"Pure Patriarchy": Nineteenth-Century Canadian Marriage

Constance Backhouse*

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The author would like to thank the following individuals for their able research assistance: Kate Hughes, Rosemary Coombe, Elaine Deluzio, Elizabeth Seto, Catherine Fedder. She is also grateful for helpful editorial suggestions and advice from Bruce Feldthusen, Diana Majury and Jean Matthews. The manuscript was completed with the aid of funds from the SSHRCC and the Law Foundation of Ontario.

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Synopsis

I. "The Sacred Character" of Marriage: Rhetoric and Reality in Nineteenth-Century Canada

Writing about marriage in 1889, legal scholar John Alexander Gemmill proudly proclaimed that Canadians could show "a cleaner record than that of any other progressive people on the face of the earth." Canadians, he noted, knew how to "value and cherish [both] the sacred character of the matrimonial tie [and] the purity and sacredness of the family."[1] It was commonplace in the late nineteenth century for Canadians to congratulate themselves on the sanctity of their marital affairs, and to contrast their national record with that of England and the United States, which were frequently condemned in strident terms for their widely accessible divorce courts. Contemporary commentators held up the strong Canadian family as "the source and life of Christian civilization", and as the foundation for the future prosperity of the country. Sentiments such as these were expressed whenever the topic of divorce was under consideration and, ironically, it is

[1]J.A. Gemmill, *The Practice of the Parliament of Canada upon Bills of Divorce* (Toronto: Carswell, 1889) at 262.

through an examination of divorce law that one uncovers the best evidence of how nineteenth-century Canadians viewed the institution of marriage.

Early colonial legislators had experimented with laws which provided reasonably open access to divorce for reasons of practical necessity. As the nineteenth century progressed, however, Canadians became obsessed with the notion of the institution of marriage as the structural underpinning of a stable and healthy society. Parliamentary legislators refused to step in to rationalize a muddled patchwork of provincial divorce laws for fear of being condemned for tainting Canadian purity. The reality, however, was that many Canadian marriages failed to live up to such idyllic characterizations, and the citizenry resorted to various means to disentangle themselves from unsatisfactory marital bonds. The existence of divorce was not unknown in nineteenth-century Canada but the rhetorical stance never changed. To the Victorian mentality, the appearance of moral virtue and respectability was key. The symbolic depiction of Canadian marriage as exceptionally pure persisted regardless of all evidence to the contrary.

A. Early Divorce Legislation: Colonial Experiments

By the early nineteenth century, the maritime colonies of Nova Scotia, New Brunswick and Prince Edward Island had established specialized divorce courts with the power to terminate marriages upon numerous grounds. Although English ecclesiastical tradition forbade divorce at this time,[2] the early Maritimers apparently felt that the colonial situation warranted a departure from historical practice. The individuals who came to the new settlements may have felt that divorce — the freedom to disentangle oneself from an unsatisfactory marriage and to start afresh — was in keeping with the spirit of the new country — bold, independent and adventuresome. The geographic reality of the relatively unsettled new land allowed for desertion and anonymous relocation. Furthermore, seafaring men were frequently absent from their families for long periods, possibly lost at sea, leaving behind wives who had to remarry to support themselves and their children.

[2]It should be noted, however, that the English ecclesiastical courts had made use of doctrines such as annulment and rescission to pronounce some marriages void *ab initio* on grounds such as bodily imperfection or infirmity resulting in total incapacity for consummation, blood ties or marital connections which brought the two persons within the prohibited degree of consanguinity, prior existing marriage, lunacy, mental incapacity, or breach of statutory requirements in the solemnization of marriage. Adultery, marital cruelty and desertion were not grounds for divorce but for judicial separation, commonly termed divorce *à mensâ et thoro*, which enabled the parties to live separately but did not dissolve the marriage. Beginning in 1701, Parliament started to provide some relief from the strictness of the ecclesiastical courts by enacting *ad hoc* statutes to permit specified individuals to obtain a full divorce on the ground of adultery, known as divorce *à vinculo matrimonii*. See Gemmill, *ibid.* at 1-8, 11-12 and 45-46.

Women were not in plentiful supply in the colonies, yet their work as household managers and childbearers was of critical importance. A married woman without a husband was a waste of a scarce resource. Factors such as these undoubtedly made access to divorce a pressing need for new settlers.

The first recorded application for divorce occurred on 15 May 1750, when Lieutenant William Williams petitioned the Nova Scotia Council (composed of the Governor and a number of army officers stationed in the area) for divorce from his wife, Amy Williams, on the ground of her adultery. Without any discussion of the difficult question of colonial jurisdiction, the Nova Scotia Council decided to hear the case. Finding Amy Williams guilty of adultery, the Council granted the divorce and provided for William's right to remarry. Amy was prohibited from remarrying during William's lifetime, and she was ordered to leave the colony within ten days.[3] When the home authorities in England learned that the Council had assumed jurisdiction as a Court of Marriage and Divorce, they took action at once. Although by this time Parliament had begun to provide a limited form of *ad hoc* access to divorce to wealthy petitioners, under English law marriage was regarded as indissoluble.[4] The actions of the upstart Governor and Council must have seemed a remarkable example of colonial power overreaching itself. The English authorities promptly disallowed the ruling.[5]

Despite the English interference, the Governor and Council of Nova Scotia boldly determined to reassert the right to colonial divorce. In 1758, in one of its first pieces of legislation, the Nova Scotia Legislative Assembly granted the Governor and Council authority to hear "all matters relating to prohibited marriages and divorce".[6] The grounds established for divorce were surprisingly broad: impotence, kinship within the prohibited degrees,[7] adultery and wilful desertion while withholding necessary maintenance for

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[3]This account was drawn from C.J. Townshend, "Historical Account of the Courts of Judicature in Nova Scotia" (1899) 19 Can. L.T. 25 at 58.

[4]Gemmill, *supra*, note 1 at 1-4, 11-12 and 45-46.

[5]The practice of having a Governor and Council assume jurisdiction over divorce paralleled the pattern being established in some of the New England colonies to the south. While some of these divorces were apparently allowed to stand, others were variously disallowed for lack of conformity to English practice, or declared null for infringing the authority of Parliament: see N.F. Cott, "Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts" (1976) 33 William & Mary Q. (3d) 586.

[6]*An Act Concerning Marriage, and Divorce, and for Punishing Incest and Adultery, and Declaring Polygamy to be Felony*, S.N.S. 32 Geo. 2 (1758), c. 17, s. 6. See also *Of the Court of Marriage and Divorce*, R.S.N.S. 1851, c. 128, ss 1-3 which authorized judges of the Supreme Court and the Master of the Rolls to sit on divorce cases as well.

[7]The *Act Concerning Marriage, and Divorce, and for Punishing Incest and Adultery, and Declaring Polygamy to be Felony*, *ibid.*, s. 7, specified that the prohibited degrees of kinship were those set out in *For Marriages to Stand Notwithstanding Precontracts, 1540* (Eng.), 32 Hen. 8, c. 38.

three years. Three years later the legislature acknowledged that its divorce law had "been found to be inconsistent with the laws of England" and amended these provisions.[8] The amendments failed in large measure to bring Nova Scotian law in line with English precedent. The new legislation did not challenge the validity of the divorce court, but merely altered the grounds upon which marriages could be dissolved. The four grounds were now listed as impotence, pre-contract and kinship within the prohibited degrees,[9] adultery and cruelty.[10] Posturing as loyal followers of English precedent, the Nova Scotia legislators managed nevertheless to frame their divorce laws to respond to the needs of a newly-developing colony.

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[8]*An Act for the Amendment of an Act, Entitled an Act Concerning Marriages and Divorce, and for Punishing Incest and Adultery, and Declaring Polygamy to be Felony*, S.N.S. 1 Geo. 3 (1761), c. 7.

[9]The second ground was thus expanded, *ibid.*, preamble, to include not only blood ties or marital connections amounting to "kindred within the degrees prohibited by 32 Hen. VIII", but also pre-contracts of matrimony. This term referred to situations in which one spouse had been engaged to someone else prior to marriage. The legislators were confused in adding this ground, since England had long since eliminated it as a cause for divorce so long as the pre-contract had not been consummated. Indeed, the English statute, *supra*, note 7, which had eliminated pre-contract as a ground for divorce, was actually cited in the Nova Scotia legislation.

[10]The 1761 *Act*, *supra*, note 8, properly eliminated desertion as a cause since it was not one in England at the time. However, neither were adultery and cruelty grounds upon which to render a marriage null and void in England; in the absence of a Parliamentary decree, adultery merely constituted cause for judicial separation and cruelty was not a ground for dissolution of marriage.

Further confusion was thrown upon the situation by the explanatory note included with the publication of the 1761 *Act*, which read:

> By the laws of England, the causes of divorce, dissolving the bond of marriage are, precontract, impotence, consanguinity, affinity, and *causa metus ante nuptias*; which being precedent impediments, the marriage was a nullity, and *ab initio* void. Adultery and cruelty being subsequent to the marriage, though they are proper causes for temporary separation *à mensâ and thoro*, yet they do not affect the validity of the marriage, and consequently cannot, as in themselves, dissolve *à vinculo matrimonii*, nor can such divorce bar the wife of her dower, or bastardize the children. The principle ground of amendment by this act seems to have been, the permission of divorce for wilful desertion, &c. as not agreeable to the laws of England, for this cause is now omitted by the act, and all the other causes are, as in the former act, inserted.

If the legislators had meant to draw a distinction between the grounds which would permit a full divorce (proof of pre-contract, impotence and consanguinity) and grounds which would permit only a judicial separation (adultery and cruelty), they certainly had not drafted the *Act* correctly: the wording authorized the court to declare marriage "null and void" on all of these grounds.

Not surprisingly, the preamble of *An Act to Explain the Acts, Concerning Marriage and Divorce, Passed in the Thirty-Second Year of His Late Majesty's Reign, and the First Year of His Present Majesty's Reign*, S.N.S. 56 Geo. 3 (1816), c. 7 explained that "doubts have arisen relative to the construction of the Acts of the Province Concerning Marriage and Divorce". This *Act* reiterated that the latter two grounds, adultery and cruelty, which must have caused the most confusion in interpretation, were sufficient to authorize the court to declare the

New Brunswick was the second jurisdiction to establish a special divorce court. Perhaps being the second made it less hesitant to proclaim the importance of such legislation to the colonial setting. The 1791 *Act for Regulating Marriage and Divorce, and for Preventing and Punishing Incest, Adultery, and Fornication* expressly asserted the need for such a tribunal: it was "necessary", the preamble stated, "in order to the keeping up of a decent and regular society, that the Matrimonial union be settled and limited by certain rules and restraints ... ."[11] The grounds for divorce were frigidity or impotence, adultery and kinship within the prohibited degrees.[12] The number of applicants seeking divorces from the new court must have been too numerous for the tribunal to handle, and several statutes were passed in 1836 and 1847 to increase the number of terms the court would sit to hear cases and to expedite proceedings.[13]

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marriage "absolutely null and void". Under the *Act*, the court also had the alternative "to separate the said parties from bed and board only" in cases of adultery and cruelty, a remedy which would prevent them from marrying again. While this *Act* ensured that the English relief of judicial separation was available for adultery and cruelty, it also went significantly further than the English law by permitting these acts to constitute grounds for a full dissolution of marriage. This situation was not altered until 1866, when pre-contract was finally removed as a ground for divorce by *An Act to Amend the Laws Relating to Divorce and Matrimonial Causes*, S.N.S. 29 Vict. (1866), c. 13, s. 8. The legislation was not clarified further and remained in this state throughout the nineteenth century.

[11]*An Act for Regulating Marriage and Divorce, and for Preventing and Punishing Incest, Adultery, and Fornication*, S.N.B. 31 Geo. 3 (1791), c. 5. S. 11 provided that the 1787 *Act* of the same name was thereby repealed. Search for this earlier statute has proved unfruitful, as it was not contained in the volume of the New Brunswick statutes covering the period from 1786 to 1820. Nevertheless, one can speculate that this *Act* may have been passed first in 1787, and was later re-enacted in 1791.

[12]Interestingly, no definition was given for "frigidity". Sheila Jeffreys, who has studied sexuality in the late nineteenth and early twentieth centuries, noted in "Sex Reform and Anti-Feminism in the 1920s" in London Feminist History Group, ed., *The Sexual Dynamics of History* (London: Pluto Press, 1983) 177 at 181-82, that frigidity did not mean the absence of sexual response in women, since lesbianism and masturbation were both viewed as causes of frigidity. Rather "[f]rigidity meant the refusal of women to see sexual intercourse as desirable, vitally necessary, or pleasurable."

[13]*An Act for Altering the Terms of Holding the Court of Governor and Council for Causes of Marriage and Divorce*, S.N.B. 6 Wm 4 (1836), c. 34, added a third term of sitting in October; *An Act to Authorize a Special Term of the Court of Governor and Council for the Determination of all Suits and Controversies Touching and Concerning Marriage and Divorce*, S.N.B. 10 Vict. (1847), c. 62, added a special term to be held in Fredericton in April 1847.

Earlier statutes had altered the dates for the sitting of the court and restructured the court to accommodate the separation of the Governor's Council into a legislative and executive body: see *An Act to Alter and Amend an Act, Intitled "An Act for Regulating Marriage and Divorce, and for Preventing and Punishing Incest, Adultery and Fornication"*, S.N.B. 48 Geo. 3 (1808), c. 3; and *An Act for the Further Regulation of the Formation of the Court of Governor and Council for the Determination of all Suits and Controversies Touching and Concerning Marriage and Divorce*, S.N.B. 4 Wm 4 (1834), c. 30.

In 1860 the decision was taken to transfer all jurisdiction over these cases from the Governor

In 1833, Prince Edward Island also established a divorce court, structured along the same lines and with identical grounds for divorce as the court in New Brunswick with one distinction: in cases of divorce for adultery, the adulterous party was barred from marrying again during the natural life of the former spouse.[14] This distinction was repealed in 1835.[15] In contrast to the New Brunswick divorce court, which did a brisk business, the Prince Edward Island court seems to have gone largely unnoticed by the early residents. Not one application was brought during the entire nineteenth century.[16]

The pattern of enacting divorce statutes was suspended, however, before it reached the inland provinces of Upper and Lower Canada. *Ad hoc* petitions for divorce were presented to the Legislature of Upper Canada (and later to the Legislature of the United Province of Canada) seven times prior to Confederation; two applications were abandoned, four were granted, and one was granted but later disallowed.[17] Between 1833 and 1859, there were several attempts to create a general divorce court but none was successful.[18]

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and Council to a court of record called the "Court of Divorce and Matrimonial Causes", staffed by a judge of the Supreme Court: see *An Act to Amend the Law Relating to Divorce and Matrimonial Causes*, S.N.B. 23 Vict. (1860), c. 37, s. 1.

[14]*An Act for Establishing a Court of Divorce, and for Preventing and Punishing Incest, Adultery and Fornication*, S.P.E.I. 3 Wm 4 (1833), c. 22, ss 1, 3, 5, 6 and 7.

[15]*An Act for Establishing a Court of Divorce in this Island, and for Repealing a Certain Act therein Mentioned*, S.P.E.I. 5 Wm 4 (1835), c. 10.

[16]R.R. Evans, *The Law and Practice Relating to Divorce and Other Matrimonial Causes* (Calgary: Burroughs, 1923) at 5.

[17]John Stuart was granted a divorce by the Legislature of Upper Canada in 1839: *An Act for the Relief of John Stuart*, S. Prov. C. 3 Vict. (1841), c. 72. Two more applications made in 1840 to the Legislature of the newly-united Canada were abandoned: see C.S. McKee, "Annotations: Law of Divorce in Canada" (1922) 62 D.L.R. 1 at 17. In 1845, Mr Harris was granted a divorce by the Province of Canada, but this was later disallowed by Her Majesty since the parties were not domiciled in Canada at the time of the passing of the *Act*. William Henry Beresford was granted a divorce by the Legislature of the Province of Canada in 1852: *An Act for the Relief of William Henry Beresford*, S. Prov. C. 16 Vict. (1853), c. 267. John McLean was granted a divorce by the same body in 1859: *An Act for the Relief of John McLean*, S. Prov. C. 22 Vict. (1859), c. 132. Gemmill, *supra*, note 1 at 18, noted that one other divorce bill was passed during this period: "Benning, 1864". The statute, however, is not printed with the provincial collection, and no further details have been discovered.

[18]During the 1833-34 session, a bill "to enable married people to obtain divorce in certain cases" was presented to the Legislative Assembly of Upper Canada. It was dropped before second reading. See Gemmill, *supra*, note 1 at 17, who states that the proposed grounds were not available for analysis; see also McKee, *supra*, note 17 at 17. In 1836, two petitions for bills of divorce were presented to the same Assembly; no action was taken upon them either: see Gemmill, *supra*; McKee, *supra*. In 1845 and 1846 motions were made to appoint a committee to draft a bill for a divorce court but these also failed: McKee, *supra*. According to Gemmill, *supra* at 19, there was a further motion in 1858 in the Legislature of the United Province of Canada to give jurisdiction to an appropriate legal tribunal in Upper Canada to hear divorce cases. The motion lost 65-34 in the House. In 1859, Mr O.R. Gowan introduced a bill to establish a divorce court, but it did not get farther than first reading: Gemmill, *supra* at 19.

Why the legislators of Upper Canada did not follow the example of the maritime provinces is not entirely clear. From at least 1841 on, however, after the union of Upper and Lower Canada, it seems that the religious convictions of the predominantly Roman Catholic legislators from Lower Canada were instrumental in blocking this development.[19] The unequivocal position in Lower Canada was represented in the *Civil Code of Lower Canada* which stated: "Marriage can only be dissolved by the natural death of one of the parties; while both live it is indissoluble."[20]

B. Post-Confederation Developments

French Canadian religious aversion to divorce seems to have provided the basis for the notion that Canadian marriage was a uniquely moral institution. During the extensive discussions which took place before Confederation, French Canadian representatives from Quebec stressed their concerns about the effect of a Protestant-dominated federal legislature on the question of divorce. Fearful that "leaving ... this question to the Federal legislature [was] to introduce divorce among the Catholics", they argued that the matter of divorce should be left in the hands of the provincial legislatures.[21] Those in favour of federal jurisdiction, however, won their case when they convinced some of the French Canadian representatives that federal jurisdiction would make it more *difficult* to obtain divorce across Canada. The Honourable Joseph Cauchon of Montmorency concluded that the consequences of federal jurisdiction would be "less serious, because [the laws] would be more cramped in their development and consequently less demoralizing and less fatal in their influence."[22] Possibly the French Canadians had been persuaded that their political strength was such that not only would

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[19]F.J.E. Jordon, "The Federal Divorce Act (1968) and the Constitution" (1968) 14 McGill L.J. 209 at 211, states that following the union of Upper and Lower Canada in 1840, legislation on the matter of divorce "became impossible".

[20]C.C.L.C. art. 185, as rep. S.Q. 1980, c. 39. There were at least some Quebec residents who disagreed with this situation. Gemmill, *supra*, note 1 at 20, notes that a group of individuals from the City of Quebec brought a petition to the Legislative Assembly in 1860, demanding the right to divorce; nothing was done about it.

C.C.L.C. arts 189-91, also provided for "separation from bed and board" on the basis of outrage, ill-usage, or grievous insult committed between the spouses, as well as on the refusal of the husband to furnish his wife with the necessaries of life. The ground of adultery remained open solely to men seeking judicial separation; wives were required to prove not only adultery, but also that their husbands were keeping the concubine in their common habitation (arts 187-88). C.C.L.C. art. 206, specifically provided that separation from bed and board would not dissolve the marriage tie, and that neither party would be free to contract a new marriage.

[21]The Hon. A.A. Dorion, member of the Provincial Parliament of Canada for Hochelaga, *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces* (Quebec: Hunter, Rose, Parliamentary Printer, 1865) at 691 [hereinafter *Parliamentary Debates*]; see also Jordan, *supra*, note 19 at 212.

[22]*Parliamentary Debates*, *ibid.* at 578.

the concept of divorce not be introduced into Quebec, but they could exert a beneficial influence by preventing the expansion of divorce legislation across the rest of the country. When the final negotiations were settled and the *British North America Act* was passed in 1867, the power to legislate in respect of marriage and divorce was transferred to the federal legislature.[23] No comprehensive divorce legislation would be enacted for the next hundred years. Fears that any attempt to amend divorce law would disrupt delicate federal-provincial and English-French relations contributed to the legislative blockage.[24]

The French Canadian position on divorce seems to have been based almost entirely on religious tenets. The Honourable Joseph Hyacinthe Bellerose, for example, denounced divorce in the House of Commons in 1868 as an "unchristian practice".[25] When a few legislators tentatively introduced bills for divorce courts after Confederation,[26] however, the furor which greeted the proposals went far beyond purely Roman Catholic religious arguments.[27] Divorce was roundly condemned because of the evil it would introduce into the social fabric of the nation. The Honourable Robert Poore Haythorne,

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[23]*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(26) (formerly the *British North America Act, 1867*).

[24]For an analysis of how the religious motivations of the French Canadian population in Quebec contributed to the conservative Canadian position on divorce, see P.T.F. Larocque, "The Evolution of the Canadian Divorce Law: A Study of the Policy Process in Canada" (M.A. Thesis, Queen's University, 1970) [unpublished].

[25]Canada, *House of Commons Debates* at 641 (6 May 1868).

[26]In 1870, Sir John A. Macdonald introduced and withdrew a bill regarding the New Brunswick divorce court, discussed *infra*, notes 44-45 and accompanying text. In 1875, the Hon. Mr de Cosmos introduced a bill into the House of Commons to set up a divorce court for each province. The motion was defeated after a very short debate. In 1879, another bill which would have introduced divorce jurisdiction to the Ontario Court of Chancery was voted down, despite favourable comments by Sen. Dr Carrall of Barkerville. In 1888, MPs Jones and Davies introduced a bill to establish divorce courts, but it was opposed by Sir John A. Macdonald. Sen. Macdonald from British Columbia introduced the final bill of that century in 1891, but due to the strength of the opposition he withdrew it before a vote. Several legislators continued to advocate the creation of divorce courts: see statements by Mr Charlton, Canada, *House of Commons Debates*, vol. 2 at 3602-3 (4 June 1894), at 3491 (19 May 1899); Sen. MacInnes from British Columbia, Canada, *Senate Debates* at 397 (16 May 1894), at 365 (20 June 1895); Sen. Macdonald from British Columbia, Canada, *Senate Debates* at 370 (20 June 1895). See, generally, Gemmill, *supra*, note 1 at 23-26; Canada, *Senate Debates* at 286-87 (18 April 1879); Canada, *House of Commons Debates*, vol. 2 at 1414 (14 May 1888); Canada, *Senate Debates* at 28-30 (5 May 1891), at 145-53 (26 June 1891).

[27]Indeed by the last decade of the century, non-Roman Catholic religious leaders were becoming equally fearful of divorce. The Rev. B. Austin of the Methodist Episcopal Church and author of *Woman: Her Character, Culture and Calling* (Brantford, Ont.: Book & Bible House, 1890) called for social reform of the institution of marriage, not for divorce reform. Happier marriages, he felt, would result if couples were given more opportunity to become thoroughly acquainted before the wedding. Increased access to divorce was simply not an option to be contemplated in cases of incompatible marriages.

for instance, lectured the senators of Canada that "the future of the country lay wrapt up in the sanctity of the marriage state",[28] and Senator Richard William Scott insisted that even one divorce was too many: "granting one divorce means a multiplication of applications for divorce", he predicted, and this would inevitably lead to the wreckage of the foundations upon which society was based.[29]

These dramatic denunciations of divorce from the standpoint of social well-being were reflective of ideas that Canadians were developing about their new nation's place in the world. In an effort to portray Canada as a particularly moral nation, legislators and legal commentators strove to distinguish it from England and the United States, which were depicted as suffering severely from liberal divorce laws and an excessive number of divorces.

In 1857, the English Parliament had passed *An Act to Amend the Law Relating to Divorce and Matrimonial Causes in England*, creating a new Court of Divorce and Matrimonial Causes with jurisdiction to grant divorces to men and women upon a number of grounds. The new law extended access to individuals who had been prohibited previously from seeking *ad hoc* Parliamentary divorces because of the cost.[30] Some years later, Prime Minister Sir John A. Macdonald described the impact of the new English divorce court in appalling terms: "the number of divorces, the corruption of society, and the number of collusive trials increase to the annually increasing degradation of the public mind". By contrast, he pointed to Canada as a much more stable society: "I prefer our system here, which offers very considerable impediments to the granting of divorces, to the systems which prevail elsewhere."[31] Senator Lawrence Geoffrey Power warned his colleagues in 1891 that, in England, divorces had increased "one-hundred fold"

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[28]Canada, *Senate Debates* at 185-88 (1 June 1887).

[29]Canada, *Senate Debates* at 389 and 392 (16 May 1894).

[30]Gemmill, *supra*, note 1 at 11-13, estimated the cost of an *ad hoc* Parliamentary divorce bill to be approximately £700 or £800, which barred all but the upper classes from seeking divorce. *An Act to Amend the Law Relating to Divorce and Matrimonial Causes in England, 1857* (U.K.), 20 & 21 Vict., c. 85 ss 2, 6, 7, 16-18 and 27 [hereinafter the *Divorce Act*], granted all former ecclesiastical divorce jurisdiction to a new Court of Divorce and Matrimonial Causes. Men were entitled to petition the court for a dissolution of marriage on the ground that their wives had been guilty of adultery. Women, by contrast, were required to prove that their husbands had been guilty of: "incestuous adultery, or bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *à mensâ et thoro*, or of adultery coupled with desertion without reasonable excuse for two years or upwards".

[31]Canada, *House of Commons Debates*, vol. 2 at 1414 (14 May 1888). Prime Minister Macdonald's position was expressly supported by the Hon. Mr Mulock who stated, at 1415, that "the facility with which divorces are now granted in England and in other countries does go a long way to interfere with the sacredness of the marriage tie."

since the adoption of a divorce court, and later added a ringing condemnation of the English example:

> I am convinced that, if the British Parliament, in 1857 had anticipated the results which have flowed from the establishment of a divorce court, it is highly probable that the change would not have been made. The divorce court in England is one of the greatest scandals of British life today.[32]

Even stronger denunciations were saved for the United States, where divorce was more accessible than it was in England. Divorce legislation had first been introduced in Pennsylvania as early as 1682, although many of the early statutes were disallowed by the English Privy Council following the pattern seen in Nova Scotia. After independence, the states north of the Mason-Dixon line responded to an increasing popular demand for divorce and passed a series of acts permitting divorce upon a broad range of grounds. By the mid-nineteenth century, in many states, the typical grounds of adultery, desertion and cruelty were supplemented by impotence, bigamy, felony conviction and non-support. In some jurisdictions, vaguely-worded clauses permitted the courts to grant divorce whenever it seemed in the interests of the parties.[33]

This state of affairs shocked many Canadians. The editor of the *Local Courts' and Municipal Gazette* wrote in 1867 that it was "almost impossible to conceive a more frightful picture of national depravity" than that of divorce in the United States. Describing the divorce laws as "libertinism (falsely called freedom)", he reassured his readers that "[w]e may all be thankful that such a state of things could not happen in our midst."[34] In 1868, the United States divorce laws were cited by Senator Bureau in the Canadian Senate "to prove the ruinous evils such acts have on the morals, well-being and the entire social interests of communities ... ."[35]

Between 1870 and 1880, the United States divorce rate jumped by 79.4 per cent, although the population only increased by 30.1 per cent. In the next decade, the divorce rate rose by 70.2 per cent, although the population increased by only 25.5 per cent. In the last decade of the century the divorce

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[32]Canada, *Senate Debates* at 150 (2 July 1891), at 30 (5 May 1891).

[33]For descriptions of the nineteenth-century American divorce situation, see L.M. Friedman, *A History of American Law* (New York: Simon & Schuster, 1973) at 181-84 and 436-39; W.L. O'Neill, *Divorce in the Progressive Era* (New Haven: Yale University Press, 1967); E. Tyler May, *Great Expectations: Marriage and Divorce in Post-Victorian America* (Chicago: University of Chicago Press, 1980); R.L. Griswold, *Family and Divorce in California 1850-1890: Victorian Illusions and Everyday Realities* (Albany, N.Y.: State University of New York Press, 1982); N.M. Blake, *The Road to Reno: A History of Divorce in the United States* (New York: Macmillan, 1962).

[34]"Divorces in the United States" (1867) 3 Local Cts & Mun. Gaz. 163.

[35]Canada, *Senate Debates* at 233 (30 April 1868).

rate went up by 66.6 per cent, while the population went up by only 20.7 per cent.[36] While this situation began to cause consternation even among Americans,[37] north of the border the response was one of great concern. Gemmill, the barrister who wrote the first treatise on Canadian divorce law in 1889, was fearful of the need to counter the American "germ of evil":

> Dare *we* say proximity to evil example can work no corruption of sentiment amongst us? ... Let us not slumber under the conscious feeling that no general loosening of moral restraints is to be found in this community. Eternal watchfulness is one of the safeguards of National purity as well as liberty. Let us take precautions in time.[38]

This, then, was the public posture adopted by many Canadian politicians and legal commentators — to paint Canada as a virtuous society into which the evil of divorce had not yet penetrated, especially in comparison with the experiences of the mother country and of the American neighbour to the south. Despite the long-standing history of divorce courts in Nova Scotia, New Brunswick and Prince Edward Island, no one directed any criticism towards them. This contradictory evidence was completely ignored.

C. The Reality: At Odds with the Vision

The ideological and religious position taken by Canadian leaders made it politically impossible to enact any general divorce legislation during the nineteenth century. Individual Canadians did, however, feel the need for divorce and some of them were determined to obtain it. Despite the scathing criticisms Canadian politicians and legal commentators had for the United States, it appears that there was a healthy traffic across the border to seek

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[36]Griswold, *supra*, note 33 at 1.

[37]Shocked by the escalating divorce rate, influential moral leaders in the U.S. began to denounce the liberal divorce laws and to demand more restrictive legislation. Five states established laws for the defence of an absent party in a divorce suit. Fifteen states forbade remarriages until one or two years after a final decree. Eighteen states increased the residency requirement prior to filing. Six eliminated certain grounds for marital dissolution and, in 1895, South Carolina took the extreme position of banning divorce altogether. None of these laws was effective in curbing the trend toward escalating divorce rates, and the number of divorces continued to skyrocket. See Friedman, *supra*, note 33 at 437-40; Griswold, *ibid.* at 2; May, *supra*, note 33 at 4.

[38]*Supra*, note 1 at 262-63. In contrast, legal commentators in the U.S. responded pragmatically to divorce law. J.P. Bishop, whose *Commentaries on the Law Of Marriage and Divorce, Of Separations without Divorce and Of the Evidence Of Marriage in All Issues*, 4th ed. (Boston: Little, Brown, 1864) became an extremely influential text in the United States, made no express criticism of divorce itself, and indeed advanced the argument that to prohibit divorce was irresponsible and dangerous. See Blake, *supra*, note 33 at 81-82; see also J.G. Snell, "'The White Life for Two': The Defense of Marriage and Sexual Morality in Canada, 1890-1914" (1983) 16 Social History 111, for an excellent discussion of Canadian concern with the institution of the family and the need to prevent disintegration of the basic social unit.

divorces in the easy-going American divorce courts. The border-crossing was so well known that it drove C.S. Clark, a rather eccentric Toronto writer, to suggest sarcastically that there was no need for a divorce court in Canada because Canadians could merely resort to the United States:

> It is quite true ... that Canada has no general divorce law, but Canadians who desire divorces get them just as Americans do — in Chicago and other states where they can be obtained — and the non-existence of a divorce law is no bar to divorce being obtained. No less a person than Mrs. George E. Foster, the wife of the ex-Minister of Finance of Canada, obtained a divorce from her first husband in Chicago. She could not have obtained it in Canada, as her first husband is simply a fugitive, but she did so in Chicago. Mrs. E.F. Blackstock of Toronto also obtained a divorce from her husband George T. Blackstock of Toronto on the grounds of non-support, in the court of Newport, R.I. What these people have done other Canadians have done, can do and will do. Hence a divorce court is not a necessity in Canada.[39]

Although Canadian courts subsequently determined that foreign divorce decrees were not legally binding on individuals domiciled in Canada,[40] the pressure to provide disillusioned spouses with some form of relief was intense. Deviating in part from its pervasive aversion to divorce, the Canadian Parliament agreed to accept petitions for *ad hoc* divorce decrees just as the English Parliament had done prior to 1857. Between 1867 and 1900, sixty-nine divorces were granted by Parliament.[41]

Despite the allocation of jurisdiction over divorce to the federal legislature in 1867, in practice the bulk of the responsibility for divorce continued to rest with the provinces. The *British North America Act* itself had laid the foundation for a *de facto* provincial divorce jurisdiction with section 129, which provided that the laws then in force, and all the courts of civil

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[39]C.S. Clark, *Of Toronto the Good* (Montreal: Toronto Publishing, 1898) at 117.

[40]See *An Act for the Relief of Susan Ash*, S.C. 50 & 51 Vict. (1887), c. 127, for an example of Parliament's refusal to recognize a divorce obtained in the United States. See also Canada, *Senate Debates* at 31-34 (21 April 1887), at 164-229 (31 May - 3 June 1887); Canada, *House of Commons Debates*, vol. 2 at 1017-28 (15 June 1887), vol. 2 at 1220-21 (22 June 1887); Gemmill, *supra*, note 1 at 71.

[41]The following is a list of all the Parliamentary divorces in the nineteenth century: Stevenson, 1869; Martin, 1873; Peterson, 1875; Bates, 1878; Scott, 1878; Holiwell, 1878; Lyone, 1878; Johnson, 1878; Campbell, 1878; Graham, 1884; Terry, 1885; Davis, 1885; Hatzfeld, 1885; Evans, 1885, Cox, 1885; Birrell, 1886; Ash, 1887; Lavell, 1887; Monteith, 1887; Noel, 1887; Riddell, 1887; Irving, 1888; Morrison, 1888; Tudor, 1888; Bagwell, 1888; Lowry, 1889; Middleton, 1889; Wand, 1889; Keefer, 1890; Glover, 1890; Bristow, 1891; Ellis, 1891; Russworm, 1891; Tapley, 1891; Aikins, 1892; Donigan, 1892; Harrison, 1892; Mead, 1892; Wright, 1892, Balfour, 1893; Ballantyne, 1893; Doran, 1893; Goff, 1893; Heward, 1893; Hebden, 1893; Schwaller, 1893; Dillon, 1894; Downey, 1894; Filman, 1894; Johnson, 1894; Piper, 1894; Thompson, 1894; Chute, 1895; Falding, 1895; Jarvis, 1895; Nordheimer, 1896; Lawry, 1897; Hart, 1898; Heyward, 1898; Pearson, 1898; Aronsberg, 1899; Dowding, 1899; Stock, 1899; Van Wart, 1899; Kobold, 1900; Featherstonhaugh, 1900; Cox, 1900; Lyons, 1900.

and criminal jurisdiction, should continue in Ontario, Quebec, Nova Scotia and New Brunswick. Provision was also made for the continuance of provincial and territorial law after the admission of any new territories to the Canadian federation.[42] In stark contradiction to the rhetoric proclaiming Canada's purity as a nation without a divorce court, the maritime divorce courts (with the exception of Prince Edward Island which received no applications) continued to grant divorces based on their long-standing legislation. Gemmill noted that between 1867 and 1889, the Nova Scotia divorce court granted fifty-two divorces and the New Brunswick court granted forty.[43]

It seems clear that the maritime provinces wished to continue to provide their citizens with access to divorce and, by one indication at least, some of the most powerful representatives of the federal government were not anxious to stop them. Gemmill has recorded that certain difficulties arose with the New Brunswick divorce court concerning the need for legislation to authorize the substitution of judges in case of illness or absence of the judge appointed. In 1870, Prime Minister Macdonald attempted to remedy this gap by introducing federal legislation but the federal legislators expressed their customary outrage at "the mere mention of a divorce court", and the storm that ensued forced the Prime Minister to withdraw the bill.[44] The Prime Minister's actions appear to be hypocritical: he was, after all, one of the foremost opponents of divorce courts in the federal jurisdiction.[45] Although his initiative failed, it did indicate that federal legislators were aware that divorce courts were operating in the Maritimes and that they were not prepared to take direct action to intervene. The majority would not acquiesce in furthering the smooth operation of the courts, but neither were they prepared to abolish them outright.

The reluctance of the federal government to intervene may have paved the way for other provinces, which had not previously had operating divorce courts, to establish them afresh. The province of British Columbia, admitted to Confederation in 1871, was the first to seize this opportunity. The reception statute provided that the laws of England, as of 19 November 1858, were to apply "so far as they [were] not, from local circumstances, inapplicable ...".[46] In 1877, the British Columbia Supreme Court entertained a suit for nullity of marriage in *M., falsely called S.* v. *S.*, and considered

[42]See Canada, *Report of the Special Joint Committee of the Senate and the House of Commons on Divorce* (Ottawa: Queen's Printer, 1967) at 47 (Chair: A.W. Roebuck & A.J.P. Cameron).

[43]Gemmill, *supra*, note 1 at 35-37. The first P.E.I. divorce was granted in 1913; see McKee, *supra*, note 17 at 6.

[44]Gemmill, *ibid.* at 22-23 and 36.

[45]See, *e.g.*, Canada, *House of Commons Debates* at 691 (13 May 1868). See also, *supra*, note 31 and accompanying text.

[46]*English Law Ordinance, 1867*, Cons. S.B.C. 30 Vict. (1877), c. 103.

whether the reception statute encompassed the English *Divorce Act* of 1857, thereby giving the Supreme Court of British Columbia jurisdiction to grant divorces.[47]

Much of this lengthy judgment dealt with rather technical distinctions between the British Columbia and English courts, but at least two of the judges did turn their minds to the more interesting question of whether the English divorce law was "inapplicable" to "local circumstances" in the colony. John Hamilton Gray J. concluded that it was not. He noted that Nova Scotia and New Brunswick had legislated to provide for divorce a century earlier, a factor which moved him to refer to them as "England's more practical Colonies".[48] That their legislation differed from the English *Divorce Act*, a point that might have inspired caution, went unnoticed. Henry Pering Pellew Crease J. alluded to the unlikelihood of seeing federal legislation on divorce "for some time to come" and concluded that, unless British Columbia courts took jurisdiction, the majority of British Columbia residents would be deprived of access to divorce because of the expense associated with travelling to Ottawa for Parliamentary relief:

> If the remedy be with the Parliament of Canada, what sort of relief *could* that afford to a struggling tradesman, or professional, or other working man in British Columbia, suffering from such a crying wrong, and unable to endure the expense and loss entailed by a journey of so many thousand miles, and much less able to bear the cost of lawyers and witnesses, and all the attendant charges.[49]

Neither judge referred to Canada as a nation of marital purity. Instead each noted that divorce was available to Maritime residents, and that those on the west coast should be entitled to equal relief. Indeed they appear to be asserting a provincial rights position, insisting that British Columbia residents should be given special treatment because of geographic realities.

The three prairie provinces and the territories fell into the same situation as British Columbia. Under reception statutes, the laws of England were proclaimed in effect as of 15 July 1870 in the province of Manitoba and in the North West Territories "in so far as the same are applicable".[50] No one petitioned the other western courts to follow the initiative of British

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[47] *M., falsely called S.* v. *S.* (1877), 1 B.C.R. 25 at 35 and 40 (S.C.).

[48] *Ibid.* at 29.

[49] *Ibid.* at 53-54.

[50] *Rupert's Land Act, 1868* (U.K.), 31 & 32 Vict., c. 105 and *An Act Further to Amend the Law Respecting the North-West Territories*, S.C. 49 Vict. (1886), c. 25, s. 3 applied English law to the area which would later become the provinces of Alberta and Saskatchewan, the Northwest Territories and the Yukon. Manitoba, which became a province in 1870, had separate but similar legislation: *An Act Respecting the Application of Certain Laws therein Mentioned to the Province of Manitoba*, S.C. 51 Vict. (1888), c. 33, s. 1.

Columbia, however, and residents of the three prairie provinces and the territories all adopted the practice of applying to Parliament for divorce rather than seeking a remedy with their local courts.[51] Since Ontario's reception statutes predated the 1857 English *Divorce Act*, its judiciary had no opportunity to assume divorce jurisdiction and, after 1867, Ontario residents directed their petitions to Parliament in Ottawa as well.[52]

The province of Quebec, with its strong Roman Catholic influence, was a special case. The *Civil Code of Lower Canada* prohibited all divorce and many Quebec residents were prepared to accept this situation. Madame Josephine Dandurand, describing "French Canadian customs" in a publication of the National Council of Women, stated in 1900:

> According to the law, divorce does not exist in Canada. The Senate, in certain exceptional cases ... grants a special decree; [she was referring here to the *ad hoc* Parliamentary divorces] but Catholics do not take advantage of it. Once married, it is understood to be for life. If one has made a mistake, one tries to accommodate one's self to it, and to make the best of it, rather than give way to useless despair.[53]

It seems apparent, however, that not all residents agreed with this sentiment. Some simply crossed the border to the United States in an effort to obtain divorce outside the province. When the courts were asked to overturn these "migratory divorce" decrees, they examined the cases under the issue of domicile. In *Stevens* v. *Fisk* in 1885, the Supreme Court of Canada concluded that, under the peculiar facts of the case, the parties were entitled to obtain a divorce in New York, despite the fact that the husband was

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[51]McKee, *supra*, note 17 at 9 and 16. McKee noted that this situation continued until 1917, when *Walker* v. *Walker* (1918), 28 Man. L.R. 495, 39 D.L.R. 731 (C.A.), aff'd [1919] A.C. 947 (P.C.), became the first divorce case to be heard in any court of Manitoba. In practice, Parliament carefully avoided considering petitions from provinces whose courts had assumed jurisdiction over divorce. The only exceptions in the nineteenth century involved B.C. residents: see *An Act for the Relief of Hugh Forbes Keefer*, S.C. 53 Vict. (1890), c. 108; and *An Act for the Relief of James Wright*, S.C. 55 & 56 Vict. (1892), c. 82.

[52]First established as a separate province in 1791, the Legislature of Upper Canada adopted English civil law as of 15 October 1792: *An Act to Repeal Certain Parts of an Act Passed in the Fourteenth Year of His Majesty's Reign, Intitled, "An Act for Making More Effectual Provision for the Government of the Province of Quebec in North America and to Introduce the English Law as the Rule of Decision in all Matters of Controversy, Relative to Property and Civil Rights"*, S.U.C. 32 Geo. 3 (1792), c. 1.

[53]J. Dandurand, "French Canadian Customs" in *Women of Canada: Their Life and Work* (Ottawa: National Council of Women of Canada, 1900) 22 at 24-25.

allegedly living in Montreal.[54] The most interesting aspect of the case was the argument that the divorce should not be recognized because dissolution of marriage was "contrary to the public policy of the province of Quebec". The Supreme Court of Canada dismissed the provincial-control argument and noted as well that even Quebec residents had the option of petitioning Parliament for divorce, and that such divorces, if granted, would have legal effect.

A number of Quebec couples did obtain divorces from Parliament after 1867.[55] The Roman Catholic legislators representing Quebec in Parliament took pains to vote against all petitions for divorce but, so long as the petitioners were Protestants, they did not seem unduly alarmed when the non-Roman Catholic majority in Parliament overruled their position.[56] Some Roman Catholic petitions from Quebec may have slipped through unnoticed

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[54]The Court of Queen's Bench of Quebec first heard the case as *Fisk* v. *Stevens* (1883), 27 L.C. Jurist 228, 6 Legal N. 329. The couple had married in New York and was initially domiciled there, although the husband later moved to Montreal and was living there when his wife obtained the divorce in New York on the ground of his adultery. The majority of the Court of Queen's Bench concluded that by moving to Montreal, a man could bar his wife's application for divorce since Quebec courts had no jurisdiction and a woman's domicile was by law that of her husband. The decision was overturned by the Supreme Court of Canada in *Stevens* v. *Fisk* (1885), 8 Legal N. 42 reprinted in E.R. Cameron, ed., *Canada, Supreme Court Cases: A Collection of Judgements* (Toronto: Canada Law Book, 1905) 392. The Supreme Court concluded that the marriage was really a New York state marriage, that there had been no collusion or fraud involved, and that the husband had been personally served and appeared through an attorney at the divorce proceedings in New York.

[55]Gemmill, *supra*, note 1 at 256-57 notes that seven of the twenty-six divorces granted by Parliament between 1867 and 1889 were granted to Quebec residents.

[56]It appears from a thorough reading of the House of Commons and Senate debates that the Roman Catholic legislators from Quebec were left out of many of the divorce proceedings. None was appointed to sit on the Senate Divorce Committee and, in 1878, the Hon. Mr Trudel told the House that there was no need to translate the evidence of the proceedings in front of the Divorce Court into French: "I think it is the unanimous desire of the French speaking members that there should be no translation." The question was referred to a Committee, but there appeared to be no further discussion: Canada, *Senate Debates* at 515-16 and 563 (9 and 11 April 1878). Gemmill, *ibid.* at 255, believed that the proper position for Roman Catholic legislators was one of distant tolerance:

> In Canada there is no connection between Church and State — all religious communities stand on an equal footing before the law. The State adopts "such broad principles as may suit the diversities of faith in the country, or at least, aims at this result as far as is reasonable and practicable" and it does not "force any special tenets of faith on grounds not generally accepted and approved."
>
> Protestants believe divorce rights under certain circumstances; the doctrine of indissolubility of marriage is held by Roman Catholics. The Constitution allows and provides for divorce, and any attempt to hinder Protestants in obtaining relief, even by those who do not personally approve of the measure, seems not in keeping, the writer humbly conceives, with a just view of religious liberty.

but when one such divorce came to the attention of the Quebec representatives in 1894, they raised a strong outcry against the application. Realizing that the divorce petition showed the couple to have been married in a well-known Quebec cathedral, the Honourable Hormisdas Jeannotte rose to dispute the Bill. He reminded his colleagues in the House of Commons that the Catholic legislators generally "protest[ed] by a silent vote" against bills dealing with Protestants, but they were strongly inclined to take a different view of petitions from Roman Catholics, especially when they came from the province of Quebec. Arguing that to pass a bill of divorce for James St George Dillon would amount to altering the *Civil Code of Lower Canada* which prohibited divorce, Jeannotte adamantly opposed the petition:

> Throughout the whole province of Quebec — I say the whole province as nine-tenths of the population are Catholics — every Catholic is opposed to divorce. And yet the Protestant majority of this House want to impose the law upon us in this matter. ... Now they want to compel us to accept the divorce law. Who may tell what the future keeps in store for us?[57]

Senator Bellerose also spoke out ardently against this divorce claiming that, if granted, it would "encourage the whole population of Montreal and of the province of Quebec ... to separate from their wives in order to achieve the same end". He insisted that it would be travesty if Parliament passed this Bill because "it was understood at the time of confederation that divorce would not be granted to Catholics".[58] The focus of this attack remained distinctly religious, namely that the indissolubility of marriage under Roman Catholic doctrine should be honoured in the legal forum. Interestingly, when the issue under consideration was an actual application for divorce, the legislators did not return to their rhetorical denunciation of divorce as a form of social malaise. The Dillon Bill was passed with the aid of the majority of legislators who were neither Roman Catholic nor from Quebec, and nothing was said about the evils of divorce or the uniquely meritorious nature of Canadian marriage.[59]

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[57]Canada, *House of Commons Debates*, vol. 2 at 6291 (18 July 1894).

[58]Canada, *Senate Debates* at 382-83 (15 May 1894). It was not only the senators from Quebec who spoke against this Bill. A number of English-speaking politicians from other jurisdictions opposed it as strongly. Sen. H.A.N. Kaulbach from Nova Scotia, Canada, *Senate Debates* at 369 (15 May 1894), argued:

> The Roman Catholic Church believes [marriage] to be a sacred ordinance, a sacrament of the church; and we should be careful how far we infringe upon the rights and religious belief of so large an element of our population, and offend the religious sensibility of two millions or more of our fellow subjects.

Sen. R.W. Scott from Ontario, Canada, *Senate Debates* at 385 (16 May 1894), also charged that "the fathers and mothers of 2,000,000 of the people of this country are told that the Parliament of Canada is superior in spiritual matters to the ecclesiastical laws of their church . . . ."

[59]*An Act for the Relief of James St George Dillon*, S.C. 57 & 58 Vict. (1894), c. 129.

The federal legislators maintained the illusion that, in the absence of a general divorce law, Canadian marriage provided a particularly secure foundation for societal development. However, in practice, they were not averse to issuing decrees in individual cases. They did nothing to eliminate the divorce courts which had been operating since the eighteenth century in the maritime provinces. They did nothing to prevent the assumption of divorce jurisdiction by British Columbia courts on the basis of statutory interpretation. And they were not disinclined to grant Parliamentary divorce decrees to individual petitioners from other Canadian provinces from time to time as they felt the circumstances warranted. The reality clearly belied the rhetorical facade.

II. Patriarchal or Companionate? Competing Concepts of Marriage in Nineteenth-Century Canada

When the idyllic picture of Canadian marriage became shattered by individual examples of marital breakdown, Canadian legal authorities were forced to delve beneath the rhetoric to examine the nature of marriage more closely. Two competing concepts of marriage vied for acceptance in Canada during the nineteenth century. The first, a patriarchal model, described a marriage in which husbands were expected to wield all the power in the relationship; this overtly hierarchical structure encouraged men to dominate their wives in a quasi-feudal manner. The second, a companionate model, attempted to assert greater equality in the marital union. While few were prepared to argue that husbands and wives should be considered equal in the full sense of the word, the companionate model of marriage diminished the hierarchical underpinnings of the institution. On this model men and women, although operating in distinctly separate spheres, would seek to achieve a genuine partnership with a working acceptance of joint authority.

The patriarchal model had its roots in England, where traditional notions of hierarchy had long influenced relations between husbands and wives.[60] The companionate model took hold across the Atlantic where more fluid concepts of human relations permitted a more equal allocation of power

[60]The patriarchal model developed in the context of feudal property and status relations where men were expected to assert dominion over women and children in the family unit. As England evolved from a feudal society into an urban industrialized nation, the patriarchal model became strained. A society moving towards commercialized market transactions was inclined to view individuals as freely contracting persons with theoretically equal rights. L. Stone, *The Family, Sex and Marriage in England 1500-1800* (New York: Harper & Row, 1977) c. 8 and c. 13, asserts that the companionate marriage had been introduced in England by the eighteenth century, but he concludes that it was displaced by a strong reassertion of patriarchal authority by the beginning of the nineteenth century. The family had been marked off as a repository of old values. Domesticity was to remain the preserve of the old order, traditional hierarchy and feudal status obligations.

inside the family unit.[61] The new-world setting encouraged the enactment of radically new divorce laws which introduced a gender-neutral set of grounds for the dissolution of marriage. The companionate model, in particular, required that adultery of men and women be treated on the same basis. Although nineteenth-century legislators were prepared to lay the groundwork for a companionate model of marriage, the judiciary eagerly embraced the patriarchal model. Judgments in cases involving criminal conversation, alimony and wife-battering did much to undermine any semblance of equality between husbands and wives. Indeed, most members of the judiciary viewed marriage as an institution which gave rise to quite disparate rights and obligations for men and women. Husbands were expected to provide leadership and direction and wives were to be obedient, restrained, forgiving and passive. The rhetoric of purity, which so frequently attached to Canadian marriage, in fact masked an institution which was to become an indispensable keystone for the maintenance of male supremacy.

A. New Divorce Laws: An Egalitarian Beginning

The first divorce statute introduced in the Canadian setting, enacted in 1758 in Nova Scotia, set forth a broad array of grounds for the dissolution of marriage.[62] While these grounds were to fluctuate somewhat over the next hundred years,[63] the most striking feature of the legislation was that it was gender-neutral. Both parties — male and female — could sue for divorce on the same basis. New Brunswick and Prince Edward Island passed similar statutes in 1791 and 1833 respectively.[64] Gender-neutral provisions reflected the relatively high status that women enjoyed in the new colonies. As a consequence of imbalanced sex ratios and women's important role in the household as essential economic contributors to pioneer life, sex roles

[61]Most research to date has focused upon the introduction of the companionate model in the United States: C. Degler, *At Odds: Women and the Family in America from the Revolution to the Present* (New York: Oxford University Press, 1980) at 144, concludes that the concept of companionate marriage held strong sway in nineteenth-century America; Griswold, who has studied divorce records in nineteenth-century California, asserts, *supra*, note 33 at 43, that there was a dramatic shift during the nineteenth century to "more equal, less hierarchical domestic relations".

[62]See *An Act, Concerning Marriage, and Divorce, and for Punishing Incest and Adultery, and Declaring Polygamy to be Felony*, *supra*, note 6.

[63]See statutes cited, *supra*, notes 8 and 10.

[64]See statutes cited, *supra*, notes 11 and 13-15.

in the colonies became more fluid.[65] Adultery became a marital transgression of equal weight for men and women.[66]

The egalitarian features of the new divorce statutes mirrored legislation which had been passed in the American states to the south,[67] but they differed sharply from English precedent. In England, although there was no divorce legislation yet, Parliament had begun to enact *ad hoc* statutes for individual petitioners. Access to Parliamentary divorce, however, depended upon the gender of the petitioner. Men could obtain divorce when their wives had committed adultery. For women, their husbands' adultery alone was insufficient unless it involved further wrongdoing, such as incest.[68] Even after the 1857 *Divorce Act*, which established the Court of Divorce and Matrimonial Causes, England retained the discriminatory nature of its earlier practice. While men were still entitled to divorce on the ground of simple

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[65]This has traditionally been characterized as the "golden age" for women by American historians. But see M.B. Norton & C.R. Berkin, *Women in America: A History* (Boston: Houghton Mifflin, 1979) at 40-43 for an argument that this concept is a myth.

[66]For interesting parallels in the evolution of nineteenth-century rape law in Canada as reflecting a higher regard for women's individual rights, see C.B. Backhouse, "Nineteenth-Century Canadian Rape Law: 1800-1892" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 2 (Toronto: University of Toronto Press, 1983) 100.

[67]For a description of American divorce statutes, see Friedman, *supra*, note 33 at 181-84 and 436-39; O'Neill, *supra*, note 33; May, *supra*, note 33; Griswold, *supra*, note 33; Blake, *supra*, note 33. American historian D.K. Weisberg, "Under Great Temptations Here: Women and Divorce Law in Puritan Massachusetts" in D.K. Weisberg, ed., *Women and the Law: A Social Historical Perspective*, vol. 2 (Cambridge, Mass.: Shenkman, 1982) 117 at 117-28, has attributed the gender-neutral Massachusetts legislation to the overall scarcity and importance of women in the colony, as well as to the "Reformation view of marriage as a civil contract based on the mutual consent of both parties." Cott, *supra*, note 5 at 605-6, has argued that the gender-neutral grounds of adultery reflected a rejection of British "corruption" and an implied critique of the traditionally loose sexual standards for men of the British ruling class:

> Motives for the change in the treatment of male adultery probably originated, however, more in men's political intentions than their desire for sexual justice. Revolutionary rhetoric, in its repudiation of British "vice", "corruption", "extravagance" and "decadence", enshrined ideals of republican virtue — of personal and national simplicity, honesty, frugality and public spirit.

I would argue that the colonial setting, rather than the Puritan or republican mentality, was the critical factor behind the disavowal of the double standard. It is interesting to note that in 1871, New South Wales also sought to introduce a single standard of adultery. This attempt was initially disallowed by the British government, but was successful ten years later. Australian historians have identified "Australian radicalism, asserting itself over British imperial conservatism" as the reason behind this development. "Divorce reformers were . . . preoccupied with their appeals to nascent nationalism and radical pride": see H. Golder, "An Exercise in Unnecessary Chivalry" in J. Mackinolty & H. Radi, eds, *In Pursuit of Justice: Australian Women and the Law 1788-1979* (Sydney: Hale & Iremonger, 1979) 42 at 44; and J.M. Bennett, "The Establishment of Divorce Laws in New South Wales" (1963) 4 Sydney L. Rev. 241.

[68]Gemmill, *supra*, note 1 at 12. Not surprisingly, of the 249 acts passed between 1701 and 1858, only four were in favour of wives. See also McKee, *supra*, note 17 at 28.

adultery, women were required to prove that their husbands had been guilty of:

> [I]ncestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *à mensâ et thoro*, or of adultery coupled with desertion without reasonable excuse for two years or upwards ... .[69]

The double standard of chastity was the subject of some debate when the *Act* was introduced in Parliament and, although several of the English legislators felt that the new law was discriminatory, the majority believed the distinction was fully warranted.[70]

By contrast, Canadian opposition to the double standard continued after Confederation, when the federal legislature was given jurisdiction over matters of marriage and divorce.[71] Parliament began to accept petitions for special legislation on an *ad hoc* basis, just as the English Parliament had done prior to 1858, and sixty-nine divorces were granted before the turn of the century.[72] Canadian legislators asserted their autonomy from English

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[69]See the *Divorce Act*, *supra*, note 30, s. 27.

[70]See U.K., H.L., *Parliamentary Debates*, 3d ser., vol. 145 at 490 (1857), where Lord Cranworth L.C. pointed to the essentially forgiving nature of women: "It was possible for a wife to pardon a husband who had committed adultery; but it was hardly possible for a husband ever really to pardon the adultery of a wife . . .". Lord Campbell insisted, at 814, that the distinction was based "in the nature of things", and that any attempt to treat male adultery as equal to female adultery would "lead to the most lamentable consequences". The Bishop of Oxford, at 1417, summed up his position succinctly: "All experience showed that the purity of civilized society depended more upon the absolute chastity of women rather than the principle of the man." Perhaps the most specific rationale cited for the double standard related to the reproductive potential of women: "[T]he introduction of a spurious offspring into the house of the husband . . . does not result from adultery of the man" claimed Lord Lyndhurst at 501. Women could become pregnant from extra-marital intercourse, and this would confuse the proper descent of bloodlines and inheritance.

[71]*Constitution Act, 1867*, *supra*, note 23, s. 91(26).

[72]For a list of all the Parliamentary divorce bills passed in the nineteenth century, see *supra*, note 41.This paper will not attempt to analyse all of the Parliamentary divorce bills except to the extent that the decisions involved the issue of adultery. However, some preliminary observations are in order. Of the sixty-nine bills passed between 1867 and 1901, forty-two were awarded to men and twenty-seven to women. The contrast to the English situation prior to 1858 is stark. These data should be compared with Griswold's finding, *supra*, note 33 at 25 and 29, that of the divorces obtained in California between 1850 and 1890, women brought roughly two-thirds of the suits. Griswold also noted that the California divorce courts were not the "exclusive province of the middle and upper classes, but offered relief from marital problems to working-men as well." He concluded that the working-class petitions represented approximately 52 per cent of the known occupations. While it is difficult to be certain about this, the Canadian data appear to be more weighted on the side of the middle and upper classes. Where the occupations were specified, Canadian petitioners (or their husbands) were listed as: barrister-at-law (5), merchant (4), physician (3), innkeeper (2), yeoman (2), contractor (2), army stationer (1), grocer (1), upholsterer (1), printer (1), railway conductor (1), labourer (1), bank

precedent, and insisted that they had the authority to grant divorces when they saw fit. Senator R.W. Scott outlined this position:

> Such cases are governed on no principle other than the individual opinions and judgments of the gentlemen who give their time and attention to the consideration of each particular case. There is no arbitrary rule laid down by which this House is compelled, under any circumstances, to grant a Bill of Divorce.[73]

Gemmill proclaimed proudly that the Canadian Parliament had departed from English precedent in one vital respect; it had abolished the double standard of sexuality:

> The Canadian Parliament ... has repeatedly granted relief to the wife for the adultery of the husband without the aggravating circumstances looked for as a necessity by the House of Lords, and in doing so, we have, by some years, preceded the Imperial Parliament in recognizing the right of the wife to equal relief with her husband ... .[74]

Gemmill's proud declaration, however, appears to have been a significant overstatement of the facts.[75] Although the Canadian legislators had

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manager (1), bank agent (1), florist (1), tailor (1), mining engineer (1), manufacturer (1), agent (1), expressman (1), optician (1), machinist (1), butcher (1), master mariner (1), and bartender (1).

[73]Canada, *Senate Debates* at 212 (3 June 1887). It should be noted, however, that federal legislators were accustomed to using English Parliamentary practice prior to 1858 as a guide to divorce cases and some senators argued that there should be consistency between the English and Canadian decisions. It would seem that Sen. Scott's position held sway, despite these contrary views.

[74]Gemmill, *supra*, note 1 at 22. The double standard, he argued, "practically created in favor of the male sex a monopoly of justice and redress." Nonetheless, he was prepared to admit that the adultery of women was still fundamentally more serious than that of men:

> Looking at it from a social, rather than from a moral standpoint, it is true that the wife's infidelity is followed by results of a graver character than those which follow the infidelity of the husband, and that it is therefore in the interest of society that one should be punished more promptly and more severely than the other.

It was the *legal* result of the double standard, not the underlying basis for it, with which Gemmill, *supra* at 52, took issue:

> [I]t is surely illogical and unjust to say that because the infidelity of the wife deserves a heavier chastisement than that of the husband, that the husband's breach of vow is in every case ... [not to] be regarded as a reason for a divorce except when aggravated by other offences, distinguished by a deep dye of turpitude, such as bigamy or incest.

[75]Gemmill's role in the attack on the double standard is an interesting one. There is little known about his background which might shed light on his views. Born in 1847 at Ramsay, Ontario, he studied at Glasgow University and was called to the bar in Ontario in 1871. He practised law in Altamonte and Ottawa, and in 1883 married Emily Helen Ogilvie, who came from the prominent Ogilvie family of Montreal: see W.W. Stewart, ed., *The Macmillan Dictionary of Canadian Biography*, 4th ed. (Toronto: Macmillan, 1978) at 292.

Gemmill was certainly not a proponent of liberalized divorce laws, since he did not advocate

not explicitly adopted the English double standard rule, neither had they expressly rejected it. Of the twenty-six divorce bills granted by the date of his 1889 treatise, twelve had been in favour of women, but Gemmill was able to name only four as evidence for his claim. Gemmill cited the Lyon Bill in 1878, the Terry Bill in 1885, the Birrell Bill in 1886 and the Tudor-Hart Bill in 1888.[76] He was mistaken about the first three cases, since in each situation there was explicit evidence of aggravating circumstances in addition to the husband's adultery.[77] The case upon which Gemmill's argument must rest is the Tudor-Hart Bill of 1888 which, Gemmill acknowledged, was the first decision in which the question of equal rights was specifically considered.[78] In this case, Eleanora Elizabeth Tudor proved that her husband had become a "constant and habitual frequenter of houses of ill-fame". The evidence also showed that the spouses were living apart, but it is not entirely clear whether this was as a result of the husband's desertion or whether Eleanora Tudor had left her husband of her own accord.[79] During the Senate debates, however, the case was treated as an issue of male adultery alone and it offered a marvelous opportunity for federal politicians to express

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the establishment of any new grounds and was fervent in his rejection of the ease of access to divorce in the United States. Gemmill's position was not that divorce should be made more accessible on a general basis, but that men should be held legally to the same standard of chastity as women. His work was widely read by lawyers and even by the legislators who decided these cases and his influence was clearly substantial.

[76]Gemmill, *supra*, note 1 at 56, cites *An Act for the Relief of Victoria Elizabeth Lyon*, S.C. 41 Vict. (1878), c. 47 [hereinafter the Lyon Bill]; *An Act for the Relief of Fairy Emily Jane Terry*, S.C. 48 & 49 Vict. (1885), c. 36 [hereinafter the Terry Bill]; *An Act for the Relief of Eleonora Elizabeth Tudor*, S.C. 51 Vict. (1888), c. 111 [hereinafter the Tudor-Hart Bill]. At 151, he lists *An Act for the Relief of Flora Birrell*, S.C. 49 Vict. (1886), c. 113 [hereinafter the Birrell Bill] on a chart illustrating cases which involved adultery alone.

[77]The Lyon Bill, *ibid.*, s. 4, indicated not only that the husband had been guilty of adultery, but also that he had lived with several women, contracted venereal disease, and "wholly neglected and refused to support [his wife], or to provide for, [her] and the children of the said marriage, and . . . wholly deserted them". Gemmill, *ibid.*, described the aggravating features in the Terry Bill in addition to adultery as follows: "[Mr Terry] became excessively addicted to the use of intoxicating liquor and neglected and cruelly used and abused [the Petitioner]." Obviously attempting to discount the evidence of wife-battering, Gemmill, at 151, noted that the evidence of cruelty was so slight that the relief was granted "practically for adultery alone". This was indeed an understatement, since Mrs Terry had been so severely beaten that the legislators noted she was forced to try to recover her health in England as a result of "her husband's ill-treatment". Gemmill, at 151, listed the grounds for divorce in the Birrell Bill as adultery coupled with desertion, but notes that the desertion was not specifically alleged. In this too he was mistaken, since the Birrell Bill, *ibid.*, preamble, listed the grounds as adultery and bigamy.

[78]Although most bills were drafted in such a manner that both spouses were referred to by the husband's last name, this Bill referred to the wife by her maiden name and thus both surnames have been used to describe it.

[79]See the Tudor-Hart Bill, *supra*, note 76; and Gemmill, *supra*, note 1 at 213-16.

their views on the inapplicability of the double standard to the Canadian setting.

Senator J.R. Gowan of Ontario expressly took issue with the English double standard:

> With respect to divorce in England one is struck with the marked, and I must think unjust, discriminations made between the sexes in respect to matrimonial offences, and the prejudices which existed, and still exist, against equal right of relief to the woman as well as the man. I am not aware of such prejudices ever existing in Canada, not in Ontario at all events ... .[80]

Senator Gowan, who chaired the divorce committee in the Senate,[81] warned that acceptance of the double standard would place the sanctity of Canadian marriage in peril:

> What should we be doing then if we refused to pass this bill? What but saying to a virtuous woman: "You are to remain to your life's end under the dominion of a profigate [sic] man who could only desire to retain his hold for unworthy purposes." Under the dominion of a shamless [sic] man, who uncovered his evil doings to his wife and flaunted his impurities in her face! Is the maintenance of a decent society, the preservation of purity in family relations a matter of slight concern ... . Will the Senate of Canada affirm by its decision that adultery may be practiced with impunity by husband and father in our Christian community, in the midst of our Christian homes?[82]

Senator J.J.C. Abbott, who agreed with Senator Gowan, based his argument upon the improving status of women in nineteenth-century Canada. He made reference to changing

> principles which now govern christian society; in conformity with which we are every day regarding woman from a higher and better point of view — we are gradually increasing our respect for her position, and more generally acknowledging her equality in every sense with man. ... We must make our own judgments and render our decisions or pass our laws ... in harmony with the times, and the improved position of woman, and with the purity which we

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[80]Gemmill, *ibid.* at 200.

[81]Sen. J.R. Gowan had been appointed a judge in 1843 and he served as the youngest judge in the province. A close friend of Sir John A. Macdonald, he was appointed to the Senate in 1885 and chaired the divorce committee for thirteen successive sessions. Gowan was the founder of the Ardagh Memorial Home for Aged Women, perhaps evidencing a particular interest in the welfare of the female sex. Gowan objected to the creation of a general divorce court in Canada, and believed that adultery should constitute the only ground for divorce. His obituary in the *Northern Advance and County of Simcoe General Advertiser* (25 March 1909) noted that one of the most important achievements in his life was to convince Parliament that men and women should share equal responsibility with respect to divorce: see, generally, H. Morgan, *The Canadian Legal Directory* (Toronto: Carswell, 1878) at 217-18; H. Ardagh, *The Life of Hon. Sir James R. Gowan* (Toronto: University of Toronto Press, 1911).

[82]Gemmill, *supra*, note 1 at 207.

> attribute to her, and which we desire she should preserve, and with the preservation of the social and family relations which I hope we desire more and more to render perfect, as far as we can.[83]

Senator Kaulbach of Nova Scotia, disagreed with these sentiments and came down squarely against eliminating the double standard:

> It is sound policy and sound judgment. It is the law to protect inheritance in England, that a man may be guilty of much indiscretion without involving divorce; but the wife's conduct must be above suspicion, that the issue of other persons might not come into the inheritance — persons not entitled to it. On grounds of public policy, and wisdom, and prudence, which cannot be questioned, this distinction is made.[84]

The uncertainty of paternity was the key factor. Although motherhood was biologically obvious, the assertion of one man's right to a particular child required the exclusion of all other possible fathers from the relationship.[85] Mona Caird, the feminist author of *The Morality of Marriage* published in England in 1897, described the conundrum:

> [A father rests] his claims upon the children solely *on the fact that the mother was his property*, not upon the fact of his fatherhood. ... It is thus that the woman's chastity became the watch-dog of the man's possession; it is thus that the dual moral standard for the two sexes has arisen. *The woman must protect the man's property* in herself, and failure in this duty is held as an unpardonable offence against the holder of the property.[86]

The problem, as Frederick Engels noted in 1884, arose from the fact that some men had accumulated considerable private wealth, and were determined to bequeath this solely to their biological children.[87]

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[83]*Ibid.* at 239-40.

[84]This extract from the *Senate Debates* is quoted by Gemmill, *ibid.* at 225.

[85]M. O'Brien, in her brilliant *Politics of Reproduction* (London: Routledge & Kegan Paul, 1981) at 56, has argued that this explains why men have been so intent upon creating "the institutional forms of the social relations of reproduction". She comments, at 152, on the "oddball proposition that uncertain paternity constituted a better ground for hereditary right than certain motherhood".

[86]M. Caird, *The Morality of Marriage* (London: George Redway, 1897) at 31 and 88. K. Thomas, "The Double Standard" (1959) 20 J. Hist. Ideas 195 at 209-10, makes a similar point but argues that men seek to assert their property rights over women quite apart from inheritance issues: "[T]he double standard derives from something more than fear of bastard children. Yet, fundamentally, female chastity has been seen as a matter of property; not, however, the property of legitimate heirs, but the property of men in women."

[87]F. Engels, *The Origin of the Family, Private Property and the State* (New York: Pathfinder Press, 1972, orig. pub. 1884) at 83 wrote:

> Monogamy arose out of the concentration of considerable wealth in the hands of one person — and that a man — and out of the desire to bequeath this wealth to this man's children, and to no-one else's. For this purpose monogamy was essential on the woman's part, but not on the man's so that this monogamy of the woman

By contrast, it seems that besides Senator Kaulbach, the majority of nineteenth-century Canadian legislators were not prepared to adopt the double standard simply for reasons of inheritance. In Canada, inheritance appears not to have assumed the critical importance which it held in England. In a newly developing country, where opportunities seemed boundless and where access to land was plentiful, the maintenance of traditional family lines for the descent of property diminished in significance. The majority of the legislators voted to pass the Tudor-Hart Bill, thus marking the first decision in which a woman was unequivocally granted a divorce solely on the basis of her husband's adultery. Between 1889 and 1900, three more bills of divorce were granted to women solely on the ground of their husband's adultery.[88]

This rejection of discriminatory sexual mores was in accord with the sentiments frequently advocated by nineteenth-century feminists who had begun to demand a single standard of sexual purity as a response to the widespread problems of seduction, venereal disease and prostitution.[89] Ramsay

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in no way hindered the overt or covert polygamy of the man.

O'Brien, *supra*, note 85 at 152, has taken issue with the rationale behind this analysis:

> In terms of social practice . . . there is no immediately evident reason why private property must be in male hands . . . there is no absolute need to leave property to one's "own" offspring, [and] no clear reason why property need be individually inheritable at all.

[88]See *An Act for the Relief of Manola Ellis*, S.C. 54 & 55 Vict. (1891), c. 133; *An Act for the Relief of Ada Donigan*, S.C. 55 & 56 Vict. (1892), c. 79; *An Act for the Relief of Adeline Myrtle Tuckett Lawry*, S.C. 60 & 61 Vict. (1897), c. 97, for statutes which granted women divorces on the sole basis of their husband's adultery. During the same period, between 1889 and 1900, eleven other women were granted divorces upon proving adultery and other aggravating circumstances such as desertion and cruelty. These divorces may be found at S.C. 53 Vict. (1890), c. 109; S.C. 54 & 55 Vict. (1891), c. 135; S.C. 55 & 56 Vict. (1892), c. 80; S.C. 56 Vict. (1893), c. 94; S.C. 56 Vict. (1893), c. 96; S.C. 57 & 58 Vict. (1894), c. 130; S.C. 58 & 59 Vict. (1895), c. 95; S.C. 58 & 59 Vict. (1895), c. 96; S.C. 58 & 59 Vict. (1895), c. 97; S.C. 62 & 63 Vict. (1899), c. 133; S.C. 63 & 64 Vict. (1900), c. 128. It appears that where additional grounds were provable, the lawyers advising these women drafted their cases so that the bill would not rest upon adultery alone. The principle of the single standard of adultery was not yet clearly enough established to obviate the perceived need to mention these additional grounds.

[89]See L. Gordon, *Woman's Body, Woman's Right: A Social History of Birth Control in America* (New York: Grossman, 1976) for an account of the American feminist position; for a Canadian perspective, see C.B. Backhouse, "Involuntary Motherhood: Abortion, Birth Control and the Law in Nineteenth-Century Canada" (1983) 3 Windsor Y.B. Access Just. 61; C.B. Backhouse, "Nineteenth-Century Canadian Prostitution Law: Reflection of a Discriminatory Society" [forthcoming in Social History]. Thomas, *supra*, note 86 at 204 argues that this position also reflected the growing strength of middle-class attitudes towards sexuality:

> From the seventeenth century, if not earlier, there becomes apparent a strong tendency to place a new and heightened emphasis upon the values of family life and to deplore any aristocratic or libertine conduct which would be likely to jeopardize domestic security. . . . It is also essentially a middle-class morality, which the rich despise and the poor cannot afford. Sexual promiscuity was condemned because it

Cook and Wendy Mitchinson have stated that one of the main targets for the first wave of the organized women's movement in Canada was the double standard of sexuality.[90] A spokeswoman for the National Council of Women of Canada put it clearly: "When we set up the standard of a 'white life for two', and demand of men the same blameless life we require of woman, then, and not till then, will the race be freed from its bondage of sensuality."[91] This platform also reflected a growing emphasis on love and mutual respect as the basis for marriage. Opposition to the double standard embodied a new definition of marriage as a partnership established upon reciprocal affection, intimacy and courtesy. Legal recognition that adultery constituted an offence of equal magnitude in either sex was the hallmark of an emerging concept of companionate marriage.

B. Judicial Rejection of Companionate Marriage

The legislators had set the stage for legal acceptance of companionate marriage with their decisions that male adultery constituted a sufficient ground for the dissolution of marriage. The judiciary, however, was far less inclined to endorse the egalitarian model of matrimony: nineteenth-century Canadian judges persistently favoured fathers in child custody decisions, despite successive statutes which sought to equalize parental rights over children. They were agonizingly slow to recognize the importance of a woman's role in child-rearing and they deliberately minimized the impact of legislation which diminished male authority over children.[92] In a parallel vein, they promoted a hierarchical model of marriage in virtually every aspect of judicial decision-making. Their judgments in cases involving criminal conversation, alimony and wife-battering reveal, with few exceptions, an unhesitating advocacy of patriarchal marriage.

1. Criminal Conversation Cases: The Embrace of the Double Standard

The judiciary was far less inclined than were the legislators to view male and female adultery as equivalent offences.[93] In two key Ontario decisions, the courts faced the question of whether the double standard ought

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was incompatible with the high emotional values expected from marriage, because it was wasteful, and because it took time and money which would have been better spent in the pursuit of a gainful occupation.

[90]R. Cook & W. Mitchinson, eds, *The Proper Sphere: Woman's Place in Canadian Society* (Toronto: Oxford University Press, 1976) at 224-25.

[91]Mrs Spofford, "Address" in *Yearbook* (Ottawa: National Council of Women of Canada, 1907) at 85-91 reprinted in Cook & Mitchinson, *ibid.*, 235 at 238.

[92]See C.B. Backhouse, "Shifting Patterns in Nineteenth-Century Canadian Custody Law" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 1 (Toronto: University of Toronto Press, 1981) 212.

[93]This analysis will focus upon reported decisions in the nineteenth century which dealt with

to apply in actions for damages for criminal conversation. This suit involved an action for damages brought against the person with whom the plaintiff's spouse had committed adultery. The basis of the claim was "the injury done to the husband by the defilement of his wife, the invasion of his exclusive right to marital intercourse, and the consequences resulting therefrom".[94] Virtually all of the Canadian criminal conversation actions had been brought by husbands against men who had committed adultery with their wives. In the last decade of the nineteenth century, the courts faced the first "equal rights" cases in which women applied for damages on the same basis as men. In the first case, one progressive judge pronounced an egalitarian decision that equated male adultery with female adultery. Four years later his dramatic ruling was unequivocally overturned.

In *Quick* v. *Church*, Mrs Quick of Woodstock, Ontario brought suit against Mrs Church for damages because the defendant had alienated her husband's affections and deprived her of his support and maintenance.[95] In 1890, after twenty-five years of marriage, Joseph Quick had run off with the recently-widowed Mrs Church to Green Bay, Wisconsin where they purchased and began to operate a hotel. The case was tried before William Purvis Rochford Street J. in Brantford in 1892 and the jury awarded Mrs Quick $2,500 for alienation of affections and $2,000 for loss of support. Mrs Church then moved before the Divisional Court to have the verdict set aside because the plaintiff's claim was not sustainable in law. D'Alton McCarthy, Q.C. argued that a wife had no entitlement to "servitude or right of property" in her husband. As a result of the unity of husband and wife, "[a] wife has no such right in the consortium of her husband as is asserted here, and even if she has, it does not so belong to her separate estate as to enable her to sue ... ."[96] Indeed the implications of granting this type of remedy to women were calamitous to McCarthy: "[I]s the husband a chattel?" he thundered.[97]

Chief Justice John Douglas Armour delivered a brilliant judgment in favour of Mrs Quick, a ruling most uncharacteristic of the typical judicial

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the issue of male adultery. Few of the reported maritime cases touched on this issue, and archival research would be necessary to determine whether the gender-neutral divorce statutes in Nova Scotia, New Brunswick and Prince Edward Island were applied in an egalitarian manner. For an example of one such application, see *Bell* v. *Bell* (1899), 34 N.B.R. 615 (S.C.), in which a woman was granted divorce based upon the adultery of her husband.

[94]*Bailey* v. *R.* (1900), 27 O.A.R. 703 at 712, Moss J.A. Thomas, *supra*, note 86 at 212, notes:

> This action was based on the legal fiction that as the husband and wife were one person at law, the wife was consequently incapable of consenting to adultery and the husband might therefore claim damages for trespass and assault. The wife had no claim to damages against her husband's mistress . . . .

[95]*Quick* v. *Church* (1893), 23 O.R. 262 (Q.B.).

[96]*Ibid.* at 265.

[97]*Ibid.* at 267.

perspective and one which would not stand unchallenged for long. After giving a detailed analysis of American[98] and English precedents and providing a careful examination of the philosophical and social bases for marriage, Armour C.J. outlined why spouses should be regarded as having equal rights:

> Whether we regard marriage as a contract or as a status, *consortium* was the foundation of it; it was the man and the woman casting in their lots together; it means marriage and all that marriage implies; and is as much the *consortium* of the man as of the woman, of the woman as of the man.
>
> It is therefore a contradiction of the term to say that in marriage the husband has the right to the *consortium* of his wife, but that the wife has no right to the *consortium* of her husband.
>
> There is in principle no legal reason why this was not a good cause of action at the common law.[99]

He considered an English House of Lords decision, *Lynch* v. *Knight*,[100] in which Lord Campbell L.C. had concluded that women could not maintain actions for criminal conversation: "[B]y the adultery of the husband, the wife does not necessarily lose the *consortium* of her husband; for she may, and, under certain circumstances, she ought to condone and still enjoy his society ... ." Rather bluntly, Armour C.J. stated that this analysis did not constitute "a legal reason, but a social reason",[101] and decided not to treat the case as binding. Furthermore he was prepared to assert that the English social attitudes which underlay such assumptions were peculiar notions, which he hoped were not operative in Canada. Interestingly, he made reference neither to the writings of Gemmill on this point nor to Parliamentary decisions and maritime legislation which would have supported his views.

Armour C.J. cautioned that it would be a "disgrace to our law" if the action for criminal conversation existed only for the husband and not for the wife. That there was no precedent for such an action in England or Canada did not trouble him. He related this to the common-law disabilities of married women, which had recently been corrected by the *Married Women's Property Act*,[102] which gave a married woman the right to sue as if she were *feme sole*. Prior to this statute, he noted, the action could not have been brought because the husband had to be joined and the damages would have accrued to him but, after this *Act*, married women could sue without

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[98]*Ibid.* at 269. Armour C.J. noted that the American authorities were "not all one way".
[99]*Ibid.* at 274-75.
[100](1861), 9 H.L. 577, 11 E.R. 854.
[101]*Quick* v. *Church*, *supra*, note 95 at 275-76.
[102]R.S.O. 1887, c. 132.

their husbands' assistance and the damages recovered were treated as their separate property.

Despite his strong views about equality in marital rights, Armour C.J. also indicated that he knew that his views were ahead of his time. He added that he hoped that discriminatory sexual mores did not exist in Canada, "for it may prove fatal to this judgment ...". He admitted ruefully that he might be wrong in this optimism since it was obvious that even in 1893 "the adulterer retains his place in society, while the adulteress loses hers."[103] Armour C.J.'s recognition that his decision might be ahead of prevailing social attitudes was perceptive. He was soon to be reminded of his comments when the Ontario Court of Appeal overruled his judgment in *Lellis* v. *Lambert*[104] four years later.

Mrs Lellis had brought an action against Mrs Lambert, a widow, for having alienated the affections of her husband, Matthew Lellis. At trial in Toronto in 1895, the jury awarded Mrs Lellis $1,500 for alienation of her husband's affections and $750 for the adulterous intercourse. The judgment was affirmed in the Divisional Court by a bench consisting of Armour C.J., Street J. and Falconbridge J. Mrs Lambert appealed to the Ontario Court of Appeal and the Court considered the case as though it were an appeal from the original ruling in *Quick* v. *Church*. While the Judges were prepared to refer to Chief Justice Armour's decision in *Quick* v. *Church* as a "well considered judgment",[105] they were not prepared to stand by its outcome.

Chief Justice George William Burton even found the suggestion that a woman could be the perpetrator of criminal conversation humorous. Although the complaint "ha[d] at least the merit of novelty", he joked that attempting to formulate pleadings that would show "that the defendant debauched and carnally knew the man" struck him as somewhat "ludicrous". Indeed he asserted that one would have to assume "the defendant to have occupied a more passive position ... ." On a more serious note, he cautioned that if such a right of action were granted to women, "it will be a very fruitful source of litigation, and the advantages of allowing such an

[103]Biographical material sheds little light upon why Armour C.J. took this position so at odds with the views of other judges. Born in Peterborough, Ontario, in 1830, he was the youngest son of Rev. Samuel Armour, a long-time rector of Cavan, County of Durham. He took all of his legal training in Ontario and was called to the bar in 1853. Two years later he married Eliza Church and had eleven children with her. He was appointed to the bench in 1877. G.M. Rose, ed., *A Cyclopaedia of Canadian Biography*, vol. 2 (Toronto: Rose Publishing, 1888) at 654-55, wrote of him: "By heredity and tradition he is a Conservative both in religion and politics, but, nevertheless, he is a Liberal in thought and education, and a firm believer in the great future the land of his birth has before her." See also Morgan, *supra*, note 81 at 201-2.

[104](1897), 24 O.A.R. 653.

[105]*Ibid.* at 654. .

action are at least doubtful."[106] Burton C.J. evaded the matter entirely: "With great respect, I think it should be left to the Legislature to determine whether such a right as is here asserted should be given to a married woman."[107] He dismissed the action.

Featherstone Osler J.A. was prepared to debate the merits of the claim a little more seriously. He was of the view that married women had no right to maintain such actions at common law because, in the relationship between husband and wife, the parties were not of equal status. Male adultery was clearly distinguishable from female adultery in his eyes, and he was quick to point out that English politicians had recognized this explicitly in their divorce legislation, which relegated women to inferior matrimonial status.[108] Burton C.J.O. and Osler J.A.'s views carried the day, and the concurring judgments of James Maclennan and Charles Moss JJ.A. decisively overrode Armour C.J.'s earlier courageous attempt to carve out a strong sense of equality in the marital relationship. In the eyes of the courts, male adultery was not to be put on the same legal footing as the adultery of women.

2. Alimony Cases: Strict Standards of Wifely Obedience

Nineteenth-century lawsuits for alimony frequently revealed instances of Canadian families torn by strife because spouses held incompatible views about the proper allocation of power between husband and wife. When these individuals resorted to the courts to seek judicial support for their actions, the judges uniformly insisted upon patriarchal authority and unquestioning wifely submission.

In the 1858 Ontario case of *McKay* v. *McKay*, Mrs McKay reported to the court that she had been forced to leave her husband because of his habit of behaving harshly and violently toward her.[109] Mrs McKay sought to obtain the court's sanction for her decision to live apart from her husband and an order for alimony. Mr McKay defended the case by arguing that his

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[106]*Ibid.* at 655 and 656.

[107]*Ibid.* at 660.

[108]*Ibid.* at 667. Osler J.A. added that he suspected that the claim of women to an equal right to the action of criminal conversation was attributable to the rise of the women's movement:

> [I]t cannot but be regretted, if it shall appear that one result of the emancipation of the modern woman is to confer upon her the right to maintain [this] action against the adulteress.

As for modern notions about separate women's property, he was not prepared to permit the new legislation to be used to extend to women access to the courts in cases of male adultery. The provisions of the *Married Women's Property Act*, *supra*, note 102, conferred "no new right of action" and did "not alter the status of the married woman or the relation of husband and wife further than [was] necessary to give effect to her rights of property".

[109]*McKay* v. *McKay* (1858), 6 Grant 380 (U.C. Ch. Ct).

wife had left his home of her own choice and that any harshness on his part had been prompted by his wife's own independence and violent temper. While both parties referred to the other's violent outbursts, the case did not focus on marital violence but on the question of whether one spouse should be required to behave with forbearance and submission toward the other.

Chancellor William Hume Blake concluded that Mr McKay had been guilty of harsh conduct and harsh language which was "highly unbecoming ... and well calculated to lead to the misery and degradation which has been the result."[110] He noted, however, that this behaviour had been provoked by "violent and unbecoming" conduct on the part of Mrs McKay. Instead of awarding alimony, he lectured Mrs McKay on her wifely duties and suggested that she return home:

> Her husband's house is open to her, and may become, I think, by prudence on her part, at least a comfortable house. ... She must remember ... that it is her duty as a wife to submit and accommodate herself as far as possible to the temper of her husband; but if instead of exercising patient forbearance, she allows herself to commit such acts of violence and misconduct ... she cannot hope for relief here. In that event her misery and degradation will have been the unavoidable result of her own misconduct.[111]

Blake C. was undeniably advocating the patriarchal model of marriage, in which women were expected to attempt, through prudent forbearance and submission, to accommodate to their husbands' desires. In this goal he was prepared to bring the full force of the law to deny Mrs McKay financial support on which to live independently and to urge her to return to the matrimonial home. He seems not to have even considered whether a less hierarchical marriage, based on the companionship of equals, might have been a preferable arrangement.

Hunter v. *Hunter*, an 1863 New Brunswick case, involved a suit by Julia Hunter to obtain judicial separation from Robert Hunter on the ground of cruelty.[112] The facts revealed two strong-willed individuals with diametrically opposed views of the nature of the marital relationship. Mrs Hunter appears to have been much younger than her husband, who was a successful merchant tailor and clothier in Saint John. During their engagement, the couple quarreled over whether Robert's widowed mother and two unmarried sisters would live with them after marriage. Supported by her father, Julia had even broken off the engagement in disagreement over the prospect of not having a home of her own. After Robert reassured Julia's father that if difficulties arose some alterations would be made, Julia agreed

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[110] *Ibid.* at 382.

[111] *Ibid.* at 383.

[112] *Hunter* v. *Hunter* (1863), 10 N.B.R. 593 (S.C.).

to go ahead with the wedding. With this slightly ominous beginning, the parties were wed in September 1860 and Julia moved into the Hunter residence.

Almost immediately, husband and wife began to find fault with one another. At breakfast the first morning of their marriage, Julia asserted her independence by demanding to be called by her maiden name. For this Robert censured her severely. On board a steamer in central Canada during the subsequent honeymoon, Robert forbade Julia from leaning over the vessel's rail and complained about her childish behaviour. Julia retorted that "if he treated her unkindly once, he would not do it a second time."[113] Upon their return to the large Hunter home, irritation set in between Julia and Robert's relatives. Julia removed herself more and more from the company of Robert's family and insisted upon going out socially and visiting her friends and relatives when she wished, often refusing to inform her husband of her whereabouts. Stormy discussions generally followed, and after one particularly acrimonious dispute, Julia set off on foot in inclement weather for her father's residence despite the fact that she was five months pregnant. After the intervention of friends some days later, she was induced to return, but the parties were never fully reconciled. Matters were aggravated once again when Robert directly challenged his wife's independent lifestyle. Shaking her by the chin, he shouted: "You infernal little devil, you will come and ask me when you go [out] or I will kick you out of my house. I will beat you every day of your life if you stay here."[114] Julia adamantly insisted that she would "go where I like and when I like" and added in anger: "I have always been accustomed to it, and I'll do it, and I don't care for you."[115] The next day the two moved into separate bedrooms and a final altercation took place when Julia insulted Robert by suggesting that he had slept in the streets. At this he struck her across the face. She threatened to complain to the police and fled to her father's home. Her father subsequently sued Robert for maintenance to support his daughter and helped Julia bring the lawsuit requesting judicial separation.

Julia and her father held to a view of marriage that was characterized by equality between spouses, in which a husband's authority did not entitle him to force his wife to obey his orders against her will. That they felt their case was strong enough to seek legal support indicates that for some individuals, at least, marriage was viewed as a companionate relationship in which women were entitled to some degree of autonomy and authority. Robert Hunter, on the other hand, appears to have espoused a rather sternly patriarchal concept of power relations within marriage. The New Brunswick Court was thus faced squarely with the competing models of marital relations.

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[113]*Ibid.* at 600.

[114]*Ibid.* at 607.

[115]*Ibid.* at 608.

Neville Parker J., who heard the case in the first instance, expressed a typical judicial reluctance to inquire into matters involved with marital breakdown.

> All conditions of life have their peculiar sources of disquiet and married life is not exempt from its own severe trials. ... [But when] the exercise of forbearance and discretion ... fail[s] to prevent a recourse to Courts of Justice for redress, the spectacle is exhibited of a husband and wife mutually exposing to the world the faults and follies which that relation should make them most anxious to conceal ... .[116]

Nevertheless Parker J. left no doubt about which party he supported. Robert's attachment to his aged mother and sisters in the face of his wife's hostility was depicted as an honourable trait in his character. As for his decision to try to restrain his wife's social comings and goings, the judge noted: "No doubt her husband might *lawfully* restrain her intercourse even with her own family, if he thought proper."[117] The violence Robert had exhibited was not to be countenanced, indeed it was an "unmanly" assault upon a pregnant wife; but Julia had provoked the violence by her taunts and furthermore it was not sufficient cruelty to justify a decree for divorce. Although Robert had been guilty of harshness and moroseness, Julia was more to blame. Decisively opting for the patriarchal model of marriage, Parker J. continued:

> [I]t was her duty, as well as interest, to make the best of the circumstances in which she had consented to place herself, though they might not be in all respects what she had desired. ... Admitting that there may have been something, perhaps a good deal to put up with; yet balancing advantages with disadvantages, there was not more than in the ordinary circumstances of life, many women are called on to endure. [T]he lady appears to have entered the married state with ideas of independence which that relation does not warrant, and ... her course was a good deal influenced by her erroneous views in this respect.[118]

Mrs Hunter appealed the decision but Chief Justice James Carter refused to overturn the ruling. Although Mr Hunter had been guilty of some cruelty, he noted that Mrs Hunter had "attempted a course of action too independent of her husband's known wishes and express directions, to be consistent with that subordination and obedience which is due from a wife to her husband."[119] Carter C.J. stressed that the court was authorized to intervene to protect a woman from the cruelty of her husband only in cases where "a proper course of submission to the lawful and reasonable wishes

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[116] *Ibid.* at 593.
[117] *Ibid.* at 608.
[118] *Ibid.* at 601, 602 and 603.
[119] *Ibid.* at 624.

of her husband would not render her cohabitation with him safe and free from any apprehension of violence, or danger to health or life."[120]

While Julia seems to have been as much a wilful young woman as an individual battling for equal rights within the confines of the marital relation, the judges seemed unprepared to deal with the case on this restrictive basis alone. Instead, they drove right to the heart of the question of allocation of power between marital partners and, on this point, they were unanimous and adamant. Husbands were permitted to behave as virtual autocrats, even to the point where they could forbid their wives from socializing with family members. Wives for their part were admonished to meet temper with restraint and harsh conduct with submission. There was to be no room for women's independence or autonomy within the nineteenth-century Canadian marriage.

While judges were prepared to insist upon the subordination of women to their husbands, they rarely explained why they reached this conclusion. Goldwyn Smith, writing in *The Canadian Monthly and National Review* in March 1872 was more forthcoming about the rationale for hierarchy within marriage. He claimed that "the husband's headship" appeared to be as "inseparable an incident of Christian marriage ... as the indissolubility of the tie", on the theory that if there was to be unity in the family, there must be in the last resort a determining will.[121] Mona Caird, in a flash of feminist wit, disputed this idea:

> The old notion that man ought to be the commander, because one must have a head in every commonwealth, is a truly comic solution of the difficulty. To preserve peace by disabling one of the combatants is a method that is naive in its injustice. Where, one feels inclined to ask, again and again ... is man's sense of humour? Does peace, indeed, mean the stagnation that arises from the relationship between the free and the fettered, or does it mean the generous mutual recognition of the right of private judgment?[122]

Social historians have not yet unearthed any such statements from nineteenth-century Canadian women, but at least by the turn of the twentieth century, prominent Canadian feminist leaders such as Flora Macdonald Denison, Dr Margaret Gordon and Nellie McClung began to advocate

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[120]*Ibid.* at 623.

[121]G. Smith, "A Bystander", "The Woman's Rights Movement" (March 1872) 1 Can. Monthly & Nat'l Rev. 249 at 257.

[122]Caird, *supra*, note 86 at 143 and 181.

the deletion of the word "obey" from marriage ceremonies.[123] McClung wrote in 1915 of the "absurdity" of referring to wifely obedience in marital vows. Advocating a true companionate marriage, she exhorted other Canadian women: "Sometime we will teach our daughters that marriage is a divine partnership based on mutual love and community of interest ... and [that] the happiest marriage is the one where the husband and wife come to regard each other as the dearest friend, the most congenial companion."[124]

The judiciary for their part clung to the patriarchal marriage as the only acceptable model in law. The only exception involved a number of unusual but interesting decisions in which a husband had thrown his wife out of the marital home and then offered to let her return when she sued him for alimony. The Canadian courts were forced to answer the distressing question of whether the general principles of wifely obedience required such women to return home and live with their estranged husbands. In the 1859 case of *Bennett* v. *Jones* the evidence indicated that Mrs Jones's illness had interfered with her domestic responsibilities; angry about her inability to work around the house, Mr Jones insisted that she pack her clothes, he pushed her out the door, and he humiliated her further by giving her a final kick.[125] His wife managed to make her living by dress-making for five years, but illness eventually forced her to give up work and to go live with her brother. When her brother sued her husband to recover for the fifty-six weeks of board and lodging he had provided, Mr Jones refused to pay unless his wife returned to live with him. She refused and the court had to determine whether this disentitled her to alimony.

Speaking for the majority of the Court, William Johnstone Ritchie and Lemuel Allan Wilmot JJ. instructed the jury that if they should find Mr Jones's offer to be *bona fides*, Mrs Jones was bound to return. If she refused, her right to pledge her husband's credit would cease. They noted that Mr Jones's act of turning his wife out of doors was a "very premeditated, gross

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[123]C.L. Bacchi, *Liberation Deferred? The Ideas of the English Canadian Suffragists 1877-1918* (Toronto: University of Toronto Press, 1983) at 31, has noted that Flora Macdonald Denison, a self-made businesswoman and Canadian suffragist, and Dr Margaret Gordon, one of the first women medical graduates from the University of Toronto, "wish to see the word 'obey' deleted from the marriage ceremony because of the insidious implications it carried for women". N. McClung, *In Times Like These* (Toronto: University of Toronto Press, 1972, orig. pub. 1915) at 72, noted that "[t]he word 'obey' had gone from some of the marriage ceremonies. Bishops even have seen the absurdity of it and taken it out."

[124]McClung, *ibid.* at 33.

[125]*Bennett* v. *Jones* (1859), 9 N.B.R. 397 (S.C.).

case of misconduct"[126] on his part, but concluded that by refusing to return she had become the wrongdoer:

> [I]s not her conduct in direct violation of her marriage vow? And is not her remaining away under such circumstances not only contrary to her duty, but tantamount to a voluntary departure? To award alimony under these circumstances would be "indirectly" to assist in keeping the parties separate, an infringement of "the divine command against putting asunder those whom God hath joined together."[127]

Wifely obedience was thus determined to extend even past the flagrant misconduct of a husband who had ejected his wife from the marital home.

The decision of the majority was not a startling one given Canadian judicial preference for hierarchical power relations in marriage. What was surprising was the dissenting opinion of Neville Parker M.R., who had delivered a strong endorsement of patriarchal marriage in *Hunter* v. *Hunter*. He was moved to compassion by Mrs Jones's story. While he felt compelled to state that he would prefer if Mrs Jones were to accept her husband's offer, he was not prepared to disentitle her to alimony for refusing. Revealing some sensitivity to the rights of wives and the importance of companionship in marriage, he stated:

> [T]he sentiments under which the union was entered into have vanished; she has been driven from her house, smarting under the sense of indignities received; years of neglect may have quenched all original regard; and why is her husband moved to desire her return? To save his pocket. Now, the question is, not whether, as a christian wife, she ought to forget and forgive, but whether she is legally bound, under these circumstances, either to return or starve. Her consent was necessary to their union: has not the act of her husband restored to her the right of exercising her own judgment as to a re-union?[128]

By depicting the situation as similar to the initial decision to marry — in essence taking Mrs Jones out of the marriage setting — Parker M.R. was able to avoid the obligations of wifely obedience which he so clearly believed to be the norm. The dissenting opinion was not particularly contradictory to the notion of patriarchal marriage but it did evidence some fledgling recognition of a sphere of independence for women whose husbands had improperly thrown them out on the streets.

Thirteen years later the Ontario Court of Chancery was faced with a similar case and by this point the majority of the Court was prepared to adopt the perspective put forth in Parker M.R.'s dissent. In *Cronk* v. *Cronk*, the parties had married in 1841 and had raised a family of two daughters

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[126] *Ibid.* at 401.
[127] *Ibid.* at 404.
[128] *Ibid.* at 410.

and two sons on a farm near Belleville, Ontario.[129] Their married life had been a particularly unhappy one, and the Court seemed to attribute most of the blame to Mr Cronk, who was described as "morose, harsh, ill tempered, jealous, and niggardly."[130] Although he appeared to have developed a strong dislike for his wife and treated her with habitual unkindness and cruelty, she stayed with him until he moved into a house in Belleville and asserted that he would not take up residence with her again. When he received notice of legal proceedings for alimony, Mr Cronk professed to be willing to receive his wife in his home in Belleville and charged that she refused to return. Vice-Chancellor Oliver Mowat concluded that Mr Cronk had had no reason to abandon his wife and that, if the order for alimony were refused, it would be tantamount to compelling Mrs Cronk to cohabit with her husband. This decision, he stated, ought to be left "to the influence of the natural and moral considerations which may affect the conduct of the parties", rather than be dictated by law.[131]

In summary, in their decisions on alimony, Canadian jurists remained staunch advocates of the patriarchal marriage. Husbands were to rule absolutely and it was the responsibility of their wives to behave with submissive obedience. Notions of egalitarian mutuality made no inroads into Canadian judicial thinking about marriage, with the minor exception of the unusual situation where a husband had already forced his wife out of his home. Some judges were prepared to depart from their traditional wifely obedience rules in these cases to the limited extent that they did not require such women to return home. Should the women have decided to forbear and take up residence with their husbands once more, however, there is little doubt that the Canadian judiciary would have rigorously enforced the patriarchal regime as before.

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[129]*Cronk* v. *Cronk* (1872), 19 Grant 283 (U.C. Ch. Ct).

[130]*Ibid.* at 283.

[131]Indeed Mowat V.-C., *ibid.* at 287, was prepared to put forth a suggestion that would ensure that Mr Cronk's offer was a *bona fide* one:

> If the defendant really wishes to be reconciled to his wife, for any other purpose than the contemptible one of getting rid of the small allowance which the Master has made to her (and which is a mere bagatelle to a man of the defendant's proved wealth), let him obtain his wife's consent to return to him; let him withdraw the foul aspersions he has cast upon her, and did not attempt to prove; and let him offer to give a binding stipulation that her little allowance shall not be imperilled or lost by her acceding to his professed wishes, but shall be continued notwithstanding the renewal of cohabitation. But for the Court to attempt, after all that has passed between these parties, to compel the wife's return . . . would be a gross injustice which I think that there is no law entitling the defendant to demand.

This position seems to have found increasing acceptance among Canadian judges, and Falconbridge J. of the Ontario Divisional Court recommended it highly in a later case: see *Rae* v. *Rae* (1899), 31 O.R. 321.

3. Wife-Battering Cases: The Violent Result of Hierarchy Within Marriage

Support of patriarchal marriages created severe problems when the husband was prepared to exert his authority in an extreme and brutal manner. In cases of wife-battering, the hierarchical model left little room for the law to come to the aid of the abused woman. The irony of the proposition that wives needed no protection from the law because they were protected by their husbands was never clearer. Judicial adherence to the patriarchal model of marriage contributed to an environment in which women were often denied basic protection against savage mistreatment.[132]

In *Severn* v. *Severn*, Chancellor Blake, one of the most vigorous supporters of patriarchal marriage, considered an application for alimony on the ground of cruelty.[133] A neighbouring couple, John and Ann Morley, testified that Aureta Severn had fled to their house one winter night, bleeding badly and severely bruised between the hip and abdomen. A doctor was called in and Mrs Severn (who was pregnant at the time) eventually miscarried. Two male witnesses testified to seeing Mr Severn get out of his buggy a year later, knock his wife down and kick her on the ground. Two female neighbours testified to being called in to help Aureta after her husband had tried to strangle her in the sitting room. Aureta was described as "black in the face" from this incident. A near relative of Mrs Severn told the court she had seen Mr Severn beat his wife on several occasions, bloodying her nose, pulling her hair out so as to leave a bald spot on her head and striking her with the handle of a broom. Indeed she testified that she had warned Mr Severn that he would kill his wife if he continued, and he had retorted, "I mean to kill her."[134]

Mr Severn's defence was that he had been driven to this violent behaviour because of his wife's "gross and offensive" language and her growing habits of intemperance. In contradiction, numerous witnesses testified that although Aureta occasionally took a glass of beer, they had never seen her "the worse for liquor". Most of the evidence against Mrs Severn was given by her eighteen-year-old son George. When Chancellor Blake learned that George was in the habit of looking on while his father "a man of powerful frame" knocked down and kicked "a helpless female", the Chancellor concluded that the young man furnished "a sad example of the lamentable consequences which necessarily result from such a course of conduct, not

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[132]This part examines the evidence of wife-battering which appeared in nineteenth-century alimony decisions. Further research into criminal cases would be necessary to determine whether these decisions represent a typical judicial approach to the problem of marital violence generally.

[133]*Severn* v. *Severn* (1852), 3 Grant 431 (U.C. Ch. Ct).

[134]*Ibid.* at 438.

only to the parties themselves but to their offspring."[135] He decided to discount George's testimony. George seems not to have been the only child affected by the violence. Elizabeth Severn, a daughter, was described by Chancellor Blake as having "herself fallen into grevious error", which she attributed to "parental unkindness". Presumably, Elizabeth had been caught in some sexual transgression which she attributed to the disharmony of her home life.

Chancellor Blake's judgment is quite startling in view of the extensive evidence of great brutality and the impact it had not only on Mrs Severn but also on her children. "Happily," he commented, "transactions of this sort are for the most part screened from public gaze."[136] It seems clear from this statement that he felt no judicial obligation to use the law as a tool to intervene to protect battered women. The preferable situation was to shield the courts and the public from all knowledge about such happenings. Furthermore, he felt that if Mrs Severn had really been guilty of intemperance, this would have gone "far to palliate the cruelty ascribed to the defendant."[137] Fortunately for Mrs Severn, he ultimately determined that the fact that Mr Severn had recently deserted his wife and refused to live with her constituted sufficient cause for an order to pay alimony. Mrs Severn's behaviour "would excuse considerable severity in the husband" but Chancellor Blake felt that the desertion was the critical factor. Despite evidence that Mr Severn's reason for refusing to live with his wife was his fear that he might do something that would "bring a rope around his neck", Chancellor Blake advised the couple on their larger responsibility to the marital relationship, and urged them to reconcile:

> The engagement between husband and wife is an engagement most solemn in its kind, and most extensive in its consequences. Those who enter into that engagement do so for better, for worse. The wellbeing of society requires that it should be so. Conscious as we all are of manifold infirmities, we must neither expect nor require perfection in others; and, where the result fails to realize all our anticipations, it is our manifest duty to bear and forbear. The true happiness of those more immediately concerned, and the wellbeing of our whole social system, rest upon this foundation of mutual forbearance. ... I will not relinquish the hope that the parties now before the court may be yet brought to a better understanding of their real interests, and that a way may be thus opened for them out of these scenes of misery and discord back to domestic happiness and peace.[138]

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[135] *Ibid.* at 439.
[136] *Ibid.* at 443.
[137] *Ibid.* at 441.
[138] *Ibid.* at 448.

Chancellor Blake's statement that the "wellbeing of society", indeed the "wellbeing of the whole social system", rest upon the permanence of marriage is all the more remarkable since the Chancellor himself had acknowledged the detrimental impact wife-beating had had on the children of the marriage. In spite of the incontrovertible fact that the individual children before him would have been better off if the spouses had separated earlier, Chancellor Blake was prepared to override their obvious interests with broad assertions about the social importance of marriage, "for better, for worse".

Not all Canadian judges were quite so wedded to the notion that the "wellbeing of society" ought to outweigh the protection of battered women. Vice-Chancellor J.G. Spragge heard evidence in 1860 of marital brutality which seems not to have been significantly different than in the *Severn* case, yet he responded quite differently. In *Jackson* v. *Jackson*, Mr Jackson had so threatened his wife that she feared he was going to cut her throat.[139] A final argument took place in November of 1859, when Mr Jackson became so violent that his wife fled his home for that of neighbours, who were forced to call a doctor. The neighbours were appalled by the severity of her injuries, which were described by the plaintiff's niece and doctor as follows:

> She was so much bruised that she could hardly sit down; she was black on the stomach and also on the throat ... there were red spots on one or both sides of her neck ... there were also red spots on the breast and pit of the stomach ... the plaintiff was in a state of irritable fever from the injuries which she had received ... [and] she asked [the doctor] to draw her will.[140]

In his defence, Mr Jackson argued that the plaintiff had given way to intemperance, and became irritable when drunk. Vice-Chancellor Spragge noted that "much the same" could be said of the defendant. Adding that the intemperance of both parties may have had much to do with the "dissensions and violence", he was still unprepared to accept this as justification for the brutality. In contrast to Chancellor Blake, he stated: "[E]ven supposing the wife alone guilty of intemperance, which is not the case ... it would afford no justification for such cruel treatment ... ." To fail to award alimony would be to "hold that a wife must endure blows on the stomach, breast, and throat at the hands of her husband — blows by which she is seriously hurt — which for days leave marks of a dark red colour upon her person, and induce a state of irritable fever, and must still remain under his roof."[141] Spragge V.-C. was clear about a woman's right to be free from marital violence, in direct contradiction to the views expressed by Chancellor Blake. However, Spragge V.-C. was not prepared to have his comments

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[139] *Jackson* v. *Jackson* (1860), 8 Grant 499 at 503 (U.C. Ch. Ct).

[140] *Ibid.* at 501.

[141] *Ibid.* at 505.

on wife-battering used to undermine the basic hierarchical structure of nineteenth-century Canadian marriage. He was adamant in asserting that the proper wifely role was one of submission and obedience:

> I should exceedingly regret by any judgment of mine to encourage the notion that a wife may, upon light grounds, leave the house of her husband and obtain a decree for alimony. ... I trust I shall not be considered as trenching on [the] principles of law which require the sacrifice of a wife's comfort and convenience to the wishes and authority of her husband, when I say I hold that the plaintiff has proved ... an act of legal cruelty.[142]

Although Vice-Chancellor Spragge was prepared to draw the line against wife-battering more firmly than Chancellor Blake, his own loyalty to the patriarchal model of marriage created an inherent conflict between the right of women to be free from marital violence and the need to maintain hierarchical order within the relationship.

The tension between Chancellor Blake and Vice-Chancellor Spragge, and indeed the contradictions within Vice-Chancellor Spragge's own thinking, were revealed again in the case of *Rodman* v. *Rodman*.[143] The two judges sat together on the case, Spragge as Chancellor this time and Blake as Vice-Chancellor, and their decision offers a unique opportunity to compare their attitudes toward wife-battering. The evidence indicated that Mr Rodman and his wife Ann had been married for eighteen years and had had several children together. Mr Rodman suffered from a serious drinking problem; he was an alcoholic and frequently given to "spells" from *delirium tremens*. Ann Rodman testified that her husband was in the habit of displaying "intemperate and violent conduct" when intoxicated. Finally, she had despaired of convincing him to stop drinking, and had taken the children and moved to her mother's home. Two days later in an effort to effect a reconciliation, she had prevailed upon George Rodman (her husband's brother) and two male neighbours to come with her to ask him to stop drinking.[144]

Infuriated when confronted by his wife and the three other men, Mr Rodman exclaimed, "Oh! she has come back, has she? I've got a rod laid up, and I'll give her a good thrashing."[145] The mediating parties were unable

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[142]*Ibid.* at 506.

[143](1873), 20 Grant 428 (U.C. Ch. Ct).

[144]Ann Rodman's attempts to seek direct assistance from these men was similar to the behaviour of the wife in *Jackson* v. *Jackson*, *supra*, note 140. Both women sought refuge from abusive husbands in the homes of relations and neighbours. The homes of neighbours and relatives often functioned as the nineteenth-century equivalent of modern battered women's shelters; neighbours and friends and relatives served as advisors, counsellors, intermediaries and peace-keepers. Battered women often turned to family and friends for the types of assistance now furnished by marital counsellors, mental health professionals and even the police.

[145]*Ibid.* at 434.

to stop him from striking his wife over the head several times, pulling her by the arm and kicking her. After this, he ordered her to be gone. Ann Rodman testified that she was now afraid to go back to her husband, that she feared he would "take my life". As for Mr Rodman, he apparently appeared in court in a drunken stupor.

Both judges had to determine whether this evidence warranted an order for alimony. Spragge C. began with the surprising comment that Mr Rodman's alcoholism was not an adequate excuse for Mrs Rodman to have left him. Although he agreed that it was perfectly reasonable for Ann to ask her husband to give up drinking, he added that she had "no right to require — abstractly considered — that her husband should give up drinking; for a husband having the bad habit of drinking to excess, is not of itself sufficient to justify the withdrawal of the wife ... ."[146] The violence, however, was a more difficult matter, and here Chancellor Spragge expressly laid out how his position in favour of the patriarchal model could be reconciled with the need to protect battered women. It was a question of degree. The law laid "upon the wife the necessity of bearing some indignities, and even some personal violence, before [the court would] sanction her leaving her husband's roof", he stated, providing overt judicial support for some degree of marital violence. Only in extreme cases would the law intervene. Indeed "[d]anger to life, limb, or health" was "necessary ... to entitle the wife to relief."[147] Although Chancellor Spragge was prepared to acknowledge that the degree of violence exhibited by Mr Rodman was sufficient to justify an order for alimony, he undermined the force of his position by the overt acceptance of lesser forms of violence.

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[146]The Chancellor's straightforward conclusion that alcoholism should not serve as a ground for entitlement to alimony is interesting since the nascent women's movement had begun to take the position that women saddled with drunkard husbands should be able to petition for divorce. There is as yet no Canadian material which describes the work of nineteenth-century feminists on this point, but Elizabeth Pleck has shown that Americans Elizabeth Cady Stanton and Susan B. Anthony were campaigning in New York as early as the 1850s for the right of battered women married to alcoholics to divorce on the grounds of *either* cruelty or habitual drunkenness. The Women's Christian Temperance Union in the United States advocated the passage of special legislation permitting women married to abusive alcoholic husbands to sue the "rum seller" for damages. According to E. Pleck, "Feminist Responses to 'Crimes Against Women,' 1868-1896" (1983) 8 Signs 451 at 453 and 463, the proposed legislation was intended to supersede the immunity in tort generally granted between spouses:

> [T]he WCTU championed special legislation which gave the drunkard's wife the highly unusual right to sue for damages. The laws did not hold the drunkard, a creature of his appetites, entirely responsible for his actions; rather, they held that the rum seller who had encouraged the man to drink should pay for the consequences of his customer's actions.

[147]*Rodman* v. *Rodman*, *supra*, note 143 at 431 and 439.

Characteristically, Vice-Chancellor Blake was far less concerned about violence of any description. Much of his judgment consisted of a lecture to Mrs Rodman on the error she had made by leaving her husband in the first place:

> I cannot say that the wife has been free from blame in the matter. She left her husband without just cause. ... I think the husband was warranted in shewing his annoyance at this act of the wife, and in reproving her for this dereliction of duty. ... She returned with two of the neighbours, which, in itself, may have been a means of aggravating her husband, as he may not unreasonably have desired that their difficulties might be kept private ... . The husband would have been, on the facts as proved, more justified in approaching his wife with her neighbours to demand a settlement than was the wife.[148]

Vice-Chancellor Blake's preference for having marital disputes, even violent ones, disposed of privately, without the intervention or knowledge of others, is reminiscent of his comments in *Severn* v. *Severn*, in which he seemed to be reluctant to permit any public investigation of domestic turmoil. His insistence on the essentially private nature of marriage complemented his preference for the hierarchical model. Patriarchal marriage was predicated upon the silence of women. To have the ills suffered by the subordinate partner exposed in the public realm was to threaten the entire inequitable arrangement. Institutionalized male supremacy in marriage required that family problems be screened from public gaze. "If the matter had not gone further than the blow", Vice-Chancellor Blake continued, "I do not think the authorities would have warranted the decree made; but followed as it was, by the demand that the wife should begone, which was again repeated shortly after, I think the decree can be upheld."[149] Mrs Rodman was entitled to alimony because her husband had forced her out of the marital home, not because of the violence.

There is as yet no research on the views of nineteenth-century Canadian feminists towards wife-battering, but ground-breaking investigation of American and English sources has revealed that such noteworthy feminists as Margaret Fuller, Elizabeth Cady Stanton, Emily Collins, Susan B. Anthony, Sarah Grimké, Lucy Stone, Frances Power Cobbe and John Stuart Mill all acknowledged it as a widespread problem.[150] Ann Jones has put it succinctly:

> Behind all the women's movement struggles for temperance, married women's property rights, liberalized divorce, child custody, and suffrage lay the grim fact that dependent women and children were subject to physical and sexual

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[148]*Ibid.* at 445 and 449.

[149]*Ibid.* at 449-50.

[150]See Pleck, *supra*, note 146; A. Jones, *Women Who Kill* (New York: Holt, Rinehart & Winston, 1980) at 75, 109 and 284.

> assault. Behind the veiled nineteenth-century references to "indignities" and "brutality" stood the battering, sexually abusive husband.[151]

The English suffragist, Frances Power Cobbe, published an article in the *Contemporary Review* in 1878 entitled "Wife Torture in England" in which she "shocked the English public with tales of atrocities".[152] She lobbied for legislation which would permit battered women to obtain legal separation from their husbands as well as alimony and custody of children and her campaign soon spread to the United States where it was taken up by Lucy Stone and Henry Blackwell.[153] There is even evidence of the existence of

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[151]Jones, *ibid.* at 284.

[152]This article is reproduced in Pleck, *supra*, note 146 at 460.

[153]In response to effective lobbying by Frances Power Cobbe, three statutes established summary jurisdiction upon which some women were permitted to seek orders equivalent to judicial separation. The *Matrimonial Causes Act, 1878* (U.K.), 41 Vict., c. 19, s. 4, declared that if a man was found guilty of aggravated assault upon his wife, in circumstances in which her future safety seemed to be in peril, the magistrate who convicted him could make an order equivalent to judicial separation. In addition, the magistrate was authorized to award such a woman alimony to be paid weekly, as well as custody of her children under ten years of age, if she had not been guilty of adultery. The *Married Women (Maintenance in Case of Desertion) Act, 1886* (U.K.), 49 & 50 Vict., c. 52, s. 1, permitted married women who were deserted by their husbands to summon them before a magistrate, who was authorized to award them weekly support payments. The more comprehensive *Summary Jurisdiction (Married Women) Act, 1895* (U.K.), 58 & 59 Vict., c. 39, s. 4, set out four grounds upon which a married woman could apply to a court of summary jurisdiction:1) if her husband had been convicted summarily of aggravated assault upon her; 2) if her husband had been convicted by indictment of assault upon her and fined more than five pounds or sentenced to more than two months in gaol; 3) if her husband had deserted her; 4) if her husband had been guilty of "persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children" in such a manner as to force her to live separate and apart from him.

The magistrate was further authorized in such cases to give an order equivalent to judicial separation, as well as to award her alimony in the form of weekly payments up to two pounds, and custody of children under sixteen years of age.

For reference to Cobbe, see W. Latey, *The Tide of Divorce* (London: Longman, 1970) at 99. See also various amendments found in (U.K.), 21 & 22 Vict. (1858), c. 108; (U.K.), 22 & 23 Vict. (1859), c. 61; (U.K.), 23 & 24 Vict. (1860), c. 144; (U.K.), 25 & 26 Vict. (1862), c. 81; (U.K.), 27 & 28 Vict. (1864), c. 44; (U.K.), 31 & 32 Vict. (1868), c. 77; (U.K.), 47 & 48 Vict. (1884), c. 68.

Encouraged by Cobbe's success, Lucy Stone and Henry Blackwell introduced several bills into the Massachusetts legislature providing similar rights for assaulted women: see Pleck, *supra*, note 146 at 459. M. Goldman, *Gold Diggers and Silver Miners: Prostitution and Social Life on the Comstock Lode* (Ann Arbor, Mich.: University of Michigan Press, 1981) at 45, has documented another campaign to enact criminal sanctions against wife-beaters during the nineteenth century on the Comstock Lode in Nevada. In a passage curiously reminiscent of the twentieth century, Goldman noted: "The legislators realized that police might react against embarassing another man whose only criminal activity occurred within his family, so they also provided for fines against lawmen who did not enforce the new penalty."

nineteenth-century battered women's shelters which furnished housing, subsistence, legal counselling and other support to battered women and children.[154] Elizabeth Cady Stanton made the express link between patriarchal marriage and wife-battering: "[M]en abuse wives," she insisted, "taught by law and gospel that they own them as property."[155]

Nineteenth-century Canadian judges must be held accountable to Stanton's charge, since they played a significant role in the evolution of legal rules condoning the violence that husbands often inflicted upon their wives. The trial decision in *Bavin* v. *Bavin* in Raleigh, Ontario in 1896 underscores the typical judicial tolerance towards wife-battering.[156] The case disclosed evidence of a particularly wretched marriage. Throughout the thirty-year marriage, Mr Bavin had manifested a violent temper, a tendency to drink to excess and considerable brutality. He drove his children from the home one by one, and threatened to dash his wife's brains out if she visited them. He once beat his wife over the head until she could not see and became insensible; she was unable to work after this episode for over a month. At other times he beat her with his fists and hands, pounded her head against a pantry door, struck her on the head with a teapot of boiling water and threatened her with a loaded revolver. He refused to obtain medical assistance for his wife when she was ill. Twice Mrs Bavin had managed to leave her husband; both times, however, she had returned on account of the children. She took the rather extraordinary measure of seeking the assistance of the criminal authorities, but despite having her husband bound over to keep the peace, his violence continued.[157] The final straw came when Mr Bavin threw the youngest child, a fifteen-year-old boy, out of the house with five dollars and told him never to come back. When he discovered that the youngster had gone to his married sister's home, he went there in a rage and hauled him back home where he beat him severely. The boy escaped the next morning, and Mr Bavin exploded and threatened to kill both his son and his wife. Mrs Bavin fled to her daughter's home, and would not be induced to return. Instead, she sued for alimony.

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[154]Pleck, *ibid.* at 465-69, describes the existence of a Chicago Protective Agency for Women and Children.

[155]*Ibid.* at 456. A number of the reformers discussed wife-battering in the context of divorce reform. The English feminists made the link most clearly. Pleck notes at 469:

> English suffragists continued to debate divorce reform for assaulted wives as late as 1911. The English had been the first to respond to domestic violence, and English reformers from Mill to Cobbe had linked protection for assaulted wives with divorce reform.

[156]*Bavin* v. *Bavin* (1896), 27 O.R. 571 (Div. Ct).

[157]Few of the reported cases indicate that battered women actually resorted to the police for protection. Further research into assault files and police records might reveal other women who did so, but it seems reasonably safe to assume that this was an infrequent response.

Smith's response can only be described as astonishing. He dismissed Mrs Bavin's application for alimony, holding that her actions until two years prior to the suit had indicated that she was willing to "forgive" the violence. After this time, while her husband had behaved "harshly", Mrs Bavin had not proved that this "had the effect of putting in jeopardy her life or injuring her health ... ."[158] Her condonation of the earlier violence had locked her into the marriage once more, and since her husband had not inflicted any actual blows on his wife since that time, she could not show that the "terms upon which she agreed to remain" had been broken. Cavalierly dismissing a wealth of evidence that showed that a man capable of extreme violence had threatened to kill his wife and child, Meredith J. refused to provide Mrs Bavin with any legal assistance at all.

Despite this judicial insensitivity, Mrs Bavin did not abandon hope in the legal system. Her lawyers, W.M. Douglas and E.W. Scane, appealed the case to the Divisional Court. Thomas Robertson J. heard the appeal and was moved by Mrs Bavin's plight. While his judgment did nothing to undermine the concept of a patriarchal marriage, Robertson J. did not hesitate to award Mrs Bavin a new trial. He clearly acknowledged that she was living in daily fear for her life:

> In my judgment she had ample cause for apprehending serious bodily hurt. She had suffered at his hands before; she knew the inclination of his mind. His treatment of her had been such that she honestly believed that he had a violent hatred of her, and there was no saying what moment he would fly into an uncontrollable rage and inflict serious bodily harm, if not (as he threatened he would) reduce her to that state that "she would not be able to take the law of him."[159]

The reported cases do not disclose, unfortunately, whether a second trial was ever held and, if so, what verdict was ultimately pronounced.

In short, the notion of a hierarchical structure within the family which vested all power in the husband set the scene for widespread acceptance of wife-beating in nineteenth-century Canada. The role played by the judiciary was an extremely distressing one. Some judges can only be described as stubbornly determined that law should not be used to provide even minimal checks upon man's arbitrary power inside the home. Others responded somewhat more sympathetically to battered women but even these shared the same unfortunate vision of marriage as a hierarchical, patriarchal institution. The seeds of marital violence were contained within this concept

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[158] *Bavin* v. *Bavin*, *supra*, note 156 at 571.

[159] *Ibid.* at 581.

and, as a result, even the most sensitive judges were unable to provide significant protection to battered women.

III. Conclusion

Marriage was perhaps the most important social institution in nineteenth-century society. It was believed to provide the bedrock upon which all other social relationships were constructed and it was universally touted as natural and essential to the smooth functioning of civilization. Canadians were proud to declare that their marriages were exceedingly strong — models of virtue and purity. In fact, however, Canada was anything but a divorceless society. Individual marriages crumbled and courts were reluctantly forced to scrutinize the conjugal relation. The Canadian judiciary played a pivotal role in expunging the newly-emerging model of companionate marriage and in shoring up the patriarchal family in nineteenth-century Canada. The majority of judges were quick to dismiss demands that marriage provide a setting in which women and men would be placed on an equal footing, in which women as well as men would be protected from indignities, coercion, violence and inequitable sexual strictures. Women's demands to be free from the arbitrary control of their husbands were categorically denied. The hierarchical framework thus created forced judges explicitly to condone an overt double standard of sexuality, tyrannical behaviour by husbands, and various manifestations of wife-battering. As a result, far from serving as the uniquely moral relationship that nineteenth-century Canadian rhetoric espoused, marriage served as a bulwark for institutionalized and ideological male supremacy.