, 7 vols. (London, 1779–81).

<sup>9</sup> Some male diarists chronicled their sexual exploits but did not typically delve into their wives' feelings; see Robert Latham and William Mathews, eds., *The Diary of Samuel Pepys*, 11 vols. (London, 1971) 1:217, 279; 2:75; 4:274, 291; 5:94, 200; 8:588, 594;9:90; twice Pepys describes his wife's enjoyment, 8:382, 9:363; Craig Horner, ed., *The Diary of Edmund Harrold, Wigmaker of Manchester, 1712–15* (London, 2008), fols. 2v, 4r, 5v, 7r, 9r, 9v, 10r, 10v, 11r, 11v, 12r, 12v, 13r, 13v, 14r, 14v, 15r, 15v, 16r, 16v, 17r, 17v, 18r, 18v, 19r, 19v, 20r, 21rv, 22r, 48v, 49r, 49v, 50r, 50v, 51r, 53r, 56r. For brief remarks about her permanently discontinuing conjugal sexual relations after her fourth delivery, see "Diary of Sarah, Lady Cowper, 1700–16," Hertfordshire Public Record Office, D/EP F29-F35, esp. vol. 1 (1700–1), 3, 20–21, 61. The fifteenth-century mystic Marjory Kempe described her husband's forcing her repeatedly into sexual intercourse; see James Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago, 1987), 507; "The Book of Margery Kempe" (ca. 1440), British Library, London, Add MS 61823. (Hereafter this repository is abbreviated as BL.)

## MARITAL RAPE AS BLIND SPOT

Before the late twentieth century, there were no laws that protected legally wed wives from their husbands' compelling them to have heterosexual intercourse.<sup>10</sup> Though customs and courtesies allowed wives to abstain after childbirth, little could be done to redress their husbands' breaching such cultural expectations.<sup>11</sup> Wives could not even criminally prosecute their husbands for violently forcing them into sex: English common law did not recognize marital rape.<sup>12</sup>

There are many underlying principles beneath this long-held marital rape exemption. Rape had been a capital felony for centuries, but medieval law had classified it as an act of trespass against a baron, not the victim herself, which would make marital rape culturally and legally illogical.<sup>13</sup> Even with a broader historical transformation in which rape was understood by the eighteenth century as “a breach of the liberty of the woman and a great injury to her,”<sup>14</sup> it remained unclear under coverture whether a husband could commit such a crime against his wife. The posthumous 1736 edition of Matthew Hale's *Historia Placitorum Coronae* explained why: “The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”<sup>15</sup> Hale's explanation was

<sup>10</sup> The statute of 1487, 3 Hen. 7, c. 2, criminalized the bridal abduction of women and girls, but the law may have served the interest of women less than that of their fathers and male relations motivated to protect familial property; wealthy widows abducted or forced into marriage had fewer protections. On abduction, see Shannon McSheffrey and Julia Pope, “Ravishment, Legal Narratives, and Chivalric Culture in Fifteenth-Century England,” *Journal of British Studies* 48, no. 4 (2009): 818–36. The difficulties that widows faced are described in Lawrence Stone, *Uncertain Unions: Marriage in England, 1660–1753* (Oxford, 1992), 96–104. Wealthy widow Rachel Rogers was unable to prosecute her abductor for rape when he introduced his surprise witness, a clergyman who falsely testified that he had legally married the two; see “John Thompson, Joseph Brown, Mary Dunford, Mark Travilian, Elizabeth Campbell; Miscellaneous: kidnapping,” 12 July 1720, Proceedings of the Old Bailey Online, t17200712–26, [www.oldbaileyonline.org](http://www.oldbaileyonline.org).

<sup>11</sup> David Cressy, *Birth, Marriage, and Death: Ritual, Religion, and the Life-Cycle in Tudor and Stuart England* (Oxford, 1997), 203–4.

<sup>12</sup> Sharon Block, *Rape and Sexual Power in Early America* (Chapel Hill, 2006), 78; Joanna Bourke, “Sexual Violence, Marital Guidance, and Victorian Bodies: An Aesthesiology,” *Victorian Studies* 50, no. 3 (2008): 419–36, at 421–22; J. L. Barton “The Story of Marital Rape,” *Law Quarterly Review*, no. 108 (1992): 260–71; Rebecca M. Ryan, “The Sex Right: A Legal History of the Marital Rape Exemption,” *Law and Social Inquiry* 20, no. 4 (1995): 941–1004, at 947; Adrian Williamson, “The Law and Politics of Marital Rape in England, 1945–1994,” *Women's History Review* 26, no. 3 (2017): 382–413.

<sup>13</sup> Caroline Dunn's elegant study cautions against viewing rape in the medieval and early modern world in the same category as understood in later periods; Caroline Dunn, *Stolen Women in Medieval England: Rape, Abduction, and Adultery. 1100–1500* (Cambridge, 2013). See also *Laws Resolution*, 378–402. As a category, rape had a contradictory and complex status in legal history, as eighteenth-century authorities noted; see *A Treatise of Feme Coverts: Or the Lady's Law* (London, 1732), 39–52; also Blackstone's observations that a man accused of raping a prostitute could be charged in criminal law but not in civil law: Blackstone, *Commentaries*, 4:213.

<sup>14</sup> Adam Smith, *Lectures on Jurisprudence*, ed. R. L. Meek, D. D. Raphael, and Peter Stein (Oxford, 1978), 120–21; Julia Rudolph, “Rape and Resistance: Women and Consent in Seventeenth-Century English Legal and Political Thought,” *Journal of British Studies* 39, no. 2 (2000): 157–84; Laura Gowing, “Women's Bodies and the Making of Sex in Seventeenth-Century England,” *Signs* 37, no. 4 (2012): 813–22, at 817.

<sup>15</sup> Matthew Hale, *Historia Placitorum Coronae* [. . .], ed. Sollom Emllyn, 2 vols. (London, 1736), 2:629. This is the first edition of Hale's Pleas to include the marital rape exemption. Until the end of the

based on marriage collapsing a woman’s identity under her husband’s identity and authority. It also was based on centuries of canon law defending what was considered the conjugal debt, in which spouses were expected to owe sexual comfort to each other perpetually.<sup>16</sup>

The 1753 Hertfordshire case of Job Wells, who was prosecuted for raping his sixteen-year-old biological daughter, suggests that marital rape was not seen as a similar violation. Tucked into the widely circulated narrative, an aside reveals what Wells did to his wife a year earlier. Because he was “much given to Women, especially when he had been drinking, and then he was a down-right Brute,” Job did not restrain himself. “His Wife died about a Year ago, in Child-bed, and there is a Report, that he was the Occasion, by forcibly going to Bed to her the next Day after she was delivered, for she died on the third Day.”<sup>17</sup> Though both assaults might now be considered sexual battery, this is not how they were seen in eighteenth-century law. Rape was “an Offence in having unlawful and carnal Knowledge of a Woman by Force, and against her Will.”<sup>18</sup> Job’s attack on his daughter met those requirements: it was unlawful because it was incestuous, against her will, and forced as he threatened her with a knife and swore that “he would rip [her] up, or cut [her] Throat” if she resisted him.<sup>19</sup> But Job was not charged for a crime against his wife, perhaps because it had occurred a year earlier and he refused to incriminate himself. Unless he had committed what was defined as an unnatural act like sodomy, there were no grounds upon which to prosecute him, even if her death resulted from the sexual attack. Job’s assault was technically unrecognizable in common law. But the author’s not identifying it as rape may have also been instinctive—a sense that wives truly gave perpetual sexual consent at the altar and that marriage collapsed the bodily boundary between spouses.

Conceptualizing marital rape required viewing a wife as possessing a separate existence that remained intact despite marriage. This was difficult for some contemporaries to imagine. Even the women’s rights advocate Sarah Chapone, who lamented wives’ loss of property under coverture, nonetheless accepted husbands’

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eighteenth century, the only legal author to state the marital rape exemption was Theodore Barlow in *The Justice of the Peace* (London, 1745), 453. It was only with David Hume’s *Commentaries on the Law of Scotland*, 2 vols. (Edinburgh, 1797) (which represented Scottish, not English, law and was written by David Hume’s nephew, who shared the same name) and Edward Hyde East’s *Pleas of the Crown* (London, 1803) that marital rape was explicitly addressed again. Richard Burn did not incorporate the marital rape exemption in his *The Justice of the Peace, and Parish Officer*, 2 vols. (London, 1755) but it is mentioned in Richard Burn, *Justice of the Peace*, 6 vols., 26th ed. (London, 1831), 3:259.

<sup>16</sup> See Richard H. Helmholz, *Marriage Litigation in Medieval England* (Cambridge, 1974), 67–69, for restitution of conjugal rights cases demanding a renewal of sex. Brundage, *Law, Sex, and Christian Society*, notes that some canonists viewed forced marital sex as legal but sinful. See also Angeliki E. Laiou, “Sex, Consent, and Coercion in Byzantium,” in *Consent and Coercion to Sex and Marriage in Ancient and Medieval Societies*, ed. Angeliki E. Laiou (Washington, DC, 1993), 177–97; James A. Brundage, “Implied Consent to Intercourse,” in Laiou, *Consent and Coercion*, 245–56; John W. Baldwin, “Consent and the Marital Debt: Five Discourses in Northern France around 1200,” in Laiou, *Consent and Coercion*, 257–70.

<sup>17</sup> *The trial of Job Wells, of Redburn [ . . . ] for a rape committed on the body of his own daughter; Maria Wells* (London, 1753), 7; see also *Remarkable Trials and interesting memoirs, of the most noted criminals [ . . . ]*, 2 vols. (London, 1765), 2:105–10; *The cuckold’s chronicle; being select titles for adultery, incest, imbecility, ravishment, &c. c.*, 2 vols. (London, 1793), 2:170–75.

<sup>18</sup> Barlow, *Justice of the Peace*, 452.

<sup>19</sup> *Trial of Job Wells*, 4.

directing sexual relations. Thanks to the Fall, which Chapone defined as the “undue Gratification of [Eve’s] Will,” a wife was required to acquiesce sexually because she “shall depend upon her Husband in all Matters of Pleasure, Diversion, and Delight: Her *Desires* should be circumscribed by his, whom she should reverence in Acquiescence to divine Authority: He should have the supreme Command in his Family, and she should act in Subordination to him.”<sup>20</sup> The New Testament provided evidence, too. The *Athenian Mercury* editor rebuked a disinterested wife in 1694 that it was “not only indiscreet, but also very wicked. . . to refuse [her husband] her bed” because Saint Paul said both spouses owed each other their bodies and warned “*defraud ye not one another, except it be with Consent for a time*; therefore without he is as well satisfied as she, cannot deny him.” “Consent for a time” was not specified, but it was (at least grammatically) a matter of the *husband’s* consent: if he is not “as well satisfied as she” with abstinence, then the wife “cannot deny him.” A Pauline passage that articulated a mutual conjugal obligation was expressed asymmetrically here. The husband consented, not the wife. If he wanted her body, she “cannot deny him.”<sup>21</sup>

Daniel Defoe saw matters quite differently in his 1727 *Conjugal Lewdness or Matrimonial Whoredom*. Hale, Chapone, and the *Athenian Mercury’s* editor asserted husbands’ conjugal authority; Defoe attacked it. He criticized the assumption that marriage allowed either husband or wife to exercise unbounded lust. Both spouses should be modest, civil, and self-governing, but above all else patient with the other’s desires and “seasons.” Sex during menstruation and pregnancy was unnatural. Good husbands respected their wives’ wishes to abstain after years of reproduction. There should be “No Violences upon Nature on one Side or another; no pushing the Constitution to Extremities, no earnest Importunities, no immodest Promptings; let all that Nature dictates be free, spontaneous, voluntary and temperate.”<sup>22</sup> Defoe described how women could be sexually abusive, too, but it was largely husbands who coerced or forced their wives into unwanted sex. Defoe cast both spouses as separate, distinct individuals who had the mutual obligation to respect one another’s different levels of desire and the mutual right to consent to sexual relations. Unlike Hale, he refuted husbands’ absolute conjugal rights over their wives, viewing unwanted marital sex as morally criminal, even if it was legal: “Marriage is no Protection for Crime . . . [T]he Woman may be ravish’d in the Marriage-Bed, and the Man deserve the Gallows for Crimes offer’d to his own Wife.”<sup>23</sup>

Defoe’s explicitly identifying marital rape in print in the 1720s was singular. His argument asserting spouses’ separate existence within marriage was radical. It was also little read. Unlike his other works, *Conjugal Lewdness* was never republished

<sup>20</sup> Sarah Chapone, *The Hardships of the English Laws in Relation to Wives* (London, 1735), 67.

<sup>21</sup> *Athenian Mercury*, 13 March 1694; the reference is to 1 Corinthians 7:3. See also Helen Berry, *Gender, Society, and Print Culture in Late Stuart England: The Cultural World of the Athenian Mercury* (Abingdon, 2003), 199–211.

<sup>22</sup> Daniel Defoe, *Conjugal Lewdness; or, Matrimonial Whoredom* (London, 1727), 94. See also Maximilian Novak, introduction to Defoe, *Conjugal Lewdness*, facsimile ed. (Gainesville, 1967), v–xv; Jennifer M. Avis, “A Crime That Wants a Name: Wife-Rape in Eighteenth-Century England” (master’s thesis, Trent University, Ontario, 2012). Rebecca Wilkin has identified how the late seventeenth-century philosopher (and former Dominican nun) Gabrielle Suchon criticized marital rape: Rebecca Wilkin, “Feminism and Natural Right in François Poulain de la Barre and Gabrielle Suchon,” *Journal of the History of Ideas* 80, no. 2 (2019): 227–48, esp. 242–44.

<sup>23</sup> Defoe, *Conjugal Lewdness*, 337.

after the 1720s, rarely referenced, and within decades described as "very scarce" when appearing at auction.<sup>24</sup> His text was ignored by reviewers, but probably not because its conceptual framework was entirely *sui generis*. His argument was fundamentally religious, mindful of sin, and shaped by imagined principles of natural law. In *Conjugal Lewdness*, Defoe was unusually explicit in discussing routine marital sex for its age, but his Godly injunctions were familiar to Christians.<sup>25</sup> As a Dissenter, Defoe diverged from the Church of England on many points. Nonetheless, he shared with the Anglican Church the view that marriage was more than a civil contract but a religious, spiritual, and moral union. Though secular courts could not prosecute unwanted marital sex or marital rape, England's ecclesiastical courts had spiritual jurisdiction over sacramental and moral matters, including the sort of marital conflict Defoe described. Here, ecclesiastical lawyers—also known as *civilians*—theoretically could consider whether unwanted or violent conjugal relations might justify a couple's marital separation.<sup>26</sup>

## MATRIMONIAL CAUSES IN THE ECCLESIASTICAL COURTS

Until the Matrimonial Causes (Divorce) Act of 1857, for centuries, English spouses had been tethered for life, required to cohabit and fulfill their conjugal debts. Most of the miserably married devised ad hoc solutions or awaited death, but those who could afford its high costs turned to England's ecclesiastical courts for a separation "a mensa et thoro."<sup>27</sup> These "bed and board" separations let spouses live apart and

<sup>24</sup> *A Catalogue of a select collection of books in most languages* ([London], 1793), 75. For other descriptions as "scarce," see *A Catalogue of Rare and Curious Books; Containing [...] the entire library of the late Dr. Robert Ramsay* (London, [1780]), 65; *A Catalogue of nearly twenty thousand volumes of curious books* (London, [1785]), 156. Defoe had *Conjugal Lewdness* reprinted shortly after its first appearance with the more polite title *A Treatise Concerning the Use and Abuse of the Marriage Bed* (London, 1727), but it, too, generated little response.

<sup>25</sup> Defoe praised Richard Baxter in particular; see Richard Baxter, *The Practical Works of the Late Revered and Pious Mr. Richard Baxter*, 4 vols. (London, 1707), 4:207. Across denominations, one Catholic theologian explained that "the two greatest Blessings of Matrimony" were (perhaps paradoxically) "Fruitfulness and Conjugal Chastity"; see Simon Michel Treuve, *The Spiritual Director for those who have none* ([London], 1703), 399; A Gentleman-commoner of Magdalen College, *The History of the Lutheran Church [...]* (London, 1714), 5; Francis Blyth, *Sermons for Every Sunday of the Year*, 4 vols. (London, 1742) 1:288–90.

<sup>26</sup> In earlier centuries, church courts appear to have more directly addressed unwanted marital sex. Sara Butler identifies medieval ecclesiastical cases in which a husband's forcing his wife into sexual intercourse resulted in a substantial fine, although the word *rape* was not used. See Sara Butler, *The Language of Abuse: Marital Violence in Later Medieval England* (Leiden, 2007), 127–29. Matrimonial causes were only one of many diverse matters handled by civil attorneys. On civil law more broadly, see Daniel R. Coquillette, *The Civilian Writers of Doctors' Commons, London: Three Centuries of Juristic Innovation in Comparative, Commercial and International Law* (Berlin, 1988); S. M. Waddams, *Law, Politics, and the Church of England: The Career of Stephen Lushington, 1782–1873* (Cambridge, 1992); R. H. Helmholz, *The Profession of Ecclesiastical Lawyers: An Historical Introduction* (Cambridge, 2019).

<sup>27</sup> Foundational works include the following: Martin Ingram, *Church Courts, Sex, and Marriage in England, 1570–1640* (Cambridge, 1988); Lawrence Stone, *Road to Divorce: England, 1530–1987* (Oxford, 1990); Stone, *Broken Lives: Separation and Divorce in England, 1660–1857* (Oxford, 1993); Joanne Bailey, *Unquiet Lives: Marriage and Marriage Breakdown in England, 1660–1800* (Cambridge, 2003); Foyster, *Marital Violence*; R. B. Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts, 1500–1860* (Cambridge, 2006); William Gibson and Joanne Begiato, *Sex and the Church in the Long Eighteenth Century: Religion, Enlightenment and the Sexual Revolution* (London, 2017). For alternatives to

cease sexual relations. But the costs were steep: both partners were forbidden from remarriage while the other was alive; wives lost custody of their children; and wives also remained *femes covert*s in common law but were forced to support themselves on alimony, which was usually set at the lowest amount that women of each station could survive on.

English canon law permitted couples to separate when adultery or cruelty (or both) could be proved. It was comparatively easy to determine infidelity, but cruelty was almost indeterminable because there was no definitive list of unacceptable behaviors.<sup>28</sup> As Judge William Scott (later Baron Stowell) explained in a 1790 case, one could not say what exactly cruelty was, “only what it is not.”<sup>29</sup> Whether unwanted sex or sexual violence counted as cruelty depended partly on the view of the judge hearing such a case.

For the most part, unwanted or violent sex was described almost incidentally or simply as one type of wrong among many others. For example, when Anne Buntin sued to nullify her marriage on the grounds of her husband’s alleged impotence, she stated that during sex he used “some artificiall Instrument ty’d or fasten’d to his Body with which he had like to have kill’d or ruined this Depont.”<sup>30</sup> Sexual abuse peppered countless marital separation suits. Husbands hit, kicked, and pinched their wives while in bed at night and particularly abused them while they were pregnant, lying in, and nursing.<sup>31</sup> Husbands forcibly exposed their wives’ private parts to others: John Wallop ordered a servant to give his wife a clyster (enema) against her will; Michael Lister and Isaac Prescott stripped their wives and commanded the servants and others to view their naked genitals.<sup>32</sup> Some men forced their wives to share a bed when they were lying in, or when

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divorce, see the following: Samuel Pyeatt Menefee, *Wives for Sale: An Ethnographic Study of British Popular Divorce* (Oxford, 1981); Rebecca Probert, Julie Shaffer, and Joanne Bailey, *A Noble Affair: The Remarkable True Story of the Runaway Wife, the Bigamous Earl, and the Farmer’s Daughter* (Kenilworth, 2013).

<sup>28</sup> John M. Biggs, *The Concept of Matrimonial Cruelty* (London, 1962); Foyster, *Marital Violence*.

<sup>29</sup> William Scott, quoted in *Evans v. Evans*, London Consistory Court [hereafter LCC] (1790), in *The Lawyer’s and Magistrate’s Magazine*, 3 vols. (Dublin, 1792), 2:142; also John Haggard, *Reports of Cases Argued and Determined in the Consistory Court of London: Containing the Judgments of the Right Hon. Sir William Scott [1798–1821]*, 2 vols. (London, 1822), 2:39. *Evans v. Evans* lent itself to multiple legal positions because it “could be all things to all women and men”; see Foyster, *Marital Violence*, 43.

<sup>30</sup> Anne Buntin in her deposition on 17 May 1711, *Buntin v. Buntin*, LCC (1711), Cause Papers, London Metropolitan Archives, DL/C/0545/104/2. (Hereafter this repository is abbreviated as LMA.) Anne used the allegations of John’s impotence in Chancery Court to regain ownership of her property, which had become his upon their marriage; see also the following items in the National Archives, London (hereafter this repository is abbreviated as TNA): Court of Chancery: Six Clerks Office Pleading: Before 1714, TNA, C 6/372/32; Court of Chancery: Six Clerks Office Pleading: Before 1714, TNA, C 6/496/73; Court of Chancery: Six Clerks Office Pleading: Before 1714, TNA, C6/497/3; Court of Chancery: Six Clerks Office Pleading: Before 1714, TNA, C 9/315/18.

<sup>31</sup> *Lister v. Lister*, LCC (1739), Allegations Book, LMA, DL/C/0169, fols. 56r–v, 57r–v, 58r–v (separate instances in successive pregnancies); *Wallop v. Wallop* LCC (1748), Allegations Book, LMA, DL/C/0171, fols. 263v–264v; *Whitmore v. Whitmore*, LCC (1749), Allegations Book, LMA, DL/C/0171, fols. 491r, 491v; Bailey, *Unquiet Lives*, 116–17; Foyster, *Marital Violence*, 36–37.

<sup>32</sup> *Wallop v. Wallop*, LCC (1748), Allegations Book, LMA, DL/C/0171, fol. 268v; *Lister v. Lister*, LCC (1739), Allegations Book, LMA, DL/C/0169, fol. 56r; *The Trial of Isaac Prescott* [. . .] in *the Consistory Court at Doctors Commons* (London, [1785]), frontispiece, 7, 10; Foyster, *Marital Violence*, 47.

either spouse had smallpox or other contagious diseases.<sup>33</sup> Some documents alluded to rape. Christopher Clarke warned his wife “that a man might ty his wife to a bedpost & was not accountable to anybody.”<sup>34</sup> Sarah Aggate’s husband stripped her naked, chained her to a bed in a garret for weeks, and apparently continued to have sexual relations with her until she escaped.<sup>35</sup> Amelia Brazier’s husband announced to a judge in 1781 that “he would beat and pox his wife whenever he thought proper.”<sup>36</sup> A few men subjected their wives to “unnatural” practices.<sup>37</sup> Jane Prescott stated that her husband took her to bed “and behaved with a Barbarity and Indelicacy which Modesty forbids this Informant to mention.”<sup>38</sup> Sometimes wives won their ecclesiastical causes. Sometimes they did not.

Eighteenth-century historians of marriage have fully acknowledged these acts of sexual violence,<sup>39</sup> but they have also tended to “shy away from addressing the issue outright.”<sup>40</sup> This is not for lack of concern, but because the nature of the archives does not easily reveal how unwanted marital sex was interpreted legally. Matrimonial causes produced voluminous manuscript records, but these are not fully transparent documents. They were molded by the court’s categories and procedures, shaped by contemporary mores and the direction of counsel.<sup>41</sup> This blizzard of formal filed papers has yielded rich social historical stories, but relatively little reveals how legal practitioners addressed sexual conflict because advocates’ arguments and judges’ jurisprudence were not kept as part of the formal court record.

<sup>33</sup> Brooke v. Brooke, York Consistory Court (ca. 1683), cited in Avis, “Crime That Wants a Name,” 109–13; Lister v. Lister, LCC (1739), Allegations Book, LMA, DL/C/0169, fols. 52v–53r; Wynn v. Wynn, LCC (1743), Cause Papers, LMA, DL/C/0550/43; Wallop v. Wallop, LCC (1748), Allegations Book, LMA, DL/C/0171, fol. 258; Parry v. Parry, LCC (1777), Allegations Book, LMA, DL/C/0178, fol. 567r, cited in Foyster, *Marital Violence*, 224.

<sup>34</sup> Clarke v. Clarke, LCC (1716), Cause Papers, LMA, DL/C/0546/100.

<sup>35</sup> Aggate v. Aggate, LCC (1745), Cause Papers, LMA, DL/C/0551/1, fols. 4–20.

<sup>36</sup> Brazier v. Brazier, LCC (1781), Allegations Book, LMA, DL/C/0179, quoted in Anna Clark, *The Struggle for the Breeches: Gender and the Making of the British Working Class* (Berkeley, 1995), 83.

<sup>37</sup> Clark, *Women’s Silence*, 42.

<sup>38</sup> Prescott v. Prescott, LCC (1783), Cause Papers, LMA, DL/C/0560/58/6, fol. 3.

<sup>39</sup> Biggs, *Matrimonial Cruelty*, 23–26; Bailey, *Unquiet Lives*, 116; Foyster, *Marital Violence*, 36–37, 44, 91–92, 124, 224, 226; Dolan, *Marriage and Violence*, 90–92; Gibson and Begiato, *Sex and the Church*, 126–30.

<sup>40</sup> Avis, “Crime That Wants a Name,” 3. By way of contrast, marital sexual assault was more openly addressed by the second half of the nineteenth-century by novelists, feminists, and jurists; see Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England, 1850–1895* (Princeton, 1989), 156–59, 177–88; Sue Davis, *Elizabeth Cady Stanton: Women’s Rights and American Political Traditions* (New York, 2008), 82; Marlene Tromp, *The Private Rod: Marital Violence, Sensation, and the Law in Victorian Britain* (Charlottesville, 2000); Lisa Surridge, *Bleak Houses: Marital Violence in Victorian Fiction* (Athens, 2005); Lois S. Bibbings, *Binding Men: Stories about Violence and Law in Late Victorian England* (London, 2014), 112–48.

<sup>41</sup> Joanne Bailey, “Voices in Court: Lawyers’ or Litigants?,” *Historical Research* 74, no. 186 (2001): 392–408; Sara M. Butler, “Lies, Damned Lies, and the Life of Saint Lucy: Three Cases of Judicial Separation from the Late Medieval Court of York,” in *Trompe-l’œil: Imitation and Falsification*, ed. Philippe Romanski and Aissatou Sy-Wonyu (Rouen, 2002), 1–16. On strategic advice from a lawyer to Henrietta Howard to include “every thing . . . that Fancy can suggest” in an ecclesiastical suit to force her abusive husband into settling, see Ingrid H. Tague, “Love, Honor, and Obedience: Fashionable Women and the Discourse of Marriage in the Early Eighteenth Century,” *Journal of British Studies* 40 no. 1 (January 2001): 76–106, at 103.

Sometimes it was not even clear which side won the case or if the parties had settled before judgment.<sup>42</sup>

Fortunately, some records of court notes and debates survive that illuminate jurists' remarks about sexual conflict. This material includes, beginning in the 1780s, published summaries of important ecclesiastical cases,<sup>43</sup> plus some surviving contemporary manuscript diaries and notebooks kept by practitioners themselves for reference.<sup>44</sup> Despite covering only a few decades across the eighteenth century, these sources record judicial attitudes and arguments where the formal cause papers do not. These notes and diaries cannot be taken as exact transcriptions of oral debate, but they capture much of what must have been said, including practitioners' vibrant and impassioned arguments.<sup>45</sup> Essential details otherwise missing from the filed papers often emerged in judicial conversation. In fact, it is only through these case notes that seemingly routine marital causes can reveal themselves to be

<sup>42</sup> Confusion about outcome is compounded by the practice of advocates on each side submitting, or "porrecting," as it was termed, a formulaic sentence that the court might reject, correct, or accept. Each submitted document left empty or blank spots for the judge's proxy to fill in, but this process was neither routine nor rigorous. One Doctor's Commons practitioner described an appeal based on the court accidentally following the wrong porrected copy; see *Turst v. Turst*, Court of Arches, 27 January 1741, Sir George Lee, Case Notes, Lincoln's Inn Library, London, MS MISC 158, fol. 17b. See also *Turst v. Turst* (174[1]), Registrar of the High Court of Delegates, Miscellaneous Papers, TNA, DEL 2/87.

<sup>43</sup> In the 1780s, individual litigants sometimes had their cases published with their advocates' arguments and the judge's decision; for example, see *The Arguments of Counsel in the Ecclesiastical Court, in the Cause of Inglefield; With the Speech of Doctor Calvert* (London, 1786). Some ecclesiastical cases with arguments and judgments also appeared in such collections as *The Lawyer's and Magistrate's Magazine*. In the 1820s, jurists published collections of ecclesiastical cases, both historical and contemporary, of which the following are examples: John Haggard, *Reports of Cases Argued and Determined in the Consistory Court of London: Containing the Judgments of the Right Hon. Sir William Scott [1789–1821]*, 2 vols. (London, 1822); John Haggard, *Reports of Cases Argued and Determined in the Ecclesiastical Courts at Doctors' Commons, and in the High Court of Delegates*, 4 vols. (London, 1827–1833); Joseph Phillimore, *Reports of Cases Argued and Determined in the Ecclesiastical Courts at Doctors' Commons and in the High Court of Delegates [1809–1821]*, 3 vols. (London, 1818–1827); Jesse Addams, *Reports of Cases Argued and Determined in the Ecclesiastical Courts at Doctors' Commons and in the High Court of Delegates [1822–1826]*, 3 vols. (London, 1822–1826).

<sup>44</sup> Manuscript notes, casebooks, and diaries were not kept as private mementos but rather shared among practitioners at Doctors' Commons to serve as a collection of precedents and principles. For instance, Sir George Lee mentioned asking one of his proctors to research advocates' debates in various earlier cases; see *Book of Cases of Sir George Lee, 1737*, Lincoln's Inn Library, MS MISC 158, fols. 99, 130. A manuscript titled "Digest of Ecclesiastical Cases" uses an alphabetical code to reference debate and jurisprudence in cases rather than dates, or the like, suggesting the scope of the manuscript collection at Doctors' Commons Library: "Digest of Ecclesiastical Cases," TNA, HCA 30/478. Other examples include the following: "Formulary of Ecclesiastical Law Compiled by Robert Wood," LMA, ACC/1362/001; [Jesse Addams], "List of Delegates' Processes," TNA, DEL 11/12; and several notebooks in TNA, HCA 30/475–478. After the dissolution of Doctors' Commons and the sale of the buildings and library, print and manuscript materials were dispersed widely, with some purchased for the Lee family law library. William Henry McAlpine, in *A Catalogue of the Law Library of Hartwell House, Buckinghamshire* (London, 1865), 49, 71, noted that some commonplace books were in the "MS. class of the late Library of the College of Advocates," and in his description of other manuscript materials, he includes shelf marks that match those of the "Digest of Ecclesiastical Cases," TNA, HCA 30/478.

<sup>45</sup> On some advocates' "brilliant and classical wit," see Francis Hargrave, *Collectanea juridical: Consisting of tracts relative to the law and constitution of England*, 2 vols. (London, 1791–92), 1:87. For colorful views on individual practitioners, see Charles Cooté, *Sketches of the Lives and Characters of Eminent English Civilians with an Historical Introduction Relative to the College of Advocates* [. . .] (London, 1804).

something else, as is evident in some of the cases discussed below. Individual practitioners represented both husbands and wives and thus could make quite contrary arguments over the course of their judicial careers, but these reported court arguments show that when they represented wives, they argued that husbands' power was limited by natural, moral, and gentlemanly principles. Though no practitioner suggested dismantling coverture entirely, wives' representatives found arguments to curtail husbands' sexual rights when wives were threatened by venereal disease, sexually violent threats, and even the trauma resulting from nonconsensual sex.<sup>46</sup>

### SAYING NO TO VENEREAL DISEASE

Reproduction ravaged women's bodies, but this wear and tear was not presented as a primary cause for separation in early modern cases because procreation was the very reason for marriage.<sup>47</sup> Sexually transmitted diseases, however, transformed the ordinary burdens of reproduction into family catastrophes. Pox was interwoven in many marriages on the rocks, but the case of *Ashe v. Ashe* was among the very few in which venereal disease was the only allegation of cruelty. The court faced the question whether a husband's infecting his wife with venereal disease so endangered her life that she had the right to refuse sex to protect her health.

Catherine and James Ashe of Twickenham were apparently happy for three married years. The two wealthy cousins had wed in 1697, and by 1700 they had three healthy children.<sup>48</sup> After the third delivery, Catherine postponed sex with James possibly to delay another pregnancy. He respected her wishes but turned elsewhere. He was indiscrete, reputedly boasting to servants "that he had picked up a pretty whore and had had her in a hackney coach and he often declared that it was a happy thing for a man to have a whore who would be constant to him."<sup>49</sup> Unfortunately, Sir James's happiness resulted in the pox, which he shared with Catherine. James denied being unfaithful, insisting that he only endured painful "fluxes" of massive doses of mercury "for nowe other reason but for the full satisfaction of the said Catherine."<sup>50</sup> Once his doctors said he was cured, the couple resumed sex. They had three more children over the next five years, but each baby manifested grisly symptoms consistent with congenital syphilis. One infant infected two wet

<sup>46</sup> Most of the materials listed above do not purport to transcribe advocates' and judges' speech in dialogue, but the following six manuscript journals do: "Transcript of Counsels' Arguments," Kenneth Spencer Research Library, University of Kansas, Lawrence, MS E181; "Law Reports from Doctors' Commons, 1771–1777," 5 vols., Middle Temple Library Archives, London, LOFT, MS6. (Hereafter this repository is abbreviated as MTLA.)

<sup>47</sup> For the assumption that providence had made marital sex pleasurable "for the Preservation and increase of Posterity," see *Aristotle's master-piece compleated, in two parts* [. . .] (London, 1702), 44; *Diary of Edmund Harrold*, 29 November 1715, fol. 55v. If women wished to escape further pregnancy, they had few options. Some wives managed to leave their husbands' homes, as in the case of an unnamed baron's wife in Reading who had entered a convent in France after twenty pregnancies: *General Evening Post* (London), 25–27 March 1735.

<sup>48</sup> *Lady Ashe v. Sir James Ashe* (1708), Registrar of the High Court of Delegates: Processes, TNA DEL 1/329. See also Foyster, *Marital Violence*, 229. (The spelling of Catherine's name varies across documents and her signatures, but for the sake of clarity I have chosen the form used in the libels and allegations.)

<sup>49</sup> Registrar of the High Court of Delegates: Processes, TNA DEL 1/329, fol. 207.

<sup>50</sup> Registrar of the High Court of Delegates: Processes, TNA DEL 1/329, fol. 359.

nurses who developed lumpy masses, running sores, and pain so severe that Nurse Eleanor Forman stated that she “was in such a Condition by giving suck to the said Mary that she should never be well again and that if Sir James gave her all his Estate he could not make her amends.”<sup>51</sup>

Catherine refused to have sex after the sixth birth in 1705, staying away in Bath for months. When she returned in August 1707, James asked when she would let him back to her bed. When she hedged, he threatened to “break a Leg or an Arme” if she would not name the date.<sup>52</sup> From then on, she slept in the servants’ quarters, and the two argued through a barricaded door. On 14 August 1707, he ordered her into the drawing room and in front of household staff demanded to know when she would let him renew sexual relations. She said perhaps in the future but not then. He ordered her to his coach, gave her twenty pounds, and sent her to her brother in Richmond. Gossips licked up the story. Isabella Lady Wentworth wrote, “al the world besyde this town is full of nothing but ye Lady Ash. whoe has Left her husband.”<sup>53</sup> In another letter she reported, “it seems Sir James transgressed and went astray, which enraged her soe much that ever senc her last childe, which was three quarters old she never beded with him never man humbled himself more than he did to her.”<sup>54</sup>

As gossip swirled, Catherine sued James in the Archdeaconry of Middlesex Court against him on the grounds of adultery and cruelty. Lady Ashe was on weak ground compared to other wives alleging cruelty. James had never beaten her and only threatened physical violence in their August showdown. She also had a surprisingly weak case against James for adultery. He refused to confess in court and no eyewitnesses came forth, leaving the Middlesex Court judge unsure whom to believe. Even more damaging to her case was her willingness to possibly forgive him in the future. Out of all the depositions describing James’s boasts, his extensive medical consultations, and the caustic effects of syphilis on the family, one statement jumped out to the judge. Witnesses reported that as she left the house in August, she told James, “Take notice I don’t say I’ll never bed with you tho’ my hard sufferings once made me think so.”<sup>55</sup>

These words also undermined her appeal at the Court of Arches where Sir John Cooke ruled against her. When she appealed again to the Court of Delegates, three bishops on the panel agreed that her words “made it appear my lady did not leave Sr. James on account of ye adultery, but only yt she was in danger of her life.” Perceiving one’s life in danger might seem to be a good reason for a separation, but this is not how Cooke (or the bishops) saw it. Some of them believed that her openness to future relations meant that she “mt. safely bed wth. him” (and thus not be “in danger”). Cooke explained that in his lower court ruling, he had “only consider’d the convenience or inconvenience” of sex and feared that her potential forgiveness was the “Periculum anima[e] [an act of jeopardy] if he did not put

<sup>51</sup> Registrar of the High Court of Delegates: Processes, TNA DEL 1/329, fol. 285.

<sup>52</sup> Registrar of the High Court of Delegates: Processes, TNA DEL 1/329, fol. 102.

<sup>53</sup> Lady Isabella Wentworth to Lord Strafford, 28 August 1707, Strafford Papers, BL, Add. MS 22225, fol. 28r.

<sup>54</sup> Cited in D. H. Simpson, *Twickenham Society in Queen Anne’s Reign: From the Letters of Isabella Wentworth* (Twickenham, 1976), 13.

<sup>55</sup> Robert Woods, 2 March 1708/9, LMA, ACC/1362, fol. [140].

’em together.”<sup>56</sup> By “convenience or inconvenience,” Cooke did not mean easy or difficult, but safe or harmful.<sup>57</sup> The church viewed marriage as inviolable so long as both partners could fulfill its obligations—even only occasionally when it was “convenien[t]” or safe, which left little ground for separation.

Though the bishops agreed with Cooke’s reasoning, the other delegates did not. They believed that James’s genital cankers, extrajudicial confession, and other evidence adequately demonstrated adultery. They also found evidence of cruelty. Another historian has proposed that James’s turning Catherine out was the cruel action and that she had goaded him into expelling her so that she could receive alimony.<sup>58</sup> That could be true, yet Catherine filed an attestation refuting financial motives, which she accused James and his allies of alleging. She explained that she pursued her cause not “for any dislike that she had for his Person” or for an increase in her “Pin money,” but because of his infidelity and her suffering from the pox. She entreated the judges simply “to take her miserable Condition into their tender Considerations.”<sup>59</sup> Perhaps they agreed with her original proclamation that “Sr. James having broken his Matrimonial Vow and defiled his Marriage bed and thereby. . . contracted the foul disease. . . the moment of her bedding with him might become unhealthy and diseased she thinks that she is not obliged by the Laws of God and Man to live and cohabit with him.”<sup>60</sup> They granted her £300 in alimony, a relatively large sum, but as the court later discussed, a small portion of the fortune she had brought to the marriage.<sup>61</sup> The delegates’ debate and final rationale seem not to have been recorded, but the case survived as a precedent for cruelty in an anonymous notebook, ca. 1758, without elaboration.<sup>62</sup> James’s expelling Catherine from the house was not unusual, but her allegation of cruelty based primarily on contracting venereal disease without any other physical abuse appears to be unique. Even if the delegates recognized Catherine’s request to separate on health grounds, this was a sorry story for everybody. As in all separations, James was granted full custody of the surviving three children, and Catherine was officially forbidden from seeing them. Out of six children, only one daughter survived to adulthood, but Catherine predeceased her.

## THE THREAT OF MARITAL RAPE

Lady Ashe succeeded in resisting marital sex because of the ongoing extreme physical pain caused by her husband’s adultery and venereal disease. The eighteenth-century courts did not explicitly use the phrase “persistent or severe,” but this was basically

<sup>56</sup> Robert Woods, 2 March 1708/9, LMA, ACC/1362, fol. [140].

<sup>57</sup> *Oxford English Dictionary*, s.v. “convenience, n.,” [www.oed.com](http://www.oed.com); *Oxford English Dictionary*, s.v. “inconvenience, n.,” [www.oed.com](http://www.oed.com).

<sup>58</sup> Junko Akamatsu, “Revisiting Ecclesiastical Adultery Cases in Eighteenth-Century England,” *Journal of Women’s History* 28, no. 1 (2016): 13–37, at 28–30.

<sup>59</sup> “Ash[e] v. Ash[e],” (1708/[09]), Registrar of the High Court of Delegates: Miscellaneous Papers, TNA, DEL 2/4.

<sup>60</sup> Registrar of the High Court of Delegates: Processes, TNA, DEL 1/329, fols. 451–52.

<sup>61</sup> Sir George Lee, notes on alimony in *Clavering v. Clavering*, 5 July 1734, Lincoln’s Inn Library, MS 158, fol. 16.

<sup>62</sup> “Doctors Commons [. . .] Precedent Book,” ca. 1758, TNA, HCA 30/590.

their standard in cruelty causes. Those who had only experienced violence once or who were threatened with forced sexual intercourse had questionable grounds for a separation, as seen in the case of *Holmes v. Holmes*.

Francis Holmes said he was an enterprising ironmonger when he courted Sarah Kingston, a wealthy widow, in 1744. Once wed, he asked her for thousands of pounds to finalize some investments. Sarah's inheritance from her first husband had been put in trust, which limited Francis's ability to absorb her wealth. To grant Francis his request, Sarah was required to ask her guardians, who authorized only loaning him £2,000 from the estate. Soon after he received the loans, she realized he had lied to her, that he was no ironmonger at all, had no profession whatsoever, and had entered the marriage with large debts. He quickly defaulted on the loan, so her guardians obtained a statute of bankruptcy against him, chasing him for years.<sup>63</sup> To avoid debtors' prison, he often left, surfacing only to inveigle money out of her.<sup>64</sup> Though he was the one who repeatedly disappeared, he filed a restitution of conjugal rights cause in 1754, claiming that she had abandoned the marriage. His formulaic documents masked a backstory that, once revealed, shows that his restitution suit was a cunning attempt to access her wealth and force her into sex.

Sarah denied that she had abandoned the marriage and then filed for own papers alleging his cruelty. She reported that in 1753, the long-absent Francis and two unknown confederates came to her door. Once she let them in, Francis scampered throughout the house, then "lockt up all the Doors and took the Keys and then came into the Parlour" and "swore he would lye with her there." The two men stated "that . . . Holmes was her Husband and that he had got them to come and meet him there in order to See him lye with her and that he should lye with her in that Room in their Presence and that they would assist him by holding her for him." One of them grabbed her, trying to force her to the floor. She wrenched away, ran to a window and escaped. She ran next door with Francis and the two men on her heels. Her neighbor Jeffrey Burston admitted her, but Francis and his men forced their way into his house, too. There they attacked her. "Francis Holmes then pulled her down upon the Floor tore off her Cap from her head and got hold of the hair of her head and attempted to drag and would have dragged her back again to [her] house," but Burston intervened and sent for a magistrate. Francis and the men fled. Sarah was bruised and so "affrighted" that she took to bed for weeks. But Francis repeatedly came back, threatening her that "he would

<sup>63</sup> *General Advertiser* (London), 16 March 1747; *Old England* (London), 21 March 1747; *London Gazette*, 26–29 November 1748; 29 July–1 August 1749; 2–6 June 1752; 3–6 February 1753.

<sup>64</sup> *Holmes v. Holmes*, LCC (1754), Allegations Book, LMA, DL/C/0172, fols. 453–59; *Holmes v. Holmes* (1755–58), Registrar of the High Court of Delegates: Cause and Miscellaneous Papers, TNA, DEL 2/40. It appears that Francis was behind a series of lawsuits in Chancery against Sarah's daughter and son-in-law (Mary and Edward Fleet), including a testamentary cause to claw back her daughter's legacy; see *Holmes v. Fleet* (1753), Court of Chancery: Six Clerks Office Pleadings: 1758 to 1800, TNA, C 12/1834/34; *Fleet v. Glanville* [Sarah's guardian] (1755), Court of Chancery: Six Clerks Office Pleadings: 1714 to 1758, TNA, C 11/209/4; *Fleet v. Holmes* (1756), Court of Chancery: Six Clerks Office Pleadings: 1714 to 1758, TNA, C 11/214/9; *Holmes alias Kingston v. Fleet alias Kingston* (1755), Registrar of the High Court of Delegates: Processes, TNA, DEL 1/570/1178. Lee heard the latter (because it was a testamentary case) and sharply rebuked Sarah: Joseph Phillimore, *Reports of Cases Argued and Determined in the Arches* [. . .] *Containing Judgments of the Right Hon. Sir George Lee*, 2 vols. (London, 1832–33), 2:101–3, 140–42.

get some Lusty Fellow who should be strong enough to . . . do any thing that he wanted to be done.” He warned he would lock her up, take all her fortune, and “send her over Sea . . . and . . . No body should ever see her again or know what was become of her.” She pleaded that her life was in “manifest Danger.”<sup>65</sup> In fact, it was, and Francis’s restitution suit was the very device that could allow him to make good on all these threats.

Both the restitution and cruelty causes were heard at Doctors’ Commons in early 1754. The court admitted Sarah’s allegations and granted her separation. Francis appealed to the Court of Arches. Sir George Lee, who was quite kind to his own wife, had no patience with Sarah.<sup>66</sup> He sided with Francis and ordered Sarah to reside with him and fulfill her conjugal duties. As for her cruelty suit, Lee denied it, explaining, “In this case she had charged nothing but words, except the single fact of his dragging her by the hair, which happened after she had separated herself from him, and that was not a cruelty sufficient to entitle her to a divorce; and it was not suggested that he had ever beat her or put her in any danger while they lived together.”<sup>67</sup>

Sarah had to let Francis back in her house if she wished to appeal to the Court of Delegates. As the suit wore on, Francis complained that she provided his “board” but gave him only “five shillings” pocket-money for tobacco. They did not have sex.<sup>68</sup> Within weeks, she had locked him out of the house, leaving him a hungry, homeless, tobacco-less pauper. Then she vanished.

Francis and his proctor doggedly pursued Sarah, demanding alimony, readmittance to her home, and her physical presence in court to answer his questions. But Sarah’s attorneys replied that her presence was a mere formality. They were her proxies and could act fully in her name. It did not matter that Francis and his attorneys could not find her. However, Francis, they pointed out, needed to appear. This went on for months. Sarah could afford a long, expensive fight, but Francis could not. He racked up legal fees, which he paid off to his proctor in part by “writing for him at [his] Office . . . from Nine in the Morning till Eight in the Evening (Sunday Excepted).”<sup>69</sup>

Sarah lost her appeal at the Court of Delegates in the spring of 1757, but Francis was no better off because she ignored the multiple court orders that were repeatedly affixed to her front door. Her intransigence led the court to excommunicate her in February 1758, but this changed nothing. In exasperation, Francis requested that his attorneys petition the crown to punish her through the secular courts.<sup>70</sup> This maneuver presumably failed, too, but it is unclear where Sarah went in the following years.

<sup>65</sup> Holmes v. Holmes, LCC (1754), Allegations Book, LMA, DL/C/0172, at 457v, 458r–v.

<sup>66</sup> Letters between Judith Lee (née Morice) and George Lee, 1741–42, Buckinghamshire Archives, Aylesbury, D-LE/C/1. Lee sat in Parliament in the opposition against Walpole in 1733 onward and served as the treasurer to the dowager Princess of Wales (1751–1757); see Coote, *Sketches of the Lives and Characters*, 113–14.

<sup>67</sup> Phillimore, *Reports of Cases Argued and Determined in the Arches*, 2:118. On Lee’s jurisprudence, see Helmholz, *Profession of Ecclesiastical Lawyers*, 174–80.

<sup>68</sup> Holmes v. Holmes (1755), Registrar of the High Court of Delegates: Processes, TNA, DEL 1/572/1180.

<sup>69</sup> Letter from Francis Holmes to Sarah Holmes, 24 November 1757, TNA, DEL 2/40.

<sup>70</sup> G. I. O. Duncan, *The High Court of Delegates* (Cambridge, 1971), 286.

What stands out in the Holmes case today is Francis's attempt to rape Sarah with the help of two other men. The London Consistory Court judge was seemingly troubled, as he granted the allegation. But upon appeal this event did not particularly impress the Court of Arches dean Sir George Lee. Francis's attempt to have sex may have even seemed justifiable to him, if his manuscript notes are any indication. Eighty years later, jurist Joseph Phillimore published Lee's notes from the mid-1750s. According to Phillimore's transcription, Lee had noted what Francis's confederates had said to Sarah when they trapped her in the parlor: "they said he was her husband, and had a right to do so, and they would hold her for him to lie with her."<sup>71</sup> None of the contemporary depositions or allegations at any of the courts included "a right to do so." Perhaps the phrase was spoken in oral arguments or Lee inadvertently wrote it in his notes. In either case, the transformation emphasized a husband's sexual rights over his wife's body beyond what Francis Holmes's own henchmen had even threatened.

Sir George Lee was a great defender of coverture in this case and others, so much so that his tone was dismissive, almost caustic when ruling against Sarah and other wives.<sup>72</sup> But Lee's was not the final word on Sarah Holmes or husbands' rights. After Sarah died intestate in 1764, Francis returned to Doctors' Commons, arguing that all the wealth and property she had accrued since their marriage belonged to him, not her daughter and son-in-law. Though he petitioned the court presuming that coverture would give him control of Sarah's wealth, he was thwarted. Sarah's first husband had protected his estate carefully so that if she remarried, her future spouse would not absorb the inheritance he left to her and their daughter. When she remarried, her property was in trust, protected from absorption under coverture. She had the power to make gifts and loans, but only with her guardians' permission. After she died without a will, Francis's advocate, Dr. Collier, insisted that her postmarital profits were his, plus he had a natural right to administer Sarah's estate as her husband. Arguing for Sarah's daughter Mary, Dr. Wynne began by challenging Francis's credibility and honor by gesturing toward the backstory: "the private History &c are not proper for me to enter into, but the Man shd be bound by his own solemn Act." Francis had agreed to the terms of his marriage with Sarah as determined by her guardians. He had made a contract and he could not change it. Sarah, however, had had the right to disperse some of her wealth as she pleased. But she had found no reason to grant him anything. This was not her meanness; it was his malfeasance. "[U]nless he shd deserve by his Behavior, that she shd make a Will in his favor" she would have. But "she had made no Will." Wynne transformed the technicalities of contract into a case of moral worthiness, invoking Francis's wretched behavior as Sarah's husband. Though hinting at the Holmes's "private History" probably did not shape Judge George Hay's decision in favor of Mary, Wynne's presentation in court was Sarah's posthumous revenge. Francis would surely have been in the audience at Doctors' Commons. Not only did he find

<sup>71</sup> Phillimore, *Reports of Cases Argued and Determined in the Arches*, 2:117.

<sup>72</sup> Lee explained that he rejected another wife's cruelty suit because "I was of opinion a wife was not entitled to a divorce . . . for cruelty, unless it appeared she was a person of good temper, and had always behaved well and dutifully to her husband, which the appellant had not done." See *Taylor v. Taylor*, Exeter Consistory Court (ca. 1755), cited in Phillimore, *Reports of Cases Argued and Determined in the Arches*, 2:172–73.

himself disparaged as dishonorable, a breacher of contract and a contemptible husband, but he also found himself barred from Sarah's wealth. Hay granted Mary Fleet the sole administration and acquisition of her mother's entire estate. Francis was left with nothing but the legal bills he would have owed Dr. Collier and his proctor.<sup>73</sup>

Thanks to the possibilities in equity, Sarah Holmes's family, first husband, and guardians had been able to establish her financial rights even in remarriage. This protected her property and assets from Francis. But such agreements in Chancery did not grant her the legal right to say no to her husband's sexual demands, as demonstrated by Lee's rulings. His decision against Sarah ultimately served as a precedent, as an example of an unhappy marriage that involved not quite enough cruelty to justify separation.<sup>74</sup> Or, as an 1895 case citing *Holmes v. Holmes* explained, "There are numerous [cases] in the books in which restitution of conjugal rights has been decreed at the instance of sometimes a husband and sometimes a wife whose conduct was unbearable, though falling short of cruelty in the technical sense of the word."<sup>75</sup> The Holmes case survived for nearly 150 years as precedent not because it was an example of men's cruelty, but because it was not. It specifically demonstrated the edge of acceptable behavior because it showed how wretched a husband's behavior could be without meeting the threshold for a marital separation. But what about when a husband successfully forced his wife into sex against her will?

### A "LOVE FIT" OR RAPE?

Lord George Warren was a status-conscious widower absorbed with gaining a peerage. He possessed land and a daughter but little cash and no male heir. Frances Bisshop, a lady-in-waiting to Queen Charlotte, was young, beautiful, and rich. In 1764, the two wed and soon inherited their bad fortune. Frances avoided sex. George was churlish and controlling, preoccupied with locating royal blood in his family tree.<sup>76</sup> Theirs probably resembled many other miserable aristocratic unions, but in 1771 two surprising, violent assaults ruptured the marriage.

One morning in March 1771, Sir George ordered Frances to breakfast before she had completed her toilette. She joined him, but when she rose after the meal, he grabbed her "and shook her by the head and shoulders to a most violent degree, and then with great force shoved her under a Sideboard Table in a Recess." She explained that "shaking her whilst under the Table and clawing at her and tearing off her Lappet from her Head . . . she was much bruised and her Skin scratched and torn by Sir George's Nails till the Blood came and was in several places black and blue with the said Bruises." She "cried and screamed violently so as to be heard by the Servants in another Room but none of them durst come to her

<sup>73</sup> *Holmes v. Fleet*, Canterbury Prerogative Court, 23 November 1765, Kenneth Spencer Research Library, MS E181, fols. 47–48.

<sup>74</sup> Arthur Gwynne Jeffries Hall, *The Law and Practice in Divorce and Matrimonial Causes* (London, 1905), 165.

<sup>75</sup> "Russell v. Russell, Matrimonial Court of Appeal (1895)," *Weekly Reporter* (London), February 1896, 217.

<sup>76</sup> Phyllis M. Giles, "The Last of the Warrens: George Warren, K. B. (1735–1801)," *Transactions of the Historic Society of Lancashire and Cheshire*, no. 140 (1990): 47–78.

Assistance as they afterwards declared for fear of losing their Places.” After the attack, she kept a servant at her side around the clock because “the vile Treatment she had received from him” led her to believe “she could not trust her life with him.”<sup>77</sup> Two months later in May 1771, Sir George caught her alone one night and locked her in a parlor. His footman and his estate bailiff—“a noted boxer”—were waiting and lifted her by the head and feet, while George “stopped her Mouth” with his gloves. They then dropped her with such force that she lay motionless for minutes. Once she came to, she asked for water and her family, but instead Sir George called two lawyers, including one Robert Kirke, “a most infamous Character. . . employed in carrying people privately away.” Water was also brought, but she feared it was poisoned. Frances sat herself on a dining chair, clutching the seat. Nobody could unlock her grip, so George told them to cut the chair apart, which injured her hands. Six hours later, at dawn, “the neighbourhood had been alarmed by her repeated cries.” The exasperated George gave up, sending the men and the hired coach away. Frances escaped to her father’s house and launched her cruelty cause.<sup>78</sup>

Lady Warren’s suit was finally heard a year later at Doctors’ Commons, with more disturbing details revealed. As he introduced the case in June 1772, Lady Warren’s counsel, Dr. Collier, added some color missing from her original libel: Lord George “bruised her, and thrust her under a marble slab. . . The gentlemen on the other side will say, I doubt not, that this was a fit of love in Sir George. But this cannot be allowed.”<sup>79</sup> Introducing this allegation by claiming his opponent would deny it was designed to lure his opponent. Dr. Harris took the bait: “it was certainly nothing more than a love fit, and there is no proof of any injury done [to] the Lady than that of clawing her thigh.”<sup>80</sup> Agreeing to the words instead of denying them, Harris vocalized what Frances herself had not explicitly stated. She did not use the words “rape” or “ravish” in her papers (or even allege a sexual assault), but advocates spoke these words in court. As the two sides debated what happened at breakfast, George’s attorney noted that Lady Germaine had said “the report was that Lady W[arren] was ravished.”<sup>81</sup> Lady Warren and her advocates did not directly allege sexual violence, instead allowing such details to emerge in depositions and the oral arguments in court. Once advocates said words like rape and ravish, allegations

<sup>77</sup> Warren v. Warren, LCC (1771), Cause Papers, LMA, DL/C/556/86/2/, fols. 18–19.

<sup>78</sup> Warren v. Warren, LCC (1771), Cause Papers, LMA, DL/C/556/86/2/, fols. 27, 28; Robert Kirke, *Minutes and Proceedings of a Court-Martial Held on John Crookshanks* (London, 1772).

<sup>79</sup> Dr. Collier, 4 June 1772, MTLA, LOFT, MS6, vol. 1, fol. 101. On Arthur Collier (1737–1777), see Lawrence Stone, *Uncertain Unions: Marriage in England, 1660–1753* (Oxford, 1992), 88–97; Charles Coote reported that he “died . . . with the character of an ingenious but unsteady and eccentric man”: Coote, *Sketches of the Lives and Characters*, 116–17.

<sup>80</sup> Dr. Harris, 4 June 1772, MTLA, LOFT, MS6, vol. 1, fol. 101. See also T. A. B. Corley, s.v. “Harris, George” *Oxford Dictionary of National Biography Online*, 2008, <https://doi.org/10.1093/ref:odnb/12386>.

<sup>81</sup> Dr. Harris, 26 June 1772, MTLA, LOFT, MS6, vol. 1, fol. 122. (Harris was Sir George’s advocate, but he mentions the report as an unprovable allegation.) From the surviving manuscript deposition book at the LMA, it does not appear that Lady Germaine was deposed herself, however; her statements of George “ravishing” Frances were reported by Frances’s brother, who euphemistically described George as “attempt[ing] to pay his addresses to Lady Warren an improper time of Day . . . at a time and place very unlikely for Acts of Love.” Depositions relating to the Warrens are at Deposition Book, LMA, DL/C/0278, fols. 471–571. For Edward Bisshop’s reference to Lady Germaine’s report, see 25 July 1771, Deposition Book, LMA, DL/C/0278, fol. 506.

were framed anew. Details that seemed merely rude, like George's ripping off Frances's hair covering, took on more sexually menacing meanings.<sup>82</sup> In court, Frances's attorneys compared her treatment to that of wives sexually victimized by their husbands, notably the Earl of Castlehaven (1631) and the Earl of Anglesey (1701), both of whom were condemned in the House of Lords.<sup>83</sup> Alluding to Castlehaven, whose name was shorthand for his crimes, including ordering a servant to rape his wife, implied Lord George's inhumane behavior. Invoking Anglesey, who bruised and scratched his wife's limbs, paralleled Lord George's marks upon Frances's thighs. These innuendos allowed Dr. Collier to assert, "Nineteen witnesses positively swear, that they believe that she cannot cohabit with him with *comfort* and five swear positively that they think he cannot cohabit with him with *safety* to her person and health. This is of itself sufficient for the foundation of a plea of divorce."<sup>84</sup> As an aside, Frances's attorneys added, "it is a known Case that man has been executed for a rape upon the mere evidence of the *woman only*," perhaps alluding to Castlehaven's fate and a reminder that conjugal relations usually happened in private without witnesses. "If it should be admitted, that this was a love scene, it is plain that his lust was turned to rage. It was the act of a Cat [*sic*] and not of a *Man* alone."<sup>85</sup>

George's counsel did not deny these accusations, instead citing *Holmes v. Holmes* as precedent that isolated moments of passion were inadequate grounds for separation.<sup>86</sup> Lord George was "fully justifi[ed]" in barricading Frances because she "had for eight months . . . withdrawn herself from his bed" and because he suspected her family "intended" "a rescue." Once removed from his home, George's attorneys suggested, he would no longer have access to her, but as long as he could keep her on his property, he had the right to have sex with her.<sup>87</sup> Though they defended his sexual

<sup>82</sup> On sexual propriety and covering the hair, see Gowing, *Common Bodies*, 93; Walker, "Everyman," 19–20; Jennine Hurl, "Voices of Litigation; Voices of Resistance: Constructions of Gender in the Records of Assault in London, 1680–1720" (PhD diss., York University, Ontario, 2001), 168–69. For coded language when reporting sexual assault, see Chaytor, "Husband(ry)."

<sup>83</sup> Dr. Collier, 26 June 1772, LOFT, MS6, vol. 1, fol. 127, MTLA. Contemporaries were horrified by the Anglesey case, but the specific acts of violence were alluded to rather than described in detail. See, for example, *A Vindication of the Earl of Anglesey* ([London?], [1702?]), 5. The published record was limited to the procedural in the *Journal of the House of Lords*, vol. 16, 1696–1701 (London, 1768–1830), 16:588, 607, 611, 613, 620–21, 627–28, 630, 640, 649, 652, 654, 657, 658, 659, 661, 663, 664, 705, 739. The manuscript minutes and witness depositions, which were not published, provided far more detail about the couple's story; "Minutes of Proceedings, 6 February 1701–6 November 1701," 6, 10, 11, 12, 13, 14, 17, 24, 25, 27 February; 3, 6, 7, 13, 15, 18, 19, 21, 25, 29 March; 1, 11, 14, 16, 23, 24, 26, 28, 29 April; 3 May 1701, PA, HL/PO/JO/5/1/36; Anglesey v. Anglesey, 14 February 17, 20 March 1700/1 [no foliation]; PA, HL/PO/JO/10/6/7; witness statements, 4 March 1701, PA, HL/PO/10/6/9/1591, a-g, fols. 28–126. On Castlehaven, see Cynthia B. Herrup, *A House in Gross Disorder: Sex, Law, and the 2nd Earl of Castlehaven* (New York, 1999); Vanessa Wilkie, *Silver Threads: The Rise of Alice Spencer* (New York, forthcoming). For an overview of Anglesey and other parliamentary marital disputes alluded to in print and on stage, see Paula Backscheider, "'Endless Aversion Rooted in the Soul': Divorce in the 1690–1730 Theatre," *Eighteenth Century* 37, no. 2 (1996): 99–135.

<sup>84</sup> Dr. Collier, 19 June 1772, MTLA, LOFT, MS6, vol. 1, fol. 113 (emphasis original).

<sup>85</sup> Dr. Collier, 19 June 1772, MTLA, LOFT, MS6, vol. 1, fols. 115–16. Incidentally, Matthew Hale worried exactly about the consequences of convictions determined by the victims' testimony alone; to bring this point home, he gestured toward cases of witnesses having lied on the stand that led to the execution of the defendants: Hale, *Historia Placitorum Coronae*, 1:635–36.

<sup>86</sup> Dr. Harris, 26 June 1772, MTLA, LOFT, MS6, vol. 1, fol. 121.

<sup>87</sup> Dr. Harris, 26 June 1772, MTLA, LOFT, MS6, vol. 1, fol. 125.

rights over Frances in marriage, they recognized a limit: he could not force her into sex outside his own home. But presumably he could force her into sex while they cohabited in his house, even if he had to imprison her there.

Lady Warren's advocates disputed whether George had any right to expect sexual relations once her "honor" had been offended in March. Because "the honor of man lies in his nose, and that of a woman under her petticoat," wives must guard their modesty. "If a woman is injured, she can only do, as Lady W[arren] did, withdraw herself from her husband, till he offers a reconciliation. A man, on the contrary, having the purse in his power, may go where he will."<sup>88</sup> Though a woman might not have the means to leave her husband financially or legally, this did not negate her natural and moral rights. When her advocates said, "She had a right to resent his ill usage," they indeed meant that she was not George's subject, but a person with separate desires and dignity. Furthermore, once Frances refused to sleep in the same bedroom, he was obligated to respect her: "from the moment she separated herself from him, he had no claim to conjugal rights . . . She has received an injury which she cannot forgive."<sup>89</sup> Dr. Bever argued that a husband's power was neither unlimited nor justifiable. He put it in characteristically eighteenth-century terms, but there was a bold principle beneath his euphemistic language: "A Lady's delicacy is more to be regarded than the authority of a man."<sup>90</sup> "And," added Dr. Wynne, "it is certain that by the Laws of this Country a Wife is not bound to live with her Husband, till her heart is broken . . . They ought to have a legal liberty to part."<sup>91</sup>

Dr. Bever tried out one last salvo against Lord George's counsel, whom he said "much to my surprise, represented the Wife as one of the livestock of the family. If, Sr. G[eorge] looks upon Lady W[arren] in this light, he treats her as bad as a negro slave."<sup>92</sup> Comparing wives to slaves was a persistent trope from Aphra Behn's day onward, but Dr. Bever's argument in June of 1772 was especially timely. Lord Mansfield had just issued his *Somerset* decision in King's Bench, which was popularly understood to proclaim that no man could be a slave when he stepped on English soil. So much for men, but Dr. Bever really asked whether the same right applied to women. In his portrayal of Sir George, he answered that women, too, have the right not to be treated as property.<sup>93</sup>

Judge John Bettesworth was unmoved. He praised Sir George, noting that "his being a Widower is . . . a circumstance greatly in his favor." He questioned how Frances ended up with wounds on her thighs after breakfast. Even though witnesses specifically refuted that they resulted from broken stay splints, Bettesworth decided this was the likely explanation after all. He said nothing about sex. Frances's refusal to

<sup>88</sup> Dr. Harris, 26 June 1772, MTLA, LOFT, MS6, vol. 1, fol. 127.

<sup>89</sup> Dr. Harris, 26 June 1772, MTLA, LOFT, MS6, vol. 1, fol. 127.

<sup>90</sup> Dr. Harris, 26 June 1772, MTLA, LOFT, MS6, vol. 1, fol. 118. For biographical information on Thomas Bever, see Coote, *Sketches of the Lives and Characters*, 125–26; Helmholz, *Profession of Ecclesiastical Lawyers*, 181–87.

<sup>91</sup> Dr. Wynne, 19 June 1772, MTLA, LOFT, MS6, vol. 1, fol. 115.

<sup>92</sup> Dr. Wynne, 19 June 1772, MTLA, LOFT, MS6, vol. 1, fol. 128.

<sup>93</sup> Feminists, novelists, playwrights, and wives themselves described marriage as a condition akin to slavery; see Chapone, *Hardships of the English Laws*, 2, 46; Ruth Perry, "Mary Astell and the Feminist Critique of Possessive Individualism," *Eighteenth-Century Studies* 23, no. 4 (1990): 444–57. On the metaphorical use of slavery as standing for "a number of evils except perhaps the evil of itself," see Michel-Rolph Trouillot, *Silencing the Past: Power and the Production of History* (Boston, 2015), 85.

go where George wished was unacceptable: “It is certainly the duty of every married woman to accompany her husband to whatever house he may choose.” As for her damaged hands, “she has no one to thank but herself for the accident of the Chair.” Overall, “she has utterly failed in the material part of this libel.”<sup>94</sup>

Frances’s proctor immediately announced his appeal. The *Kentish Gazette* reported that “indignation and contempt were seen visibly struggling in the J—’s countenance upon this declaration.” The writer sympathized with poor George: “We believe every married man will feel for a tender, indulgent husband thus harassed with an expensive suit, in which, whether conqueror or conquered, he is equally one sufferer, being sure to *pay the piper*.”<sup>95</sup> That husbands settled their wives’ legal costs was one of the few protections that *femes covert*s had. Here, however, it only served to prove how spoiled and spiteful Lady Warren was.

Lady Warren dropped her appeal, according to the *London Chronicle*, because they “finally settled in an amicable way.”<sup>96</sup> This was false. They could not be reconciled. George focused on his peerage and completely ignored her, even when she attempted to goad him into a parliamentary divorce through an extramarital flirtation in the 1770s.<sup>97</sup> As they aged, they drifted from the public eye. Then in 1794, the breakfast conflict dramatically reappeared in the radical Republican Charles Pigott’s political satire *The Female Jockey Club*.<sup>98</sup> Rich with sexual innuendo, the text claimed that Lady Warren had “intimated” in 1771 to her stepdaughter “the very alarming *falling off* which she experienced in Sir George, who had become altogether remiss in the performance of matrimonial duty.” Because he was “justly indignant, that his manhood should be called in question,” he decided “to prove the falsehood of the accusation, and to *convince* her ladyship of the error under which she laboured.” So, “one morning AT BREAKFAST . . . seizing her unawares, with all the vehemence of inflamed and indignant passion, brought the *whole affair* directly *on the carpet*, and atchieved [*sic*] a complete victory over all her doubts and apprehensions.” As a result, “by the violent means which he had employed, *my lady* thought proper to swear a *rape* against her *lord and master*, but the court unwilling to *widen a breach* which seemed to have been occasioned by too much *ardour* on both sides, quashed the matter, and reconciled the parties.” Pigott claimed the “anecdote afforded . . . an inexhaustible fund of conversation to all the fashionable circles, and an infinity of remarks.”<sup>99</sup>

Pigott’s tale captured the cultural challenges that Lady Warren faced. An early modern view that all women were naturally lustful had developed into a political, rank-based argument in the eighteenth century.<sup>100</sup> British critics had claimed for

<sup>94</sup> “Court [Dr. John Bettesworth],” 26 June 1772, MTLA, LOFT, MS6, vol. 1, fols. 128–29.

<sup>95</sup> *Kentish Gazette*, 27 June 1772.

<sup>96</sup> *London Chronicle*, 10 September 1772.

<sup>97</sup> Mary Curzon to Miss Heber, 10 July 1777, in Francis Bamford, ed., *Dear Miss Heber: An Eighteenth-Century Correspondence* (London, 1936), 7–8.

<sup>98</sup> On Charles Pigott, see Jon Mee, *Print, Publicity, and Popular Radicalism in the 1790s: The Laurel of Liberty* (Cambridge, 2016), 131–48.

<sup>99</sup> [Charles Pigott], *The Female Jockey Club, or, A Sketch of the manners of the age* ([New York], 1794), 112–17. See also Simon Dickie, *Cruelty and Laughter: Forgotten Comic Literature and the Unsentimental Eighteenth Century* (Chicago, 2011).

<sup>100</sup> On the overarching transformation from viewing women as lustful to sexually listless, see Thomas Laqueur, *Making Sex: Body and Gender from the Greeks to Freud* (Cambridge, MA, 1992); Robert

decades that female royals and aristocrats secretly pulled the reins of power by sexually controlling political ministers and the public. By the time Pigott published *The Female Jockey Club* in 1794, Marie-Antoinette and her circle were also depicted as lascivious and power-hungry, the opposite of bourgeois wives who were chaste, compliant, domestic, and in need of protection.<sup>101</sup> Pigott situated Lady Warren in this anti-aristocratic discourse, portraying her as sexually voracious (when in fact she was barely interested in sex). When Pigott transformed her into a female rake, he asked whether rape was even possible if women always wanted it. In fact, Lady Warren's advocates had depicted her as an obedient, sexually modest, and sensitive wife. But the challenge was her social rank. She belonged by birth to a coterie of women who were publicly portrayed as debauched and independent, busy cheating on their poor husbands (whose own infidelities were irrelevant). Lady Warren was not among these women, but Lord George's advocates and Judge Bettesworth treated her as one of them, even comparing her to notorious adulteresses in various asides.<sup>102</sup>

When Lord George died in 1801, Lady Warren found herself removed from his will in favor of her stepdaughter. Worse followed. In February 1804, her muslin gowns caught fire in bed, and she died days later from the burns. Yet even in death, she was not free of her husband. The press recalled their conflict at Doctors' Commons but transformed the resolution into a fairytale: "afterwards [they] renewed all their conjugal endearments, and lived together till the death of Sir George."<sup>103</sup> Lady Warren's post-rape hatred had been rewritten as reconciled bliss.

### "A MAN MAY COMMIT A RAPE ON HIS OWN WIFE"

*Rape* was not a word to be used lightly in court. Aside from the political risks of an advocate directly accusing George Warren or any other elite of such an act, the civilians — the ecclesiastical lawyers — of course also recognized that Doctors' Commons had no criminal jurisdiction.<sup>104</sup> There is one time recorded, however, that an advocate did use the word to discredit a scoundrel husband in 1766. In addition to the

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B. Shoemaker, *Gender in English Society, 1650–1850: The Emergence of Separate Spheres?* (London, 1998), 59–86; Tim Hitchcock, *English Sexualities, 1700–1800* (New York, 1997); Bailey, *Unquiet Lives*, 110–12; Martin Wiener, "Alice Arden to Bill Sikes: Changing Nightmares of Intimate Violence in England, 1558–1869," *Journal of British Studies* 40, no. 2 (2001): 184–212; Faramerz Dabhoiwala, *The Origins of Sex: A History of the First Sexual Revolution* (New York, 2012).

<sup>101</sup> Anna Clark, *Scandal: The Sexual Politics of the British Constitution* (Princeton, 2003); Lynn Hunt, *The Family Romance of the French Revolution* (Berkeley, 1992); Simon Burrows, *Blackmail, Scandal, and Revolution: London's French Libellistes, 1758–92* (Manchester, 2006); Choderlos de Laclos's *Les Liaisons Dangereuses*, the archetypal depiction of lascivious aristocrats, appeared in English as *Dangerous Connections: or, Letters Collected in a Society* [. . .] By M. C\*\*\*\* de L\*\*\*, 2 vols. (London, 1784).

<sup>102</sup> Dr. Burrell, 24 January 1772, MTLA, LOFT, MS6, vol. 1, fol. 47.

<sup>103</sup> *Hull Packet*, 28 February 1804.

<sup>104</sup> Dr. Harris explained that his client Rhoda Addison sued her husband "for cruelty; several atrocious acts of which appear. [His] Proctor . . . refuses to give any answers . . . as it is an accusation of a criminal nature." The advocates urged Mrs. Addison to take the case to King's Bench as they viewed the charges to be criminal. See Addison v. Addison (Court of the Dean and Chapter of St. Paul's), 27 January 1773, MTLA, LOFT, MS6, vol. 3, fols. 51–52.

remarkable fact that this Doctors' Commons debate explicitly invoked marital rape, this case also sheds light on the eighteenth-century transformation in representations of male and female sexuality that helped to make marital rape visible.

The Balderstons of Canterbury informally parted ways in 1759 after six years of marriage. William's legal career never flourished, leaving him unable to support his family. His wife and children moved to her brother's home, and he went to London to resuscitate his fortunes. When his wife, Philadelphia, tried to visit, he rebuffed her. He was not busy with work, as he claimed, but with other women. Once Philadelphia realized the depth of his double life by 1762, she began proceedings to separate formally on the grounds of adultery, easily proved by his illegitimate children. William became desperate. He made a surprise visit on 28 October 1765 to Philadelphia at her brother's Canterbury home to attempt reconciliation, but did so by brandishing pistols at the door, terrifying the servants. When he discovered that Philadelphia was out, he restrained her maid Hester Bowes to prevent her from escaping to warn his wife of his presence. When Philadelphia came home later and saw him (and her captured maid), she fell into "the Fi[t] of Histericks." It was late at night, so he called a watchman through the window to call an apothecary for help, who arrived and supposedly calmed Philadelphia. In his legal briefs, William insisted that despite these setbacks the night was a success. He described how once Philadelphia relaxed, he "continued with his Wife until the next Morning," when she "in a very courteous and polite manner express[ed] her Thanks and Gratitude . . . for . . . his great Civility and Conduct towards her during the preceding Night."<sup>105</sup>

Philadelphia's household members were not so filled with thanks and gratitude. Hester Bowes finally escaped the next day to a Justice of the Peace to report William's assault upon her. Magistrates arrived with a warrant, seized, charged, and jailed him for days until a patron posted bail. From his perspective, his incarceration resulted from Philadelphia's brothers' conspiracy to keep his wife (and her fortune) from him. He said nothing about his double life, instead painting himself as a tragic victim and Philadelphia as a loving, if high-strung, wife.<sup>106</sup>

William Balderston's claims about their October night were vague and euphemistic, but his attorneys pushed further at Doctors' Commons, arguing that they had had sex that night. Dr. Harris, Philadelphia's advocate, charged back. If sexual contact occurred between the two, the question was whether she had consented: "If Mr. B. can prove he laid with his Wife in 1765, it will be material, the Sute being brought in 1762; but did not he use force, was he naked with her on the same Bed, more shd be said; Consent, Carnal Knowledge, because on the same Bed, is a weak implication, a Man may commit a Rape on his own Wife."<sup>107</sup>

<sup>105</sup> Balderston v. Balderston, LCC (1765), Cause Papers, LMA, DL/C/0554/173/2, copies of baptism records of William Balderston's two illegitimate children with his "wife" Letitia; affidavits of George Reynolds (6 December 1765) and William Balderston (5 December 1765) describing events, LMA, DL/C/0554/174-175 (no foliation).

<sup>106</sup> Balderston v. Balderston, LCC (1765), LMA, DL/C/0554/174-175.

<sup>107</sup> 26 February [1766], Kenneth Spencer Research Library, MS 181, fol. 92. In the Warren case five years later, advocates implied that a husband could not demand conjugal relations once his wife was no longer in his home. It is speculative, but perhaps this point lay behind the marital rape discussion here—Philadelphia was in her brother's home and had been long separated from her husband at his instigation. Perhaps practitioners at Doctors' Commons treated a husband's conjugal rights extending only as far as his property.

Harris's proposition that "a Man may commit a rape on his own wife" was not an endorsement, but rather an observation: husbands could coerce or force their wives into sex. The quick notes do not clarify if he meant this hypothetically or if he was suggesting that unwilling, forced sex had occurred that night in October 1765. Whatever happened, Judge John Bettesworth dismissed William's claims that they had renewed sexual relations. From the start, Bettesworth was not inclined toward William's version of events: "I never saw an All[egati]on with more Words & fewer Facts."<sup>108</sup> In the end, he granted Philadelphia's adultery separation against her wordy husband on the indisputable evidence of his having been present at his out-of-wedlock children's baptisms.<sup>109</sup>

The Warren and Balderston cases were contemporaneous, but parallel details took on different valences. Both wives were described as nervous, but Lady Warren's feelings were treated as emotionally self-indulgent and manipulative while Philadelphia Balderston's were treated as the natural reaction of a modest woman frightened of a brutal husband. While aristocratic wives like Lady Warren were viewed as debauched, manipulating their exhausted husbands, middle-class marriages like that of the Balderstons were portrayed contrarily, with sexual voracious husbands and modest wives. This representational shift may have helped to make some cases of marital rape more imaginable than in earlier decades when women were once seen as lustful as men.

This transformation toward seeing wives as victims of their husbands' unrestrained sexual passion is epitomized by Mary Popkin's 1794 cruelty and adultery case against John Bennet Popkin. The two married in 1778 in Bath but spent most of their marriage on the Continent. By the late 1780s they resided primarily in Lisle, France. Deponents described John as mean-spirited and lascivious, a serial adulterer. His behavior was worse than merely frequenting prostitutes or carrying on affairs. Witnesses described sexual assaults on servants, local working women, and possibly even a three-year-old girl.<sup>110</sup> John's eventual venereal disease was predictable, but his willingness to keep separate bedrooms from his wife was less so. At some point, however, he tired of virtue when no other woman was available. In September 1790, he "forcibly dragged" Mary "towards his bed." Once captured, she resisted. Upon "her refusal, he became violently enraged, made use of many outrageous and dreadful menaces to compel her," but she escaped his bedroom to a parlor. In front of house-guests and servants, she dropped to "her knees, intreat[ing] him to desist, promising to return to his bed as soon as he would satisfy her he was cured." From that night forward, John physically tried to force her into sex. Amazingly, Mary warded him off for months. Witnesses described how she was "injured and impaired by. . . anxiety fear and terror" "that he might at last effect what he had attempted and compel her by force to sleep with him." When John traveled on a business trip in January 1791, Mary fled to England where she could file her matrimonial suit on the grounds of cruelty and adultery. She listed many wrongs but was selective in her formal allegations, emphasizing his infidelity, debauching of servants, symptomatic venereal disease, and recent threats to bed her in Lisle. Mary Popkin may have

<sup>108</sup> Dr. Bettesworth, 3 February 1766, Kenneth Spencer Research Library, MS 181, fols. 71–72.

<sup>109</sup> Court discussion, [January 1767], Kenneth Spencer Research Library, MS 181, fols. 222–27.

<sup>110</sup> Deposition of Frances Peuple, 18 March 1794, in *Popkin v. Popkin* (1794), Deposition Book (F-Z), 1792–96, LMA, DL/C/0285, fol. 395v.

been forced or coerced into sex for years, but her attorneys left it to the witnesses to suggest such trauma.<sup>111</sup>

The court granted Mary’s separation, but John appealed. In the final ruling, Judge William Scott saw ample justification for separation, not only because of the number of allegations but also because he considered their sexual nature to make them particularly cruel. Though his ruling was not sweeping, Scott limited some of husbands’ sexual rights. First, when he ruled that “A husband’s attempt to debauch his own women servants was a strong act of cruelty. . . an act of considerable indignity and outrage to his wife’s feelings,” Scott recognized that adultery was not distinct from cruelty but overlapping as it caused irreparable emotional pain. Not only did this mean that infidelity could be more than adultery but that cruelty was not only defined as a physical wound. This determination was among others that Scott made that acknowledged cruelty arising from emotional abuse and interpersonal turmoil, including that of a sexual nature. Second, he rejected husbands’ absolute carnal rights when he stated, “The husband has a right to the person of his wife, but not if her health is endangered.” Third, he shifted damage from something that had happened to something that could be credibly feared. Mary had resisted his violent attempts and therefore had not yet been raped or infected with venereal disease, but Scott recognized that she had a right to relief and protection: “It is not necessary, when there is an attempt at violence by an overt act, to wait till it is actually put into execution.” Fourth, though John Popkin’s advocates argued that Mary’s “promise” to return to his bed meant that she forgave him, Scott disagreed, recognizing that her “declaration. . . was made under force and violence, and to relieve herself from his attacks. The promise was merely conditional, and that condition was never fulfilled.”<sup>112</sup>

Scott’s finding cruelty in the Popkin case reflected a different legal approach than that of jurists in the cases of Ashe, Holmes, and Warren. Whereas judges had evaluated those cases in terms of whether life-threatening harm had occurred or not, Scott viewed John Popkin as having failed his contractual obligations. Scott did not question husbands’ prerogative over their wives’ bodies, but their bodily rights were predicated on their remaining faithful, healthy, and nonviolent. Scott was not the first to treat marriage as involving reciprocal commitments, even under coverture. As John Bettesworth explained in a 1775 case of marital sexual abuse, “Till ye husband behaves as he ought to do, ye wife is at liberty to stay from him.”<sup>113</sup> When these judges sanctioned a wife’s resisting sex, they did so because they considered the marital contract as binding only when both parties fulfilled its terms. In certain

<sup>111</sup> Popkin v. Popkin (1794), Allegations Book, LMA, DL/C/0184, fols. 519–52; Popkin v. Popkin, Deposition Book (F–Z), 1792–1796, LMA, DL/C/0285, fols. 352–410, esp. depositions of Eliza Potts, 23 April 1794, fols. 358–61; Sir Walter Lewes, 14 June 1794, fols. 379–90; Jane Honnor, 6 December 1794, fols. 391–94; Frances Peuple, 18 March 1794, fols. 395–410.

<sup>112</sup> John Scott’s decision in Popkin was published in a multi-page footnote to the 1825 case of *Durant v. Durant*; see Haggard, *Reports of Cases Argued and Determined in the Ecclesiastical Courts at Doctors’ Commons*, 1:767–68. Manuscript notes on John Bennet Popkin’s appeal case are in High Court of Admiralty, and Supreme Court of Judicature: Ecclesiastical notes of Sir John Nichols, TNA, HCA 30/476 and closely align with the published case.

<sup>113</sup> Bach v. Bach, Court of Arches appeal (originally, Gloucester Consistory Court), 13 November 1775, MTLA, LOFT, MS6, vol. 5, fol. 7. As usual, the husband’s advocate cited *Holmes v. Holmes* in his defense; see Dr. Wynne, 13 November 1775, MTLA, LOFT, MS6, vol. 5, fol. 6.

situations, a wife's consent was revocable, and it was dependent on the husband fulfilling his side of a bargain.

Cruelty was not a black-and-white matter, and this was especially true when wives' allegations were sexual in nature. Without statutes or specific definitions, ecclesiastical advocates had to identify when a husband's behavior was essentially breaching his marital contract. Because this court's authority resided in the spiritual and moral realms, their power to punish was very limited, but their prerogative to pass judgment on interpersonal behavior in marriage was extensive. They were the arbiters of not necessarily what was legal or not, but what was moral and ethical. Here then, advocates played upon a cultural sense of what was considered appropriate behavior. When practitioners represented wives, they insisted that there were limits to husbands' control over their persons. Eighteenth-century defenders of wives did not fully challenge the hierarchical nature of coverture, but instead they exploited it, arguing that husbands were obligated to protect and cherish their wives if wives were expected to obey and comply. Advocates' arguments increasingly emphasized the natural vulnerability and weakness of women across the eighteenth century. Though depicting wives as emotionally fragile placed them below men in terms of rationality and reason, these characterizations could also be practical. As Elizabeth Foyster has described, wives' "hysterical" responses to abuse and sexual violence provided a culturally legitimate "vehicle of expression."<sup>114</sup> Advocates also used such characterizations to defend wives against their husbands. The terminology they used here was thus not primarily individualistic and rights-based, but rather based on feeling, nature, morality, honor, and decorum. This of course is not equivalent to recognizing spouses' fundamental status as individuals with equal rights over their bodies.

But these eighteenth-century arguments were also not the opposite. They did not say that wives were entirely subsumed by their husbands' dictates, but rather proposed that spouses were ethically obligated to consider each other's needs and desires. As William Scott explained in 1790 case, "When people understand that they *must* live together except for a very few reasons . . . they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes."<sup>115</sup> His opinion may seem oppressive from a modern, secular, individualistic understanding of marriage today. But in the context of the eighteenth century, Scott's view that some matrimonial conflict could be resolved through "mutual accommodation" was a challenge to husbands' prerogatives over their wives in all matters and an alternative way of imagining coverture as a union of two individuals. Scott was forced to acknowledge that some husbands like John Popkin ultimately failed in their duties and that their wives could not be expected to be endlessly accommodating. Though Scott and other ecclesiastical judges hardly found for wives in all cases, these positions meant that husbands' contractual failures were not proved only by action but by credible threat and the emotional fear that they instilled in their wives.

<sup>114</sup> Foyster, *Marital Violence*, 124.

<sup>115</sup> Evans v. Evans, in *Lawyer's and Magistrate's Magazine*, 2:139–40.