

A History of Cruelty in Australian Divorce

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ABSTRACT

This paper examines the concept of matrimonial cruelty in Australia during the twentieth century. Cruelty was a matrimonial offence in Australian statutes and grounds for judicial separation or divorce until 1975. Most allegations of cruelty were by wives against their husbands. Judges often espoused on men's role as husbands, their use of power and the nature of hierarchy within marriage. I examine the background of matrimonial cruelty as it developed within English common law in the Australian colonies until Federation. While claiming to be doing justice, the courts used the grounds of cruelty in a strategy to preserve hierarchy in the marriage-based family by the silencing of women and the empowering of men. The theory was that men were 'naturally' superior to women in ways that were good for the family and ultimately for social stability. Until the 1970s, the Australian man had a legal duty to control his wife as much as a wife had a duty to obey her husband. The legal endorsement of patriarchy over decades reinforced misogynist attitudes in men as much as it provoked ultimately successful feminist demands for reform. Cruelty was abolished with all matrimonial offences by the *Family Law Act 1975* however the controlling attitudes remained, to materialise in a new regime of domestic violence.

Introduction

This paper examines the legal concept of matrimonial cruelty with special reference to Australia during the twentieth century. Cruelty was a matrimonial offence in Australian statutes until 1975 and a finding of cruelty was grounds for judicial separation or divorce. Most allegations of cruelty were by wives against their husbands, although there were periods when the courts protected husbands from the apparent cruelty of their wives. Judges hearing divorce applications had many opportunities to examine male behaviour directly, according to contemporary social and legal expectations of men, and to justify or reject particular attitudes about men's role as husbands, their use of power and the extent of hierarchy within the marriage. Between the late-nineteenth century reforms and the *Family Law Act 1975* (Cth), the courts used the grounds of cruelty strategically in their larger historical project to preserve the marriage-based family. The paper begins by examining the English common law background of matrimonial cruelty, the discourse on cruelty in the Australian colonies until Federation, and the concepts of mental cruelty and constructive desertion. Finally, I analyse the judicial use of cruelty in marriage as a tool in the social management of the family.

At most times in most western cultures, male aggression at some level was accepted as typical, normal, natural and a healthy response to threat or frustration. 'Common sense'

views included that male violence was necessary and functional in the defence of self, family and community, and to defend or extend the national interest through war. The law contributed to these assumptions about male violence, helping to merge religious beliefs and scientific theories about men and to confirm male power through aggression as authoritative. In so doing, the law justified men's violence and further distinguishing men from women; that is, the law helped to gender violence.

Conversely, masculine violence helped to gender law. At times, the law depended on men's capacity for violence (police, prison guards, torturers, executioners) as governments depended on soldiers' willingness to kill. While male control was impotent without the capacity to express aggression through violence, a woman's aggression was almost impossible to justify and, in most discourses, evoked disapproval and sanctions. The notion of women's violence challenged the capacity of men to enforce their superior position in the dualist hierarchy and threatened the sexual boundaries that gendered the law. In marriage a violent woman was unnatural and a problematic conception because it weakened patriarchy and contaminated the regime of male control.

The law deemed violence by the husband, on the other hand, to be necessary to control disruption in the family and to restrain a wife who threatened the marriage by irrational behaviour or by attempting to leave the home. Only in cases where the man 'went too far', might the wife successfully complain to the police or to the divorce courts. The police could charge the husband with assault or attempted murder, but rarely did so, unless they believed that the woman's life was at risk. The divorce courts could grant the wife relief on the grounds of 'cruelty', in the form of 'divorce' *a mensâ et thoro*, judicial separation or dissolution of the marriage, but only if her evidence satisfied the contemporary judicial standards of matrimonial cruelty. The woman's decision to approach a court of law was always difficult and often dangerous, as she risked provoking her husband to further violence. At stake was not only the woman's physical wellbeing but, by jeopardising her marriage, her standing in the community, her financial survival, the custody of her children and sometimes her life.

Judicial views on cruelty were slow to change, but the law reports from the nineteenth century allow some analyses of the reasons behind the judicial reluctance to accept reforms that continued after 1900. In Australia, reported cruelty cases were rare and no articles on cruelty or other forms of domestic violence appeared in the *Australian Law Journal* from its inception in 1927 until 1963.¹ Similarly in the international *Journal of Marriage and the Family* there were no articles on cruelty or violence from its inception in 1939 to 1969. The apparent silence over matrimonial cruelty suggests not only a professional prejudice against the jurisdiction of the law of husband and wife, but conformity to judicial views reflected in the reticence to meddle in a man's family.

Cruelty cases often involved 'disobedient' wives, and it is arguable that authorities sought to shield society from the uncertain effects of their publicity.²

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¹ H. Tablo was the first to examine 'cruelty' as an aspect of law in 'Intention and Insanity in Divorce Law', *Australian Law Journal*, Vol. 37, 30 May 1963, pp.3-19 at 9-12.

² Wendy Weeks and Kate Gilmore referred to a 'conspiracy of silence' which helped to suppress women's outrage over the violence in their homes: 'How violence against women became an issue on the national

Further, it is likely that legal publishers considered matrimonial cruelty to be relatively uncontentious and 'settled'.³ Many unreported divorce cases may have involved incidents of extreme cruelty or gratuitous violence, but they were not interesting *legally* because practitioners assumed that such cases 'turned on their facts' rather than legal principle. In any case, this analysis will illustrate the changes in judicial beliefs about men in Australia using the limited reports on cruelty cases in the context of other records about marriages and the discourse on divorce.

English Common Law and 'Wife Abuse'

In England the enduring notion of male superiority contributed to the common law's expectation that men would be the head of the family and in control of their wives. Beliefs in male superiority over women survived relatively unchallenged for several centuries of western cultural development until the rise of liberalism. Judeo/Christianity provides the earliest authority for patriarchal attitudes as evident in the Old Testament, which variously authorised men's control of women.⁴ Church leaders therefore tolerated wife-abuse, up to a point, as it was also consistent with New Testament references obliging men to control their wives.⁵ Church courts seemed to authorise wife-abuse in seventeenth-century England, and the early common law responses followed the ecclesiastical rules.⁶ Church leaders supported male control of families as it reflected the patriarchal and hierarchical structure of Christianity itself. Incidents of men's extreme violence were dismissed as abnormalities, as though wife-beaters were 'mad', and not 'bad'.⁷

Overall, the ecclesiastical response deflected male violence away from the legal (fault-based) realm and afforded violent men an excuse for their behaviour. It also protected the institution of marriage and pre-empted the law's tendency over the

policy agenda', T. Dalton, W. Weeks, M. Draper and J. Wiseman (eds), *Making Social Policy in Australia: An Introduction*, Angus and Unwin, St Leonards, 1996, pp.141-153.

³ Australian matrimonial law had hardly changed since the nineteenth century until the Commonwealth passed legislation in 1959. That reform however did little more than to consolidate existing State legislation on divorce; 'Muted Voices: Women and the Matrimonial Causes Act 1959', Diane Kirkby (ed.), *Law and History in Australia*, Vol. IV, Selected Papers from the Fourth and Fifth Law Conferences at La Trobe University, 1985-1986, pp.53-63 at 53.

⁴ Genesis 2.24; also Ephesians 5:22-23: 'Wives be subject to your husband, as to the Lord. For the husband is the head of the wife as Christ is the head of the Church'; Ecclesiastes 7: 26-9: 'The wiles of a woman I find mightier than death; her heart is a trap to catch you and her arms are fetters'.

⁵ 'Do not permit women to teach, nor to have dominion over man, but to be in quietness', 1 Timothy 2:12; see also Matthew 19.5b and Mark 10.8.

⁶ In 1617, William Whatley proclaimed that beating a wife was justified in circumstances of 'the utmost extremities of unwifelike carriage', *The Bride Bush or A Wedding Sermon: Compendiously describing the duties of Married Persons: By Performing whereof, Marriage shall be to them a great Helpe, which now finde it a little Hell*, Printed in London by William Iaggard, for Nicholas Bourne, 1617, published by Theatrum Orbis Terrarum, Ltd, Amsterdam, 1975.

⁷ Martin Ingram, *Church Courts, Sex, and Marriage in England, 1570-1640*, Cambridge University Press, Cambridge, 1987, p.183; Susan Amussen claimed the church courts took a serious view towards men's non-lethal 'mistreatment of servants or wives'; *An Ordered Society: Gender and Class in Early Modern England*, Basil Blackwell, Oxford, 1988, p.167; others, such as J.A. Sharpe, found that, at least in the Essex assizes, juries were inclined to acquit men accused of killing their servants or apprentices in order not to erode 'godly discipline'; 'Domestic Homicide in Early Modern England', *The Historical Journal*, Vol. 24, No. 1, 1981, pp.29-48, at 38.

following centuries to diminish the significance of men's violence towards their wives. Some local communities in medieval England and Europe responded to men's violence well before legal systems saw any need to regulate wife-beating. Several English communities used shaming rituals, known variously as 'badger's bands' of 'rough music', where people collected to bang 'pots, pans, kettles, horns', to embarrass and warn an 'overly-violent' husband.⁸ In Italy and France, a similar practice, called *charivari*, developed as a community censure of men who beat their wives.⁹ In addition, particularly during the seventeenth-century, a folk discourse emerged in England and European communities where ballads, plays and pamphlets satirized wife-beaters and killers.¹⁰

The law's reluctance to get involved in men's oppression of their wives stemmed from the principle of unity. Under that notion, the common law constructed a married couple as the one person, and as that person was embodied in the husband, a married woman could not complain about her husband's violence.¹¹ The law was loath to enter a man's home to protect a wife who was, in law, owned by and *already protected* by the husband. Therein lay the rationale for a charge of 'petty treason' against a wife who killed her husband, an aggravation to a charge of murder and increasing the penalty from mere death by hanging to burning at the stake or hung, drawn and quartered.¹²

According to a 1632 treatise, 'A man may beat an outlaw, a traitor, a pagan, his villein or his wife because by the Law Common, these persons can have no action.'¹³ Thus, in *Cloborn's Case* in 1629, a woman complained to an ecclesiastical court that her husband 'gave her a box on the ear, spat in her face, whirled her about and called her a damned whore'.¹⁴ The man claimed he had, by 'the law of the land', chastised his wife for a reasonable cause and the court advised him simply to 'tender a justification' for the assault. Similarly, in *Bradley v Wife* in 1663, the court assured the husband that he had a right to 'chastise' his wife 'because by law, he had the power of castigation'.¹⁵

⁸ W. Cooper, *Flagellation and the Flagellants: A History of the Rod in All Countries*, Reeves, London, 1860, pp.30 and 390; note, however, that Elizabeth Pleck found that English shaming rituals originally occurred as a community response to 'disorderly women'; *Domestic Tyranny: The Making of Social Policy against Family Violence from Colonial Times to the Present*, Oxford University Press, New York, 1981, pp.214 and 221.

⁹ R. Dobash and R. Dobash, 'Community Response to Violence Against Wives: Charivari, Abstract Justice and Patriarchy', *Social Problems*, Vol. 28, No. 5, 1981, pp.563-81.

¹⁰ Frances E. Dolan, *Dangerous Particulars: Representations of Domestic Crime in England 1550-1700*, Cornell University Press, Ithaca and London, 1994, Ch.III, pp.89-120.

¹¹ The eighteenth-century jurist William Blackstone described some of effects of unity in *Commentaries on the Law of England*, Book 1, (Facsimile of 1st ed. 1765-69), Chicago, 1979, p.430, 'the very being or legal existence of the woman is suspended during the marriage'; and also at p.442.

¹² The same laws applied to a servant killing his master or a man killing a clergyman; *Treason Act* 1351, (25 Edw. III St. 5 c. 2). Although heavily amended this Act remains in English law.

¹³ *The Lawes resolutions of womens rights: or, The lawes provision for woemen*. S.T.C. 7437. Preface signed I. L. [Sir Egremont Thynne?], epistle signed T. E. [Thomas Edgar?], London, printed by the assigns of John More and are to be sold by John Grove, 1632.

¹⁴ *Cloborn's Case* (1629), Hetl. 149; 124 ER 414; S.N. Grant-Bailey, *Lush on the Law of Husband and Wife*, (1884,1896,1910) London, Stevens and Sons Limited, 1933, p.27.

¹⁵ *Bradley v Wife* (1663), in A.R. Cleveland *Women Under English Law*, Hurst and Blackett, London, 1896, p.222; also in *Lord Leigh's Case* (1674) 3 Keb 433; 84 ER 807, Hale CJ. held that 'salv moderata

‘Cruelty’ begins

The legal notion of cruelty originated in ecclesiastical law as a ground for 'divorce' *a mensâ et thoro*, an early form of judicial separation, since ecclesiastical law allowed no true divorce.¹⁶ The common law's promotion of the patriarchal family structure grew from ecclesiastical rules and the discourse of men's authority over women and children as a natural right. Where there are records, they confirm that the courts constructed matrimonial cruelty to reinforce male control within the family. One method was to pitch the standard of unacceptable cruelty at a high level, difficult for a wife to prove, thereby grounding acceptable controlling behaviours by the man for which the wife had no complaint in law.

In the eighteenth century the records suggest some female to male cruelty, but coinciding with an apparent increase in men's cruel behaviour towards their wives.¹⁷ In a small sample, two of ten cruelty cases that Hunt found from the Consistory Court of London between 1711 and 1713 involved allegations of women assaulting their husbands, suggesting that cruelty was predominantly what husbands did to wives.¹⁸ It seems that wife abuse was not unusual at that time, as men seldom denied they beat their wives and often asked for sympathy for having to resort to such measures.

Abstract legal principles soon emerged to corroborate the ecclesiastical rules about the hierarchy of relations between wife and husband. In 1736 the 'statutory declaration' of Bacon's Abridgment confirmed the legitimacy of men's use of violence.¹⁹ Accordingly, a husband 'hath by law power and dominion over his wife, and he may keep her by force within the bounds of duty, and may beat her, but not in a violent or cruel manner'.²⁰ In the same year (1736), Hale's Pleas stated that a husband could rape his wife at will, and 'restrain and chastise' her, providing he did not breach

castigatione' in the register did not allow a man to beat his wife for her extravagance, but rather admonition and confinement to the house; writing in 1819, W. O. Russell referred to the seventeenth-century case of Crompton and Hale where the judges convicted a man who killed his wife by beating her with a pestle, but only because a pestle was not an appropriate instrument of correction; *A Treatise on Crimes and Misdemeanors*, (2 vols), London, 1819, Vol. 1, p.632.

¹⁶ Adultery was the other ground for divorce *à mensâ et thoro* under ecclesiastical law; some texts included sodomy (or 'unnatural acts') and attempted sodomy as further grounds for this remedy prior to 1857: C.E.P. Davies, 'Matrimonial Relief in English Law', in R.H. Graveson and F.R. Crane (eds), *A Century of Family Law, 1857-1957*, Sweet and Maxwell, London, 1957, pp.311-351 at 314; Joseph Jackson, *The Formation and Annulment of Marriage*, London, Butterworths & Co., 2nd ed., 1969, p.72.

¹⁷ Margaret Hunt, 'Wife Beating, Domesticity, and Women's Independence in Eighteenth-Century London', *Gender and History*, Vol. 4, No. 1, 1992, pp.10-33 at 16.

¹⁸ Hunt found that 50% of cases involving violence included attempts by the men to send their wives to a bridewell (house of correction) or madhouse; in only one case was the wife accused of putting her husband in a madhouse (*Alderman vs. Alderman*); Hunt, 'Wife Beating', 1992, p.19, n.33; also at p.18, n.29.

¹⁹ Matthew Bacon, *Bacon's Abridgment*, London, 1736 (Crom.28; F.N.B. 80; Hetl. 149 cont.; 1 Sid. 113, 116).

²⁰ This quote from Matthew Bacon, *Bacon's Abridgment*, London, 1736, was discussed in twentieth-century texts such as S.N. Grant-Bailey, *Lush on the Law of Husband and Wife*, (1884,1896,1910) London, Stevens and Sons Limited, 1933, p.25; it was also considered in the Australian case of *La Rovere v La Rovere* [1962] 4 FLR 1 at p.7.

the rule of thumb by striking her with a stick thicker than his thumb, or in Wales, with a stick longer than his forearm.²¹ In 1753, William Blackstone explained the husband's right to apply 'moderate correction' to his wife by applying 'domestic chastisement, in the same moderation that a man is allowed to correct his servants or children;²² Even as late as 1872, Jeaffreson claimed that while it was possible in law to 'thrash a woman with a cudgel', it was not permissible to knock her down with an iron bar.²³ The harsh language here depicts attitudes that seem distant from current beliefs and practices. While social liberalism slowly modified the rules of patriarchy, the attitudes underlying male control in families proved resilient.

Liberal Reforms

Liberalism, in the forms of feminism and individualism, led to significant reforms in divorce laws during the second half of the nineteenth century. Both individualism and feminism were supported by the philosophy of 'social Darwinism' and ideas about 'progress' and the evolution of western civilization. Superficially, individualism was contrary to the doctrine of unity, but the courts applied it to individual (male-headed) families, rather than people, as the primary unit of society. Feminism was a more effective aspect of liberalism since it improved the status of women by directly promoting women's rights, suffrage and sexual 'equality'. In Britain and America the writings of Mary Wollstonecraft in 1792, Harriet Taylor Mill in 1851, John Stuart Mill in 1869 and Frances Power Cobbe in 1872 contributed to social and political developments in society and politics, and ultimately to legal reforms.²⁴

The first reform to acknowledge and restrict male aggression in families emerged in 1853, with passage of the English *Act for the Better Protection of Aggravated Assaults Upon Women and Children*.²⁵ The preamble stated that 'the

²¹ Rape: Lord Sir Matthew Hale, *History of the Pleas of the Crown*, (1736) Vol. 1, Ch. 58, at p.629; *Forster v F.* (1790), 1 Hag. Con. 144 at p.145, and the Australian case of *R v McMinn* [1982] VR 53 at p.57; 'Rule of thumb' and 'Rule of forearm': 'Some men, not inclined to be severe, used to restrict the size of the thickness of the rod to the little finger', Cooper, *Flagellation*, p.388; Madam Justice Wilson, (Canadian Supreme Court) *R v Lavallee* (1990) 1 SCR 852 at p.872; Professor Christine Boyle, Walter S. Owen Lecture, 10 September 1992, University of British Columbia, Vancouver, cited in Regina Graycar 'Gendered Assumptions in Family Law Decision Making', *Federal Law Review*, Vol. 22, 1994, pp.278-299 at 280.

²² Sir William Blackstone, *Commentaries on the Laws of England*, 4th edit. (1753), Clarendon Press, Oxford, 18th. ed. 1829, Vol. 1, p.444, (contains references *inter alia* to 1 Hawk. P.C. 130, 1716).

²³ John Condy Jeaffreson, *Brides and Bridals*, Hurst and Blackett, London, 1872; an American example was *Fulgham v State*, 46 Ala. 143, 146-147 (1871)., where the judge stated: 'The privilege, ancient though it may be, to beat her with a stick, to pull her hair, choke her, spit in her face, or kick her about the floor, or to inflict upon her like indignities is not now acknowledged by our law'.

²⁴ Mary Wollstonecraft, *A Vindication of the Rights of Women* (1792), W.W. Norton, New York, 1974; Harriet Taylor Mill, 'Enfranchisement of Women' (1851), in Rossi (ed.), *Essays on Sex Equality*, Chicago, University of Chicago Press, 1970, pp.91-121; John Stuart Mill, *The Subjection of Women* (1869), in *ibid.*, pp.125-242; Frances Power Cobbe, *Darwinism in morals, and other essays*, reprinted from the Theological and Fortnightly reviews, Fraser's and Macmillan's magazines, Williams and Norgate, London and Edinburgh, 1872, and 'Wife-Torture in England', *The Contemporary Review*, Vol. XXXII, Strahan and Company Ltd, London, April - July, 1878, pp.55-87.

²⁵ The full title of the Act was *Act for the Better Protection of Aggravated Assaults Upon Women and Children, and for Preventing Delay and Expense in the Administration of the Criminal Law*, 16th Victoria, c.30, (1853).

present law has been found insufficient for the protection of women and children from violent assaults'; however subsequent prosecutions under the Act failed to curb the high incidence of wife-beating, especially among the poor in English communities. Later initiatives included the *Matrimonial Causes Act* 1857 (Imp) and the English Married Women's Property Acts of 1870 and 1882 which were reproduced by the Australian colonies.²⁶ Those Acts enabled judicial (instead of Parliamentary) divorce, and marked the erosion of the principle of unity. However, as Frances Cobbe observed in 1878, the Acts allowing separation and divorce were not available to the majority of those in greatest need, poor married women.²⁷ Further, under the 1857 Act and its colonial equivalents, a woman could not dissolve a marriage on the basis of her husband's cruelty alone; she also had to prove his adultery.²⁸ Proof of cruelty by itself might have entitled a woman to a judicial separation, but the husband's behaviour had to be serious enough to have warranted a divorce *à mensâ et thoro* in the old (ecclesiastical) law, thus preserving the patriarchal values of the precedent cases on cruelty.²⁹

In 1874, Colonel Egerton Leigh made an impassioned plea in the House of Commons to increase the punishment for aggravated assaults on women, as a measure to reduce the high incidence of wife beating.³⁰ Ultimately, Leigh was outwitted and his amendment failed, but his concerns about the inadequacy of the laws to protect wives from violent husbands were shared by the majority of staff and magistrates in the lower courts that handled most of the cases. According to a 1875 Home Office survey of magistrates and sheriffs, there was general agreement that the law was ineffective in protecting wives.³¹ In 1876, according to a conference paper by Serjeant Pulling, 'No one who has gained experience of wife-beating cases, can doubt that our present system of procedure seems as if it were designed not to repress crime, but to

²⁶ The *Divorce and Matrimonial Causes Act* (Imp) 1857 introduced judicial divorce which, at least theoretically, enabled divorce for many people to whom Parliamentary dissolutions had not been available for reasons of class (political access) and costs; the *Married Women's Property Act* (Imp) 1870 mitigated the doctrine of 'unity' and enabled a married woman to retain her own earnings, any personal property she may receive through an intestacy and up to £200 which she might accrue by deed or will; the *Married Women's Property Act* (Imp) 1882 abolished many of the remaining formal effects of the doctrine of unity by enabling a married woman to own real property, to enter into contracts, and to sue and be sued in contract and in tort.

²⁷ According to Frances Cobbe, 'It is impossible to imagine a matter in which the existence of "one law for the rich and another for the poor" is more unrighteous and intolerable than this', 'Wife-Torture in England', *The Contemporary Review*, Vol. XXXII, Strahan and Company Ltd, London, April - July, 1878, pp.83-84.

²⁸ Conversely, the husband could divorce his wife on the sole proof of her adultery, *Matrimonial Causes Act* (Imp) 1857, s.27; other individual grounds for judicial separation were adultery and desertion for two years: *Matrimonial Causes Act* (Imp) 1857, s.16.

²⁹ What constituted 'cruelty', or 'legal cruelty' varied over time: 'It is undoubtedly cruelty to leave a wife to starve, but has it ever been held to be "legal" cruelty?', Jeunne, P., *Jeapes v Jeapes* (1903) 89 LT 74; TLR, Vol. 19, p.451 at 452. According to Biggs, physical violence was an essential ingredient of matrimonial cruelty until 1790, J.M. Biggs, *The Concept of Matrimonial Cruelty*, University of London, The Atholone Press, 1962, p.20.

³⁰ Hansard suggests that Leigh was bluffed by Disraeli who persuaded him to withdraw his proposed amendment (to allow flogging of wife-beaters), on the promise that 'His Majesty's Government will bear in mind what is evidently the opinion of the House', Benjamin Disraeli, Hansard (UK), Vol. ccxix, (1874), p.396.

³¹ *Reports on the State of the Law relating to Brutal Assaults*, a 'British Parliamentary Blue Book', London, 1875.

discourage complaints.³² That observation remained pertinent in English and Australian law for the next century, at least.

There was some amelioration of women's lot following the *Matrimonial Causes Act* 1878 (Imp) that extended the injunction powers to enable courts to protect the wife in cases where the husband had been convicted of assault.³³ The same Act allowed women to petition for judicial separation and maintenance (but not divorce) if their husbands were convicted of assaulting them.³⁴ In addition, a further reform in 1882 abolished the formal effects of the doctrine of unity.³⁵ Contrary to the spirit of reforms, however, many courts continued to allow 'reasonable' discipline by husbands for the 'legitimate' correction of their wives. It was not until the 1891 appeal case of *R v Jackson* that the Law Lords found, against several centuries of judicial opinion, that a husband had no legal right to capture and forcibly detain his 'errant' wife.³⁶

Many judges believed that the equality of women and men was a radical idea, and allowed physical discipline as sometimes necessary for a man to maintain control in his family. The difficulty for legal practitioners was deciding when a man's legitimate discipline of his wife crossed into the area of matrimonial cruelty. To the extent the Acts allowed some women to apply for judicial separation or protection orders, they improved the formal position of women without changing the institutional practices in how the courts administered the law.³⁷ Consequently, the political reforms did not seriously challenge masculine dominance in the family, despite the contemporary debates about women's rights and the notion of equality. The political developments arose from a new emphasis on 'the individual' that purported to include women but, perversely, the effect of the reforms helped confirm the patriarchal notion of the *individual family*, each represented by a man, as the paramount unit in society.³⁸

The companionate marriage, as an expression of sexual equality in families that had slowly emerged in the eighteenth century was boosted by early feminist

³² Mr. Serjeant Pulling, paper presented at Social Science Congress, *Transactions*, Liverpool, 1876, p.345; reported by Cobbe, 'Wife-Torture', p.81.

³³ This injunction was adopted by the Australian colonies separately, for example by Western Australia in *An Act to amend the Ordinance to regulate Divorce and Matrimonial Causes*, 43 Victoriae, No. 9, (1879), s.3.

³⁴ A 'non-cohabitation' order together with a maintenance order was available under the *Matrimonial Causes Act* (Imp) 1878, s.4.

³⁵ See above, n.26.

³⁶ *R v Jackson* [1891] 1 QB 671, per Lord Halsbury, L.C. at p.682, 'there is no power by law such as the husband claims to exercise,' and Lord Esher M.R. at p.684 'it is not and never was the law of England that the husband has such a right of seizing and imprisoning his wife as contended'; these views contradicted established law from several sources: *Lord Leigh's Case* (1674), 3 Keble, 433; (26 Car. II) Case No. 37 in B.R., per Hale C.J; *Mrs Cochrane's Case* (1840), 8 Dowl. 630, per Coleridge J..

³⁷ During the 1890s at the Sydney Divorce Court, the registry staff avoided petitions based on cruelty, as staff handed women already-completed forms alleging desertion as the grounds for the petition; *Divorce in Nineteenth Century New South Wales*, New South Wales University Press, Sydney, 1985, p.266.

³⁸ Until the late-nineteenth century 'family members' in England and 'upper-class' colonial society included servants who were sometimes at risk of violent and/or sexual abuse by the male patriarch; Susan Amussen, *An Ordered Society: Gender and Class in Early Modern England*, Basil Blackwell, Oxford, 1988, p.167; J.A. Sharpe, 'Domestic Homicide in Early Modern England', *The Historical Journal*, Vol. 24, No. 1, 1981, pp.29-48, at 38.

discourse and the divorce reforms in the late-nineteenth century.³⁹ Clearly, the 'separate but equal' idea was inconsistent with male control under traditional patriarchy, and the notion of 'separate realms' developed as a compromise. Separate realms allowed the law to retreat from its historical responsibility for the family by handing more responsibility for its control to the husband.⁴⁰

The woman's private realm of the family, children and domesticity was subjective, personal and private. It contrasted with the public realm of the man, which became associated with formalities, the capacity to be objective, and responsibilities for government, business and law. Importantly however, the woman's realm of the family was subservient to the husband's ownership of it. The combined effect of separate realms and the principle of unity ensured the husband was responsible not only to protect his family from outside threats, but from disruptions *within*, such as a disobedient or non-submissive wife. Ultimately, in England around 1900 the male-headed family was secure as the basic unit of society. The reforms allowed women to leave or divorce their husbands in 'severe' cases of male violence, despite the discrimination and social ignominy towards divorcées and the employment and financial difficulties facing single mothers.

Cruelty in Nineteenth-Century Australia

Wife-beating was not a concern for Australian colonial authorities. Until the 1850s a severe shortage of women affected the marriage rates in the colonies.⁴¹ Initially, some men married to secure sexual access and companionship with a woman, while women, who were mostly convicts, married as soon as possible to gain some protection against marauding males.⁴² However, while a husband offered a woman some protection from rape and assault by other men, women were commonly abused by their husbands.⁴³

³⁹ Lawrence Stone, *The Family, Sex, and Marriage in England 1500-1800*, New York: Harper and Row, 1977, pp.326-7, 404.

⁴⁰ There is some evidence that the law's retreat from formal involvement in families began in the seventeenth and eighteenth centuries, according to L.J. Miller in 'Violent Families and the Rhetoric of Harmony', in *British Journal of Sociology*, Vol. 41, No. 2, 1990, pp.263-88.

⁴¹ The history of convict transportation produced a sex imbalance in all colonies except South Australia; the total colonial population in 1788 was 775 men and 220 women; by 1836 there were 85,044 colonial men compared with 33,760 women; Wray Vamplew (ed.), *Australians: Historical Statistics*, Sydney, 1987, POP pp.27-28.

⁴² Gordon A. Carmichael, 'From Floating Brothels to Suburban Semirespectability: Two Centuries of Nonmarital Pregnancy in Australia', in *Journal of Family History*, July 1996, pp.281-315, at 283; soldiers of the regiment sometimes had their choice of the women convicts as concubines and occasionally married them so that the women and their children could accompany the men home to England at the expiry of their terms; Governor Macquarie to Viscount Castlereagh, 30 April 1810, *Historical Records of New South Wales*, Vol. 7, p.351.

⁴³ Portia Robinson found, for example, that most murders of women following European colonisation of Australia involved women killed by their male partners; 'The First Forty Years', in Judy Mackinolty and Heather Radi (eds), *In Pursuit of Justice: Australian Women and the Law 1788-1979*, Hale & Iremonger, Sydney, 1979, pp.1-16; Marilyn Lake agreed from her analysis of personal letters and court proceedings that 'domestic violence' was not only 'widespread' in nineteenth-century Australia but 'taken for granted'; 'Intimate Strangers' in *Making a Life: A People's History of Australia Since 1788*, Verity Burgmann and Jenny Lee (eds), Fitzroy, 1988, pp.156-160; Golder found that most of women's petitions in her study of divorce in late-nineteenth century Sydney cited the husband's 'cruelty'; Hilary Golder, *Divorce in Nineteenth Century New South Wales*, New South Wales University Press, Sydney, 1985, p.172, Table 5.

Many contemporary journals and letters mention violence towards women suggesting it was more prolific than official records or court cases show.⁴⁴

The lack of official records and court reports on wife abuse suggest that women had little recourse to the courts. Where records have survived the courts appear to be particularly harsh. One early example was the judicial response to Deborah Ellam Herbert's complaint at Sydney in December 1788 that her husband John had assaulted her after a neighbour's pigs got into their vegetable patch. One record suggests Judge Advocate Collins sentenced the woman to receive twenty-five lashes and to be returned to her husband.⁴⁵ A woman had to choose to either put up with the wife-beating, leave and risk the danger of being an unattached woman and the legal consequences of deserting her marriage, or apply for divorce and endure the legal double standard in fault-based divorce. Prior to the reforms, to divorce her husband a woman had to prove her husband's adultery plus an 'aggravation' such as cruelty, bigamy, bestiality or incest.⁴⁶ A man only had to prove his wife's adultery for a divorce.

After the English Acts in 1878 and 1882, there were debates in the Australian colonies over the extent to which the reforms should be followed.⁴⁷ In New South Wales in the 1880s, for example, the *Bulletin* led a masculinist resistance to the reforms, consistent with that journal's history of supporting white male issues against those of women and other races. At one stage, the *Bulletin* campaigned perversely in support of divorce reforms to favour *men*, not women.⁴⁸ The newspaper's 'bohemian' editor, J. F. Archibald, argued that men's violence towards their wives was a simple matter of excessive alcohol and that the prosecutions of violent men were tactical moves by the police: 'it would seem that there is ... a desire on the part of the wallopers to prove the necessity for passing the new Divorce Act'.⁴⁹

⁴⁴ François-Maurice Lepaillieur, a French-Canadian, wrote from Parramatta in 1841: 'We hear more women crying in the night here than birds singing in the woods during the day'; F. Murray-Greewood (ed.), *Land of a Thousand sorrows: the Australian Prison Journal 1840-42 of the Exiled Canadian Patriote, François-Maurice Lepaillieur*, Melbourne, 1980, p.94; Penelope Selby wrote from Port Phillip in 1849: 'Another peculiarity of this country is that men, gentle and simple, are rather fond of beating their wives - a gentleman residing in Belfast killed his the other day. He had not been married six months'; quoted in L. Frost (ed.), *No Place for a Nervous Lady*, Melbourne, 1983, p.181.

⁴⁵ Marlene Herbert Goldsmith, 'The Readiness is All: A Cautionary Word', in *Political Correctness*, Hodder & Stroughton, Rydalmere, 1996, p.48.

⁴⁶ *Divorce and Matrimonial Causes Act 1857 (Imp)*, s.27

⁴⁷ See nn.36-38 Golder, *Divorce*, 1985, Chapter Two, 'The Politics of Divorce', pp.46-99.

⁴⁸ *Bulletin*, 28 March 1885, cartoon entitled 'Relief'; referring to men's maintenance obligations, the *Bulletin* argued that men needed relief from the 'holy chains of matrimony'; in Melbourne, the *Bull-Ant* showed similar masculinist opinions, but it lasted for a short time only; Marilyn Lake described how these journals presented women generally as 'spoilors of men's pleasures'; 'The Politics of Respectability: Identifying the Masculinist Context' in *Historical Studies*, Vol. 22, No. 86, April, 1986, pp.116-131 at 119.

⁴⁹ *Bulletin* 5 June 1886; there was a continuing attempt by some politicians in New South Wales to increase the statutory penalties for assault, especially by men against women and children: NSW Parliamentary Debates, 1st. Series, No. 8, 1883-84, p.621. Marilyn Lake argued that the *Bulletin* was 'an exponent of the separatist model of masculinity', and almost defensive of the perpetrators who were brought to court for 'wife-beating', in 'The Politics of Respectability: Identifying the Masculinist Context' in *Historical Studies*, Vol. 22, No. 86, April, 1986, pp.116-131, at 126; Lake was the first to identify 'masculinism' in Australia as a conservative political force in opposition to feminist demands for legal and social reforms of practices that discriminated against women.

Between 1890 and 1910 as Judith Allen observed, popular newspapers continued to trivialise or condone wife-beating, which suggested that the practice was a familiar and visible phenomenon.⁵⁰ Around the same time, less popular journals such as the *Dawn* lobbied with small success for the New South Wales government to assist boarding homes and refuges for the victims of violent husbands and fathers.⁵¹ Despite the reforms that 'extended' the divorce laws allowing women to apply for separation and divorce in some situations, Australian authorities hoped to 'protect' families by preventing marriages from 'breaking down'. Their simplistic method was to restrict access to divorce and separation, and encourage women to submit to male control.

More than wife-abuse, a major concern in New South Wales and Victoria during the 1890s was the decline in the legitimate birthrate (the 'demographic transition').⁵² With the imminence of Federation, the concern was to maximise the birthrate and to secure the future wellbeing of the nation. Political attitudes were influenced more by nationalist concerns than complaints about wife-abuse. In any case, the liberal reformers prevailed and, prior to 1900, most of the Australian colonies introduced reforms in criminal law and the law of husband and wife.⁵³ Generally, the reforms improved the theoretical capacity for women to escape their violent husbands by increasing the courts' power to convict abusive men of assault and to recognise cruelty as a grounds for separation and divorce.⁵⁴ The 1892 amendment in New South Wales allowed a woman to divorce her husband if she could prove that he had, for a continuous period of three years, been an 'habitual drunkard' and 'habitually been guilty of cruelty towards her', or, for a period of one

⁵⁰ Judith Allen, 'The invention of the pathological family: a historical study of family violence in N.S.W.', in Carol O'Donnell and Jan Craney (eds), *Family Violence in Australia*, Longman Cheshire, Melbourne, 1982, pp.1-27 at 10. Marilyn Lake argued that the *Bulletin* was 'an exponent of the separatist model of masculinity', and almost defensive of the perpetrators who were brought to court for 'wife-beating', in 'The Politics of Respectability: Identifying the Masculinist Context' in *Historical Studies*, Vol. 22, No. 86, April, 1986, pp.116-131, at 126; Lake was the first to identify 'masculinism' in Australia as a conservative political force in opposition to feminist demands for legal and social reforms of practices that discriminated against women.

⁵¹ *The Dawn*, Vol. 5, No. 8, 18 September 1892, p.11

⁵² In Australia the birthrate was in continual decline from 1860 until the mid 1930s and was blamed variously on 'economic downturns', the postponement of marriage and increased usage of contraception; T.A. Coghlan, (NSW Government Statistician) *The Decline in the Birth Rate of New South Wales*, Sydney, 1903.

⁵³ *Matrimonial Causes Amendment Act 1881* (NSW); *Divorce Act 1889* (Vic); *Divorce Amendment and Extension Act 1892* (NSW), s.1(b) and (d); *Matrimonial Causes Act 1899* (NSW), s.14; *Divorce Amendment Act 1911* (WA) (No 7. of 1912), s.23; also *Marriage Act 1928* (Vic), s.77; *Matrimonial Causes Ordinance 1932* (ACT), s.3(2); in the original statutes cruelty enabled divorce providing it was proved in conjunction with other grounds such as adultery or drunkenness. After 1901 most States amended their statutes to recognise cruelty simpliciter as grounds for divorce in some situations and increasing the capacity of courts to convict men for assaulting their wives.

⁵⁴ In New South Wales, according to Golder, after the 1881 Act most petitioners for judicial separation filed on the grounds of cruelty and, while men were frightened of public accusations of adultery, it seems unlikely 'that [men's] careers and businesses were more vulnerable to allegations of adultery than to allegations of persistent and gross cruelty', *Divorce*, 1985, p.207.

year, had repeatedly assaulted and cruelly beaten her, or, during the previous year, had been convicted of seriously assaulting or of attempting to murder her.⁵⁵

However, the need for liberal reform was not so evident to the Australian judiciary or the police. Despite the *Bulletin's* comments about the 'wallopers', in some places police practice and official policy was not to interfere in 'minor assaults' by a man on his wife.⁵⁶ In most Australian colonies, 'police culture' was sympathetic to the world-view of controlling men, and slow to change.⁵⁷ The initial attitude of the police towards a report of wife-abuse often determined the success of the subsequent events in protecting the wife. For example, the husband's perception of a limited police response to his violence was likely to reinforce his dominant attitude towards his wife. Similarly, a moderate response by a court to a woman's allegations of her husband's cruelty and abuse tended to confirm the man's attitude and encourage his controlling behaviour, as it dissuaded the wife from further complaint. As the cases below show, *some* judges actively resisted the statutory reforms that were intended to help women leave their violent husbands.

In addition, legal costs limited the effectiveness of the law reforms in protecting women, especially given the complexity of the evidence necessary to prove cruelty when the husband opposed the petition.⁵⁸ Consequently many petitions were based on other grounds, such as desertion, even though men's cruelty was a common complaint of petitioning wives.⁵⁹ Allen found that between 1892 and 1939 less than one percent of divorces in New South Wales were petitioned on the grounds of cruelty, while 75 per cent of wives referred to their husband's violence in their testimony.⁶⁰ While cruelty could be pleaded as a ground for separation, prior to the divorce reforms

⁵⁵ *Divorce Amendment and Extension Act* (NSW) 1892, s.1(b) and (d); *Matrimonial Causes Act* (NSW) 1899, s.14; *Divorce Amendment Act* 1911 (WA), s.23; *Marriage Act* 1928 (Vic), s.77; *Matrimonial Causes Ordinance* 1932 (ACT), s.3(2).

⁵⁶ In 1905 New South Wales police were instructed not to interfere in 'domestic quarrels' and that men should not be arrested for 'minor assaults' on their wives; Sir Daniel Stephen, *Handbook for police and police magistrates in N.S.W.*, Sydney, 1905, pp.62-63.

⁵⁷ Matrimonial cruelty was not a criminal offence, but police had a legal obligation to arrest and charge a person for assault where there was sufficient evidence to prosecute; for example, under the *Divorce Amendment and Extension Act* 1892 (NSW) s.1(d), a woman could only divorce her husband for cruelty if he was recently convicted in a criminal jurisdiction for assaulting her (or, alternatively under s.1(a), if she could prove he had been habitually cruel for a period of three years); in Victoria, the alternative to the husband's conviction for assault could be proof that he had repeatedly during one year assaulted and cruelly beaten the petitioner, *Divorce Amendment Act* 1890 (Vic) s.11(e).

⁵⁸ Golder found in New South Wales that it was difficult to know how some women afforded their divorce unless they were financed by other men who wanted to marry them; *Divorce*, 1985, p.196; after Judge Windeyer extended the *forma pauperis* provisions in 1893 by amending, for example, Rule 32 of the Rules of the Supreme Court of New South Wales, the effect was an immediate increase in petitioners; in *Meadham v Meadham* (1915) 32 NSW WN, 29, Judge Gordon noted that 'for many years in this court' solicitors had charged petitioners as little as £5, but the costs would be much higher in the event of the husband's denial of cruelty accusations.

⁵⁹ Allen found in New South Wales that men's violence was of 'paramount importance' as an underlying factor in divorce, although even the reformed divorce laws had to be 'manipulated' to afford sufficient protection; for example between 1889 and 1939, 66% of divorces were granted on the grounds of desertion, 'Pathological Family', 1982, p.16.

⁶⁰ According to Allen, 150 pleadings of cruelty appeared in a total of 26,313 petitions for divorce in NSW between 1892 and 1939, 'Pathological Family', 1982, at 16 and n.55. *New South Wales Statistical Registers*, 1892 – 1939.

it was seldom sufficient to grant divorce; after the reforms cruelty required evidence of serious assaults over one year in Victoria (three years in New South Wales and four years in Western Australia), or of the husband's conviction for assault.⁶¹

The economic and social position of the couple often affected the outcome of the husband's violence; poor men were more likely to be prosecuted for assaults on their wives, while similar violence by *petit bourgeois* men would lead to civil actions for judicial separation in divorce proceedings.⁶² Typically, in the later case, a wife would leave her violent husband who would later accuse her of desertion and petition for restitution of conjugal rights in an attempt to avoid an order for maintenance.⁶³ Several studies found that middle-class men used violence more sporadically, often in frustration over a specific incident, compared with working-class men who used violence more consistently and were more likely to kill their wives if a bashing 'went too far'.⁶⁴ Alcohol abuse by men seemed to be a continuing problem, however, and some courts in the 1870s and 1880s allowed it as a complete defence for men charged with wife-killing.⁶⁵

Although the *formal* relevance of matrimonial cruelty had increased in Australian jurisdictions by the beginning of the twentieth century, there is little evidence that women's safety had improved as a result. The courts often dismissed the allegations of men's cruelty in women's petitions for judicial separation or divorce and encouraged women to return to their husbands and to adopt a more submissive attitude. The increased complaints of women following the divorce reforms had made men's oppression of their wives more 'visible', but the petitions also gave the courts opportunities to promote the idea of separate realms where the private (female) was subservient to the public (male). The message for men was that the court would *expect* a husband to discipline his wife, providing he kept physical punishment and correction to a reasonable level. However, if women accepted their role, men would have no call to discipline them, marriages would be saved, the population boosted and the nation

⁶¹ For example Golder found that 30 out of 47 'female petitions' for divorce in the Sydney registry from 1873 to 1881 involved an allegation of cruelty; *Divorce*, 1985, p.172, Table 5.

⁶² Judith Allen, 'The invention of the pathological family: a historical study of family violence in N.S.W.', in Carol O'Donnell and Jan Craney (eds), *Family Violence in Australia*, Longman Cheshire, Melbourne, 1982, pp.1-27.

⁶³ The reforms allowed cruelty to be a wife's defence to a husband's suit for the restitution of conjugal rights; also, it was a 'just cause' for a wife withdrawing from cohabitation in a desertion suit, a 'discretionary bar' (*Matrimonial Causes Act* 1899 (NSW) s.20 and 35, and *Matrimonial Causes and Personal Status Code* 1948 (WA) s.4 and 27) and grounds for reviving condoned adultery (*Bertram v Bertram* [1944] P.59 (C.A.)).

⁶⁴ Allen's data showed that husbands killing wives by bashing ranged from 50% of all femicide cases in the 1880s to 11% in the 1930s; 'Pathological Family', 1982, p.4; several historical references in early studies concerning England, the United States and Australia confirm that while wife abuse happened in all socio-economic classes, most of the criminal assault charges involved working class men and most of the matrimonial cases involved middle or petit-bourgeois class men; Del Martin, *Battered Wives*, Glide Publications, San Francisco, 1976, pp.19-20; D. M. Moore (ed.), *Battered Women*, Beverley Hills, 1979, pp. 15-16; *Report of the New South Wales Task Force on Domestic Violence*, Sydney, Premier's Department, Sydney, 1981, pp.32-33.

⁶⁵ Kay Saunders examined unreported cases of wife-abuse in colonial Queensland and found several cases where men were acquitted of killing their women partners in situations where the men had been drunk or even 'slightly intoxicated'; 'The Study of Domestic Violence in Colonial Queensland: Sources and Problems', *Historical Studies*, Vol. 21, No. 82, April 1984, pp.68-84, at 77, n.29-30.

would benefit. Clearly, at the turn of the century, the divorce courts had an important role to play in the nation-building project.

'Epithets of insult' - Mental Cruelty in Australia

Prior to the 1870 English case of *Kelly*, matrimonial cruelty required some degree of physical violence by the husband, and injury to the petitioning wife.⁶⁶ In *Kelly*, the wife applied for a judicial separation on the grounds of her husband's cruelty, although she made no accusation of physical violence against him. Instead, the wife claimed that her husband had caused her suffering by a regime of 'isolation and reproaches'. The court found that the husband had created for his wife 'the daily life ... little better than an imprisonment, the solitary silence of which was broken only by the language of harsh rebuke, foul words, and epithets of insult, indignity and shame'.⁶⁷

In a powerfully eloquent decision, the Judge Ordinary, Lord Penzance, affirmed that in law the husband was 'the ruler, protector, and guide of his wife', as well as 'master of her pecuniary resources'. In giving the husband the control of his wife's person within legal limits, the law fostered 'the reasonable supremacy of the man in the institution of marriage'. The judge refused to be drawn on the source of men's supremacy and instead claimed that the 'subordination of the wife is doubtless in conformity with the established habits and customs of mankind', whether or not the law was acting 'in conformity with the dictates of nature'. Consequently, the man was entitled 'by his own conduct and bearing, to secure and maintain the only submission worth having, that which is willingly and cheerfully rendered'.

In *Kelly*, the husband had failed to secure his wife's submission and, since his cruelty was proved, the court decreed a judicial separation with costs against the husband.⁶⁸ The case became fresh authority for the existence of 'moral cruelty' but the Court of Appeal refused to proffer a definition for the new ground since 'the perverted ingenuity of mankind is constantly devising fresh forms of cruelty'.⁶⁹ Without a definition, something judges avoided as it would 'fetter discretion', subsequent courts refused to adopt the mental cruelty and they insisted that cruelty still required proof of danger, that it was 'grave and weighty', or that the woman had a reasonable apprehension of risk to her 'life, limb, or health'.⁷⁰

In 1895, in the principle case of *Russell*, the Court of Appeal rejected the husband's claim that his wife's allegedly false accusations against him of 'unnatural offences' constituted cruelty.⁷¹ The husband appealed to the House of Lords which split five to four in agreeing with the Court of Appeal. Lord Davey, in the majority in the House of Lords, specifically declined to express an opinion on point, but the decision

⁶⁶ *Kelly v Kelly* (1870) L.R. 2 P. & D. 31 and on appeal at p.59. See discussion by Biggs, *Cruelty*, 1962, p.36.

⁶⁷ *ibid.*, at p.35; subsequent quotes are at pp.35-37.

⁶⁸ Typically costs were awarded against the 'losing' party, but it was a matter for the court's discretion.

⁶⁹ *Kelly, op cit*; 27 Digest 284, 2555; this dictum was repeated in successive Australian law texts: Joske, (1952), p.233; (1969), p.416.

⁷⁰ 'Grave and weighty' was the often repeated standard inherited from *Evans* (1790) 1 Hag. Con; 161 ER; *Russell v Russell* (1895) P 315 at p.329.

⁷¹ *Russell v Russell* [1895-9] All E.R. Rep. H.L. 1.

remained the authority for rejecting mental cruelty in common law jurisdictions for most of the twentieth century.⁷² This decision prolonged the incoherence of the law on cruelty and, in cases where there was no physical violence, it remained unclear what would or would not be considered cruelty sufficient to ground a petition for divorce or judicial separation. Under the confusing influences of *Kelly* and *Russell*, English and Australian courts gradually extended the ground of cruelty to include threats of violence, verbal abuse, and false accusations of infidelity or immorality.⁷³ The process took longer in Australia, reflecting the courts' apparent desire to protect the family in the newly formed country by restricting divorce.

In the 1904 Victorian case of *Stoneham*, the wife accused her husband of 'frequent violent abuse and foul names addressed to her in the presence of her children'.⁷⁴ Although he had also spat in her face, blackened her eye, threatened to beat her with a strap and denied her and the children adequate food, A'Beckett J. ignored the physical cruelty as irrelevant and he was not persuaded that the woman's health had been injured by her husband's 'misconduct'.⁷⁵ However, after citing references to 'mental health' in the case of *Russell*, he found in favour of the wife. In a statement designed apparently to broaden the law's power to influence behaviour in marriages, the judge declared that 'a wide door is opened, and the Court can give relief for offences which operate injuriously on the mind only'.⁷⁶ What the judge did not say was that the open door was not so wide as to challenge existing gendered stereotypes.⁷⁷

A wife's 'nagging' was accepted as a form of cruelty against a husband by the English courts in the 1940s.⁷⁸ Since nagging was behaviour recognised only in women, it not only reinforced gendered assumptions, but suggested a fear of female speech and its capacity to unsettle male truths. All reported attempts to prove nagging (or 'incessant harping' or 'criticism') as matrimonial cruelty in both England and Australia involved petitions by husbands against wives.

The Australian courts were reluctant to recognise the 'nagging' innovation, as in the 1951 South Australian Supreme Court case of *Harper*. In that case, Napier C.J. found that a wife's nagging was not 'legal cruelty', unless there was an intention to hurt or injure the husband.⁷⁹ In the 1954 case of *Sangster*, the husband alleged nagging but

⁷² *ibid.*, per Davey LJ. at p.32; [1897] A.C. 395; despite the contentious nature of *Russell* and the close division in the House of Lords, this authority remained good law in Australia at least until the 1960s; *La Rovere v La Rovere* [1962] 4 FLR 1, and probably until the *Family Law Act* 1975 (Cth).

⁷³ *Mytton v Mytton* (1886) 11 P.D. 141; *Jeapes v Jeapes* (1903) 89 LT 74; *Binks v Binks* (1930) WALR 106.

⁷⁴ *Stoneham v Stoneham* (1904) 29 VLR 732.

⁷⁵ *ibid.*, at p.734

⁷⁶ *ibid.*, at pp.734-35

⁷⁷ Most State Acts continued to deny men the possibility of applying for divorce under the ground of cruelty, although some States enabled men to use that ground in a petition for judicial separation; eg. *Matrimonial Causes and Personal Status Code* (WA) 1948, s.15(g) and s.17(c).

⁷⁸ *Atkins v Atkins* [1942] 2 All ER 637; followed by *Usmar v Usmar* [1949] 1 All ER 76, and *King v King* [1953] AC 124 (H.L.); C.K Allen acknowledged in 1957 that nagging was a form of cruelty and that nagging 'in law, though not always in fact, is a peculiar feminine weakness'; 'Matrimonial Cruelty I', *Law Quarterly Review*, Vol. 73, July 1957, pp.316-339 at 337.

⁷⁹ *Harper v Harper* [1951] SASR 66; here the court's requirement for the guilty party to have an intention to end the marriage suggested an ominous development in more violent cruelty cases that came later and are considered below.

the court found that, while the wife's actual assaults upon the husband did amount to matrimonial cruelty, her nagging did not.⁸⁰ While Australian judges often displayed masculine priorities and claimed to be bound by English precedents, their rejection of the nagging petitions by husbands suggests their focus was to preserve marriages and to encourage them in a particular form.

If women were said to 'nag', men were said to 'sulk'. The notion of a man's sulking reinforced gendered assumptions and was counterpoised to the nagging wife. Men's capacity for sulking implied silence, and suggested strength and wisdom, at least to themselves, but to others it alluded to male withdrawal, selfishness and irresponsibility consistent with experiences of the 'absent father'.

The English precedent for sulking was *Lauder* in 1949, when the Court of Appeal agreed with the trial judge, Ormerod J., to find that a man's silence, sulking or 'sending to Coventry' directed at his wife amounted to legal cruelty.⁸¹ In 1954, the Adelaide case of *Beattie* accepted sulking into Australian law when Ross J. ruled against the husband with the words: 'I can imagine no course of conduct more calculated to be destructive of married life than persistent and deliberate sulking during the day time followed by sexual demands at night.'⁸²

The extension of cruelty by recognition of nagging and sulking has more to do with the gendering project of law than improving peoples' access to divorce or judicial separation. Prior to the abolition of matrimonial fault in Australia in 1975, the majority of petitions alleged desertion by husbands or adultery by wives.⁸³ However, these records show more about the discourse of legal practice than the actual behaviour of women and men in marriage. In practice, divorce by 'mutual consent' had been happening with varying degrees of judicial awareness and toleration since before 1900.

Formally, 'collusion' between the parties was an 'absolute bar' to divorce, but only if there was adequate evidence brought to court in proper form.⁸⁴ Parties could conspire, with the guidance of solicitors and court staff, to arrange the 'facts' so that the grounds for divorce such as adultery, desertion or cruelty could be 'proved'. The practice was so widespread that as late as 1981, some Australian researchers suggested that divorce reforms had little effect on divorce rates because of the tradition of constructing the 'facts' to satisfy the required grounds.⁸⁵

⁸⁰ *Sangster v Sangster* [1954] SASR 129

⁸¹ *Lauder v Lauder* (1949) P 277, esp. 294; followed by *Eastland v Eastland* (1954) 2 WLR 851, esp. 857.

⁸² *Beattie v Beattie* [1954] SASR 143, per Ross J.

⁸³ Margaret James, 'Double Standards', in Judy Mackinolty and Heather Radi (eds), *In Pursuit of Justice: Australian Women and the Law 1788-1979*, Hale & Iremonger, Sydney, 1979, at p.202 found that between 1910 and 1960 in Victoria desertion and adultery constituted over 90% of the grounds used by petitioners.

⁸⁴ S.26(a), *Matrimonial Causes and Personal Status Code* 1948 (WA); s.40, *Matrimonial Causes Act* 1959 (Cth); Golder considered that the majority of divorces during the 1890s were collusive although they reflected 'convenience or convention' of legal practices; *Divorce*, 1985, p.252, 290; M. Glendon, *Abortion and Divorce in Western Law*, Harvard University Press, Cambridge, Massachusetts, 1987, p.64; an early satirical view on the divorce law's effective encouragement of collusion was A. P. Herbert's *Holy Deadlock*, Doran & Company, Inc., Doubleday, Garden City, N.Y., 1934.

⁸⁵ Seweryn A. Ozdowski and John Hattie, 'The Impact of Divorce Laws on the Divorce Rate in Australia: A Time Series Analysis', in *Australian Journal of Social Issues*, 1981, Vol. 16, No. 1, pp.3-17; strangely, the authors ignored the extreme effect of the *Family Law Act* 1975 (Cth) on divorce rates in the following years.

The Success of Men's Cruelty

The reluctance of Australian courts to allow divorce appeared more evident after Federation in 1901. As shown above, the judicial interpretation of matrimonial cruelty was narrow, making it difficult for women petitioners seeking the relief of separation or divorce on the grounds of cruelty. The message was that women could avoid the unpleasantness of their husband's behaviour by being submissive and accepting their place as subservient to the husband in marriage. In many courts, the 'fault' of a man's cruelty was obscured by his wife's failure to obey. Consequently, many women made the best of their lot rather than risk violence from their husbands, disapproval by society and rejection by the courts.

The late-nineteenth century reforms weakened the formal aspects of patriarchy in Australia by encouraging the notion of separate realms ('separate but equal'). However, the reforms failed to overturn the patriarchy that survived in the minds of many and the 'mind' of the law. In most States the reforms elevated cruelty as a new grounds for divorce, but only if the wife had endured the cruelty for twelve months or more. By 1929 in South Australia, 'habitual cruelty for one year' by either party was sufficient grounds for divorce, while in other States divorce for cruelty was generally available to the wife only and required additional grounds such as the husband's adultery, drunkenness or 'repeated assaults and cruel beatings'.⁸⁶

The reforms had little benefit for women in practice, as they mostly related to divorce not judicial separation. In any case, to petition on cruelty, the woman needed to prove that 'the respondent has repeatedly during that period assaulted and cruelly beaten the petitioner', or else that the respondent was a drunkard who 'habitually' left her without means over a three year period.⁸⁷ Due to the consequences of conviction of a matrimonial offence, often a husband would defend his wife's petition with a cross-petition for divorce on the grounds of her desertion.

In some cases, therefore it was easier for a woman to apply for judicial separation on the grounds of her husband's cruelty. However, by leaving him she risked his cross-application for restitution of conjugal rights.⁸⁸ Despite the stringent requirements of the statutes, the outcomes of the cases often depended on the attitude of the judge to the facts alleged.

⁸⁶ Adultery: *Marriage Act* 1958 (Vic) s.77; *Matrimonial Causes Act* 1899 (NSW) s.14; drunkenness: *Marriage Act* 1958 (Vic) s.73 (1)(b); *Matrimonial Causes Act* 1899 (NSW) s.13 and 16; *Matrimonial Causes Act* 1860 (Tas) s.8; assaults: *Marriage Act* 1958 (Vic) s.73 (1) (d); *Matrimonial Causes Act* 1899 (NSW) s.13 and 16; *Matrimonial Causes Act* 1860 (Tas) s.8 and 9; *Matrimonial Causes Act* (Tas) 1860 s. 9; see also *Matrimonial Causes and Personal Status Code* 1948 (WA) s.15 (g).

⁸⁷ *Divorce Amendment and Extension Act* 1892 (NSW) s.1(b) and (d); also *Divorce Amendment Act* 1890 (Vic) s.11(d); *Divorce Amendment Act* 1911 (WA) (No. 7. of 1912) s.2, amending s.23 (c) of the principal Act, *Divorce and Matrimonial Causes Ordinance* 1863 (WA); due to the unreformed colonial equivalents of section 17 of the 1857 Imperial Act.

⁸⁸ See the unreformed colonial equivalents of sections 16 and 17 of *Divorce and Matrimonial Causes Act* 1857 (Imp).

In *Egan v Egan*, a Sydney case in 1910, the husband had repeatedly assaulted and beaten his wife for fifteen months before leaving her unsupported.⁸⁹ The wife petitioned for divorce on the grounds of cruelty nine months later. However, Sly J. interpreted the statute to require twelve months of cruel treatment immediately before the date of the petition and so the wife was not entitled to a divorce. If Mrs Egan had left her husband she could have been convicted of 'wilful desertion'.⁹⁰ Then, as a 'guilty' party, the courts could have denied her maintenance as well as the custody of her children. It was understandable, given these laws, the economic and employment discrepancies affecting women, and the lack of childcare (until 1972) that many wives chose to submit to their husbands' will.⁹¹

In the mouths of politicians, the reforms enabled liberal rhetoric about equality and women's rights; but in the courts, contradictions emerged between the principles of equality and the real difficulties women experienced in accessing those rights. Many Australian judges retained pre-reform attitudes that empowered a husband to control his wife by using whatever force was necessary to 'save the marriage'. During the decades of wars and depressions, these contradictions were unresolved, submerged in other social and political priorities.⁹²

In the 1927 case of *Anderson*, for example, the husband hit, kicked and knocked down his wife on several occasions and lastly threatened her with a razor.⁹³ Owen J. refused the wife's petition, saying there was insufficient violence to satisfy the section. This strict reading of the statutes appears frequently in the reported cases, denying women's petitions, as if protecting them from their controlling husbands was subordinate to the need of saving marriages from 'breakdown'. In *Maney v Maney* in 1945, Morris CJ rejected a petition for divorce by a wife who had suffered consistent assaults and beatings over a number of years, but only for seven months of the year previous to filing her petition.⁹⁴ In attempting to rationalise these outcomes, judicial reasoning became more complex. The courts struggled to balance the need to follow precedent decisions (*stare decisis*), to apply the new law reforms and to acknowledge changing cultural values.⁹⁵

When Australian judges did find respondent husbands guilty of cruelty, it was often not for their controlling acts or threats and violence, but based on English standards of male behaviour. At least until the late 1960s, legal texts and many Australian judges favoured the views of English judges about proper behaviour for

⁸⁹ *Egan v Egan* (1910) 26 WN (NSW) 184.

⁹⁰ See the section below on 'constructive desertion'; in general, this situation prevailed in Australia until the *Family Law Act* 1975 (Cth).

⁹¹ Regarding the effects of matrimonial fault on applications for the custody of children see *Re an Infant* (1933) 50 WN (NSW) 85; until 1920 the average married woman in New South Wales had at least three children (NSWSR, 1941, p.603).

⁹² As late as 1949, the New South Wales Attorney General could not confirm that the law protected women from beatings by their husbands: 'Just how far the rights of husbands over wives in earlier ages have now been modified, it is impossible to say with precision', Attorney General to M. Warhurst, 29 November 1949, The United Associations of Women Papers, MS 2160/Y791, Mitchell Library, Sydney.

⁹³ *Anderson v Anderson* (1927) 44 WN (NSW) 9.

⁹⁴ In *Maney v Maney* (1945) Tas SR 15.

⁹⁵ For example, in *Lang v Lang* [1954] 90 CLR 529 at p.543 (see analysis below), the judgment examined the differences between a man's intentions, hopes and desires as he committed his cruel acts.

English men that may have had little relevance in Australia.⁹⁶ After World War II, for example, Australian law reflected the decisions of English judges who found men's cruelty in 'slovenly boorishness around the house',⁹⁷ indecent exposure,⁹⁸ treasonable activities,⁹⁹ cross-dressing,¹⁰⁰ 'coitus interruptus',¹⁰¹ 'gross perversions',¹⁰² and in the actions of a man insisting that his wife tickle the soles of his feet.¹⁰³ The timidity of Australian courts towards developing a local jurisprudence of cruelty was mirrored by the refusal of successive Commonwealth governments to 'meddle' with divorce law until 1959, despite having the Constitutional authority to do so from 1901.¹⁰⁴

Even after the Commonwealth rationalised divorce law in Australia with the *Matrimonial Causes Act* 1959 (Cth), a woman had to prove her husband was 'habitually cruel' over a period of twelve months to obtain a divorce, and, if she left the home for a period of two years, her husband could divorce her on the grounds of desertion.¹⁰⁵ If there was an agreement to separate, divorce was only possible if the parties remained separated, without either committing adultery, for five years, and during which time the refusal of either party to immediately resume cohabitation upon the request of the other would amount to 'wilful desertion'.¹⁰⁶

The 1950s in Australia was a decade of relatively improved marriage rates and levelling if not decreased divorce rates.¹⁰⁷ Yet behind the façade of harmony, some significant Australian cases on men's cruelty emerged. One was the 1954 Privy Council decision of *Lang*. In that case, a Victorian woman who had left her violent husband sought to divorce him on the grounds of *his* 'wilful desertion' over three years.¹⁰⁸ Cruelty was not a ground for divorce in Victoria at that time.¹⁰⁹ The wife

⁹⁶ English cases remained authoritative in Australia, although England legislated in 1937 to allow divorce for cruelty simpliciter, *Matrimonial Causes Act* 1937 (Imp) ss.2 and 8; Percy Ernest Joske, for example, espoused Australian law as dependent on English precedents in his authoritative text *The Laws of Marriage and Divorce in Australia and New Zealand*, Butterworth & Co. (Australia) Ltd., Sydney and Wellington, (1925, 1942, 1952, 1969): 'The Full Court of the Supreme Court of South Australia in a series of decisions adopted and applied the legal conception of matrimonial cruelty as developed by the English courts to the South Australian Act and in this we think they were right', *La Rovere* [1962] 4 FLR 1 at p.11, (Full Court of the Supreme Court of Tasmania; considered further below).

⁹⁷ *Waters v Waters* [1956] P 344 (DC).

⁹⁸ *Crawford v Crawford* [1955] P 195 (DC).

⁹⁹ *Ingram v Ingram* [1956] P 390.

¹⁰⁰ *Williams v Williams* (unreported), *The Times*, 15 March 1958.

¹⁰¹ *Knott v Knott* [1955] P 249.

¹⁰² *Cooper v Cooper (No. 1)* [1955] P.99.

¹⁰³ *Lines v Lines* [1963] 107 *Solicitors Journal* 596.

¹⁰⁴ According to Malcolm D. Broun, 'laws relating to divorce have always been regarded as politically dangerous ...[and] frequently thought of as Acts which are best left to some more convenient time'; in 'Historical Introduction', Toose, Watson and Benjafield, *Australian Divorce Law and Practice*, Law Book Company, Sydney, 1968, p. ci; the Commonwealth assumed jurisdiction for marriage and divorce when the Australian Constitution came into operation on 1 January 1901, but despite the inconsistencies between the State laws on divorce, the Commonwealth failed to legislate until 1959.

¹⁰⁵ *Matrimonial Causes Act* 1959 (Cth), s.28 (d) and (b) respectively.

¹⁰⁶ *Matrimonial Causes Act* 1959 (Cth), s.30

¹⁰⁷ Seweryn A. Ozdowski and John Hattie, 'The Impact of Divorce Laws on the Divorce Rate in Australia: A Time Series Analysis', in *Australian Journal of Social Issues*, 1981, Vol. 16, No. 1; P. Spearitt, 'Statistical Tables: Melbourne and Sydney at the Census', in J. Davidson (ed.), *The Sydney-Melbourne Book*, Allen & Unwin, Sydney, 1986, Table 10.

¹⁰⁸ The High Court of Australia appeal of *Lang v Lang* [1953] 86 CLR 432 came from a decision by Lowe J. in the Supreme Court of Victoria.

alleged she had been brutally ill-used and insulted for over five years before she left the home. In their joint judgment delivered by Lord Porter, the Privy Council distinguished the *factum* of the physical separation from the *animus deserendi*, the intention underlying the conduct to terminate the marriage. Here the husband was guilty of the *factum*, since it was clearly his behaviour that drove his wife from the home. The difficult question was whether the wife needed to prove the husband's animus according to what a 'reasonable man' would agree was calculated to drive her from the home (the 'objective test'), or did she need to prove that this particular husband knew that his behaviour would lead to her departure (the subjective test).

In considering this question, the Law Lords gave the notional husband permission to have conflicting intentions ('human nature being what it is'), so that he might have known that she would be likely to leave if he continued his cruel behaviour.¹¹⁰ However, there arose from that concession a third possibility whereby, no matter how inexcusable the husband's cruel behaviour, the wife's petition would fail if he could demonstrate he genuinely wanted to preserve the marriage. In earlier decisions, the 1912 Australian case of *Moss* had favoured the objective test, adopting the level of abusive behaviour that a 'reasonable man' would consider was intended to drive the wife from the home, and this was affirmed by *Dearman* in 1916 and *Baily* in 1952.¹¹¹ In *Lang*, the High Court of Australia (from which the appeal went to the Privy Council) had followed those cases since the husband never denied the extent of his violent assaults and sexual abuse of his wife.¹¹²

The Privy Council, however, detected 'signs of vacillation' in the High Court's reasoning, calling it a 'slight recession from the severely objective rule'.¹¹³ From that point, the judgment descended into a cloud of distinctions between a man's wishes, his intentions and his desires, and produced a result that conflated the objective test with a subjective qualification.¹¹⁴ Ultimately, the Law Lords deemed a man to have the intention that reasonably flows from his behaviour *unless*, in a particular case, the man could evidence his real intention to the contrary. The wife was successful, yet the judgment was obtuse, displaying reasoning that potentially authorised men to control their wives by cruelty and threats, so long as they could evidence a wish for the marriage to continue.

Australian Men as 'Constructive Deserters'

¹⁰⁹ Cruelty had been a ground for judicial separation only in Victoria since the colonial Act of 1861, and it remained so under the *Marriage Act* 1928 (Vic) s.67.

¹¹⁰ *Lang v Lang* [1954] 90 CLR 529 at p.533, (Privy Council).

¹¹¹ *Moss v Moss* (1912) 15 CLR 538, see below at n.129 and 135; *Dearman v Dearman* (1916) 21 CLR 264; *Baily v Baily* (1952) 86 CLR 424, see below at n.136.

¹¹² Sir Owen Dixon CJ. (who explained the strength of this case later in *Deery v Deery* (1954) 90 CLR 211, where the subjective test was applied to preserve the marriage) delivered the main judgment with which Fullagar and Kitto JJ. agreed.

¹¹³ *Boyd v Boyd* (1938) 4 All ER 181; 55 TLR; *Bartholomew v Bartholomew* (1952) 2 All ER 1035; 2 TLR.

¹¹⁴ *Lang v Lang* [1954] 90 CLR 529 at p.544.

The law of 'constructive desertion' was a further extension of the offence of cruelty and developed as a result of the *Lang* appeals.¹¹⁵ The divorce reforms introduced 'desertion' as a matrimonial offence that would be committed by either party who left the matrimonial home without justifiable excuse and typically for a set period of between twelve months to three years.¹¹⁶ In some cases, such as *Lang*, women claimed that they left the home in fear of their safety and that consequently their 'desertion' was forced by the husband's cruelty.

The precedent for constructive desertion was the 1884 English case of *Farmer v Farmer*.¹¹⁷ In that case, the court accepted that if a man's behaviour was so 'intolerable' that his wife was forced or 'morally compelled' to leave him, the man could be guilty of 'constructive desertion', entitling the woman to a judicial separation. However, the wife might have grounds for divorce if she could prove that the husband's cruelty was so severe that it warranted a separation for three years or more, or that the husband was guilty of adultery in addition to cruelty. While appearing to respond appropriately to women's claims of cruelty, many constructive desertion cases, like simple cruelty cases, demonstrate how the law could minimise men's violence towards their wives, making it seem necessary for the preservation of the marriage.¹¹⁸ Several reported Australian cases from around 1900 illustrate how the courts emphasised the obligations on men to retain control of their families.

In the 1897 New South Wales case of *Giblett*, the husband had seriously assaulted his wife in attempting to force her to return to him. He broke down a door with an axe to gain entry to where she was living, he punched her in the face, threatened to kill her with the axe and to shoot her if she did not return to him.¹¹⁹ The evidence included that the husband was a drunkard and that he often left his wife without food or money. The trial judge, Simpson J., rejected the wife's petition for divorce, saying the evidence did not show the husband intended to drive her from the home. However, the appeal court disagreed, finding that the wife did have 'reasonable justification' for leaving her husband, but only because he had failed to supply her with adequate provisions.¹²⁰ Consequently, the husband was found guilty of constructive desertion but not because of his gross violence, which he did not deny and which

¹¹⁵ It is interesting that the law of constructive desertion developed inversely, arising in *obiter* more from the cases that rejected petitions based on constructive desertion, than from *ratio* in petitions that were successful.

¹¹⁶ No Australian or English statute defined desertion although the High Court of Australia held that it was the wilful abandonment by one spouse of the other without reasonable excuse and without the consent of the other, *Bradford v Bradford* (1908) 7 CLR 470. The Australian reform Acts introduced desertion as grounds for either judicial separation or, in conjunction with another matrimonial offence, for divorce; for example, *An Ordinance to regulate the Divorce and Matrimonial Causes* 1863 (WA), s.11 ('desertion without cause for two years and upwards' was sufficient grounds for a decree of judicial separation; this provision was amended by *Matrimonial Causes and Personal Status Code* 1948 (WA), s.17);

¹¹⁷ *Farmer v Farmer* (1884) 9 P D 245.

¹¹⁸ In *Waters v Waters* [1956] P. 344, Lord Merriman linked constructive desertion to the considerations in cruelty cases, and this was approved by the Supreme Court of Tasmania in *La Rovere v La Rovere* (1962) 4 FLR 1 at p.10.

¹¹⁹ *Giblett v Giblett* (1897) 18 NSWLR Div. 25; in Victoria the precedent for constructive desertion was *Simons v Simons* [1898] 24 VLR 348, as mentioned in *Stoneham v Stoneham* [1904] 29 VLR 732.

¹²⁰ The NSW appeal court referred to the English precedent on constructive desertion, *Farmer v Farmer* (1884) 9 P D 245.

neither the trial judge nor the three appeal court judges found exceptional or relevant in law.

On occasions, if a man's violence 'went too far', the courts would find that the man was in error, not for his violence *per se*, but for jeopardising the integrity of the family unit by intentionally driving his wife from the home. A man would be guilty of constructive desertion if the evidence disclosed a *mens rea*, that he had a guilty mind, and the wife's petition would be granted.¹²¹ The construction of the husband's desertion required more than his violence towards his wife, since mere violence did not *conceptually* challenge the basis of the marriage while the parties remained together. If the wife left, however, the law would view the marriage at risk and the wife could succeed with her petition if she could prove that the husband *intended* to drive her away. Leaving the husband, however, still raised the risk of the husband's cross-petition for restitution of conjugal rights.

Cases of constructive desertion turned on judges' values more than cases based on other grounds because the construction involved a personal view of the evidence. Typically, judges exercised their discretion in deciding whether the husband's cruelty was 'acceptable' or whether the circumstances required a decision based on a precedent authority.¹²² In some cases, judges referred to precedents in order to reinforce a 'timeless' principle, based on a biblical reference, or rhetoric about common-sense or the law-of-nature that obliged women to be subservient to their husbands.

In the 1900 New South Wales case of *Pearce*, the wife applied for divorce on the ground of desertion.¹²³ The court heard evidence of the husband's violence, threats and abuse towards his wife, who had been trying to leave him for six years. Simpson J. accepted that the husband beat and burnt his wife, threatened to strangle her, to shoot her and then to shoot himself. He also battered their baby and, when she managed to escape from him on one occasion, he forced her to return by further assaults and threats to kill. In the view of Simpson J, however, these facts were not relevant to the wife's petition for divorce:

In my opinion the law of constructive desertion has gone far enough, and I am not inclined to extend it. Marriage is marriage however miserable it may turn out to be, ... I am very strongly of the opinion that the interests of the public, and the interests of morality require that marriage should not be dissolved for such trivial causes as exist in this case.¹²⁴

¹²¹ The petition could be for either divorce or separation, although divorce sometimes required additional grounds; in *Giblett* the wife's petition for divorce was approved because the constructive desertion was held to have existed for three years, the statutory minimum in New South Wales at that time.

¹²² Arguably every task of a judge involved some use of discretion, even when deciding that a case should be decided *without* discretion since its 'facts' required adherence to an earlier authority; in many cases it was apparent that if a judge did not wish to follow a precedent in a particular case, he would 'distinguish' the case from the precedent by finding some feature in the facts that 'allowed' him to decide the case differently.

¹²³ *Pearce v Pearce* (1900) 21 NSWLR (D) 32.

¹²⁴ *ibid.*, per Simpson J. at p.33.

These cases suggest some judges felt that their paramount duty in matrimonial cases was to protect the ideal of marriage by, when necessary, sacrificing some women petitioners as examples; and perhaps to draw the line on earlier reforms.

Pearce cannot be dismissed as an example of harsh 'formalism', the strict application of legal principle, because the judge claimed that both 'public interest' and 'the interests of morality' would consider the husband's violence to be 'trivial' compared with the importance of marriage. Since the court accepted the evidence of the assaults, it was a case about constructive desertion; however the petition depended on whether the extent of the husband's violence enabled a legal presumption that he intended to drive the wife from the home. In deciding that the husband had no such intention, the court effectively rewarded his behaviour by forcing the wife to return to his control. Despite the liberal reforms, an Australian man was expected to control his wife; and short of a killing or grievous injury, a court of law would not interfere in a man's attempts to preserve his marriage.

In *Glynn*, the trial judge found as a fact that the husband had sexually assaulted his wife, had caused her 'not only physical suffering but mental suffering and to a certain extent, mental degradation, [and committed] a gross outrage' upon her.¹²⁵ However, the judge also found that this did *not* demonstrate the husband intended to bring about a separation, and so there was no constructive desertion and the wife's divorce petition failed. On appeal, the three judges unanimously supported the original finding that the husband had no intention to force his wife to leave, despite the contradictory finding that the husband could not expect her to continue living with him after the sexual assault.¹²⁶

Cases such as *Pearce*, *Giblett* and *Glynn* illustrate judicial priorities at the turn of the century and reveal the strength of the masculinism that operated in Australian society under 'the shadow of the law', through solicitors' advice, media coverage and popular reporting. The cases were likely to reflect the views of many influential authorities and were not the actions of a renegade judge given the confirmation of the appeal court in *Glynn*.¹²⁷ However, they may represent a 'backlash' against the divorce reforms in New South Wales that occurred despite a degree of conservative political resistance. In the lead up to that State achieving woman suffrage, it is possible that some authorities felt the need to re-assert 'traditional' controls within the family.¹²⁸

In any case, the decisions gave a clear message that, despite the divorce reforms making it 'easier' for a woman to petition for divorce, a man still had a primary duty to preserve his marriage. The courts would 'turn a blind eye' to a man's cruelty

¹²⁵ *Glynn v Glynn* (1900) 21 NSWLR (D) 35.

¹²⁶ *ibid.*, per Simpson J. with whom Stephen J. and Owen J. concurred, at p.37; see also *Kollner v Kollner* [1918] Victorian Law Reports, 500 at p.502.

¹²⁷ Hilary Golder observed a strict regime in the Supreme Court of New South Wales when G. B. Simpson succeeded W. C. Windeyer in the divorce jurisdiction, but she claimed that Simpson's actions 'cannot simply be regarded as those of an anti-divorce zealot'; *Divorce*, 1985, p.267.

¹²⁸ The main reforms in New South Wales (*Matrimonial Causes Act Amendment Act* 1881, *Divorce Amendment and Extension Act* 1892 and the *Matrimonial Causes Procedure Amendment Act* 1893) were consolidated by the *Matrimonial Causes Act* 1899. New South Wales achieved woman suffrage in 1902.

providing he did not intend to cause a separation, even though he might err morally in committing a 'gross outrage', including sexually and physically assaulting his wife.

The preservation of the marriage continued as a primary objective of the courts, no matter the cost to women's well being. In the 1907 Victorian case of *Tulk*, Cussen J. expressed disapproval of the concept of constructive desertion because it suggested a lesser form of 'real desertion'. He attempted to simplify the combined *ratio* of earlier cases by declaring that real desertion exists only if 'he or she drives the other away'.¹²⁹ Cussen J. stated that there had to be a 'real' intention, so that no matter the nature of the cruelty, if there was evidence to rebut an intention of the accused person to drive the other away, it was not desertion. However, in 1912, the High Court of Australia re-emphasised the broad power of the court to find or dismiss constructive desertion in the case of *Moss v Moss*.¹³⁰ There, the High Court held that if the cruelty is sufficiently 'blameworthy and prolonged', the law will impute to the guilty husband an intention to bring the marriage to an end, whatever his actual or professed desire.¹³¹

The judicial denial of constructive desertion peaked in the 1923 High Court case of *Bain v Bain*.¹³² In that case, the trial judge Irvine CJ. considered cross-petitions for divorce on the grounds of desertion. Concerning the husband's charge that the wife had deserted him, the judge dismissed the petition, finding that the wife was justified in leaving because of the husband's 'brutal assertion of his [matrimonial] rights, especially when intoxicated' and when his wife was unwell and suffering from ulcers. The High Court agreed with that decision:

The law is not so unreasonable as to compel a wife, unable to prove that her husband has passed the utmost limit of misconduct allowed by law, to choose between complete submission, for instance, to ill-usage which has not developed into legal cruelty and herself becoming an offender by deserting him.¹³³

However, the trial judge also dismissed the wife's petition because he found that the husband's behaviour was not so bad as to allow an inference or an imputation that he *intended* to break the matrimonial relationship. Again, the High Court agreed, saying that, although the husband 'must have contemplated that his wife might resent [his behaviour] as inconsiderate and selfish ... he would not contemplate that she would regard it as intimating an intention to terminate their matrimonial relations'.¹³⁴ The High Court complained that, although desertion was a 'comparatively new offence in our legal history' and was not defined by statute, it was already the most prolific ground of divorce in Australia.¹³⁵ The court then attempted to reduce further the

¹²⁹ *Tulk v Tulk* [1907] VLR 64 at p.66; also *Hoffmeyer v Hoffmeyer* [1907] VLR 64 at p.69.

¹³⁰ *Moss v Moss* (1912) 15 CLR 538.

¹³¹ *ibid.* per Griffith CJ. at p.541.

¹³² *Bain v Bain* (1923) 33 CLR 317.

¹³³ *ibid.* per Isaacs and Rich JJ. at p.322.

¹³⁴ *ibid.* at p.326; the High Court considered the maxim that 'in a Court of law every man is taken to intend the natural or necessary consequences of his action', (per Lord Parker in *Attorney General for Australia v Adelaide Steamship Co.* (1913) AC 781 at p.799), and then distinguished that maxim from this case.

¹³⁵ *Bain v Bain* (1923) 33 CLR 317 at p.323, per Knox C.J. and Gavan Duffy J. who claimed that desertion was unknown as a matrimonial offence in the ecclesiastical or common law.

capacity of women to divorce their husbands by 'reading down' the significance of constructive desertion in previous decisions.¹³⁶

In a series of cases during the 1950s, the High Court confirmed the hard line it had taken in *Bain* to deny women petitioners the grounds of constructive desertion against their violent husbands. In each case, *Baily* in 1952, *Sharah* in 1953 and *Deery* in 1954, the court emphasised the need for petitioners to prove the *animus*, or clear intention, as well as the *factum*, the 'facts', that the party who remained (usually the husband) drove the wife from the home so as to 'rupture the matrimonial relation'.¹³⁷ It was only where the husband persisted with such cruelty that 'any reasonable person' would regard it as calculated to end the marriage that the court would impute such an intention to the husband. In the context of the pro-family orientation of the 1950s, that imputation was so unlikely that it is difficult to recognise in these cases any conception of justice in principle, other than the judicial imposition of social policy.

During the late 1950s, however, at the end of that rare period in Australia's history when marriage rates were up and divorce rates were steady, the legislators allowed a small concession, but one that reversed half a century of case-law.¹³⁸ The *Matrimonial Causes Act* 1959 (Cth) consolidated and rationalised the various grounds for divorce and judicial separation in the state Acts, but it included constructive desertion as a grounds for divorce *without* requiring the wife to prove that the violent husband had an intention to end the marriage.¹³⁹ Within ten years of that Act, however, the authorities' fears for the future of marriage were realised.

By 1970, marriage rates were down, separations had increased significantly, yet divorce petitions remained steady. Many people rejected the minimalist reform in the 1959 Act, preferring to ignore marriage and divorce law altogether as it had failed to stay abreast of cultural changes during the 1960s. As a consequence, the divorce courts also lost their influence on people's lives. The 'shadow of the law' faded and authorities and social planners must have feared anarchy as de facto rates increased and the importance of marriage diminished.

¹³⁶ 'No doubt the dissolution of the marriage tie is a very serious step, and from a variety of considerations, both public and individual, the duty cast upon the Court is by no means a light one. ... the consequences to the parties themselves and to others, perhaps innocent, would be sufficient to induce a Court to move with more than ordinary caution', per Isaacs and Rich JJ., *Bain v Bain* (1923) 33 CLR 317 at pp.326-7; the Court critiqued *Pizzala v Pizzala* (1896) 12 TLR 451 and its own decision of *Moss v Moss* (1912) 15 CLR 538

¹³⁷ *Baily v Baily* (1952) 86 CLR 424 at p.427; *Sharah v Sharah* (1953) 89 CLR 167 at p.175; *Deery v Deery* [1954] 90 CLR 211; see also the Privy Council decision (examined below) *Lang v Lang* [1954] 90 CLR 529.

¹³⁸ *Simes v Simes* (1961) 2 FLR 311.

¹³⁹ *Matrimonial Causes Act* 1959 (Cth) s.29; Sir Stanley Burbury, Chief Judge of the Supreme Court of Tasmania, considered this provision to be 'a realistic extension of the concept of constructive desertion as worked out by the courts. But to call it desertion is in my view to perpetuate a fiction', 'Family Law: Some extra-judicial reflections upon two years' judicial experience of the Commonwealth Matrimonial Causes Act 1959', *The Australian Law Journal*, Vol. 36, 28 February 1963, pp.283-307 at p.289.

The End of Cruelty and the Rise of Domestic Violence

The end of cruelty did not come from any general improvement in men's behaviour or change in the courts' view. The end came with a decisive correction in the focus of Matrimonial Law that had lost the faith of the Australian community. The *Family Law Act* 1975 (Cth) reflected shifts in attitudes about family life and symbolised the completion of the reform of family law that began in the late-nineteenth century.

Although the 'first-wave' of liberal reforms had sown the seeds, substantive change to male control in families became possible only after the 1950s, the post-war era when Australians fully tested the merit of separate realms in marriage. Robert Menzies, Prime Minister from 1949 to 1966, developed the notion of 'home-centred independent individualism' as a Liberal Party achievement.¹⁴⁰ Subsequent conservative politicians attempted to emulate the policies of the 1950s, using nostalgic imagery of the 'golden decade', where a white-picket fence metaphorically framed individual families, headed by men, and relatively untroubled by feminist questioning. The apparent contentment and stability in families was a response to the personal and cultural disruptions of World War II and the recovery period during the late-1940s. However, during the 1960s, the decade of changing values that led to substantive reform, some cruelty cases suggested another judicial reaction and attempts by the courts to re-establish male control in Australian families.

In the 1962 Tasmanian case of *La Rovere*, the court accepted the wife's evidence that a man had frequently slapped, punched and kicked his wife, including an assault two weeks before she gave birth. The case was determined under the 1959 Commonwealth Act which, like its State predecessors, gave no definition of cruelty and obliged judges to use their discretion and to apply precedent authorities to determine the petition. The trial judge, Crawford J., refused the wife's petition for divorce on the grounds of cruelty over a period of twelve months because he claimed the court

will not grant relief to a wife if she could have ensured her own safety by an alteration of her own conduct by being dutiful, restraining her outbursts of temper and exercising self command.¹⁴¹

On appeal, the Full Court gave a unanimous decision that acknowledged 'the development of the law of domestic relations'.¹⁴² In its reasoning, the Court considered whether it was appropriate in 1962 that a wife be refused a divorce on the ground of cruelty because she had failed to be dutiful and submissive to her husband. Strangely, however, the Full Court referred to the 1899 Sydney case of *Vardy* and quoted the

¹⁴⁰ Menzies was also Prime Minister from 1939 to 1941 and although a political conservative, he attracted support for his family-centred policies from the working and lower-middle classes; J. Brett, *Robert Menzies' Forgotten People*, Pan Macmillan, Sydney, 1992, pp.33 and 49; John Murphy, 'Social Policy and the Family', in Scott Prasser, U. R. Nethercote and John Warhurst (eds), *The Menzies Era*, Hale & Iremonger, Sydney, 1995, pp.228-238.

¹⁴¹ *La Rovere v La Rovere* [1962] 4 FLR 1 at p.5; at this time, the Commonwealth's legislation had replaced the State Acts and imposed provisions allowing for divorce by either party on grounds of cruelty (undefined) for one year: section 28, *Matrimonial Causes Act* (Cth) 1959.

¹⁴² *La Rovere v La Rovere* [1962] 4 FLR 1 at p.9.

following unambiguous passage: 'If [the wife] can ensure her own safety by an alteration of conduct and reforming her own manners by being dutiful and submissive to her husband she will not be entitled to a decree'.¹⁴³ Not satisfied with that Australian authority, the Full Court looked deeper into common law to find the English *a mensâ et thoro* case of *Dysart* in 1847, prior to the 1857 Act that allowed divorce by judicial order.¹⁴⁴ In that case, Dr Lushington refused the wife's petition because she 'failed in the first great duty of submission'. In addition, he decreed that while the law had some responsibility: 'Let there, however, be no mistake. ... the husband, so far as the law is concerned, is the sole judge, and to his will the wife is bound to submit. No human tribunal has authority to interfere, and none could interfere with real benefit to the public interest.'¹⁴⁵

Returning to the 1960s, the Full Court in *La Rovere* then claimed that whether a wife still had a duty of submission to her husband depended on 'what is reasonable according to contemporary notions of social behaviour'.¹⁴⁶ The judgment attempted to appear progressive, firstly by acknowledging some progress since English law had rejected *Bacon's Abridgment* of 1736, which had required the husband to keep his wife 'by force within the bounds of duty, and may beat her, but not in a violent or cruel manner'.¹⁴⁷ Second, the judges said that to speak of a wife's duty of submission had an 'odd sound' in 1962, especially given the 'equal' grounds of divorce contained in the Commonwealth's 1959 Act. The judges referred to the historical developments which put the wife 'on the same footing, *so far as possible*, as her husband' [emphasis added]. However, there remained a 'limited duty' of women to obey their husbands depending on what was 'reasonable according to contemporary notions and social behaviour'.¹⁴⁸ Implicit here was that a 'good wife' would obey the orders of her husband and a 'good husband', where necessary, would encourage her obedience by 'reasonable' acts in order to preserve the marriage.

The Full Court in *La Rovere* accepted that the husband had assaulted and abused his wife. Ultimately, however, it rejected the wife's appeal because she had failed to prove a 'second limb' of cruelty, which required danger to her 'life, limb or bodily or mental health or reasonable apprehension thereof resulting from the ill-treatment', evidence that earlier courts considered unnecessary following their recognition of mental cruelty.¹⁴⁹ In addition, the court implied that the wife failed

¹⁴³ *Vardy v Vardy* (1899) 16 WN (NSW) 78.

¹⁴⁴ *Dysart v Dysart* (1847) 1 Rob. Eccl., at p.140.

¹⁴⁵ *ibid.* at p.111.

¹⁴⁶ *La Rovere v La Rovere* [1962] 4 FLR 1 at p.10; the Full Court considered *Meacher v Meacher* [1946] P. 216 at p.219 (a decision later reversed by the Court of Appeal) and the South Australian cases which defined cruelty in terms of 'danger' and 'apprehension of danger': *McCann v McCann* [1947] SASR 108 and *Dunkley v Dunkley* (1949) SASR 325.

¹⁴⁷ The relevant part of *Bacon's Abridgment* titled *Baron v Feme* allowing a man to keep his wife by force, including the power to beat her, was rejected in *R v Jackson* [1891] 1 QB 671.

¹⁴⁸ The Full Court graciously declined to express an opinion as to whether a wife was still under any duty, and if so, what the nature of that duty was; *La Rovere v La Rovere* [1962] 4 FLR 1 at p.9; reference to *Matrimonial Causes Act* 1959 (Cth) s.28(d) concerning its failure to define 'cruelty' at p.10; see s.7 *Matrimonial Causes Act* 1960 (Tas).

¹⁴⁹ *La Rovere v La Rovere* [1962] 4 FLR 1 at p.14. Within four years, Burbury C.J. sitting alone in the Supreme Court of Tasmania in *Nicholson v Nicholson* [1966] 9 FLR 414 reverted to a single and objective test for cruelty, following *Williams v Williams* [1964] AC 698: 'there is only one issue - whether the conduct amounts to cruelty'.

because she was partially responsible for her husband's violence, and that she could have simultaneously preserved the marriage and protected herself by obeying her husband and submitting to his will.¹⁵⁰

La Rovere was the unhappy culmination of cruelty in Australia and the end point of sixty years of judicial rejection of equality in the family, despite the cultural and political developments in its favour. The Full Court reinforced the capacity of husbands to assert authority over their wives, including the use of cruelty and abuse if necessary to preserve the marriage by bringing the woman into submission. Although decided in the 1960s, it reflected nineteenth-century priorities to affirm that little had changed in the law's view of men as the source of authority and control in the family. As an attempt to protect marriage, however, the decision was too late (and, from Tasmania without High Court confirmation, too remote) to resist the historical fragmentation of the Australian family and the formal disabling of male control.

During the 1960s, many Australians reacted to the staid uniformity of the 1950s and welcomed new attitudes, cultural developments and alternative values. The attitudinal shifts were often feminist, anti-formalist and favoured alternatives in lifestyles, sexual expression and family arrangements.¹⁵¹ By the end of the 1960s, marital separations had increased significantly and the majority of cases began with women leaving their husbands.¹⁵² In addition, the proportion of de facto unions had risen as had the rate of *ex nuptial* births.¹⁵³

These demographic changes showed a clear rejection of conventional priorities, including the male hierarchy within families historically implied by marriage and promoted by the courts, and helped to break the façade of matrimonial harmony that had peaked in the 1950s. The courts struggled to preserve a 'traditional' structure of family, emphasising a core of masculine authority, against the fragmenting changes in community attitudes. Some courts continued their defence of male control in families beyond the 1975 reform that abolished 'matrimonial fault' and gendered distinctions in family law.¹⁵⁴ Without matrimonial fault, a new 'domestic violence' developed but it was invisible to some judges, reminiscent of the judicial tolerance of matrimonial cruelty.

The *Family Law Act* 1975 (Cth) reflected a more benevolent understanding of the reasons for marital breakdown. It aimed to facilitate each party's ability to

¹⁵⁰ Strangely, Chief Justice Sir Stanley Burbury claimed in a case note in 1963 that the Full Court in *La Rovere*, in which he was the leader of three judges, *allowed* the appeal when the report of the case clearly dismisses the appeal and affirms the trial judge's decision; see 'Family Law' above at n.138, esp. p.291.

¹⁵¹ Anne Summers claimed 'a revolution was underway' when she addressed a 1969 meeting of the Adelaide branch of the Women's International League for Peace and Freedom on the topic of Women's Liberation at the request of Dame Roma Mitchell, *Damned Whores and God's Police: The Colonization of Women in Australia* (1975), Penguin, Ringwood, Victoria, 1994, p.509.

¹⁵² Ailsa Burns, 'Matrimonial Breakdown and Divorce', *Search*, Vol. 5, No. 7, July 1974, pp.309-314; *Census of the Commonwealth of Australia*, Vol. 1, Part 2, 1966 and 1971; Peter Jordan, 'Men Hurt: The Effects on Marital Separation on Men', *Research Report No. 5*, Family Court of Australia, Sydney, 1985; 'The Effects of Marital Separation on Men', *Journal of Divorce*, Vol. 12, suppl. 1, pp.57-82, esp. pp.79-80, 1988; 'Ten Years On - The Effects of Marital Separation on Men', *Australian Journal of Family Law*, Vol. 11, 1997, pp.133-140 at p.137.

¹⁵³ Re *ex nuptial* births, S.E. Khoo and R.F. McDonald, 'Ex-nuptial births and unmarried cohabitation in Australia', *Journal of the Australian Population Association*, Vol. 5, 1988, pp.164-177.

¹⁵⁴ Colin James, 'A History of Domestic Violence', *forthcoming*.

escape an unhappy marriage and to enable a more successful remarriage. Large numbers of unhappily married people (mostly women) took advantage of the reform and applied for divorce quickly, however it constituted a less benign outcome for many women.¹⁵⁵ Given the abolition of matrimonial cruelty, a subsequent paper will show that many family court decisions following 1975 refused to acknowledge domestic violence in the context of 'no fault' divorce.¹⁵⁶ The effect was to obscure the gendered nature of men's violence as a cause of marital breakdown in many cases.

The failure of the new family law court to recognize domestic violence for fear of reintroducing the concept of fault, contributed to a parallel reluctance by police, the criminal courts and society at large to view men's domestic violence as a criminal offence. Consequently, the courts continued to make decisions that further disadvantaged abused women.

After 1975, with the new 'freedom' in divorce law, there was a stronger assumption of equality between wife and husband than under the previous law, and it was consistent with the liberal individualism of that decade. Given the assumption of equality, incidents of men oppressing their wives should have been less 'excusable', since courts no longer had to regulate or justify the hierarchy in the family. However, while the new law facilitated liberation for many oppressed women, it had unintended consequences for others. Many men felt aggrieved with the reform as they no longer had the control over their wives that had previously been sanctioned by the courts. Consequently, after the reform, not only were more women exercising their freedom to leave repressive marriages, more men were reacting by increasing their threats and violence, trying to continue their control over their wives, to preserve their marriages by assuming their patriarchal position in the traditional marital hierarchy had not changed.

Conclusion

Until the 1970s, the matrimonial offence of cruelty served as a judicial instrument for the silencing of women and the empowering of men. Australian courts managed families by reinforcing gendered assumptions concerning violent men and submissive women. The law authorised male control in families, and one method was to promote notions of male superiority. As cultural values changed, some courts engaged in legal contortions to restrict the meaning of matrimonial cruelty in order to dismiss the wife's petition and to reassert male control. The theory was that men were 'naturally' superior to women in ways that were good for the family and ultimately for social stability. At stake were not only the particular marriages of the parties before court, but the future of society and the stability of the nation.

¹⁵⁵ Australian Bureau of Statistics, *Marriages and Divorces Australia 1994*, Catalogue No.3310.0, AGPS, Belconnen, 1995, Appendix A, p.71; '3,000 applications for divorce in two weeks', *Sydney Morning Herald*, 22 January 1976, p.4; 'Divorce increases almost fourfold in one year', *Sydney Morning Herald*, 5 May 1976, p.10; the initial increase was from 7.3 divorces per 1,000 married women in one year (1975) to 19.2 in the next; Gordon A. Carmichael, 'The Changing Structure of Australian Families' *Australian Quarterly*, Vol. 57, 1985, p.102; Irene Wolcott and Jody Hughes, *Towards Understanding the Reasons for Divorce*, Australian Institute of Family Studies, Commonwealth of Australia, 1999, p.15.

¹⁵⁶ Colin James *forthcoming*.

Political demands for gender equality hindered the efficiency of the courts' self-imposed objective: to preserve marriages by protecting and encouraging male control of women. Formally, the statutes allowed a complaint of cruelty as a *limitation* of any power imbalance in the marriage, giving abused parties an opportunity of 'relief' in the remedies of divorce or judicial separation. Often, however, courts went to extraordinary lengths to avoid 'finding' cruelty in the behaviour of the husband, and instead, found a reasonable response by a man trying to save his marriage from the unhelpful attitude of his wife. Some courts found the wife responsible for provoking her husband's violence, typically when the wife had refused to submit to her husband's will. Some forced women back to the matrimonial home even where the evidence suggested that total submission to their husbands would not have ensured their safety. At times straining for coherence, the courts authorised male power, contrary to the spirit of liberal reform and the increasing social importance of sexual equality.

The cases show an assumption that marriage created an immune space, the family home ('a man's home is his castle'), in which men's behaviour was not subject to the law's view.¹⁵⁷ A man's cruelty to the point of violence towards his wife generally was not criminal and often not deviant behaviour such that it would concern the state unless it caused death, grievous injury or, in the opinion of the court, jeopardised the marriage. As reformist notions of individualism and equality strengthened, they showed in the cases as an increase in the power of the wife to impute to the abusive husband an intention to terminate the marriage; but the courts reacted to that liberal trend and re-established the husband's power for the sake of 'the marriage' and the good of society. Effectively, the law's toleration of a husband's abuse of his wife reinforced the marriage as an extension of the husband's person, consistent with the doctrine of unity and contrary to the spirit of the reforms that had begun in the 1850s. The courts developed a perverse application of individualism by purporting to protect the marriage and thereby supporting the husband's interests as paramount over the well-being of the wife.

Historically, most families were marriage-based and modelled on a 'naturalised' hierarchy in which the man had a legal duty to control his wife as much as a wife had a duty to obey her husband. The legal encouragement of male control in the family over many decades until the 1970s had the dual effect of provoking feminist demands for reform and reproducing misogynist attitudes in many men. This contradiction was to manifest in an intensification of male violence in the home, giving rise in the late twentieth century to recognition of a new phenomenon: domestic violence.

¹⁵⁷ Barbara H. Rosenwein, *Negotiating Space: Power, Restraint, and Privileges of Immunity in Early Medieval Europe*, Cornell University Press, Ithaca, NY, 1999, esp. Ch.9.