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"Rules in Law": On the Castlehaven Scandal

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In April 1631 Mervin Touchet, Lord Audley, second Earl of Castlehaven, was indicted for rape and sodomy. The rape was not any old rape: according to the indictment, the Earl had urged his servants to penetrate his wife Anne in front of him, and at least two servants obeyed him.¹ In the trial both Anne and her rapists gave witness - some in person and others in written depositions - against the Earl, who was consequently found guilty: of the twenty-seven peers, all convicted him of rape, and fifteen of sodomy.² He was duly beheaded in the next month, still insisting on his innocence; two servants, the one rapist and the other sodomite, followed him a month later.

This episode now known as the Castlehaven scandal was common knowledge among his contemporaries: "The Lord of Castlehavens arraignment for many shamefull exorbitances was now all the talke," as John Evelyn wrote (23). It is also well known to later historians and, especially, literary critics who are familiar with the occasion on which Milton's *Comus* was presented. The masque was performed on September 29, 1634, celebrating the accession of Castlehaven's brother-in-law, John Egerton, first Earl of Bridgewater, to the position as President of the Council of Wales. The blood relation, the temporal proximity of the scandal and the celebration, and the thematic similarity between them - in the scandal two women lost their chastity or virginity (see below), while a virgin resists a sexual temptation in the masque - these factors have led some critics to entertain the possibility that the masque was written with a deliberate reference to the scandal. Barbara Breasted, for one, has found it "difficult to believe that *Comus* could have been written and performed with no thought in anyone's mind of how it might allude to the scandal" (217).

In fact, the scandal has been studied almost always in conjunction with *Comus*, the chief questions being: Did it really influence the form of the masque as presented in the celebration? Was chastity really chosen as its theme in order to remind the family members of their "fallen" relatives?³ I believe, however, that the records of Castlehaven's trial have in themselves many things to tell us about the contemporary discourse on marital relationship, and even more about judicial procedures of the day. If, as historians have recently shown, rape is one of the most problematic areas of English legal history, such a well-documented case as Castlehaven's is worth reexamining in itself.⁴ What follows is my reconstruction of the heterosexual side of the scandal, in which I will address the following two questions: What was the discursive status of the Earl's misdeeds, the one to be determined in relation to the discourse then dominant on marital relationship? And, under what statute(s) was he convicted? Hopefully, these inquiries will bring to light those aspects of the scandal which

have not been fully explored.

1 . The Scandal

The disgraceful story of the family began in 1624, soon after Castlehaven married his second wife, Lady Anne Stanley, widow of Grey Bridges, Baron Chandos. The wife says in her deposition:

That shortly after the earl married her, viz. the first or second night, Amptil [Antill; a servant] came to the bed's side, while the lord Audley spake lasciviously to her, and told her, "That now her body was his; and that if she loved him she must love Amptil; and that if she lay with any other man with his consent, it was not her fault but his; and that if it was his will to have it so, she must obey, and do it." - That he attempted to draw her to lie with his servant Skipwith; and that Skipwith made him believe he did it, but did not - That he would make Skipwith come naked into his chamber, and delighted in calling up his servants to shew their privities; and would make her look on, and commended those that had the largest. - That one night, being a-bed with her at Founthill, he called for his man Brodway [Broadway], and commended him to lie at his bed's feet; and about midnight (she being asleep) called him to light a pipe of tobacco. Brodway rose in his shirt, and my lord pulled him into bed to him and her; and made him lie next to her; and Brodway lay with her, and knew her carnally, whilst she made resistance, and the lord held both her hands and one of her legs the while: and that as soon as she was free, she would have killed herself with a knife, but that Brodway forcibly took the knife from her and broke it; and before that act of Brodway, she had never done it. - That he delighted to see the act done; and made Amptil to come into bed with them, and lie with her whilst he might see it; and she cried out to have saved herself. ("Trial of Mervin Lord Audley" col. 411)

The rapist Broadway endorses this account: leading him into his bed, "my lord [Castlehaven] turned him upon his wife, and bid him lie with her, which he did; and the earl held one of her legs and both her hands, and at the last (notwithstanding her resistance) he lay with her" ("Trial of Mervin Lord Audley" col. 413).

The situation got even worse and more complicated after 1628, when Castlehaven arranged the match between James, his son by his first marriage, and Elizabeth, Anne's daughter by her first marriage. This time, the Earl urged his servants to sleep with the young bride who was then only twelve years old. The girl deposes:

that she was first tempted to lie with Skipwith by the earl's allurements; and that she had no means but what she had from Skipwith; but she would not lie with Pawlet; he solicited her also to lie with Green. - That the Earl himself saw her and Skipwith lie together divers times; and nine servants of the house had also seen it.

When the Earl solicited her first, he said, that upon his knowledge her husband loved her not; and threatened that he would turn her out of doors, if she did not lie with Skipwith; and that if she did not, he would tell her husband she did. - That she being very young, he used oil to enter her body first: and afterwards he usually lay with her, and it was with the earl's privity and consent. ("Trial of Mervin Lord Audley" col. 413)

And these are her partner Skipwith's words:

That the earl often solicited him to lie with the young lady, and persuaded her to love him; and to draw her thereunto, he urged that his son loved her not; and that in the end he usually lay with the young lady, and that there was love between them both before and after . . . and that she was but twelve years of age when he first lay with her, and that he could not enter her body without art; and that the lord Audley fetched oil to open her body, but she cried out, and he could not enter; and then the earl appointed oil the second time; and then Skipwith entered her body, and he knew her carnally; and that my lord made him lie with his own lady, but he knew her not, but told his lord he did. ("Trial of Mervin Lord Audley" col. 412)

Thus we have the core of the scandal: Broadway, Antill and Skipwith duly carried out their master's perverse orders, except for the last when he did not penetrate Anne. Of course, the price of those dirty shows was not cheap: both the rapists and the raped revenged themselves on Castlehaven, sending him to court, and then up to the scaffold. As Sir Edward Coke said in *The Institutes of the Laws of England*, and as Sir Robert Heath, then the King's Attorney General, repeated at the beginning of the trial, "Rape is a felony by the Common law . . . and the offender shall not have the benefit of Clergy" (Coke, *Third Part* 60; *Trial and Condemnation* 10).

Before going further into details, I would like to note that I will dismiss from my consideration the possibility that Castlehaven was actually innocent as he insisted to the very last, that to blame was not he but rather his wife and son who "had plotted and conspired his destruction and death" ("Trial of Mervin Lord Audley" col. 415).⁵ We can never know, to be sure, what was the truth of the scandal, what really happened in the Earl's house between 1624 and 1631. But given Castlehaven's acknowledgement of the unseemliness of his conduct - in the second examination he "desired to be pardoned of those things whereof he must accuse himself," saying that "condemnation should not come out of his own mouth" ("Trial of Mervin Lord Audley" col. 413) - and given also the surprising consistency of the witnesses' depositions, I think it justifiable to assume that all those rape shows actually took place. So I will question how: I will reexamine how they took place and how they were required. Hopefully, it will be clear that Castlehaven's degeneracy was not the only thing that was scandalous about the scandal.

2 . Wifely Obedience

Let me begin with the first question: What was the discursive status of Castlehaven's misdeeds? The awkwardness of the question is clear, for at the heart of the recommended marital relationship, as the contemporary authorities on the subject determined it, was the wife's subjection to the husband.

One of such authorities is William Whately, whose *Bride-Bush* reiterates the biblical instruction about wifely obedience: "concerning which duty a plaine text [the Bible] avers it to the full, saying; 'Let the Wife bee subject to her husband in all things, in the Lord'" (42).⁶ Indeed, the motto on the first page of this wedding sermon is the Pauline doctrine, "The Husband is the Wives Head" (1). To what extent, however, should the wife obey her husband? The real issue is "Not whether shee must obey, but how farre" (42). Whately answers: "In whatsoever thing obeying of him doth not disobey God, shee must obey" (42). In turn, he says on the husband's control over his wife: "Where God hath commanded, let not him forbid; where God hath forbidden, let not him command" (33). Although Whately requires the wife be subjected to her husband, it is not his intention to make a bondslave of her. He therefore reminds the couple that God too is involved in their marriage as the invisible third party, that the husband's claim to superiority is legitimate only when he is godly.

On close reading, however, Whately's God is actually on the husband's side: if the husband is the wife's head as Saint Paul says, is it not he, the husband, that determines what God has commanded or forbidden?⁷ No wonder, God is sometimes absent from Whately's mind, as when he says that it is "conscionable submission when she chuseth to doe what her-selfe would not, because her husband wils it" - and not "because God wils it" (42). No wonder, too, he describes the ideal wife in the following terms: "it is laudable, commendable, a note of a vertuous woman, a dutifull wife, when she submits her-selfe with quietnesse, cheerfully, euen as a wel-broken horse turnes at the least turning, stands at the least check of the riders bridle, readily going and standing as he wishes that sits vpon his backe" (43). While telling the husband that his wife is not a slave, Whately is effectively implying that she is.

The work of William Gouge, another authority on the subject, is suffering from a similar contradiction. Like Whately, he is careful not to emphasize the wife's subjection too much: "this *subjection* is no seruitude," as he says (269). Therefore, under the heads "Of cases wherein a wife ought not to forbear what her husband forbiddeth" and "Of cases wherein a wife ought to forbear what her husband requireth," Gouge writes respectively that "The wife must yeeld no other subiection to her husband then what may stand with her subiection to Christ," and that "If an husband require his wife to doe that which God hath forbidden she ought not to doe it" (326, 328). Yet, we are soon confronted with the following question and answer that argue the opposite:

Quest. What if an husband be an enemie of Christ? must such subiection be yeelded

to an enemy of Christ as to Christ himself?

Answ. Yea: because in his office he is in Christ's stead, though in his heart an enemy. In this case will the wisdom, patience, and obedience of a wife be best tried. (330)

That is to say, while God is half absent in Whately, His enemy is here positively welcomed as His deputy.⁸

Then, what are we to make of the relationship between Castlehaven and his wife, of what he did to her? In a sense the husband only exerted - and abused - his authority over his wife, as was sanctioned by those clergymen. The Earl did what was "good" or "right," or at least what those writers could not determine decisively as evil or wrong. When the Earl exacted obedience from his wife, saying that "if it was his will to have it so, she must obey, and do it," he was only trying to "keep" and "use" his authority, which Whately said was the chief duty of the husband ("Trial of Mervin Lord Audley" col. 411; Whately 18). And, according to Gouge, even if Castlehaven "had not the fear of God before his eyes," even if "he left God, and God left him to his own wickedness" - which is how the Attorney General described the Earl in the trial - "such subjection [must] be yielded to an enemy of Christ as to Christ himself"; this was precisely the case in which "the wisdom, patience, and obedience of a wife [would] be best tried" ("Trial of Mervin Lord Audley" col. 410; Gouge 330).

But where did such "wisdom, patience, and obedience" lead the wife in question, Anne? What was the result of her "conscientious submission" - Whately's phrase cited above - or her doing "what her-selfe would not, because her husband wils it"? Ironically, it was nothing less than her own ruin, which was double: it is not only that she was put through the utmost humiliation of rape more than once, but also that she thereby lost her chastity, the female virtue *par excellence*. For her (forced) virtue of obedience, Anne ended up losing another, no less important, virtue. Absurd, to say the least: being a "good" wife, she found herself stripped bare both physically and socially.⁹

3 . The Trial

Of course, this is only half of the story. Castlehaven was deservedly indicted, convicted, and executed. The judicial system of the period did punish, if not prevent, the rapes he had caused. But how? Was it sufficiently equipped to handle such a case as was more or less sanctioned by the dominant discourse on marriage?

Let us return to the trial records. Reading the indictment, the Attorney General introduces four rules according to which the Earl is to be judged:

- 1 . In this case, not only he that doth the Act is Principal, but also they that are present, Abetting, and Aiding the Misdoer, are Principals also.
- 2 . If the party on whom the Crimes was [sic] committed be notoriously Unchaste, and a knowne Whore, yet there may be a Ravishment.
- 3 . [I]n an Indictment of Rape, there is no Limitation of time for the prosecution.

4 . If a Man take away a Maid and Ravish her by Force, and afterward she gives her consent and Marries him that did the Act, yet it is a Rape. (*Tryal and Condemnation* 11)¹⁰

All these rules are indispensable, if Castlehaven is to be incriminated effectively. First, it is necessary to treat all the participants in the rapes - Castlehaven, Antill and Broadway (and Skipwith, if Elizabeth's case is counted) - as one in the offence, if the first, the very person being tried, is to be deemed a rapist. Strictly speaking, the Earl penetrated neither Anne nor Elizabeth, but only instigated the servants to do so. And, according to Coke, "if there be no penetration, that is, *res in re*, it is no rape, for the words of the indictment be, *carnaliter cognovit, & c.*" (*Third Part* 60). As a mere instigator, Castlehaven could be exempted from the punishment to be administered to the rapist, that is, execution.¹¹

The rest of the rules are no less necessary, for Anne's painful story could be read against her, to the effect that she has actually given consent, or at least something that could be construed as consent, to her rapists. It is not so clear from the depositions cited above, but probably there were continuous forced affairs between her and the servants, *res in re* or otherwise, which she came to resist less and less. Given the considerable space of time between her second marriage (1624) and the indictment (1631), it is hard to believe that Broadway and Antill slept with her only once respectively. If so, who are to blame? Only Castlehaven and his servants? At least, Anne's mother, Alice, Countess Dowager of Derby, does not think so, who writes in her letter that she is "perplexed and afflicted wth grieffe for my daughter Castlehaven, and Grandchilde Audlie, in that they have so Infinitelie offended God, & the King, by their wicked crimes." She wishes "that neither my daughter nor she [Elizabeth] will euer offend either God or his Ma.^{tie} againe by their wicked Courses, But redeeme what is past, by their reformation and newnesse of life" (qtd. in Breasted 215). Strangely, the forced affairs - again, the words "wicked Courses" suggest continuance - are thus regarded as "wicked crimes" on the part of the victims.¹²

Though not mentioned in the indictment, Elizabeth's case is clearer, because almost all the examined servants have acknowledged the open liaison between her and Skipwith. Fitz-Patrick says: "Skipwith lay with the young lady often, and ordinarily." Edmund Scot: "Skipwith frequently knew the young lady." Fry: "Henry Skipwith and that young lady lay often together." Broadway: "He has seen Skipwith lie with the young lady in bed together." And Skipwith himself: "in the end he usually lay with the young lady, and that there was love between them both before and after" ("Trial of Mervin Lord Audley" cols. 412-13). Though it is possible that the first encounter between the two was traumatic, probably they have got more and more intimate with each other in the mad air of the house which Fitz-Patrick calls "a Common *Brothel-House*" (*Tryal and Condemnation* 19). That is probably why the young lady is reluctant, despite her grandmother Alice's command, to return to her husband, who in his turn refuses to receive her. That is why a contemporary letter reads that "His [Castlehaven's] sonnes wife (it seemeth) is not yet 16 yeeres old, whom before 12. he made a

whore" (qtd. in Breasted 219). And, that is why Alice herself hesitates to receive her granddaughter into her house even after Castlehaven's execution: "I doe Earnestlie entreate yo:^r Lo:^{sp} to plead my Cause, beseech his Ma:^{tie} to excuse me (yet a while) for [i.e. from] taking my Grandchilde Audlie. . . . I am fearefull least there should be some sparkes of my Grandchilde Audlies misbehauour remaining, w^{ch}: might giue ill Example to y:^e young ones w^{ch}: are w:th me" (qtd. in Breasted 216).¹³

Hence the need to establish that the rape of an unchaste woman is still a rape, that there is no time limit for the indictment against rape, and that consent given by the ravished to the ravisher after the deed cannot annul it. Given these rules, the peers can dismiss as irrelevant whatsoever happened in the Earl's house except the rape of Anne by Broadway and Antill.

The legal foundation of such precautions, however, is not so firm as it might seem at first. The laws in the period with regard to rape, and also their application to actual cases, were in sheer confusion. It would not be difficult at all to raise objections to the four rules above except for the third. For instance, against the first - that in rape cases, "not only he that doth the Act is Principal, but also they that are present, Abetting, and Aiding the Misdoer, are Principals also" - one could cite Henry de Bracton, the most eminent legal authority in the Middle Ages, who is invoked with respect in this trial. As he affirms, "Several may be accessories, but only one shall be held for the defilement, though several may be liable for lying with her, for to defile a virgin and to lie with one defiled [are different deeds]. And since the deeds are different it is evident that the same punishment ought not follow in both cases" (417). So, according to him, the one to be punished most severely would be Skipwith, if his affair with the twelve-year-old virgin Elizabeth should be counted as a rape. The punishments for others would be less severe, Broadway and Antill having penetrated a non-virgin, and Castlehaven not having penetrated anyone at all.

This differentiation between the rape of a virgin and that of a non-virgin could certainly be cited against the second rule - "If the party on whom the Crimes was committed be notoriously Unchaste, and a knowne Whore, yet there may be a Ravishment" - whose source is Bracton himself.¹⁴ Although Bracton declares that "if she was a whore before, she was not a whore then, since by crying out against his wicked deed she refused her consent" (418), such a rape for him is still different from, and less consequential than, that of a virgin:

when a virgin is defiled she loses her member and therefore let her defiler be punished in the parts in which he offended. Let him lose his eyes which gave him sight of the maiden's beauty for which he coveted her. And let him lose as well the testicles which excited his hot lust. Punishment of this kind does not follow in the case of every woman, though she is forcibly ravished, but some other severe punishment does follow, according as she is married or a widow living a respectable life, a nun or a matron, a recognized concubine or a prostitute. . . . (414-15)¹⁵

If so, Castlehaven would not have to lose his life, or even eyes and testicles. The legal

authority invoked against Castlehaven could as easily be employed in his service.

It might be objected here: Bracton was very often cited in the Earl's trial, to be sure, but what was decisive in determining the Earl's fate must have been another, and more recent, statute, 18 Elizabeth c. 7, which reads, "if any person shall fortune . . . to commit rape or burglary, and to be found guilty . . . in every such case every person so being found guilty . . . shall suffer pains of death and forfeit . . . without any allowance of the privilege or benefit of clergy" (Prothero 74). Probably; but this statute was not without problems either, the most fatal of which was that it was as good as a dead letter. As Nazife Basher has shown, all the victims of the nine men hanged for rape in the Home Counties between 1600-1649 were under eighteen (37-38). As the historian concludes, "the relative ease of conviction of men accused of raping girls under eighteen was a stable factor through the years 1550-1700" (38). At the time of the Castlehaven trial, that is to say, the tendency to treat the rape of a virgin more seriously than that of a non-virgin was still alive in court, if not in statute. Legal precedents could have readily been cited in favor of anyone that had not meddled with the virgin Elizabeth.

Some more possible objections: it could be pointed out that the Attorney General is quoting Bracton quoting earlier laws, the custom of Bracton's own day being a little different - "some dispensations are nowadays provided, for instance, that the ravishers may receive those they have ravished in marriage" (418).¹⁶ Needless to say, this goes diametrically against the fourth rule, "If a Man take away a Maid and Ravish her by Force, and afterward she gives her consent and Marries him that did the Act, yet it is a Rape." Again, Bracton is on Castlehaven's side: according to him, the indictment against the Earl for the rape of Anne is invalid from the outset because, as her husband, he has already gained that consent which is enough to cancel the rape.¹⁷ Such an argument sounds terrible, but it would be supported at least by the contemporary jurist Sir Matthew Hale, who argues: "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" (qtd. in Geis 40).

Lastly, the strange history of the fourth rule could be cited against the rule itself.¹⁸ Its source is the statute 2 Westminster c. 34 (1285), which reads, "whosoever ravisheth any woman by force, though she consent afterward, shall have judgement as afore is said [of life and member]" (*Lawes Resolution* 381).¹⁹ The apparent severity of this law, which replaced extremely lenient 1 Westminster c. 13 (1275) - where the punishment for rape was two years imprisonment and ransom - is actually undermined by the ambiguity of the word "ravishment." On the one hand, it means rape per se, rape as Coke defines it: "*Raptus* is, when a man hath carnall knowledge of a woman by force and against her will" (*First Part* 124). But on the other hand, it also means abduction or, when given consent, something like elopement. While the former offence certainly requires redress, the latter is no less disturbing to the head of the family of a "ravished" woman, whether her father or husband. For he will thereby lose his wife or daughter - whether as an object of love or as a

marketable commodity - and the family honor. Here Westminster II can be cited against both offences: it serves not only the raped but also the patriarch whose wife or daughter has been carried off - or willingly left home - without his consent. Given this statute, in short, a man can take a legal action who has for whatever reason lost a woman under his protection or control. History tells us the consequence of such a law: protecting the family interests became its chief aim. For instance, in 1305 there was only one man convicted of rape per se, and he was allowed to pay fine instead of life and member (Post 157-58). Later statutes too went in this direction, elaborating the destiny of consenting women:

Afterwards by the Statute of R[ichard]. 2. a greater punishment is inflicted upon the party ravished, if she after consent to the ravisher, viz. that as well the ravished as the ravisher should be disabled to challenge inheritance, dower, or joint-feoffment, & c. and that the next of blood should enter, & c. (Coke, *Second Part* 434)²⁰

The law cited to incriminate Castlehaven would thus incriminate more the raped than the rapist. Indeed, the conditions are perfect for the Earl: as seen above, Anne and Elizabeth could be regarded as having given consent to their ravishers, and the main offender, Castlehaven, is the representative of the family interests to be protected by the law.²¹

Now the question is: Why was any of these objections not raised in the trial? How could the validity of those four rules pass unquestioned?²² The answer is simple: the peers did not have the least intention to inquire into legal matters, and such inquiry was forbidden to Castlehaven. Knowing the statutory complications or not, the Earl asked to have counsel at the very beginning of the trial: "I am ignorant of the advantages and disadvantages of the law, and am but weak of speech at the best, and therefore I desire to have the liberty of having Counsel to speak for me." To this, the judges answered, "in criminal cases, counsel is not to be admitted for matter of fact; but for matter of law they may"²³ ("Trial of Mervin Lord Audley" col. 406). Strangely, however, they did not allow that liberty to the Earl, Lord Chief Baron asserting assuredly: "The Law is express in this case, and Counsel ought not to be granted" (*Tryal and Condemnation* 6). The Baron and other peers possibly knew that the laws with regard to rape could be - and had actually been - manipulated in favor of the offenders, but in this particular case, they were determined to employ them against Castlehaven. Hence the abrupt and peremptory introduction of the four rules in question. Defining rape, and mentioning the punishments dictated by Bracton and Westminster II, the Attorney General went on, saying: "but I shall not Tyre your Lordships patience with Citing Authorities, nor inlarging upon the Hainousness of an Offence that admits of no aggravation, and therefore shall only mention three or four Rules in Law. . ." (*Tryal and Condemnation* 10-11).

Conclusion

What is to be made of such a scandal, of those discursively justifiable rapes and the legally

dubious trial? I think that the rapes were the radical embodiment of the discourse of wifely obedience. The husband, Castlehaven, followed Whately and Gouge's instructions too sincerely, exerting his authority over his wife to the utmost degree, subjecting her to his perverse desire; and his wife Anne did the same, obeying her husband's commands, whatever they were. Doing so, they found themselves at the core of the discourse, where the most desirable and the most detestable strangely met. In other words, the internal contradiction of the discourse was brought to light by its most faithful followers. This means that there was no redressing the actual wrongs done to Anne on the discursive plane: after all, her husband did the "right" things as determined by those writers. No wonder, Castlehaven could say to the peers unabashedly, "Woe to that man, whose Wife should be a witness against him!" ("Trial of Mervin Lord Audley" col. 415). It must have been hard - if not impossible - to falsify this woe; in other situations than this, it would have been deemed quite natural.

Yet, despite the discursive complication, and despite the legal confusion with regard to rape, the peers were determined to convict Castlehaven. They assembled those pieces of law which could work against the Earl, and declared that they were the Law not to be questioned. The trial was not what it should have been, not so much a site where statutes and precedents were put to a thorough hermeneutic process for and against the alleged offender, as a kind of ritual to get rid of such a hateful person as Castlehaven. Is this to be called justice? One possible answer would be: if the history of rape - besides many others, some might say - is full of cases in which wrongs were not redressed, this one should be evaluated as a rare and reassuring case in which some measure of retributive justice was done; whatever means were employed, Castlehaven was executed for what he had done. Yes, but simultaneously revealed was injustice in the very apparatus that was to do justice. Just as the discourse that aimed at promoting the right marital relationship could encourage the wrong one, justice here was almost at one with its antithesis.

Notes

This essay is a revised version of a chapter in my PhD thesis "Beyond Discourse: Sexuality in Renaissance England" (Hiroshima University, 2000). An earlier Japanese version was read at the 47th colloquium of Milton Center of Japan (Aoyama University, 1999).

¹ Although the peers certainly knew that by Castlehaven's command, his stepdaughter Elizabeth too had a (forced?) affair with his servant, Henry Skipwith (see below), it was not mentioned in the indictment ("Trial of Mervin Lord Audley" cols. 402-3). This means, I think, that the peers did not have sufficient ground - or motivation - to prove Elizabeth's affair as rape. Otherwise the peers would not have missed the opportunity to multiply the Earl's offence, and Skipwith could not have escaped execution; as will be seen, in this period the rape of a virgin was more readily punished than that of a non-virgin. I admire Barbara Breasted's precaution, who did not call what happened to Elizabeth rape or ravishment but

cited a phrase from a contemporary letter, the "conversion . . . into a 'whore'" (201, 202, 219); and I suspect that the point has escaped John Creaser, who says "he [Castlehaven] had the girl [Elizabeth] repeatedly ravished by one of his servants" (24) - though this will not invalidate his arguments against Breasted on the relevance of the scandal to Milton's *Comus*. I think that Elizabeth's case was only strategically mentioned in the trial for its shocking effect.

²These are the numbers as given in "Trial of Mervin Lord Audley" (col. 416). *Tryal and Condemnation* gives the number of the peers as twenty-six. Rushworth, which gives the number as twenty-seven, reads:

Then the Lord *Steward* asked them one by one, beginning at the lowest, and so ascending, Whether the Lord *Audley* were guilty of the *Rape* whereof he stood indicted? and they all gave him in *Guilty*, the Lord *North* excepted. Then whether he were guilty of the *Sodomy*? and in this fifteen of the Lords condemned him, and other eleven freed him. (101)

For a similar account, see *Trial of the Lord Audley* 8.

³See Brown 20-22; Creaser; Kerrigan 150; and Mundhenk. Exceptions include Bingham, which features Castlehaven's homosexuality; and Herrup, which casts a serious doubt upon what we all have assumed: Was Castlehaven really guilty of those crimes for which he was executed?

⁴See Baines; Basher; Brundage; Porter; Post; and Shorter.

⁵See also *Arraignment and Conviction* 11; *Trial of the Lord Audley* 7-8; *Tryal and Condemnation* 21-22; and Rushworth 101.

⁶For the following arguments on Whately and Gouge, I am heavily indebted to Davies.

⁷See Aers and Hodge for a similar argument with reference to Milton's divorce tracts.

⁸Cf. Henry Smith, who wrote: "so a good Wife is knowne when her wordes and deedes and countenances are such as her Husband loueth, she must not examine whether he bee wise or simple, but that she is his wife & therefore they which are bound must obey, as Abigail loued her husband though he was a foole" (78).

⁹Similar arguments can be made about Elizabeth's obedience to Castlehaven, her father-in-law, if we assume her case to be a rape; and also about his servants' more or less forced obedience to their master. See Gouge's instructions about what children must do to their parents, and servants to their master (427-96, 589-645).

¹⁰All these rules except the first are quoted in "Trial of Mervin Lord Audley," too (col. 409). See also Rushworth 98-99.

¹¹The judges had actually agreed on the principle, "no penetration, no rape": in one of the preparatory meetings, they asked themselves "Whether in a Rape there must be penetration," and answered in the affirmative ("Trial of Mervin Lord Audley" col. 403). See also Staunford cited in *Lawes Resolutions*, who said that "it is a good plea for the Defendant,

though hee lay with the woman, yet hee did not carnally know her, for the force of the Declaration resteth in that" (396).

¹²We may well recall here the rapist Broadway's last words from the scaffold, that Anne is "the wickedest woman in the world," having "more to answer for than any other woman" ("Trial of Lawrence Fitz-Patrick and Giles Broadway" col. 424).

¹³It is possible, I think, that Elizabeth did not even resist the penetration by Skipwith. Although it can be deduced from the phrase "she cried out" in Skipwith's deposition that she did not welcome him, it is not sure whether that "cry" was for help or from pain pure and simple. Whatever the truth was, it must be remembered that the peers decided not to indict the Earl for what he had done to her, and also that Skipwith was not executed.

¹⁴Bracton tells us of king Athelestane's Law before the Conquest: 'If the party were of no chaste life, but a whore, yet there may be a ravishment . . .'" ("Trial of Mervin Lord Audley" col. 409; *Arraignement and Conviction* 5; Rushworth 98).

¹⁵This passage is actually cited in the trial by the Attorney General (*Tryal and Condemnation* 10).

¹⁶See also Bracton 417, and Smith 44.

¹⁷See Brundage.

¹⁸I am indebted for the following arguments to Post 158.

¹⁹The original in French is reproduced in Coke, *Second Part* 433-34, and Post 164.

²⁰See also *Lawes Resolution* 381-83.

²¹Still another questionable point about the trial: the definition of rape as forcible penetration, which was confirmed by the peers in a preparatory meeting (see note 11), was turned upside down by the judges themselves in Castlehaven's second examination. When the Earl questioned "Whether, because Broadway [Skipwith?] doth not depose any Penetration [of Anne], but only that he emitted upon her belly while the earl held her, that should be judged Felony as for a Rape," the judges "resolved it to be a Rape, and so consequently to be Felony" ("Trial of Mervin Lord Audley" col. 414). If so, however, why was Skipwith not executed? And, how could Antill, who actually penetrated Anne, escape execution?

²²Actually, some objections were made by the Earl himself in his second examination, but they were made chiefly on the competency of the witnesses (*Trial of the Lord Audley* 6-8; "Trial of Mervin Lord Audley" col. 414).

²³Cf. Baker 36-37: "prisoners indicted for felony were in law denied the assistance of counsel in presenting their case unless a point of law arose upon the evidence."

Works Cited

Aers, David, and Bob Hodge. "'Rational Burning': Milton on Sex and Marriage." *Milton Studies* 13 (1979): 3-33.

The Arraignement and Conviction of Mervin Lord Avdley, Earl of Castlehaven. London, 1642.

Baines, Barbara J. "Effacing Rape in Early Modern Representation." *ELH: English Literary*

- History* 65 (1998): 69-98.
- Baker, J. H. "Criminal Courts and Procedure at Common Law, 1550-1800." *Crime in England, 1550-1800*. Ed. J. S. Cockburn. London: Methuen, 1977. 15-46.
- Basher, Nazife. "Rape in England between 1550-1700." *The Sexual Dynamics of History: Men's Power, Women's Resistance*. Ed. London Feminist History Group. London: Pluto, 1983. 28-42.
- Bingham, Caroline. "Seventeenth-Century Attitude toward Deviant Sex." *Journal of Interdisciplinary History* 1 (1971): 447-72.
- Bracton, Henry de. *Bracton on the Laws and Customs of England*. Ed. George E. Woodbine. Tr. Samuel E. Thorne. Vol. 2. Cambridge, MA: Belknap, 1968.
- Breasted, Barbara. "Comus and the Castlehaven Scandal." *Milton Studies* 3 (1971): 201-24.
- Brown, Cedric C. *John Milton's Aristocratic Entertainments*. Cambridge: Cambridge UP, 1985.
- Brundage, James A. "Implied Consent to Intercourse." *Consent and Coercion to Sex and Marriage in Ancient and Medieval Societies*. Ed. Angeliki Laiou. Washington: Dumbarton Oaks Research Library and Collection, 1993. 245-56.
- Coke, Edward. *The First Part of the Institutes of the Laws of England*. Vol. 1. London, 1628. New York: Garland, 1979.
- . *The Second Part of the Institutes of the Laws of England*. London, 1642. New York: Garland, 1979.
- . *The Third Part of the Institutes of the Laws of England*. London, 1628. New York: Garland, 1979.
- Creaser, John. "Milton's *Comus* : The Irrelevance of the Castlehaven Scandal." *Milton Quarterly* 21. 4 (1987): 24-34.
- Davies, Kathleen M. "Continuity and Change in Literary Advice on Marriage." *Marriage and Society: Studies in the Social History of Marriage*. Ed. R. B. Outhwaite. London: Europa, 1981. 58-80.
- Evelyn, John. *The Diary of John Evelyn*. Ed. Guy de la Bedoyere. Woodbridge: Boydell, 1995.
- Geis, G. "Lord Hale, Witches, and Rape." *British Journal of Law and Society* 5 (1978): 26-44.
- Gouge, William. *Of Domesticall Duties*. London, 1622. Amsterdam: Theatrum Orbis Terrarum, 1976.
- Herrup, Cynthia B. *A House in Gross Disorder: Sex, Law, and the 2nd Earl of Castlehaven*. Oxford: Oxford UP, 1999.
- Howell, T. B., et al., eds. *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Present Time*. Vol. 3. London, 1811-26.
- Kerrigan, William. "The Politically Correct *Comus* : A Reply to John Leonard." *Milton Quarterly* 27. 4 (1993): 149-55.
- The Lawes Resolutions of Womens Rights*. London, 1632. Amsterdam: Theatrum Orbis

- Terrarum, 1979.
- Mundhenk, Rosemary Karmelich. "Dark Scandal and the Sun-Clad Power of Chastity: The Historical Milieu of Milton's *Comus*." *Studies in English Literature* 15 (1975): 141-52.
- Porter, Roy. "Rape - Does It Have a Historical Meaning?" *Rape*. Ed. Sylvana Tomaselli and Roy Porter. Oxford: Blackwell, 1992. 216-36.
- Post, J. B. "Ravishment of Women and the Statutes of Westminster." *Legal Records and the Historian: Papers Presented to the Cambridge Legal History Conference, 7-10 July 1975, and in Lincoln's Inn Old Hall on 3 July 1974*. Ed. J. H. Baker. London: Royal Historical Society, 1978. 151-64.
- Prothero, G. W., ed. *Select Statutes and Other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I*. 4th ed. Oxford: Clarendon, 1913.
- Rushworth, John, ed. *Historical Collections: The Second Part*. London, 1680. Westmead: Gregg International, 1969.
- Shorter, Edward. "On Writing the History of Rape." *Signs: Journal of Women in Culture and Society* 3 (1977): 471-82.
- Smith, Henry. *A Preparative to Mariage; Of the Lords Supper; Of Usurie*. London, 1591. Amsterdam: Theatrum Orbis Terrarum, 1975.
- "The Trial of Lawrence Fitz-Patrick and Giles Broadway, Two Servants of the Before-Mentioned Lord Audrey, Earl of Castlehaven, at the King's Bench, for a Rape and Sodomy." Howell cols. 419-26.
- "The Trial of Mervin Lord Audrey, Earl of Castlehaven, for a Rape and Sodomy." Howell cols. 401-418.
- The Trial of the Lord Audley, Earl of Castlehaven*. London, 1679.
- The Tryal and Condemnation of Mervin Lord Audrey, Earl of Castlehaven*. London, 1699.
- Whately, William. *A Bride-Bush: Or, A Wedding Sermon*. London, 1617. Amsterdam: Theatrum Orbis Terrarum, 1975.