Criminal Conversations
Rowbothan, Judith, Stevenson, Kim

Published by The Ohio State University Press

Rowbothan, Judith and Kim Stevenson.
The Ohio State University Press, 2005.
Project MUSE. muse.jhu.edu/book/28295.

👉 For additional information about this book
https://muse.jhu.edu/book/28295

🔍 For content related to this chapter
https://muse.jhu.edu/related_content?type=book&id=1152516
Introduction

Eighteen eighty-eight was a dangerous year for women. The contemporary social and legal climate was fuelled by contradictory sexual phobias and paranoia, to the point of sexual hatred. Women’s sexuality was viewed with particular suspicion, as newspaper crime reporting underlines. Any suggestion of female immorality reflected negatively upon any case. Yet where women were victims, a commonplace was that the Victorian media regarded the details as “unfit for publication.” Notoriously, 1888 was the year of the Whitechapel serial murders of women, famed as the work of Jack the Ripper. It was an age in which women’s independence was under scrutiny, both social and legal, and in which a legal backlash of a magnitude worthy of the Ripper’s era was forthcoming in response to increased female sexual agency, and was hotly debated in the media. This chapter examines the criminal case of R v Clarence, the trials of which appeared before the Court of Queen’s Bench from June to November 1888. It was a significant case, yet its content meant that the press coverage was mixed. The Times effectively ignored it, presumably because of its unpleasant subject matter; more sensationally inclined organs, including nationals such as the Daily Telegraph, and local press such as the East London Observer, gave it attention, but even then shied away from the “disgusting” details. Clarence concerned charges of Assault and Grievous Bodily Harm (GBH), yet the judgment was notorious for its confirmation of the marital rape exemption, and the breadth of its influence extends today far beyond marital rape. The case involved Selina Clarence in her bold attempt to seek redress for the assault she identified in her husband’s deceitful transmission to her of gonorrhea. A woman’s claim of sexual harm, particularly in the context of marriage, was a novel move met with considerable judicial suspicion.
This chapter provides a detailed analysis of the Queen’s Bench appeal decision. The discussions of the Bench and nature of their reporting provide a perfect example by which to illuminate the peculiar sexual paranoia and fears of the Victorian establishment of the day. Although the charges of this trial concerned assault, the judges of the Bench quickly seized the opportunity to digress to a discussion *obiter dicta* of the damning obligations of the “marital contract” for women. And they did not stop here. The *Clarence* decision provides judgment on many facets of sex beyond that of the marital obligation, clearly illustrating the underlying motivations and sentiments of the Bench. In particular, the righteous debates of the court provide great insight into the prevailing moral fear of prostitutes and sexually visible women, enabling a greater insight into wider media representations of women’s sexuality. A consistent theme of panic over the sexual agency of women can be identified in the frequently rambling discussions, most notably concerning the fear of sexually “aggressive” and potentially litigious women. This panic, together with a contemporary association of women with disease and therefore danger, combined to produce the long-standing, damning decision of *Clarence*: a denial of women’s capacity to experience sexual harm and a declaration of the inherently dishonest nature of the sexual contract.

*Clarence* is not mere historical curio. It is a tenacious case that somehow is still cited, even since its overruling in England in 1991, when Justice Owens described the marital rape exemption as “as offensive a fiction as it is senseless.” Indeed *Clarence* continues to be cited in a variety of cases, with little surrounding controversy, not least of all to define the boundaries of consent. To appreciate fully the logic of these modern legal interpretations of sex, harm, and consent which descend from the *Clarence* decision, one must understand first the social and legal climate of the day, and the prevailing moral fears fuelling the majority judgment. Somehow, in the midst of a mass social fear of prostitutes, arose a legal decision that confirmed men’s position as normally the primary victims of sexual harm. In an era where women were viewed metaphysically as sexual disease, to make allegations of men’s sexual culpability was indeed a brave move on Selina Clarence’s part.

The Prostitute and Social Panic

Certain new sexual freedoms and rights of social movement had been experienced by women in the wake of the repeal of the repressive Contagious Diseases legislation in 1886, ending the degrading and intrusive ritualized detainment and inspection of so-called “common prostitutes.” Also, the Criminal Law Amendment Act 1885 had raised the age of female heterosex-
ual consent from twelve to sixteen, a move viewed variously as benevolently paternalistic, repressive, and misguided, or now viewed as primarily in men's cynical interest. Nonetheless, the massive public campaigns and agitation surrounding its inception were indicative of a novel, yet growing, discourse of female sexual rights, albeit tinged with a paternalism fuelled by the large-scale hysteria promoted in the press about the supposed white-slave traffic. While the discourse may be understood as misguided in its paternalism and as ultimately sexually oppressive, particularly in its legislative association with hostility to male homosexuality and antibrothel provisions, its symbolic attachment to women's sexual agency should not be overlooked. The mass and organized sectarian campaigns visible in the press for legislation against (trafficked) prostitution and for the raising of the age of female consent involved a public pronouncement of female sexual choice (admittedly this involved primarily the choice not to participate in prostitution). The media dimension ensured these were very public debates which, at their core, concerned female sexual rights and must be located in reaction also to the Married Women's Property Act 1882, which advanced both female economic independence and popular fears about female morality. Female sexuality, its incumbent rights, and regulation, were on the public agenda and this agenda was pressing the legislature for response. Women's sexuality was demanding independent recognition and attention in the form of protection from both civil exploitation and state-based harassment.

This discourse combined with the prevailing morbid fear of prostitution (actually, prostitutes themselves) to provide a peculiar social climate of panic over female sexuality and more specifically, female sexual independence. Years of public association of prostitutes with disease and the notion of the “great social evil” had produced grave social suspicions over the moral nature and character of prostitutes, and consequently of women generally. Strengthened by the newly developed medical model of analysis that focused on recently identified (though often confused) venereal disease, the fear of prostitutes proved strangely contradictory. In the ultimate sense of the “necessary evil” paradigm, prostitutes were posited as the “potential source of both physical and moral contagion” for men. The underlying premise of this concern, of course, was the unquestioned acceptance of men's large-scale commercial use of women:

Women . . . were the targets of surveillance, harassment and incarceration. For at no time could medical practitioners and politicians, despite their misgivings about the ineffectiveness of a partial system of identification and compulsory treatment, challenge the collective privileges of men for unencumbered heterosexual indulgence.
Davidoff’s sewer metaphor captures it best: “defenders of prostitution saw it as a necessary institution which acted as a giant sewer, draining away the distasteful but inevitable waste products of male lustfulness, leaving the middle class household and middle class ladies pure and unsullied.” Mary Spongberg also uses this metaphor, claiming that “The task of public hygienists was to sanitise these sewers so as to promote their cleanliness and efficiency.” In the Victorian period,

Fear of venereal disease had become the way in which men articulated the anxieties caused by prostitution. It opened the debate on prostitution, making it a health problem. It allowed an expression of the idea that prostitutes were a necessity. On one level it left the notion of women as innately pure and untainted by making the prostitute pathological. But on another level it meant that all women were tainted because of the connection between venereal disease and femininity.

All women were, after all, potential prostitutes.

For Davidoff, Victorian sexuality (particularly male) became the “focus of a more generalised fear of disorder and of a continuing battle to tame natural forces.” The social panic over prostitutes’ independence and its accompanying phobias are best comprehended as linked to wider social fears. Early “social investigators” had identified prostitution as an “intolerable evil that threatened the sanctity of the family as well as the social order.” Yet oddly, regulation and free access to “clean” prostitutes was deemed the appropriate remedy for this evil. The greater fear, of men’s unnaturally constrained lust, was preeminent. Ironically, in this analysis, prostitutes may be viewed as the unreliable, immoral guardians of social stability where any increase in agency, or their inclusion in the modern discourse of individual rights, was terrifying. These were dangerous, if necessary, women.

Indicative of this complicated “love-hate-need relationship” with prostitution, Parliamentary debates over the raising of the age of consent were influenced explicitly by concern for men’s sustained access to prostitutes, and especially the fear of women’s increased sexual agency in the face of disputed consent. The 1885 Act was exhaustively entitled “An Act to make further provisions for the Protection of Women and Girls, the suppression of brothels, and other purposes.” However Stevenson identifies the driving motivation behind it as “the perceived need to protect men from immoral girls and women, rather than any primary desire to protect vulnerable females from male sexual violence,” noting the influence of a fear of “wholesale extortion by ‘girls of bad character.’” As Weeks comments,
Most of the men who wished to keep the age of consent at twelve and thirteen accepted as a matter of course an outlook in which young girls from the working class were perceived to be easy sexual targets. For many upper class men, prostitution appeared both necessary and inevitable; and their objections to raising the age of consent often arose from fear that either they or their sons might be threatened by the new legislation. 

Indeed, “a casual acceptance of male sexual licence was traditional among the British upper classes and continued to be upheld by aristocratic ‘reprobates’ in parliamentary debates.”

Into this climate (sustained by regular newspaper comment) of medically “justified” female phobia, of unquestioned acceptance of men’s inalienable right to use prostitutes, and widespread paranoia over sexually aggressive, litigious women, Selina Clarence marched with her accusations of sexual harm. It is beyond irony that Selina’s claim of assault concerned gonorrhea. Walkowitz points out that the denial of her harm was too concertedly deliberate to be considered ironic:

complications due to untreated gonorrhoea can in fact be very serious, but doctors barely recognised it as a serious disease for women, mistaking its asymptomatic early stages as a sign of a condition that women passed on to men but did not suffer from themselves, [that is], women as carriers of gonorrhoea, as producers of disease in men, but not sufferers.

This prevailing medical and social prejudice both informed the judiciary and thrived on its blind sight regarding women’s capacity to experience sexual harm. Selina’s allegations were manipulated to extend this denial beyond the case of disease, to the broader context of sexual harm in general.

Creating the Marital Rape Exemption

On 20 December 1887 Charles Clarence had sex with his wife, Selina. It appears that Charles knew he was infected with gonorrhoea, but declined to inform his wife of his condition. Clarence was convicted of assault and GBH contrary to the Offences Against the Person Act 1861. The Times had felt compelled to report the matter in as demure a tone as possible, obscuring the precise content by explaining that the case was one that raised “questions as to the law affecting the domestic relations.” Both convictions were quashed by the Queen’s Bench Division with the apparent aid of the logic of the
marital rape exemption. Newspaper reporting either failed to report this development, like The Times, or, like the Daily Telegraph, did its best to obscure the sordid details behind the decision. It simply did not appear to be understood by the majority of the Victorian Bench that a wife could be assaulted sexually by her husband (except perhaps in the most physically violent of circumstances). As she was akin to his legally contracted property, for her to charge this would be as inane as a man bringing charges against himself. This is unsurprising, given that in Victorian England the marital contract was considered so binding that a wife’s rights to personal freedoms were contingent on her husband’s discretion, as the words of Chief Baron Pollock underline: “Such a [marital] connection may be accompanied with conduct which amounts to cruelty, as where the condition of the wife is such that she will or may suffer from such connection.”

The apparent misogyny of such archaic legal conventions as the marital rape exemption is well documented, as is the judicial system’s historic disregard for female complaints of sexual harm. However, even such “well-documented” history is complicated, and far from straightforward. For example, in Clarence, “despite the overwhelming decision that no crime had been committed at common-law, the judgments were in no means similarly in support of the idea that a wife could never withdraw consent to intercourse.” Thus even in 1888 there was far from judicial unanimity surrounding the legal understanding of “rape” in marriage. This makes the apparent uncontroversial manner in which the logic of the Clarence ruling has been cited and upheld recently seem all the more surprising, especially in light of the official judicial and parliamentary discrediting of such outdated conventions as the marital rape exemption.

Although the Crown in Clarence had charged specifically nonsexual assaults, the case was introduced, ruled, and publicized as one of sexual propriety and morality. Some discussion was given to the nature of criminal assault and the crime of inflicting GBH. Fitzjames Stephen (for the majority) thought that “the word ‘inflict’ implied an assault and battery of which GBH was the manifest, immediate and obvious result. As this was not the manifest, immediate and obvious result of Clarence’s act he did not ‘inflict’ harm onto this wife.” Yet the judiciary’s analysis swiftly deferred to that of the nature of the marital contract of consent to sex, a deferral that “was clearly not incumbent on them.” The cleverly chosen charges of assault and GBH were dismissed as misguided in a case involving not only sex but also marriage.

The defense immediately set the tone for the decision, revealing what was to surface in much of the judicial discourse as the wider agenda: “if the conviction is right, it appears to follow that any man who is accused by a prostitute of having defrauded or infected her may be prosecuted for an indecent
assault, if not for rape.” The physical harm to Selina was summarily dismissed as the primary concern, and the case was transformed into a lengthy discussion of the damning wider repercussions of allowing a wife to charge her husband with nonconsensual sex. Although Selina had not claimed rape, she did state that she would not have had sex with Charles had she known of his disease. And the prosecution did argue, “irrelevantly” according to Gilbert Geis, that had she resisted her husband’s advances, that had he persisted with force he would then be guilty of rape. The case was hastily rephrased by the defense and the court in terms of consent, rather than assault, and almost as if by magic there appears the first instance of an English appellate court discussion of the rape-in-marriage doctrine that was to be authoritatively upheld in Britain, in some form, until 1991:

The comments in Clarence upon rape-in-marriage amounted to little more than stray, unfocused observations. But later, these inconclusive musings would come to serve as a major basis for more fixed judicial views upholding Lord Hale’s statement on the inviolability of the husband’s right of sexual access to his spouse.

The logic employed in this conceptual leap of faith from GBH to marital rape appears bizarre. How was it able to occur?

The Logic of Marital Rape

Charles Clarence was charged under sections 20 and 47 of the Offences Against the Person Act 1861. Both sections relate to physical assault and are explicitly and clearly separate from those dealing with matters of sexual assault. Selina argued that she had been assaulted in the harm inflicted by her husband’s informed and deceitful transmission of gonorrhea. Clarence was convicted on both counts with reference to two previous judgments of a similar nature, neither of which involved a married couple. On appeal, defense counsel argued that according to Lord Hale’s Pleas of the Crown a husband “cannot be guilty of rape upon his wife,” and that as “consent to coition on the part of the wife is a matrimonial obligation . . . coition cannot as between them constitute assault.” Therefore, her allegations were both misguided and unfounded. Defense logic was accepted as sound and uncontroversial by the majority of judges and even the four dissenting judges declined to contest the logic or sense of this conceptual leap from GBH to rape. Their dissent was based mainly on a more subtle reading of Hale’s marital rape opinion. Surely, they reasoned, a wife need not consent to every act of marital intercourse,
under every circumstance, particularly if it will leave her injured. Hawkins argued that

by the marriage contract a wife no doubt confers upon her husband an irrevocable privilege to have sexual intercourse with her during such time as the ordinary relations created by such contract subsist between them. . . . [T]his marital privilege does not justify a husband in endangering his wife's health and causing her grievous bodily harm.35

In fact, many of those of the majority were also hesitant to hold Hale's proposition as sound in all circumstances. Mr. Justice Wills was “not prepared to assent to the proposition” that marital rape was “impossible,” and both Mr. Justice Field and Mr. Justice Charles thought “there might be cases in which a wife might lawfully refuse intercourse and in which, if the husband imposed it by violence, he might be held guilty of a crime.” In other words, they suggested, there were certain exceptional circumstances that might allow a wife to revoke consent. This ambiguity surrounding the limits of Hale's opinion adds further curiosity to the tenacity of Clarence and the motivation behind its consistent use in modern law. The authority of Clarence is perhaps “not the bulwark of the irrevocable consent argument it may have been considered.”36

Unfortunately for Selina, hers was not the situation to warrant exception. Despite momentary misgivings over the extent of Hale's pronouncement, the logic that Selina's complaint amounted to rape was uncontested. It was most uncontroversially accepted that as the assault (gonorrhea) was sexually based, that therefore if any criminal assault was committed, it had to be rape. As Wills asserted, “If an assault—a rape also.”37 And, as stated, marital rape was a crime the allegations of which could not be upheld against a husband (except apparently in certain circumstances, the details of which were not illuminated). As such, no basis for Clarence's conviction prevailed. The marital rape exemption exonerated the defendant of any culpability, thus precluding the convictions, despite the fact that Selina had not charged rape.

The creative invocation of the marital rape exemption against charges of assault and GBH is indicative of a profound disinterest in, or perhaps even an incapacity to conceive of, the harm of sex, particularly within marriage. To speak of assault in relation to sex is to immediately invoke the notion of rape, even today. The nature, therefore harm, of rape is typically understood as the lack or abuse of consent. Thus in instances where consent may be “proven” or taken for granted, there exists no crime and legally no harm. Selina's marital contractual “consent” to sex meant that she had not been raped, or indeed assaulted. And as the only harm of sex is rape (nonconsent), no crime (or harm) was legally recognized. As Hawkins (who was actually more sympa-
thetic to a wife’s rights, than, say Baron Pollock, and who urged the conviction of Clarence) explained:

A wife submits to her husband’s embraces because at the time of marriage she gave him an irrevocable right to her person. The intercourse which takes place between a husband and wife after marriage is not by virtue of any special consent on her part, but mere submission to an obligation imposed upon her by law. Consent is immaterial.38

Quite simply, the harm of sex is nonconsent and consent in marriage is immaterial. Therefore, what harm of sex may prevail in marriage? It is unclear where this logic leaves a wife deceitfully infected with a serious illness by a knowing husband, except for the obvious; that it leaves her beyond the protection of the law, apparently simply because the vehicle for her assault was sex. Selina Clarence remains unvindicated.

The Other “Harm” of Sex

Aside from “rape” or contested consent to the sex that infected her, the other common theme in the discussion of Selina’s fate was the panic over prostitution, or more tellingly, fear of prostitutes themselves. Remember, the defense for Clarence’s appeal introduced the case with this fear as explicit priority. The ramifications from acknowledging Selina’s assault at the hands (or penis) of her husband were deemed considerable by both the defense and the court. The fear of the application of the principle to women in general, beyond the wife, prompted a lengthy digression from the charges at hand to discuss the varied “dangers” of allowing women legal recourse for the harm of sex. The notion that a man could be held legally responsible for sexual activities was patently unthinkable, if it were not so implicit a threat. Indeed Wills’s analysis extended beyond commercial prostitution to that of private seduction, exhibiting a grave antipathy toward regulating or in any way interfering with the “contract” of sex. The indignation and cynicism with which he framed this “problem” of assessing harm and sex suggests that Selina probably never stood a chance with her bold allegations.

In his judgment, Wills was obsessed with prostitution. More specifically, he was preoccupied with the potential harm to men at the hands of unscrupulous prostitutes and other dishonorable women. So charges of GBH against a husband led to not only a discussion of the illogicality of marital rape, but also involved a disorderly parade of all number of hypothetical situations surrounding sex and the inherent extortive dangers for men therein. Far from
providing mere obscure historical insight into the curious personal fears of the Victorian establishment, *Clarence* is still with us today. When the full bench seized the opportunity in 1888 to muse at length, providing “random, cryptic comments” over the perils of sex for men, it furnished explicit precedents for contemporary understandings of the legal conceptions of rape, fraud, consent, and not least of all, the harm of sex. The obsession with potential harm to men at the hands of women in this context could only arise from a presupposed disinterest in or dismissal of the actual harm of sex in and of itself. It exhibits instead, a particular interest in the sexual availability of women to men, beyond the limits of the law. Rather than concerns for the regulation of the harm of sex, the *Clarence* judgment presents almost hysterical fears for the harm of men around the contract of sex. And top of this list was the fear of the most obvious contractual participant, the defamed manipulative prostitute.

The Sexual Contract—The Fear of Fraud

Defense counsel introduced *Clarence* as of great importance, arguing that the upholding of Charles’s convictions could pave the way for the liability of sexual activity as such. It opened the door to future extortions and false accusations. Men across the nation, it would appear, were already at grave risk of harm from prostitutes, and Clarence’s conviction would provide even more avenues for their malevolent ways. Wills, who introduced the verdict, was in agreement with the defense’s paranoid logic. He focused particularly on the suggestion that perhaps Selina’s consent was vitiated by the fact that it was induced fraudulently. Apparently the idea of extending legal protection against fraud from the legitimate commercial world to the intimate one of sex was dangerous, and plainly misguided. Wills concurred with the rather contradictory Stephen: “The act of intercourse between a man and a woman cannot in any case be regarded as the performance of a contract. In the case of married people that act is part of the greater relation based on the greatest of all contracts but standing on a footing peculiar to itself.” Apparently the greatest contract of all was beyond the greatest reach of the law.

Wills conceded that Clarence’s actions were both “wicked and cruel enough.” But this acknowledgment did not outweigh his greater concern, the protection of the subtle nuances of the contracting of sex:

If the first [prosecution] view be correct, every man, as has been pointed out, who knowingly gives a piece of bad money to a prostitute to procure
her consent to intercourse or who seduces a woman to by representing him- 

...seems to me therefore, of rape.42

...alatable consideration for the court. Wills and his “brothers” presented many such hypothetical scenarios to display the absurdity they identified in attempting to regulate the “mysteries of sex.”43 He ardently pandered to the hysterical fears raised by the defense, warning that the logic of the conviction proved not only distasteful but, quite frankly, too difficult:

Surely these considerations point to the conclusion that a wide door will be opened to inquiries not of a wholesome kind in which the difficulties in the way of arriving at the truth are often enormous, and in which the danger of going wrong is as great as it is by people in general inadequately appreciated.44

So, a wife’s charge of GBH against her husband was opportunistically seized upon to determine the legal protection of fraud within sex, primarily aimed at the protection of men from false accusation, and most profoundly the protection of sex from the rigors of the law.

Selina claimed she would not have consented to sex with Charles had she been aware of his disease. As such, the prosecution argued optimistically that had she expressed nonconsent, and Charles had “proceeded with force,” he would have then been guilty of rape.45 Given that Hale’s marital rape opinion had not yet been discussed in court, perhaps this optimism was not as misplaced as it now seems. The prosecution were apparently unaware that, as Hawkins came to explain, within marriage a wife does not consent but merely 

...submit. Indeed the argument for the prosecution indicates just how profoundly the nine judges of the majority were actively making law, in their often vague and unfocused discussions. Hale’s seventeenth-century opinion that a man cannot be guilty of raping his wife had not been judicially confirmed prior to the frequently contradictory, opinionated departures of the court in Clarence. The hypothetical proposition of Selina’s nonconsent suggested that as such, her consent was not “real.” Given that she would have resisted sex if she had known the facts, and given that such resistance ought to be upheld in court, it would follow that her consent should not be accepted as “real.” That is, it should be recognized as vitiated by the fraudulent representation by Clarence as to the nature of the sex act (although it should be noted that this too is a digression from the straightforward charges of assault and GBH which do not involve a constituent component of consent). While
this was a discrete aside from the charges laid, the court again took the opportunity to muse prolifically, this time over the nature of that fraud (if any) which may vitiate consent to sex.

The Deceit of Seduction

James Fitzjames Stephen in particular was concerned with the consequences of acknowledging through this debate that fraud may vitiate consent to sex. For him, “the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word.”46 In particular, sexual matters proved well beyond the “maxim that fraud vitiates consent.”47 Stephen concluded that consent may only be vitiated where the fraud related to the nature of the act itself, or as to the identity of the person who does the act. His attempt to narrow the scope of that fraud which may be recognized legally in sex was still ambiguous, however, but may be found cited today as authority to uphold the most narrow interpretation of fraud in rape.48 His concerns lay also with the dangers of extending rights of recourse to those engaging in acts of “immoral” (nonmarital) sex. Like Wills, Stephen was particularly concerned that perhaps “seduction” may be captured as criminal should the contract of sex come to be regulated by law: “Many seductions would be rapes, and so might acts of prostitution procured by fraud, as for instances by promises not intended to be fulfilled.”49

The fear of extending criminal fraud provisions more broadly to the contract of sex was quite simply the fear of female reaction in the face of disputed consent. For Wills this specifically implicated the prostitute and the contract of commercial sex. What had the most worrying long-term implications was his assessment of seduction, or noncommercial sex, as primarily a deceitful pursuit:

If the conviction be upheld on the grounds of the difference between the thing consented to and the thing done, the principle will extend to many, perhaps most cases of seduction, and to other forms of illicit intercourse, including at least theoretically, the case of prostitution.50

Thus although seduction or the negotiation of sex was identified as almost entirely dishonest, it did not warrant legal intervention. In fact, because seduction was identified as almost entirely dishonest it could not warrant intervention. The Clarence judgment explicitly identified the dishonest, manipulative nature of the contracting of sex and used this “fact” as reason for legal immunity. Clarence’s behavior was acknowledged as immoral,
“wicked and cruel,” but the court could not legally acknowledge harm, for almost all seduction (apparently) is similarly immoral. Wills explained, “a great many rapes must be constantly taking place without either of the parties having the least idea of the fact.”\textsuperscript{51} Or, put more crudely: “we simply cannot convict Clarence, because then we’d have to convict all those other men too.”\textsuperscript{52}

Thus, the \textit{Clarence} judgment of 1888 was a culmination to a debate over women and their rights in the sexual contract taking place against the background of increasing panic over women’s independence. This panic has never entirely disappeared, and partly explains why \textit{Clarence} has been so enduring. In its vague and disjointed offerings, \textit{Clarence} has set as precedent for over one hundred years that the sexual contract is normally dishonest, yet still beyond the interests of the law. It cemented the onus on “consent” as determining the presence or absence or harm in sex, despite the rather contradictory acknowledgment that seduction at least is inherently dishonest. The wisdom of \textit{Clarence} holds that the presence of consent acquits, or prevents, harm in sex. Yet at the same time, sexual consent in marriage is considered largely immaterial, if not nonexistent. And “consent” in seduction is deemed almost entirely deceitfully induced. It is difficult to avoid the conclusion that the \textit{Clarence} judgment exhibits primarily a fundamental disinterest or disbelief in the harm of sex, and in contrast, a most concerted offensive against the legal regulation of the sexual contract, something which is interestingly contradictory of sociocultural stereotypes about feminine sexuality. With the understanding of sexual negotiations as inherently dishonest, and with marital consent deemed little more than contractual submission, it is not surprising that the court displayed scant interest in legally intruding into the “mysterious” sexual realm. With such a normalized understanding of hurt and manipulation and dishonesty in sex, it was probably quite a surprise to the court that anyone would complain.

The deceit of seduction and the duplicity of the sexual transmission of gonorrhea were deemed in \textit{Clarence} problems of morality, rather than problems of criminal harm. The only harm that could be legally identified to arise from sex was that of the potential extortion of men (in particular those who used prostitutes), and that connected to the rather narrowly defined construct of “consent.” Consent obtained by lies (seduction) or fraud (as to say, the health risk) was not so problematic as to warrant legal intervention. Both may be “immoral” perhaps, but for Wills, such immorality was not the business of the law. Indeed, he identified in the original \textit{Clarence} conviction “a fresh illustration afforded of the futility of trying to teach morals by the application of the criminal law to cases occupying the doubtful ground between immorality and crime, and of the dangers which beset such attempts.”\textsuperscript{53}
Conclusion

The conversation leading to the Clarence judgment both constructed and confirmed certain understandings of sex which underlay so much newspaper reporting of women and sexuality, especially in the courtroom. Most notoriously, this ratified Hale's seventeenth-century opinion that the marital contract implies (all but) irrevocable consent on the part of the wife. Aside from marital sex, it also established legally a particular view of sexual negotiations and the nature of sex itself. First, it held that sex is by typical nature of no legally recognized harm (to women), that sex is rather an issue of morality beyond the practicable interests of the law. Second, it confirmed that the civil or commercial contract of sex is both relevant and irrelevant to the law. It was relevant in establishing consent (to ensure lack of “force” and violence, outside of marriage at least). Yet oddly the nature of this contract was primarily of little interest to the law. Fraud in the sexual contract was acknowledged only in extreme, narrowly defined circumstances. The day-to-day fraud of deception involved in seduction is of no business to the law, because sex itself was seen as of little, if any harm. The contracting of sex, either commercial or social, was not to be limited by law. That is, the liberty of men's access to sex was not to be limited by law.

Third, it declared sex, especially extramarital, a routinely dishonest activity. The Clarence judgment not only pronounced disinterest in the regulation of sex. It actually defined sexual negotiations as typically dishonest. The Court's disinterest in the deceit of seduction flowed from an understanding of sex as fundamentally harmless to women and, most importantly, merely an issue of morality. Sexual dishonesty might well be immoral, but it did not constitute a harm relevant to law. If sex was harmless, then what was the “real” harm in being fraudulently induced to participate? Where was the “real” harm in lying to encourage someone to participate in an essentially harmless act? The morally righteous sex of marriage was beyond the reach of the law. And the immoral sex of seduction was quite simply just that: immoral. Indeed, only with a committed understanding of sex as fundamentally harmless could one make the spectacular conceptual leap necessary to overlook the obvious physical harm of gonorrhea.

With women posited typically as sex and indeed the very essence of sexual danger in their “contagion” and manipulative ways, the motivation of the Bench was skewed ferociously toward the discrediting of female testimonies of sexual harm and, therefore, toward the denial of the actual capacity of women to experience sexual harm inflicted by men. Clarence was decided amidst social paranoia and panic regarding the danger of prostitutes. These distracted motivations of the Bench ensured that sex was declared an issue of
morality beyond the interests of the criminal law. The ambiguities or “mysteries” of seduction were used to justify the presumption that sex was essentially dishonest and difficult to regulate, that therefore the law was best kept at bay, particularly if “consent” were apparent. Clarence explicitly denied the capacity of sex for assault, indeed asking rhetorically if the legal construct of assault “could really have been intended to apply to circumstances so completely removed from those which are usually understood when an assault is spoken of, or to deal with matters of any kind involving the sexual relation or act.” Yet the panic of 1888 has maintained its influence to this very day.

(Editors’ postscript: A 2004 Court of Appeal opinion has finally settled the Clarence controversy—apparently?)

Notes

2. R v Clarence (1888) 22 QBD 23.
7. W. T. Stead’s use of the Pall Mall Gazette in his “Maiden Tribute to Modern Babylon” is the best known example of this. Pall Mall Gazette, 1885.
8. Pall Mall Gazette, 15 December 1880, for example.
9. Illustrated Police News, 29 August 1885, for example.
10. The Contagious Diseases Acts 1864 aimed at control of both gonorrhea and syphilis. There was no effective scientific diagnosis for gonorrhea before 1879; the development of a blood test for syphilis came as late as 1906. P. McHugh, Prostitution and Victorian Social Reform (London: Croom Helm, 1980), 259.
15. Ibid., 47.
18. Stevenson, “Women’s Silence,” 1, 9
24. *R v Clarence* (1888), 64, per Baron Pollock. See also Edward’s chapter in this volume.
29. Ormerod and Gunn argue the charges were actually not so cleverly chosen: “The judges do not appear to have realised that Parliament had chosen to make criminal the administration of poisons, destructive and other noxious things, so that the persons passing on smallpox to a friend or a child would be guilty of a crime which did not require improper extension of the concept of assault.” Realization would have enabled those judges of the view Clarence *should* have been guilty of an offense to point out he was “prosecuted for the wrong offence.” See sections 23 and 24, Offences Against the Person Act 1861. D. C. Ormerod and M. J. Gunn, “Criminal Liability for the Transmission of HIV,” *Web Journal of Current Legal Issues* 1 (1996).
32. Ibid., 288.
33. *R v Bennett* (1866) 4 F & F 1105; *R v Sinclair* (1867) 13 Cox CC 28. In 1866, in Bennett, a syphilitic uncle had been convicted of assault on the basis of “consensual” sexual intercourse with his niece. The following year, in Sinclair, a man affected with gonorrhea had been similarly convicted after sexual congress with a “consenting” female of twelve. Ibid., 287.
34. *R v Clarence* (1888) at 25, per Fulton.
35. Ibid., at 51, per Hawkins J.
36. Scutt, “Consent in Rape,” 260; *R v R* [1991], 4 All ER, at 485, per Lord Keith.
37. *R v Clarence* (1888) at 34, per Wills J.
38. Ibid., at 54, per Hawkins J. Original emphasis. Freeman, “Martial Rape Exemption,” 11, urges that Hawkins’s judgment “was thoroughly confused, contains gross
inconsistencies, and is best ignored.” Unfortunately the similarly confused majority sentiments have yet to be ignored.

40. *R v Clarence* (1888) at 44, per Stephen J.
41. Ibid., at 34, per Wills J.
42. Ibid., at 28, per Wills J.
43. Ibid.
44. Ibid. at 32, per Wills J.
46. *R v Clarence* (1888) at 44, per Stephen J.
47. Ibid.
49. *R v Clarence* (1888) at 44, per Stephen J.
51. Ibid. at 34–35, per Wills J.
52. Ormerod and Gunn, “Criminal Liability,” 16, argue “this is an irrelevant argument if there is an offence covering the activity in question. If the activity is criminal . . . there is nothing necessarily wrong in there being hundreds of convictions.”
53. *R v Clarence* (1888) at 34–35, per Wills J. The lack of medical interest in this aspect of the moral dimension of sex stands in interesting contrast to that explored in Crozier’s chapter in this volume.
54. Ibid.