

Marital Cruelty: Women and the Nova Scotia Divorce Court, 1900-1939

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Volume 18, numéro 1, autumn 1988

URI : https://id.erudit.org/iderudit/acad18_1art01

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Éditeur(s)

The Department of History of the University of New Brunswick

ISSN

0044-5851 (imprimé)

1712-7432 (numérique)

[Découvrir la revue](#)

Citer cet article

Snell, J. (1988). Marital Cruelty:: Women and the Nova Scotia Divorce Court, 1900-1939. *Acadiensis*, 18(1), 3-32.

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Marital Cruelty: Women and the Nova Scotia Divorce Court, 1900-1939*

WIFE-BEATING AND MARITAL VIOLENCE HAVE a long history. But beginning in the 19th century commentators in the western world increasingly articulated a new domestic ideology. Marriages were to be closer to a companionate ideal, where wives and husbands were near equals, each with their own sphere of work and expertise. Womanhood was increasingly idealized within this powerful ideology, and women were regarded as requiring and deserving of special treatment. It followed that husbands came to be expected to treat their wives with affection, consideration and gentleness.¹ The ideal, of course, as with all such expectations, did not reflect reality. But while the disjunction between ideal and reality might be tolerated in the abstract, inevitably at the level of the individual family it forced a response of some sort. Women in particular increasingly tried to reshape the reality of their marriage to conform more closely to their newer expectations. One area of marital behaviour where this was obviously true was that of the husband's discipline and control of his wife, particularly where that discipline extended to physical or mental abuse. Of all the contemporary grounds for divorce in the western world, cruelty deals most directly with the conduct of spouses in their daily relations with each other.²

In early 20th century Nova Scotia wives increasingly complained of wife-beating and mental cruelty in their marriages.³ Most abused wives ceased cohabitation with their husbands, at least for a time. Often they moved out of the marital home, joining parents or family or establishing a residence of their own.

* I would like to express my gratitude to the following persons who read an earlier draft of this paper: Donna Andrew, Marg Conrad, Philip Girard and David Murray. This study was carried out with the support of the Social Sciences and Humanities Research Council of Canada through its Leave Fellowship and Research Grant programmes.

- 1 R.L. Griswold, *Family and Divorce in California, 1850-1890: Victorian Illusions and Everyday Realities* (Albany, 1982); B. Welter, "The Cult of True Womanhood: 1820-1860", in M. Gordon, ed., *The American Family in Social-Historical Perspective* (New York, 1977), pp. 313-33; C.N. Degler, *At Odds: Women and the Family in America from the Revolution to the Present* (New York, 1980).
- 2 J.M. Biggs, *The Concept of Matrimonial Cruelty* (London, 1962), p. 7. A useful recent survey of current scholarship on wife-beating is W. Biernes and L. Gordon, "The New Scholarship on Family Violence", *Signs*, VIII (1982-83), pp. 507-31.
- 3 Since this study is limited to petitions before the Court for Divorce and Matrimonial Causes, it obviously omits the potentially very important lower courts. It is certainly possible, for example, that elsewhere wives were making very different use of laws against cruelty. A study of assault charges in magistrates' courts, for example, might prove quite interesting.

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Family members or neighbours also acted as mediators in abusive situations. Less frequently the wives resorted to public agencies for aid. While clergy were occasionally used as mediators in the early years of the period under study, increasingly wives relied on police (sometimes informally) and the courts.⁴ If and when these techniques failed, the only viable solution left (apart from toleration) was to leave the marriage and the husband behind. One way of doing this, of course, was to seek a divorce.⁵

As an investigation of interaction between victims and the legal system, divorce offers a very particular perspective. Divorce, of course, is a civil proceeding, initiated by one spouse, but controlled by the state which imposes and attempts to enforce its own rules. But in contrast to most other legal proceedings dealing with violence, the state does not attempt in any direct way to punish the perpetrator. Rather, it can be argued that in divorce the state offers compensation to one type of victim. It is therefore a special sort of legal proceeding as regards violence and deals directly with only one sort of victim.

Women in the first four decades of 20th century Nova Scotia used the divorce process to articulate and to try to enforce their beliefs regarding marriage. Despite a legal system that was initially hostile to cruelty charges for divorce, wives persisted in pressing their claims and were able to persuade their male lawyers at least partially to support them in this effort. Nevertheless, this persistent pressure in the courts had little impact on the legal system. Led by the judiciary, the legal system placed a greater priority on marital stability. Where marriages were judged deserving of dissolution, the law strongly emphasized adultery as the most egregious marital wrong, relegating spousal violence to distinctly secondary status.

The law not only seeks to reproduce the social order but helps to create and define that order; it is a major means for organizing and expressing both beliefs and social relationships. Nowhere is this more apparent than in family law, where the law "actively regulates the behaviour of family members and through a variety of methods encourages and reproduces the 'social relations between the sexes' ".⁶ By relegating domestic violence to a minor position in the divorce process or even ignoring it, the legal system was helping to maintain male

4 On the rise of family courts at this time and their activities, see: G. Marquis, "Police Social Service in Early Twentieth-Century Toronto", unpublished paper; J.G. Snell, "The Founding of Courts of Domestic Relations: a study of early twentieth century judicial reform", *Windsor Yearbook of Access to Justice*, VI (1986), pp. 36-60.

5 It was possible, of course, for Canadians to seek a divorce in the United States, as well as in the province of one's legal domicile. Despite their dubious validity in Canada, it is notable that Canadians often chose the American option and, based on impressionistic evidence only, where women petitioners were concerned, the grounds were usually either desertion or cruelty.

6 D. Sugarman, "Theory and Practice in Law and History", in B. Fryer *et al.*, eds., *Law, State and Society* (London, 1981), pp. 82-3; C. Smart, *The Ties that Bind: Law, marriage and the reproduction of patriarchal relations* (London, 1984), p. 101.

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authority in the family and was implicitly condoning the use of violence there. The Nova Scotia courts did so in such a way as to confirm the importance placed by contemporary society on gender and class as criteria for discriminating among persons deserving of the law's protection.

In 1867 the Dominion of Canada acquired exclusive jurisdiction over divorce, preventing any further changes in divorce law by individual provinces. In the following 101 years, the federal government declined to exercise its jurisdiction to pass a general divorce statute. The grounds for divorce thus remained as they were when each province entered Confederation. Prior to 1867 no province other than Nova Scotia had adopted cruelty as a ground for divorce; in all other jurisdictions adultery was effectively the sole ground used.⁷ Not until the first general divorce statute was passed in 1968 did cruelty become available to all Canadians seeking divorce. Nova Scotia thus provides a special opportunity historically to examine abusive marriages and the interaction between women and the courts in responding to marital violence and wife-beating.

The abusive marriages in this study are drawn from a 797 case sample of divorce petitions.⁸ The use of cruelty allegations definitely changed over the 40-year period under investigation, but it was consistently lower than in some foreign jurisdictions (see Table I).⁹ Physical cruelty was always a more frequent type of abuse among wives' complaints,¹⁰ but like the charges of non-physical (or

7 The early history of the Nova Scotia divorce law is discussed briefly in C.B. Backhouse, " 'Pure Patriarchy': Nineteenth-Century Canadian Marriage", *McGill Law Journal*, XXXI (1986), pp. 283-4; K. Smith Maynard, "Divorce in Nova Scotia, 1750-1890", in P. Girard, ed., *Essays in the History of Canadian Law: the Nova Scotia Experience* (Toronto, forthcoming). Prior to 1925, wives seeking a judicial divorce in the four western provinces were required to prove aggravated adultery on the part of their husband, that is, adultery plus a further aggravating factor such as desertion or cruelty. But cruelty was not a separate ground for divorce there.

8 There were for the period 1900-1940 some 973 divorces in Nova Scotia, but they were very unevenly divided. As in the rest of Canada, the number of divorces rose rapidly beginning in 1918. There were 136 divorces from 1900 to 1917 inclusive, and 837 from 1918 to 1940. In order to be able to compare these two time periods, I examined the entire population of divorces for the early period and a random sample of the second period. The trial files varied considerably in their completeness. There were more case files than there were actual divorces, but it was often not possible to determine whether any one divorce had ended in a final decree. I opted to treat all files the same, on the ground that the marriage was, at the very least, in serious trouble in that one spouse at least was turning to the divorce process for a solution. The total sample for Nova Scotia was 797 cases: 199 cases were all those initiated between 1900 and 1917, inclusive; a further 598 cases represented a 50 per cent sample of the cases filed after 1917.

9 Complaints of physical violence were contained in 27 per cent of women's divorce applications in Los Angeles, 1880-1920; see: E. Pleck, *Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present* (New York, 1987), p. 246.

10 Recent studies have found that men are far less likely than women to report the presence of marital violence; one study suggests that men minimize the intensity of marital conflict in self-reports. See J. Kelly, "Divorce: The Adult Perspective", in A. Skolnick and J. Skolnick, eds., *Family in Transition* (Toronto, 1986), pp. 313-4.

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Table I

Frequency of Cruelty Allegations against Husbands in Divorce Petitions
(% of allegations)

	year of petition							
allegation	1900-4	1905-9	1910-7	1918-9	1920-4	1925-9	1930-4	1935-9
physical abuse to wife & children	2.4	0.9	1.4	0	1.1	0.8	0.4	0
physical abuse to wife	4.7	7.0	5.8	7.7	12.2	11.6	7.8	5.9
non-physical abuse to wife & children	1.6	0.9	1.0	0	1.4	0.8	0	0
non-physical abuse to wife	3.1	5.3	4.1	4.9	8.4	9.3	7.0	3.2
unspecified abuse	0	0.9	0	2.2	1.1	0.8	0	0
total	11.8	9.7	12.3	11.0	24.1	23.2	15.2	9.1
n	127	114	293	182	369	259	257	375

Source: sample of judicial divorces in Nova Scotia, 1900-1939.

mental) abuse such allegations became much more common in the 1920s when combined they made up almost a quarter of the charges. The most obvious explanation for this change in frequency is a time lag in the response to a change in the personnel on the Divorce Court bench. What is also striking about the number of complaints is their persistence despite a bench and divorce system that was generally unsympathetic. The availability of cruelty as a ground undoubtedly invited complaints of such conduct in the same way that adultery did. But given the relative ease with which adultery could be established in the courts, it is unlikely that the proportion of cruelty complaints exaggerated the existence of such conduct in marriages in which divorce was sought; it is much more likely that the existence of cruelty was underreported.

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The social characteristics of spouses involved in abusive marriages generally followed the patterns for those seeking divorce on other grounds. Where age at marriage could be ascertained, the median age for women was 21 ($n = 122$), ranging from a low of 14 to a high of 52. For men the median age was 24 ($n = 104$). Most marriages were the products of the vast number of small communities scattered throughout the region. Of 278 marriages where the location of the wedding was recorded, 39.6 per cent of the couples wed in communities of less than 1000 population, and a further 13.3 per cent in towns and villages between 1000 and 5000 in population. However, as with divorces in general, urban places (over 5000 in population and containing 28.3 per cent of Nova Scotians in 1921) were disproportionately the site of these weddings, accounting for the remaining 47.1 per cent. By the time the first recorded breakdown in these marriages had occurred, a movement towards larger communities had taken place. Communities of less than 1000 were the site of 35.2 per cent of such breakdowns, with a further 10.7 per cent taking place in towns between 1000 and 5000 population. Urban places accounted for 54.1 per cent ($n = 233$). This trend continued. By the time divorce had become an acceptable solution to the individual marriage, fully 63.3 per cent of the wives ($n = 281$) and 57.5 per cent of the husbands ($n = 282$) resided in towns and cities over 5000 in population. This too followed the general pattern for divorces.

Marriages involving spousal abuse also followed the standard demographic pattern in other regards. The median length of cohabitation by the couple before the first recorded separation was 7.7 years ($n = 270$), and the median age of the marriage at the time of the divorce petition was 11.6 years ($n = 314$). In slightly over a third of the petitions (36.1 per cent, $n = 274$) the divorce was contested, a somewhat higher proportion than for divorces generally. Over the entire time period, most (59.3 per cent, $n = 280$) of the cruelty allegations were made by working class wives (including both blue-collar and white-collar workers); this was, however, a somewhat lower proportion of working class participation compared to the divorce petitions overall.

Only in one area did divorce petitions involving cruelty differ significantly from those involving adultery. The husband's age was appreciably higher in cases of cruelty.¹¹ Older husbands, it can be hypothesized, had a much more rigid or developed sense of the appropriate character of a marriage and of the husband's and wife's roles. When their ideal of marriage was violated, they tended strongly to use coercion to maintain their marital ideal and more generally to assert their influence in their marriages.

At the turn of the century Canadian courts were quite clear as to what constituted legal cruelty. Based on the leading English cases of *Evans* (1790) and

11 Using a T test, the following variables were also tested: husband's occupation, wife's age, community size at marriage, community size at first breakdown, community size at petition. Husband's age was significant to .01.

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Russell (1897), legal cruelty required that the victim suffer physical illness or mental distress such as seriously to impair bodily health or to endanger life. It was thus something more than ordinary cruelty, and the leading cases emphasized that 'casual' violence was insufficient. In *Evans* the judge had stressed that justice took precedence over simple humanity in such questions and justice demanded that broader interests be considered:

It must be remembered that the general happiness of the married life is secured by its indissolubility. When people understand that they must live together, except for very few reasons known to law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off.... In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good.

Thus evidence of legal cruelty had to be "grave and weighty, and such as show an absolute impossibility that the duties of married life can be discharged".¹² In so holding, the courts thus focused not on the marital conduct itself, but rather on the result of that conduct.¹³ This judicial emphasis tended to frustrate individuals who sought to use the divorce courts to articulate new standards of marital behaviour. What is equally striking about this judicial stance is that it tended to ignore more recent English and particularly American decisions that articulated a standard for cruelty that tended to reflect a more companionate ideal of marital behaviour.¹⁴

Thus for Canadian courts a conservative judicial culture imposed a particular conception of legal cruelty, one with which many local jurists were comfortable. Again the courts were expected to measure the needs of the individual against the needs of the broader community, with special weight being given to the latter. Nevertheless it was well established that the test for legal cruelty was subjective, depending on the individuals and circumstances. Canadian jurists therefore had a good deal of discretion in this matter, a discretion that Nova Scotia jurists were willing to exercise only within quite limited boundaries, at least when it came to divorce.

J.M. Biggs has argued that judicial discretion in applying divorce rules is essential in permitting the legal process to take into account the wide variety of individual standards, values and behaviour.¹⁵ This discretionary authority

12 *Evans v Evans* (1790), 1 Hagg. Con. 35; *Russell v Russell*, [1897] A.C. 395. Constance Backhouse considers related 19th century jurisprudence in " 'Pure Patriarchy' ", pp. 303-11.

13 Biggs, *Cruelty*, pp. 20, 51.

14 A.J. Hammerton, "Victorian Marriage and the Law of Matrimonial Cruelty", unpublished paper given at the Law and History Conference, LaTrobe University, May 1987; R.L. Griswold, "The Evolution of the Doctrine of Mental Cruelty in Victorian American Divorce, 1790-1900", *Journal of Social History*, XX (1986-7), pp. 112-48.

15 Biggs, *Cruelty*, pp. 7-9.

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allowed the local judiciary to adapt the law to new standards of the day, where local legislatures were constitutionally prohibited from action, but it also allowed judges to incorporate or maintain class and gender discrimination within the jurisprudence. In Nova Scotia this discretion was often exercised for the purpose of maintaining the stability of marriages and placing imposing barriers in the way of divorce.¹⁶ A 1905 decision of Justice Wallace Graham makes clear the strict demands placed on allegations of cruelty. "This is a petition for divorce on the ground of cruelty", he began his judgement, "and of course in such a suit a very strong case must be made out".¹⁷ This implied higher evidentiary standard was important. The court was clearly less comfortable with allegations of cruelty than with adultery. Proof of adultery was usually more straightforward and less subjective. In contrast, it was often difficult to provide corroboration of abuse, particularly mental cruelty. For this reason the legal profession, both solicitors¹⁸ and jurists, generally preferred to concentrate on adultery. In cases where both adultery and cruelty were alleged, counsel usually concentrated on adultery. Where evidence of both had been adduced, the judge usually based his decision solely on adultery, since it was unnecessary to detail all that was wrong with the marriage and sufficient to find that the minimum legal requirements had been met.

Implicit in this approach was, of course, the apparent message that cruelty was not as significant or as serious as adultery. The law seemed to prioritise marital wrongs. A 1902 case provides a useful example. Married at Truro in 1899 to a tailor who was a widower with two children, Dorothy Lawton had resided with her husband at Bridgetown.¹⁹ Soon after their marriage he began a pattern of considerable abuse, both mental and physical. On several occasions he beat her, dragging her across the floor, striking her face against a door post and causing major bruising and swelling on one cited occasion. In this environment his use of "threatening, abusive, slanderous and obscene language to her" induced great fear. After 13 months of cohabitation, he sold his home and furniture at Bridgetown, and moved to Truro, and when Dorothy followed him

16 This judicial bias in favour of maintaining marital stability complemented a more broadly articulated attitude that expected wives to tolerate such marital 'difficulties' as abuse in order to 'keep the family together'. See V. Strong-Boag, *The New Day Recalled: Lives of Girls and Women in English Canada, 1919-1939* (Toronto, 1987), pp. 97-8; A. Prentice *et al.*, *Canadian Women: A History* (Toronto, 1988), p. 148; P. Ayers and J. Lambertz, "Marriage Relations, Money, and Domestic Violence in Working-Class Liverpool, 1919-39", in J. Lewis, ed., *Labour and Love: Women's Experience of Home and Family, 1850-1940* (Oxford, 1986), pp. 195-219.

17 File B-40, RG 39 "D", Public Archives of Nova Scotia [PANS].

18 See, for example, Files C-229, D-209, D-381, RG 39 "D", PANS.

19 Access to the divorce files after 1925 was granted on the express condition that the identities of individuals be concealed. This was voluntarily extended to the parties throughout the study period. All names have been altered; where necessary other aspects of identity have been obscured without distorting the person's social characteristics.

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there he refused to take her in or support her. Pointing out that she had lost her strength and that her health had suffered permanently, Dorothy Lawton petitioned for divorce 26 months later. In her petition she set out the allegations of cruelty and asked for a divorce. She had clearly been able to persuade her solicitor that this was the ground on which her marriage had foundered. But uncomfortable with allegations of cruelty that probably would not meet the legal tests of the time, her counsel pushed for further evidence or allegations. Five months later the petition was amended to add an allegation of two instances of adultery shortly after the wedding. When Justice Graham granted the divorce, the decision pointedly discussed only the adultery; no mention was made of cruelty whatsoever.²⁰ The implicit message was clear: adultery was a much more serious matrimonial offence than wife-beating.

It was a demanding task to establish the degree of cruelty required by the law in the early 20th century. Two cases, one that succeeded and one that failed, will serve to exemplify this difficulty. The successful case rested on a strong evidentiary base. Married in a small community just outside Halifax in 1895, Isabel Alexander had been subjected to abuse from the very beginning of her life with her husband, James. The day after their wedding James had publicly struck Isabel, knocking her down, when she was busy talking with neighbours (presumably, rather than attending to her husband). This set the pattern. "When I lived with him when he wasn't beating me he treated me like a dog", according to Isabel's sworn testimony. "I could never get a kind word from him. Never received one cent from him from the time I got married". She was able to back up her story of an unhappy marriage with specific instances of abuse. More important, she could corroborate these with independent evidence. After one attack, for example, she tried to treat herself and then resorted to a Halifax doctor. He treated her for two weeks and then operated to repair some of the damage done to her by her husband. After a period of recovery, she returned to hospital for a further three weeks' treatment but never fully recovered from the results of her husband's attacks. In the summer of 1901, for example, she had four more operations. Because of her reliance on a doctor and on formal medical treatment, Isabel Alexander had access to corroborating evidence. As well, she had earlier taken her husband successfully before police court for assault, and this too could be readily established. With such evidence and with corroboration from doctors and a magistrate, the legal tests could be met. Justice Graham found James Alexander "guilty of very exceptional cruelty" and granted Isabel a divorce on that ground.²¹

Betty Mulholland of Truro was less fortunate. Married in 1884 to Walter, they had lived in several Nova Scotia communities and in Washington State for the first ten years of married life before settling down in Truro. After years of abuse

20 File B-19, RG 39 "D", PANS.

21 File 63, RG 39 "D", PANS.

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Betty finally left her husband in 1900, but waited until 1906 before petitioning for a divorce. Justice Graham's reasons for judgement set out the extensive evidence that he had accepted. Apart from a number of instances of assault that were detailed, Walter had once attempted to drown Betty. Several times he had threatened her life, once to that end trying to reach a revolver that he usually kept under his pillow. Assaults with instruments (a bird cage in one instance) or fists were detailed; she was thrown about. Eventually reduced to a state of "terror", she became ill from "nervous prostration" and remained ill for an entire winter. When she finally summoned a doctor, he advised that only by leaving her husband could she recover her health — and indeed once Betty Mulholland left Walter, her nervous prostration ended and her health returned. Concluded Graham:

The Respondent has clearly inflicted serious bodily injury and also mental injury upon his wife and has been guilty of such cruelty as renders it impossible to live with him without danger to her health, life or limb. She has all along before the separation as well as after been obliged to support herself. He has been excessively drunken.

While the last two sentences deal with matters of no legal import, they are proof that the judge was clearly affected by the nature of the Mulhollands' married life together. Nevertheless, Graham held that these circumstances were insufficient for a divorce. Instead he awarded a judicial separation and alimony.²²

It is unlikely that the quality of life for the wives in these two marriages was substantially different. But one (perhaps more frail?) had undergone repeated medical treatment and hospitalization. The other, physically more hardy, had had the misfortune to endure 16 years of her husband's treatment before leaving and regaining her health. But while the quality of the married environment was similar, in the eyes of the law they were held to be significantly different. And the legal result was therefore substantially different.

There was no doubt in Justice Graham's mind that he was often dealing with persons who were inherently cruel in these cases. A 1910 petition described a man who habitually used serious physical violence, petty intimidation, abuse, and considerable mental cruelty to dominate his wife. Graham's judgement expressed no doubts that the allegations both generally and specifically were true, and he agreed that they had been corroborated at many points. Indeed, he commented: "I think he was of a cruel nature. He was violent tempered and used abuse and threatening language to her. And as she was but 14 years of age when he married her in August 1904 this fear of him is not to be wondered at". Nevertheless, no divorce could be awarded here, only a judicial separation.²³

22 File B-58, RG 39 "D", PANS. See also, for example, *ibid.*, Files B-82, B-93.

23 File B-95, RG 39 "D", PANS.

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The growing number of petitions using cruelty as a ground for divorce in the early years of the 20th century thus confronted a rather rigid legal system. Women's increasing concern with wife-beating and mental cruelty engendered little or no response in the Nova Scotia Divorce Court. At least part of the explanation of the rather strict interpretation of cruelty lies with the jurists involved. The practice of the Nova Scotia Court for Divorce and Matrimonial Causes was distinct from that outside the Maritimes and from post-1968 procedure in that this separate court had only one judge, who was cross-appointed from the provincial Supreme Court.²⁴ Except in case of illness or holidays, all cases before the court were decided in the first instance by this one judge who therefore exerted considerable influence locally in family law. In the early years of the 20th century that judge was Wallace Graham.²⁵

In his position as Judge Ordinary of the Court, Graham sought a judicial response to those intolerable marital environments that did not meet the continuing jurisprudential standards for divorce. For almost two decades he argued that an intermediate solution, judicial separation, ought to be available, finally establishing his point in 1907 and 1909. By finding grounds for a judicial separation, Graham offered a positive and substantial judicial response to the broken marriages facing him while at the same time maintaining the dominant judicial philosophy in Nova Scotia regarding divorce. As in the case of the Mulhollands, Graham held that judicial separation required a lesser standard of cruelty that could be sustained by a weaker evidentiary case. By such judicial innovation Justice Graham was able to respond to some of the real marital problems facing him in his courtroom and yet at the same time work within the conservative jurisprudential position regarding cruelty.²⁶

Wallace Graham's essential conservatism became more apparent after he was replaced on the Court for Divorce and Matrimonial Causes in 1915 by James J. Ritchie.²⁷ It was not long before there were indications that Ritchie was inclined to take a somewhat different stance than Graham regarding cruelty.

24 New Brunswick also had a separate court for divorce.

25 Born in Antigonish in 1848, Graham attended Acadia College before studying law in chambers. Called to the bar in 1871, he practiced in Halifax, particularly with such Conservative Party luminaries as J.S.D. Thompson, C.H. Tupper and R.L. Borden. Graham was appointed to the Supreme Court and as Judge in Equity in 1889. See H.J. Morgan, ed., *The Canadian Men and Women of the Time* (Toronto, 1912), p. 466.

26 K. Smith Maynard, "Divorce in Nova Scotia". The dual standard of cruelty thus established was overturned in *Stewart v Stewart* (1944), 18 M.P.R. 302 and *Jones v Jones* (1947), 20 M.P.R. 213.

27 Born in 1856 in Halifax, Ritchie was the son of an Anglican priest. Educated at Annapolis Academy and King's Collegiate School (in Windsor), Ritchie received his legal training at Harvard, graduating with an LL.B. in 1877. He practiced law in Halifax and Annapolis before joining the Supreme Court in 1912. He was named Judge in Equity, and thus the judge for the Court of Divorce and Matrimonial Causes, three years later. See *The Supreme Court of Nova Scotia and Its Judges 1754-1978* (Halifax, 1978), p. 74.

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Indeed in a 1913 case, while temporarily assigned to the Court, Ritchie had gone out of his way to hold that, while there was sufficient evidence for a divorce on the ground of adultery alone, this divorce would also be granted on the ground of cruelty.²⁸ For this judge at least the judicial priority given to adultery was at times significantly reduced. Once he became the permanent judge on the Court Ritchie even showed signs of reversing the order of priority — in what he described in one judgement as “a very bad case” of “very gross cruelty”, he declined to deal with the charge of adultery since the cruelty had been sufficiently established.²⁹ He was, however, not consistent in this regard. At another time, for instance, he wrote that the husband had treated his wife in a very brutal and cruel manner “but it is not necessary to make this the basis of my decision as the adultery is clearly proved”.³⁰

Ritchie’s personal attitude toward cruelty was confirmed in a second 1913 case. Mary Williams had married her husband Norman, a trader, in 1898 at Oxford. They lived together there, childless, for a little over 13 years, before Mary finally left. Norman, who drank a good deal, was described as large and very powerful, and he used his size to good advantage in attempting to impose his will on his wife. She was able to detail a number of brutal attacks during the last four years of cohabitation, and described an increasingly oppressive mental environment in their home. For all of this behaviour there were witnesses. Yet only once had she had to call a doctor, and treatment outside her home was never required. Judging by Justice Graham’s standards, this might well have been a case for a judicial separation, but not a divorce. Ritchie, however, found the cruelty established to have been “of a very gross character” and awarded a divorce on that ground.³¹ On a number of occasions Ritchie allowed his personal revulsion to show, using such terms as “very gross cruelty” in his decisions.³²

In a 1922 case Justice Ritchie articulated what was perhaps his most forceful adoption of a more progressive jurisprudential position regarding marital cruelty against women. The wife of a physician in Truro had petitioned for a divorce on the grounds of cruelty and adultery. Ritchie accepted her evidence of cruelty (but not adultery) in its entirety, rejecting the husband’s firm denials. When counsel for the husband put forward a Nova Scotia precedent (*Desbrisay* [unreported]) that would have undermined the wife’s position, Ritchie explicitly distinguished this case and rejected the philosophy behind the earlier ruling:

28 File B-120, RG 39 “D”, PANS. Compare *ibid.*, B-163, B-175, C-63. In a 1916 case (File B-184), Ritchie explicitly held in his judgement that both cruelty and adultery had been established by the petitioner, but the decree itself mentioned only adultery. Whether this was simply a clerical error or reflected a systematic bias is unclear.

29 File B-168, RG 39 “D”, PANS.

30 File C-63, RG 39 “D”, PANS.

31 File B-127, RG 39 “D”, PANS.

32 See, for example: Files B-165, B-168, B-184, C-60, RG 39 “D”, PANS.

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I quite agree that the court should be slow to exercise its power to grant a divorce for cruelty alone, and that it should be done for grave and serious cause.... [despite the wife's repeated attempts to end her husband's misconduct and to attempt reconciliation, she was repulsed] then after repeated and continuous ill treatment and insults, there came a time when she would not speak to him; and I am not surprised: there is a limit to a woman's endurance. I may add that it is nearly fifty years since the case of *Desbrisay v. Desbrisay* was decided and the status and rights of women have changed a good deal since then. Perhaps in those days it might have been held that a woman is bound to give up all her friends, women as well as men, and not cross the threshold of the marital dwelling without the express permission of her husband; and that if she does otherwise she forfeits her right to relief. I am not prepared to so hold.³³

The Court had clearly adopted some of the current attitudes regarding the companionate marital ideal.

Nevertheless, even with Justice Ritchie cruelty remained a difficult allegation to prove. In one 1921 case, for example, the wife's allegations of physical and mental abuse and of non-support were sustained by her own testimony and that of her adult daughter. But the charges were vehemently denied by the husband, an accountant for a local government agency, whose testimony impressed Ritchie: "The respondent met the charges made against him by clear and distinct denials. I could not detect anything in his way of giving evidence or his demeanour which would lead me to disbelieve him". The wife, on the other hand, was accused of including "frivolous" accusations regarding an inadequate supply of coal, and the corroboration of the daughter was undermined by her being an "intense partizan" of her mother. Ritchie found the evidence insufficient, suggesting that both mother and daughter were guilty of partially "unconscious...exaggeration". In dismissing the suit, the judge gave voice to what must have bothered many middle-class observers about cruelty: "I must be convinced before I fasten upon the respondent the grave stigma that he has been guilty of the kind of cruelty that the law requires" for such a petition.³⁴ One cannot help speculating about the possible class bias here: what was credible of persons in some social stations was more difficult to believe of others in 'higher' walks of life, to whom such stigma would presumably be more damaging.

Some sense of varying class attitudes towards domestic cruelty arises in other cases. In 1925 the wife of a Halifax doctor, married for over 26 years, petitioned for a judicial separation on the ground of cruelty. While the petition set out a number of examples of physical and mental abuse, particularly the latter, the two parties reached a pre-trial agreement for a judicial separation and alimony.

33 File C-292, RG 39 "D", PANS.

34 File C-261, RG 39 "D", PANS. See also *ibid.*, C-390.

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Their counsel asked Justice Ritchie that the evidence not be heard and that the court simply adopt the agreement worked out by the couple and their solicitors. Ritchie refused. The granting of divorce or judicial separation was the responsibility of the court on behalf of the state and was not to be controlled by individual couples. Nevertheless, it is interesting that this middle class couple sought to avoid an open discussion of their marital behaviour.³⁵

This protest against public humiliation can be seen elsewhere. Not surprisingly, it tends strongly to appear among middle class couples with a sense of social status to be preserved. A Nova Scotia Senator and his wife signed a separation agreement in 1921, one of the terms of which bound the two spouses to silence regarding their marital problems.³⁶ In another instance, the wife of a Methodist cleric in Digby cited as proof of her husband's cruelty not just his physical abuse, but his public calumny. He had subjected her to great indignity by addressing his congregation with remarks about her conduct, alleging that she had been a detriment to his ministry, that she was unreasonable and jealous, and that she had made his life so unbearable that he had recently considered suicide. Given the one-sided nature of the petition the husband's perception of the context of his conduct cannot be presented. But the wife's objection to the public character of his charges is quite clear.³⁷ The fact that the case went no further suggests that while at least some spouses were willing to include public humiliation within the definition of cruelty, the courts were not.³⁸

Perhaps for this reason, some families opted to deal with spousal cruelty privately. For example, Lucy and Bill Stanley farmed in Hants County. They had already been married ten years when Bill's brother wrote to Lucy's parents urging them to come to their daughter's assistance.

I have often wondered if you knew that your daughter Lucy who married Bill Stanley was living a life like some poor dog.

Her husband has given her abuse Both by talk and by giving her a slap with his fist. Any person who has just been married this short a period and they spat and quarrel many times a week. On April 4th Monday evening he and Mrs Stanley visited his father's home and they fought for over 4 hours and he slapped [sic] her fall and bruised her cheek. And he has never been the man to use her like a bride since he come to live in Hants.

I think you and Mrs. Smith should as a mother and father show something towards this poor woman. I think that at the least you should offer her a

35 File C-475, RG 39 "D", PANS.

36 File D-40, RG 39 "D", PANS. The clause read: "The parties shall maintain silence with respect to their grievances against each other and neither shall make statements relating to the other or to the relatives or family of the other".

37 File D-47, RG 39 "D", PANS. Compare Griswold, *Family and Divorce in California, 1850-1890*.

38 See, for example, Files D-66, D-243, RG 39 "D", PANS.

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home back. Weather [sic] it would be accepted or not I dont know. But I believe it would.

You can offer her a home back in your family again. I am not telling any thing but what I could face the public or the law with. I am an eye witness and was in the room to witness what has been said.

Our whole family including any one except Bill has always showed our kindest acts towards Lucy and we all feel sorry for her that she has to live in this way sworn and cursed at, struck in the face, and such talk at an innocent woman should not be said.

I believe you should insist on her coming home as it is most terrible the way this young woman lives. Mr and Mrs Smith and family you should do something towards this matter and act immediately.

Lucy's parents did respond. Her father had the entire letter reprinted in a local newspaper and came to take his daughter home, after speaking to Bill's parents. But after just one night away, Lucy returned to Bill on his promise to treat her better. Five months' later, and by now pregnant, Lucy left Bill permanently, returning to her parents.³⁹

This information, which was revealed in Lucy's divorce action five years later, makes it clear just how much the ideals of proper domestic behaviour had penetrated the private sphere of the family. While some persons were unwilling to face possible scandal over such problems, others were obviously willing to jeopardize family relationships and to use the power of public opinion to try to enforce those ideals. But it is important to note just how late in the cycle of violence and marriage breakdown resort was finally had to the courts, at least in cases coming to the Divorce Court.

It is equally important to remember that attitudes toward family violence varied considerably. Just as corporal punishment of children was still common, so too some persons thought that husbands could (and perhaps should) use physical force in disciplining their wives. Some divorce petitions or testimony described the cruelty involved as "excessive" or "unnatural", implying that some physical coercion was acceptable or normal. Other sectors of the legal process took the same position. In a 1916 action brought by a Colchester County farmer who had charged his wife with adulterous conduct (she was allegedly living as a prostitute in Moncton and Saint John) a local magistrate testified about the marriage. Asked by counsel whether there were any rumours of the husband abusing his wife, the jurist suggested that this was just the sort of discipline that

39 D.E. Stanley to Mr. and Mrs. Smith, Hants County, N.S., 5 April 1921, File D-20, RG 39 "D", PANS. The father's appeal to public opinion and pressure is reminiscent of the use of charivari at the popular level to enforce widely held beliefs regarding social and familial behaviour. See B.D. Palmer, "Discordant Music: Charivaris and Whitecapping in Nineteenth-Century North America", *Labour/le travailleur*, III (1978), pp. 5-62; M. May, "Violence in the Family: An

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was lacking: "He used her too good; he never abused her; he ought to have".⁴⁰ At least some sectors of the legal system thus accepted or condoned wife-beating.

Other elements of provincial society also accepted the naturalness of the phenomenon. A 1914 petition by a fisherman from Shelburne County focused on his wife's desertion and subsequent adulterous cohabitation as housekeeper with a widower. When that widower gave testimony at the trial, he disclosed that spousal violence had been among the causes of the wife's original desertion. What is striking is the casual way in which this evidence came out and the almost 'locker-room' context in which the husband had told the widower about the marital environment.

Q. What was the trouble [between husband and wife]?

A. He told me himself that he didn't think she was really bad in the way she was with me, but they could not get along they had so many quarrels. He said she would get jealous sometimes and he would go [out] and she would think he was with other women and he would give her a whipping; they parted twice and the third time for good; he gave her a beautiful whipping and her mother brought the magistrate and took her away and after that they didn't live together.⁴¹

This relegation of violence to incidental status in the divorce process and its relatively casual acceptance among 'the boys' are both revealing, as is the terminology ("beautiful whipping").

In 1925 Justice Ritchie was replaced on the Divorce Court by Justice R.H. Graham.⁴² The new Judge Ordinary soon demonstrated his strict and limited interpretation of cruelty. Mary and Roger Cooper married in Sydney in 1920, and resided at Stewiacke East thereafter while Roger farmed. They had one child, ten months old, when Mary petitioned for divorce, alimony and custody in November 1927. After two years of relatively peaceful married life, Roger had begun to show a strong temper, claimed Mary. Abusive and threatening language and actual physical cruelty combined to create an atmosphere of constant unpleasantness and anxiety. Mary's petition mentioned in a generalised

Historical Perspective", in J.P. Martin, ed., *Violence and the Family* (New York, 1978), p. 141.

40 File B-178, RG 39 "D", PANS. In a study of wife-beating cases in the 1870s before Halifax magistrates, M. Himmelman found that the judges were insensitive to domestic violence, levying fines against the husbands in only two of 17 cases; see Maynard, "Divorce in Nova Scotia".

41 File B-144, RG 39 "D", PANS.

42 No relation of Wallace Graham, Robert Henry Graham was born in New Glasgow in 1870 and educated at Pictou Academy and Dalhousie College, earning an LL.B. at the Dalhousie Law School. Graham had been active politically, being mayor of New Glasgow (1899-1900) and a member of the provincial Assembly (1916-1925), before accepting appointment to the Supreme Court of Nova Scotia in 1925. He was Judge Ordinary of the Court for Divorce and Matrimonial Causes for the next 23 years. See *The Supreme Court of Nova Scotia*, p. 78.

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fashion her husband's pushing and shaking, his blows to her body and head, and his forcing her out of their home without adequate clothing. Mary had earlier asked their clergyman to mediate, but after a short time the violence resumed, culminating in October 1927 in a fight in which Roger hit and 'mauled' his wife, pushing her through a hall window cutting her arm and hand for several stitches. Thereupon, Mary ceased cohabitation, taking the baby with her, and soon filed suit for divorce.

Roger's response was to deny all charges. No adequate grounds for divorce had been established, he argued. At best this was a case for judicial separation, and in any case Mary had so bad a temper and had assaulted Roger (using such instruments as a butcher knife and firewood) so frequently that she was not fit to have custody of the child. Perhaps his final complaint that Mary was a poor housekeeper was designed to help to undermine her claims to custody. Some of this evidence of her own violent behaviour Mary was forced to confirm in her testimony at trial. But before the trial, Mary answered by filing much more detailed and specific descriptions of Roger's alleged violence. Not only were various types of assault (choking, for example) laid out, but resultant bruises and corroboration (medical treatment by neighbours) were described. The climatic struggle of October was set out in greater detail. Mary concluded by underlining her fear of worse mistreatment and her great mental anguish.

The sorry tale moved Justice Graham very little in his official capacity. Refusing any legal remedy to their problems, he commented:

There may be (and in this case there was) much wilful and unjustifiable conduct inflicting misery upon the petitioner for which a divorce cannot be given. The spouses were married after a very short acquaintance and lived unhappily. Both had hasty tempers. They quarrelled frequently. There is some evidence of violence; but I do not think considering the status of the parties and their manner and habit of life that it was serious. The wound caused by being pushed against the window was not in my judgment intentional. I am not convinced that the petitioner's personal safety was endangered or that there was reasonable apprehension that it might be.⁴³

For Graham there was now a strong emphasis on the traditional test for cruelty common at the turn of the century. A year later in a similar case Justice Graham was quite explicit about the criteria for legal cruelty:

Cruelty in the aggregate is made up of all the acts of personal violence to petitioner...together with humiliating treatment and aggravated by bad language and hostile demeanour. It must in order to be ground for divorce

43 File D-63, RG 39 "D", PANS.

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establish bodily hurt, or injury to health, or a reasonable apprehension of one or the other. Danger to life or limb or health is the foundation of the doctrine.

And like his namesake earlier on the Court, R. H. Graham felt duty bound to rule “in conformity with the principles laid down by courts of the highest authority”. As he interpreted and applied those precedents, Graham placed a greater value on the maintenance of general marital order and stability than on the prevention of individual spousal suffering. And again like his namesake, he considered parties in divorce court to be “very likely (quite unintentionally) to exaggerate their injuries”.⁴⁴ Violence between spouses, he suggested in another case, was clearly wrong, but violence was distinct from cruelty and was not a matter with which the Divorce Court could deal: “there are many wilful and unjustifiable acts inflicting pain and misery which do not fall within that rule [of cruelty] and in respect of which relief cannot be given”.⁴⁵

Neither time nor continued exposure to the sordid acts of spousal violence softened Justice Graham’s position. A 1936 petition from the Annapolis Valley alleged three years of cruelty, including violent and abusive language and two specific incidents of assault in which the wife was struck and kicked by her husband, a bootlegger. Graham was unimpressed with the evidence adduced. “The trouble with this case”, he interjected during the wife’s testimony, “is, it is so trifling”. His written judgement dismissed the action:

I have no doubt the parties are unhappily married; and that the respondent, when intoxicated, is abusive, and more or less violent, as drunken men often are. There may be a great deal of bad conduct and ill-usage which does not come within the meaning of cruelty.

It is impossible to say that the petitioner has not suffered much distress of mind by reason of her husband’s conduct, when under the influence of liquor; tho her physical suffering was inconsiderable; but I cannot find that sufficient has been shown to bring the case within the principle laid down for legal cruelty.

The court has no power to deal with unhappiness from ill-asserted marriages or the loss of domestic comfort by drinking.⁴⁶

Nothing had changed in Graham’s view of cruelty or of his role.

Not surprisingly, R.H. Graham also demonstrated a definite preference to

44 File D-123, RG 39 “D”, PANS. See also, for example, *ibid.*, Files D-122, D-340.

45 File D-182, RG 39 “D”, PANS.

46 File D-514, RG 39 “D”, PANS. This suggests that the overwhelming concern in these decades with temperance and prohibition could lead to a distorted perception of the role of alcohol. Without denying the potential role that alcoholism could play in undermining a marriage, it is

award a divorce on the ground of adultery (rather than on cruelty).⁴⁷ To be fair, much of this was simply legally efficient. It does not imply that the judge himself was personally unmoved by evidence of cruelty. In one case, for example, he held that a husband's "savage violence toward his wife" made the evidence of adultery more credible. Nevertheless in this same case the divorce was granted on the sole ground of adultery, Graham stating that it was unnecessary to deal with any other grounds.⁴⁸ Again, the legal system was sending out a message regarding the relative iniquity of various marital behaviour.

Where cruelty was accepted as the ground, the evidence was truly severe and overwhelming. When Frances Gilliam began an uncontested action for divorce, custody and alimony in 1929, she alleged almost continuous cruelty during her 20 years of married life and was able to provide extensive detail, by day or at least by month over the past eight years. Seemingly repeating notes from a diary or journal, Frances described abusive incident after abusive incident, both physical and otherwise. Weapons, such as knives, razors, and rifles, were mentioned, and corroboration was pointed to in neighbours, employees and doctors. Justice Graham nevertheless granted a divorce only after much hesitation. Frances Gilliam appeared to him to be not only a person given "to exaggerate small matters" but also one quite able to stand up for herself ("particularly able and likely to take her own part"), as if this deviation from the prevailing perception of women as weak and defenseless somehow mitigated the husband's violence. It was with definite reluctance that Graham dissolved the marriage on the ground of "gross cruelty".⁴⁹

As with his predecessors, Justice Graham found social class to be a meaningful factor in considering cruelty. As others have pointed out, the view of women as weak and defenseless was primarily a middle class one. While working class women were tougher and had a greater capacity for tolerating abuse, middle class women were felt to require the protection of paternalistic institutions.⁵⁰ When the daughter-in-law of a prominent Halifax merchant family sought a divorce on the ground of her husband's cruelty, Graham held that a lesser standard of injury could sustain the charge: "The situation and

striking that Justice Graham places almost the total cause of violence here on the drinking itself rather than on the husband's personality.

47 See, for example, Files D-55, D-101, D-126, D-221, D-267, D-296, D-319, D-550, D-602, RG 39 "D", PANS.

48 File D-30, RG 39 "D", PANS. See also, for example, *ibid.*, File D-414. For a similar Saskatchewan case, see *Gordon v Gordon and Watt*, [1935] 2 W.W.R. 419.

49 File D-130, RG 39 "D", PANS. Elizabeth Pleck, "Wife-Beating in Nineteenth-Century America", *Victimology*, IV (1979), pp. 60-74, argues that wives that fought back (that is, that did not fit the prevailing middle-class definition of women as weak and defenseless) were left largely unprotected by the U.S. legal system, forcing wives to rely on informal systems of support and response.

50 May, "Violence in the Family", pp. 140-3; Griswold, "Mental Cruelty", pp. 131-9.

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condition of life of the petitioner is a material consideration. A blow which raised a large swelling on her face meant more to the petitioner than it would to a woman in a rougher condition of life where blows were not uncommon or were not much regarded".⁵¹ Similarly, in the 1936 Annapolis Valley case discussed above the judge was influenced by the husband's occupation as bootlegger. During the wife's testimony Graham was provoked to interject: "here are [just] two instances: cruelty is cruelty; there are many things that are done between people in their circle of life: you would divorce everybody in Nova Scotia if you divorced them for this sort of thing. Half the people in her class would have to be divorced".⁵²

Gender was also an important factor. In large part this was structural, since cruelty was overwhelmingly a female complaint against husbands. But gender could certainly affect the judge's perception of a case. By the time Velma McDougall petitioned for divorce in 1934, she had been married to John, a farmer in Pictou County, for almost 14 years and had had six children, four of whom were still living. In her testimony before the court, Velma described vividly John's extensive physical and mental abuse. She claimed to be very fearful of possible serious injury, but the judge was unconvinced. "She evidently didn't believe it because she didn't go away", Graham commented during her testimony; "she would have left then if she did believe he would [injure her]; the whole question is whether she was in terror and justifiably in terror.... The case does not strike me as a strong one at all. It is unusual to find a woman leaving her children and going to work. I am only just explaining this for your [counsel's] benefit; it is an unusual case; very few women will leave their children in the custody of a bad man". While commending her desire to get out and work, Graham clearly felt that some maternal instincts would have compelled her to stay at home for her children if her husband had been seriously violent.⁵³ In the end, however, Graham was persuaded and awarded a divorce for cruelty.

Men were also subject to gender expectations. When a male farmer petitioned for divorce on the ground of his wife's cruelty, Justice Graham made it clear just how unusual was such an allegation, but he accepted it in this case. The husband "is very clearly not like ordinary men; & quite palpably was dominated by the stronger will & character of the respondent". Graham considered the husband's testimony credible "in light of the opinion which I have formed of his mentality".⁵⁴

Yet, as Robert Griswold points out, it was women who were particularly able to appeal to gender stereotypes to enhance their claims to injury resulting from

51 File D-163, RG 39 "D", PANS.

52 File D-514, RG 39 "D", PANS. See also, for example, *ibid.*, File C-473.

53 File D-360, RG 39 "D", PANS. As Biggs, *Cruelty*, pp. 19-20 points out, the definition of cruelty had long varied with the gender of the victim.

54 Files D-233, D-419, RG 39 "D", PANS.

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their husbands' abuse. Women were regarded not just as weak and defenseless, but as particularly vulnerable to nervous disorders. An abusive husband could readily be presented as creating an oppressive and threatening environment of the type that would particularly affect the mental health and well-being of their wives.⁵⁵ Though the doctrine of mental cruelty received no explicit support from Nova Scotia jurists in this period, wives and their solicitors throughout the period under study repeatedly appealed to this concept and to the image of women's particular vulnerability. The standard phrase — "course, violent and threatening language" — appeared in many petitions. Some petitioners appealed more directly to this concept than others. The wife of a Halifax customs officer, for example, charged that her husband

has systematically and continuously exercised duress, terrorism and petty tyranny of an indescribable kind over me, that he has also repeatedly terrorized me by advancing towards me with clenched fists and in threatening attitudes and that from his words, looks and actions I was in almost daily dread of assault, which, being now in delicate health, I feel I cannot bear.⁵⁶

Since delicate health and nervousness were particularly associated with middle class women, it is not surprising to find someone such as the daughter-in-law of the Halifax merchant family describe herself in especially vulnerable terms. Not only had her health been seriously impaired and had resort to a physician been necessary, but she had had a nervous breakdown, had lost weight and had suffered repeated nightmares in which her husband attempted to kill her. Justice R.H. Graham was very sympathetic, finding that the wife had suffered a number of abusive and "humiliating" incidents that had eventually resulted in neurasthenia.⁵⁷

Nova Scotia jurists were constrained by such factors as gender and class and by a judicial philosophy that valued marital stability more than it deprecated most forms of marital violence. In such an environment cruelty remained a restricted ground for divorce in the Nova Scotia Court for Divorce and Matrimonial Causes. Over the 40-year period under examination, the applied definition of cruelty had varied somewhat according to personnel on the bench. But overall during the 40-year period there had been strikingly little development or change in the concept of legal cruelty, despite the changes that had been taking place in marriage and in the perceptions of men and women. Cruelty under Justice R.H. Graham in the 1930s remained much what it had been under Justice Wallace Graham at the turn of the century — with one exception.

55 Griswold, "Mental Cruelty", pp. 131-39.

56 File B-31, RG 39 "D", PANS.

57 File D-163, RG 39 "D", PANS.

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Beginning in the 1910s a new set of attitudes regarding sexual cruelty slowly manifested itself in divorce petitions. Prior to the end of the First World War any claims of cruelty involving sexual violence between spouses were quite rare. An indirect such claim first occurred in 1902 when the wife of a Colchester County farmer offered as proof of his mental cruelty his habit of appearing naked before young girls, a practice that the judge characterized as “calculated to outrage the feelings of his wife”.⁵⁸ Six years later another wife answered her manufacturer husband’s petition for divorce by charging him with cruelty and failure to support. Among the types of cruelty listed was the claim that he “frequently, forcibly and unnaturally used the rights and privileges of married life as to cause the Respondent great physical and mental pain and worry and serious illness”.⁵⁹ Yet even here the charge is unclear, masked by euphemisms and symbolic phrases to discuss the most private of marital subjects, sexual behaviour.

Not until five years later did the next claim of sexual cruelty appear. This time the allegation was made by the petitioning wife and was only slightly more explicit. Flora McLean of New Glasgow charged her merchant husband with developing a “depraved and brutish” disposition, resulting in adultery, cruelty and failure to provide. Among the instances cited were two attempts on his part to force her to commit “an unnatural offence” which Flora successfully resisted. In this instance the husband responded with a vigorous denial of all charges, seeking to undermine his wife’s claim for child custody and to replace it with his own such claim. There the file ends and thus presumably the case.⁶⁰

Clearly women and their solicitors were still quite uncomfortable in presenting the court with explicit charges regarding sexual behaviour within marriage. It was not that sexual cruelty did not occur. Rather such conduct was either not perceived as cruel (or as sufficiently cruel to meet the legal tests) or the subject was of too private a character to allow public discussion. It is fruitless to speculate as to how many other instances of sexual cruelty were being hinted at in petitions in such oblique fashion that the inferences are now lost to us (though perhaps not to persons of that time period). In this regard, however, it is worthwhile pointing out that the bedroom was the site of a good deal of alleged spousal violence in divorce petitions.⁶¹

Late in 1915 the wife of a Parrsboro master mariner filed a divorce petition based on charges of adultery and physical abuse. But she also (and almost incidentally) claimed that her attempts to withdraw from sexual partnership with her husband had been thwarted by his coercion. Beyond that, and

58 File B-40, RG 39 “D”, PANS. See Pleck, *Domestic Tyranny*, pp. 91-3, for the changing attitudes regarding sexual cruelty in American marriages.

59 File B-74, RG 39 “D”, PANS. The wife’s charges were insufficient to counter her husband’s evidence of her adultery, and his divorce was granted.

60 File B-124 1/2, RG 39 “D”, PANS.

61 See, for example, File B-127, RG 39 “D”, PANS.

important because she also sought custody of their three minor children, she claimed that her husband was guilty of attempted incest with their second oldest daughter. However, the court demonstrated striking insensitivity. Finding that an alimony agreement reached in anticipation of a divorce was far too favourable to the husband, Justice Ritchie, instead of finding this to be further evidence of a coercive environment, suspected the couple of collusion and dismissed the action.⁶² It would have been little or no compensation that from the point of view of women asserting their concerns about sexual conduct within the marriage new ground had been uncovered.

Not until 1916 was the first major and explicit charge of sexual cruelty made. A Lunenburg County farmer was charged by his wife with mental cruelty and with adultery, but the bulk of her petition dealt with his sexual violence and its results. She detailed his use of force in the wedding bed on the morning after the marriage ceremony, causing her extensive injury and bleeding. Thereafter her husband frequently used force to exercise his so-called 'marital rights'; the resultant pain caused the wife to scream so that he had to use further force to cover her mouth. After the marriage was a year old, one particular instance of what can only be called rape resulted in further injury. The husband had his wife in "such a position that she could not help herself", and using considerable force tore her vagina in attempting penetration. Eight months later a similar attack (possibly involving 'unnatural' rear entry⁶³) produced the most serious damage yet: displacement of the uterus and inflammation of the uterus and bladder. Seriously ill and further weakened by nervous prostration, the wife was under several doctors' care for many months, most of them in her father's home. When she finally returned to her farmer husband almost one and a half years later, he immediately resumed his attempts at frequent intercourse. Though no coercion was used, the husband was so angered by her denials of sex that, after only one week's cohabitation, the wife left again, this time permanently.⁶⁴

Here was the first articulated sense in these petitions that aggressive, unrestrained male sexual behaviour within marriage was wrong and legally cruel misconduct. Here was the first plea in Canada that a marriage based on such sexual behaviour ought to be dissolved. Some women at least (and even some men — solicitors) were now prepared to challenge publicly such conduct. But Justice Ritchie was not yet ready to join this battle. He awarded the woman a

62 File B-171, RG 39 "D", PANS.

63 The concept of 'natural' intercourse was vital among the criteria for acceptable sexual behaviour. In one case, counsel were careful to distinguish between anal intercourse, which was 'unnatural', and rear entry vaginal intercourse, which was possibly 'natural'. Two solicitors proceeded to argue before the Court about whether rear entry vaginal intercourse was natural or not. The wife testifying put forward her own practical test for 'natural': if it was natural intercourse I didn't object, she said; but if it was unnatural, that is "if it hurt me", I objected. See File D-486, RG 39 "D", PANS.

64 File B-176, RG 39 "D", PANS.

divorce on the sole ground of adultery, declining to deal with the evidence of cruelty.

Two years later, however, the battle was joined though still somewhat indirectly. A soldier's wife, married only six months earlier in Halifax, petitioned for divorce, charging him with cruelty. The details set out a number of verbal and physical assaults, as well as having communicated venereal disease to her. What was striking was that rather than attempting to use venereal disease as evidence of adultery (likely because the timing of the contraction was possibly pre-marital), it was cited as evidence of cruelty. Ritchie was incensed by such behaviour. He informed a physician giving testimony that "if this man communicated venereal disease to this woman it is the worst form of cruelty", and in his judgement called such conduct "the worst kind of cruelty that a man can inflict on his wife". Citing precedents that it was unnecessary for the man to have knowingly communicated the disease, Justice Ritchie granted a divorce for cruelty.⁶⁵ The contemporary concerns about the spread of venereal disease were clearly part of a broader development regarding appropriate sexual behaviour by married couples, particularly men.⁶⁶ Here was a distinct message that extra-marital sexual activity was not only physically, but legally, hazardous.

Discussion of sexuality was obviously becoming more open, not only in the courts but in many other public arenas.⁶⁷ Nor was this totally proscriptive. Sexual intercourse was, to use the terms of the day, "normal" and "natural" within marriage. Indeed it was each spouse's duty to take part in such activity. In testimony in 1921, one mother-in-law attempted to bolster her daughter's allegations of cruelty by citing the husband's refusal to have sex: "I have often heard him say he did not want her in bed with him and I know that on some occasions he had to sleep on the floor".⁶⁸

The denial of sex was, of course, a weapon in spousal warfare available to either party. Like violence, sex was a means of attempting to control marital relations and it was clearly used both publicly, as reformers sought to control male sexuality in particular,⁶⁹ and privately. On most occasions found in the

65 File C-50, RG 39 "D", PANS. Other cases, of course, continued to use venereal disease as proof of adultery. As Biggs, *Cruelty*, pp. 131-41 points out, willful communication of venereal disease to one's spouse had long been recognised as constituting cruelty; it is the judge's remarks in this case that are particularly notable.

66 On the campaign against venereal disease, see J. Cassel, *The Secret Plague: Venereal Disease in Canada 1838-1939* (Toronto, 1987).

67 See, for example, J.M. Bliss, " 'Pure Books on Avoided Subjects': Pre-Freudian Sexual Ideas in Canada", *Historical Papers* (1970), pp. 89-108; A. McLaren and A. Tigar McLaren, *The Bedroom and the State* (Toronto, 1986); J.G. Snell, " 'The white life for two': the defence of marriage and sexual morality in Canada, 1890-1914", *Histoire sociale/Social History*, XVI (1983), pp. 111-29.

68 File C-60, RG 39 "D", PANS. Compare R.L. Griswold, "Law, Sex, Cruelty, and Divorce in Victorian America, 1840-1900", *American Quarterly*, XXXVIII (1986), p. 736.

69 Degler, *At Odds*, pp. 279-96. Compare S. Jeffreys, "Sex Reform and Anti-feminism in the

divorce petitions it was the wife who employed such leverage within the marriage. Though some husbands apparently accepted or tolerated their wives' withdrawal from sexual partnership,⁷⁰ other husbands reacted by attempting to assert their control of the sexual relationship. Indeed, this assertion of male dominance is a feature common to all forms of marital cruelty. The use of cruelty was obviously the manner in which many men chose to demonstrate or maintain their sense of control of the marital relationship. But where the Divorce Court demonstrated some tolerance of physical and mental cruelty, increasingly the definition of sexual cruelty was expanded to encompass more and more male sexual behaviour outside the limited area of 'natural' (missionary position) sexual intercourse between spouses.

Legally the significant breakthrough occurred in the case of *Cesale v Cesale* (1920).⁷¹ Married in 1892, the couple had lived together for almost 21 years at Mulgrave in Guysborough County. Six children were born to the couple, three of whom (ages 26, 20 and 11) survived in 1919 when Janet Cesale petitioned for divorce. Mrs. Cesale charged her husband, Joseph, a hardware merchant and small businessman, with adultery (just one instance was cited) and with cruelty. Only one form of cruelty was alleged — sexual violence — and this had been occurring, she said in her testimony, since the beginning of their marriage. Joseph Cesale frequently performed oral sex on his wife, usually while she was asleep. "He would not ask my consent to do this", she complained. Despite her repeated requests to stop this conduct, he persisted. In her own words, Janet Cesale found this abuse "so repulsive I could not stand it any longer". Finally in 1913, she withdrew totally from the sexual relationship and moved to a separate bedroom. Twice, the husband tried to use coercion to restore sexual relations — in her words:

he came into my room; I told him I was to have this room alone; he said while he was supporting me he was supposed to come into my room if he wanted; I said, then I will take another room; when I was getting up to go into another room he grabbed me by the throat and left the imprint of his fingers.....he said if I didn't [resume the sexual relationship] he would make me.⁷²

1920s", in the London Feminist History Group, ed., *The Sexual Dynamics of History* (London, 1983).

70 See, for example, Files C-20, D-104, D-148, D-696, RG 39 "D", PANS; *Cesale v Cesale* (1920), 54 N.S.R. 91.

71 *Cesale v Cesale* (1920), 54 N.S.R. 91. Since the details of this case are already available in published form, this is the only instance where the identities of the parties have not been kept confidential.

72 *Ibid.*, at 92.

She also stated that he had left her arms "black and blue" after the second assault. The oral sex and the surrounding environment brought on nervous prostration and depression in Mrs. Cesale, necessitating medical treatment. Finally in 1919, she brought her uncontested action for divorce.

Compared with the extensive physical injury and damage to health found in other cases of cruelty, Mrs. Cesale's physical sufferings were relatively slight. Nevertheless, Justice Ritchie held that the evidence disclosed legal cruelty (no evidence regarding the adultery was adduced, so that the case rested entirely on the allegations of cruelty). However, Ritchie also held that the evidence rested entirely on the wife's testimony, uncorroborated by any independent evidence (an affidavit from Mrs. Cesale's physician was considered inadequate corroboration). Since the legal rules insisted on corroboration, Ritchie felt required to dismiss the petition, although he explicitly stated that "if I could find corroboration I would grant the divorce". He also raised the possibility of appealing the ruling that corroboration was necessary, and this is just what happened. The four-man panel of the Supreme Court, relying largely on British precedents, ruled unanimously that in such a case corroboration was unnecessary. Indeed, the reasons for judgement pointed out that any such requirement would make it almost impossible to sustain any charges of this sort. "The secret vice practiced in the dead of the night", wrote the Chief Justice, "is something as to which no other evidence than that of the wife can be obtained". His colleague on the court described any insistence on corroboration as "cruelly unreasonable" since such evidence was "extremely unlikely" to be available. None of the justices questioned whether such sexual behaviour fell within the definition of cruelty.⁷³

The legal definition of cruelty was thus expanded to include sexual conduct that was outside the perceptions of normal sexuality and that was done coercively. As well the evidentiary rules for establishing such cruelty had been relaxed. In both ways greater access to divorce had been permitted. A woman had privately asserted her right to control her body and the character of her participation in marital sex; she had extended this assertion from the private sphere to the public, insisting that the wrongs involved were of such weight that the marriage ought no longer to continue. What was more a group of men with considerable stature in that society had supported her. Both publicly and privately the sexual behaviour of married men was being noticeably constrained.

By deciding to publish the case, the law reporters underlined its legal and social significance.⁷⁴ Technically, the appeal dealt only with the issue of

⁷³ *Ibid.*, at 97-98.

⁷⁴ As Philip Girard has pointed out to me, *Cesale* is the first divorce case in the law reports of Nova Scotia, and as such broke a code of silence in the law reports regarding both divorce and sexual behaviour within marriage.

corroboration, and that was all that needed to be included in the law report. But instead the law reporters quoted extensively that part of the trial judge's decision that detailed the sexual cruelty. In so doing they played their part in condemning such behaviour and in inviting counsel to consider incorporating such behaviour in divorce petitions, where appropriate. Before long this invitation was accepted by Nova Scotia solicitors and their female clients seeking divorce. Two months after the appellate decision in *Cesale* was handed down, the first of the new claims appeared. In a petition charging adultery, failure to provide, and mental and physical abuse, the wife of a Windsor railway worker explained that when she had responded by withdrawing from their sexual relationship, he had used coercion to overcome her refusal.⁷⁵

Late in 1921 the wife of a Truro commercial traveller submitted a petition for divorce on grounds of adultery and mental and physical cruelty. For the past three or more years he had, she said, abused her "by acting in a repulsive and unnatural manner towards me" and by committing secret vice towards her had produced "ill-health". She listed a variety of 'unnatural' sexual practices by her husband, including oral sex, coerced sex (the term 'rape' was never used in such cases), rear entry intercourse, intercourse during menstruation, and masturbation by rubbing his penis against his wife's body. All of this had resulted in the wife's "nervous prostration, nervousness, and nervous depression, vomiting and chills". Ritchie found that the charge of adultery had not been proven, but accepted the allegations of cruelty, "the disgusting and revolting details" of which he declined to repeat. Citing *Cesale*, he held that corroboration was unnecessary and that the wife's demeanour while giving testimony was entirely convincing. "It strikes me as unthinkable that the story which she told was concocted. The charges are absolutely denied by the respondent, therefore a question of fact is presented which might be decided either way. I am not unmindful that the burden of proof is on the Petitioner, but notwithstanding this, as I believe the evidence of the Petitioner, I must decide accordingly".⁷⁶

Here was a far cry from most other forms of cruelty, requiring threat or injury to life or limb. Yet, as already seen in other cases, women were able to employ gender stereotyping to attract the sympathy and support of the middle class men who dominated the legal system. While the initial demands for recognition of sexual cruelty tended to come from middle class women petitioners, by the 1920s and 1930s a majority of such claims were made by working class women, the wives of labourers and railway workers. The view of women, of men, and of sexual behaviour within marriage that was represented in these demands was thus shared by women across class divisions.

The cases that followed repeated many of the same themes as earlier cases.⁷⁷

75 File C-254, RG 39 "D", PANS.

76 File C-272, RG 39 "D", PANS.

77 For the following years to 1939, the sample produced 20 cases in which some form of sexual

Husbands engaged in a number of sexual practices in the home that at least some wives found very objectionable, and when protests were made, these husbands imposed their will by force. Intercourse during menstruation seemed to be particularly objectionable to women, but complaints were also made about oral sex, intercourse during illness or pregnancy, painful intercourse, high frequency of sexual demands, and transmission of venereal disease.⁷⁸ Most of all, these wives were complaining about sexual domination and were insisting on their right to share in the control of marital sexual relations. The wife of a Halifax carpenter, for example, complained not only of intercourse during menstruation over her protests, but also of being wakened during the night to satisfy her husband's "own selfish purposes".⁷⁹ Others objected to the public demonstrations of male possessiveness implicit in sexual attentions in the presence of others.⁸⁰

Just how far the courts were willing to extend the definition of cruelty to fit the changing perceptions of women and of marriage can be illustrated by two final cases towards the end of the period under study. In 1936 the wife of a Shelburne County labourer sought a divorce on the ground of physical and mental cruelty. The physical assaults included wounding with a blunt instrument and with a knife; the mental cruelty centred on the threatening environment and the husband's aberrant sexual behaviour. He persistently demanded that his wife parade around "in the nude", despite her protests that it was improper. Once nude, he did not force her to perform any sexual acts; usually he simply wanted to admire her body. But the wife objected, feeling uncomfortable and sinful. Counsel asked her repeatedly during her lengthy testimony to explain her husband's behaviour:

Q. [Did your husband] give any reasons why?

A. He said I was his wife and he could do as he liked with me.

Q. Anything further he said?

A. He said he had bought and paid for me.

Q. He thought it was the days of slavery.

Later when the wife described her husband's preference for intercourse in unusual and (to her) painful positions, her counsel called him "a sexual pervert". The Watching Counsel, a solicitor representing the interests of society at large in

cruelty was alleged. See Files C-330, C-343, C-346, C-357, C-378, C-397, C-448, C-478, C-481, D-2, D-7, D-9, D-18, D-48/D-101, D-366, D-486, D-525, D-539, D-591, and D-696, RG 39 "D", PANS. Ritchie's attitude was clear in one case (C-343) where he listed in his judgement the husband's coercive sex during menstruation and "other evidence of a revolting nature".

78 These petitions included complaints of extra-marital sexual 'deviance' as well — indecency (File C-397), buggery (File D-48), father-stepdaughter incest (File D-9).

79 File C-343, RG 39 "D", PANS.

80 Files C-357 and C-397, RG 39 "D", PANS.

divorce cases in Nova Scotia, cautioned that using nudity as evidence of sexual cruelty was going too far and that there was nothing wrong with a husband admiring his wife's figure. But to the wife this sort of control of her body was unacceptable. The court awarded a divorce for cruelty, but failed to specify whether this particular evidence had been of weight.⁸¹

Further ground of a new type was broken in a 1938 case. Though this was an action for nullity, it contained many of the same elements as the sexual cruelty cases. Henry Taylor, a United Church minister, had married his wife Mary, a former nurse, at Bridgewater in 1930, after an acquaintanceship of five years and an engagement of two years. On their honeymoon to Prince Edward Island they shared the same bed, but no consummation occurred because he never attempted sexual intercourse (the initiative clearly lay with him, from Mary's point of view). After three months had passed and the marriage remained unconsummated, Mary finally raised the subject but he did not respond. Finally, three or four months later he broached the subject, explaining that he was incapable of sexual intercourse because of a kidney condition. Thereafter an increasingly unfriendly and antagonistic atmosphere developed in their home, and the couple moved to separate beds. After almost seven years' marriage, Henry Taylor left his wife, never to return; eleven months later Mary filed her suit. Their family doctor testified that Mary was indeed still a virgin, so that the marriage could not have been consummated. He further stated that he knew of no kidney disease which could cause impotence. The real cause of Henry's problem, according to the doctor, was that he was a homosexual; the doctor had seen him in the Windsor jail once "charged with an offence which confirmed in my mind that he was homosexual". Here was a form of sexual 'deviance' that too deserved the full rigour of the law.⁸²

While not an instance of cruelty, this case serves as a useful reminder that the legal system exercised its influence at more than one place on the spectrum of sexual behaviour by married persons. Not only was a wide variety of sexual practices increasingly punished by the court, but 'normal' sexual intercourse was also encouraged.⁸³ Of course, the continuing criminalization of the sale or distribution of birth control devices or information in Canada was part of this same process.

Beyond the rather limited (in numbers) development regarding sexual cruelty, the general area of mental cruelty is somewhat puzzling. There can be little doubt that women and their solicitors in the early 20th century frequently appealed in their petitions to the ideal of a tranquil, mutually enjoyable, and reciprocal marital relationship. References to the husband's violation of this

81 File D-486, RG 39 "D", PANS.

82 File D-591, RG 39 "D", PANS.

83 According to Biggs, *Cruelty*, pp. 182-4, sodomy or attempted sodomy had been considered a matrimonial offence at least since the late 18th century.

ideal appeared in 23.9 per cent of the petitions. But given the legal requirements and the absence of positive response from the bench, such allegations were often relegated to a minor role in the petition or in the testimony and evidence at trial, whatever their actual importance in the process of marriage breakdown. In a typical example, a 1920 petition listed seven different assaults, ranging from kicks, through beating with several household objects, to whipping with a lash. Only at the end of this list was it added that the husband had also used abusive, offensive and menacing language, including threatening to kill his wife.⁸⁴

Claims of mental cruelty tended to be of secondary importance, and their role in the jurisprudence of cruelty remained almost totally undeveloped. This offers a striking contrast to developments in England and in the United States.⁸⁵ The almost complete provincial reliance on early English precedents in this area of law and the Divorce Court's demonstrable aversion to more recent legal developments in the common law world regarding cruelty are a striking commentary on the judicial conservatism and on the deliberate shaping of family policy to follow a more conservative and stable form of marriage. The members of the Nova Scotia Divorce Court consciously adopted common law precedents in support of a relatively rigid and limited definition of cruelty. In so doing they were following the patterns noted in other areas of law and reflecting what Jennifer Nedelsky has argued was an active and principled judicial conservatism.⁸⁶

The emphasis of current scholars on the "social construction of battering" points to the failure of current institutions to deal directly with the basic causes of family violence. Judging by the response of the Nova Scotia Court for Divorce and Matrimonial Causes, this institutional failure has a considerable history in Canada. But that failure was not simply passive. Law and legal institutions both reflect and create values and attitudes, and the absence of a substantial response to marital violence implied a lack of concern that continued to reproduce abusive forms of marital behaviour.⁸⁷

Nor was the judiciary alone in its attitude and lack of substantial response. Nova Scotia was one of only three provinces in this time period not to have deserted wives' maintenance legislation (the others were Alberta and Prince Edward Island). When the province finally did pass such an act in 1941, it

84 File C-213, RG 39 "D", PANS.

85 R.L. Griswold, "Sexual Cruelty and the Case for Divorce in Victorian America", *Signs*, XI (1986), pp. 529-41; Griswold, "Mental Cruelty"; Griswold, "Law, Sex, Cruelty, and Divorce"; Hammerton, "Victorian Marriage".

86 J. Nedelsky, "Judicial Conservatism in an Age of Innovation; Comparative Perspectives on Canadian Nuisance Law, 1880-1930", in D.H. Flaherty, ed., *Essays in the History of Canadian Law* (Toronto, 1981), I, pp. 281-322; C.B. Backhouse, "Shifting Patterns in Nineteenth-Century Canadian Custody Law", in *ibid.*, pp. 212-48.

87 Biernes and Gordon, "New Scholarship", pp. 519-20; N. Oppenlander, "The Evolution of Law and Wife Abuse", *Law and Policy Quarterly*, III (1981), pp. 382-405.

32 *Acadiensis*

followed the standard elsewhere by condoning a wife's separation from her husband because of his acts of cruelty and continued his duty of providing reasonable maintenance. But the slow character of the provincial response is consistent with the judiciary's cautious treatment of cruelty as a ground for divorce.⁸⁸

Yet in the face of this conservative state posture, one is struck even more forcefully by the continuing insistence on new standards of cruelty by women in Nova Scotia. In both the private and public spheres wives sought to shape and reshape their marriages to conform more closely with their beliefs about themselves, about men and about married life. As Griswold points out, within the private world of sentiment, a "revolution, fueled by domestic ideology, was under way that hoped to 'feminize' male attitudes about personal relations".⁸⁹ Wives sought to encourage, even force, husbands to recognize and accept these new ideals. One of the means used to articulate these beliefs and to persuade others to adopt them was the divorce court. In Nova Scotia the domestic ideology had clearly penetrated private family sentiments, particularly among women, and was making major inroads at the public level as well. Women, as Veronica Strong-Boag has recently argued, were struggling domestically for better lives, and at times turned to the courts to assist them.⁹⁰ But public change was slow to come, and the judiciary played a prominent role in ensuring that the public ideal of marital stability continued to receive stronger support than did ideals of individual welfare or marital comfort (much less marital happiness).

88 *Statutes of Nova Scotia*, (1941) 4 George VI, c.8. Similar New Brunswick legislation was adopted in 1926 (16 George V, c.11).

89 Griswold, "Sexual Cruelty", p. 532.

90 V. Strong-Boag, "Pulling in Double Harness or Hauling a Double Load: Women, Work and Feminism on the Canadian Prairie", *Journal of Canadian Studies*, XXI (1986), pp. 32-52.