NOTHING “IMPROPER” HAPPENED:
SEX, MARRIAGE, AND COLONIAL IDENTITY IN UPPER CANADA, 1783-1850

by

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A thesis submitted to the Department of History
in conformity with the requirements for
the degree of Doctor of Philosophy

Queen’s University
Kingston, Ontario, Canada
June, 2010

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Abstract

This study explores the importance of heterosexual relationships, in theory and practice, to the making of Upper Canada as a British colonial society. Between 1783, when settlers began to enter the territory in the wake of the American Revolutionary War, and 1850, when the transition toward a more powerful colonial state was underway, contests surrounding marriage, gender, and sexuality were of great significance. The colony was intended by its first and many of its subsequent Lieutenant-Governors to serve as a model of loyalty to the British Empire and a bulwark against American democratic “disorder.” Fundamental to this colonial project was the presence of an orderly body of white settlers; however, this aim was often complicated and undermined by a diverse settler population which refused to conform to middle-class mores and social norms. Marriage and sexual “morality,” significant aspects of assessing “race” and “civilization” in this period, were primary sites for these tensions.

This study reenvisions appropriate and inappropriate heterosexual behaviour in the colony and explores the importance of debates over marriage and sexuality to articulations of settler identity. Using private writings, travel literature, and judicial records, including the benchbooks of the colony’s judges, I examine the ways the formation and dissolution of intimate relationships were contested between individual colonists, in local politics, and in international discourse about the British empire and the value of its colonies of settlement. Although Upper Canadians generally tolerated a broader spectrum of heterosexual behaviours and practices, including “irregular” marriage forms, disputes over appropriate expressions of sexuality and marriage were
implicated in the rhetoric of inclusion and exclusion from the colony’s inception. The role of the “neighbourhood” and community knowledge was multivalent and critical in determining acceptable behaviour in consensual relationships and defining sexual coercion. By the end of the 1840s, shifts in cultural and legal values increasingly placed the regulation of intimate matters in the hands of the state.
Acknowledgements

Many people helped me during the long process of completing this thesis. It is a great pleasure to finally be able to thank them in print.

First of all, thanks to all the librarians, archivists, and support staff who assisted with my research at Queen’s University Archives and Stauffer and Douglas libraries; Library and Archives Canada; the Toronto Public Library (North York and Metro Toronto Reference Library); the University of Toronto (especially Robarts Media Commons); the United Church of Canada Archives; and above all, the Archives of Ontario. I gratefully acknowledge the financial support of the Social Sciences and Humanities Research Council; Ontario Graduate Scholarships; Queen’s University; the Sir James Aikins Prize in Canadian History; the Joseph Leslie Engler Dissertation Fellowship; and the Roger Graham Fellowship in Modern Canadian History. I also thank James Carson, Robert Shenton, Sandra den Otter, David Parker, and Richard Greenfield, all of whom served as graduate or department chair during the completion of this thesis, for their assistance with navigating the program, securing funding, and providing opportunities to teach. The department’s amazing support staff, Cathy Dickison, Cindy Fehr, Debbie Stirton-Massey, and Yvonne Place, helped me innumerable times, as a graduate student and a commuting instructor. Thanks as well to my students, who helped me articulate my ideas, listened to my courtroom stories, and reminded me why history mattered.

I don’t quite know how to thank my co-supervisors, Jane Errington and Karen Dubinsky, for their belief in me and in this project. My immense debt to their scholarship will be obvious. Their patience, rigorous questioning, and above all, their willingness to
let me explore and make this project my own may not have led to a quick completion, but it has made me a far better scholar. They have gone far, far above and beyond what any graduate student has the right to expect. From the beginning, Jeff McNairn’s probing questions have challenged me to make this project better; I appreciate and have learned much from his interest in the records of Upper Canada’s courts. I thank him, and the other members of the examination committee, Sandra den Otter, Sylvia Söderlind (Department of English, Queen’s University), and Adele Perry (Department of History, University of Manitoba), for a defence filled with good discussion, helpful critiques, and suggestions for future development. Adele Perry’s encouragement of my work has been much appreciated. Cecilia Morgan generously took the time to discuss this project with me at a few critical stages, and during the final year of writing gave me the opportunity to present my research to three very difference audiences: the History of Education seminar at OISE, and lecture series at Black Creek Pioneer Village and the Niagara Historical Museum. I thank her, and the participants, for their comments and suggestions. Questions from audiences at the annual meetings of the Canadian Historical Association, graduate conferences at York and Dalhousie Universities, the History Departmental Seminar Series at Queen’s, and the University of Victoria also deepened my thinking about this project. Elizabeth Vibert supervised my M.A. thesis; equal parts encouragement and rigorous critique, her mentoring was invaluable in developing the tools I needed to undertake this project. Thanks also to Greg Blue, the best teacher I have ever met, who helped me open the right door at the right time. His intellect and generosity continue to inspire me.
The doctoral program at Queen’s introduced me to Julie Johnson, Jennifer Marotta, Matthew McKean, Sean Mills, and Stuart Henderson. Many of the ideas which ultimately appear here were tested and refined in their company, and I am grateful for their friendship and encouragement. I was fortunate to meet Alison Norman, Kristine Alexander, and Jennifer Bonnell just as I was planning a move to Toronto; this thesis also owes much to their intellectual support and friendship, and that of all the members of the Toronto Area Women’s Canadian History Group. I am also grateful to the friends who eased the transition between B.C. and Ontario. The kindness of Danielle Aird and family when I first moved to Kingston will never be forgotten. James Malfair generously shared his living space in Toronto during my first summer of research; Kristeen von Hagen, and Michelle Braakman and Matt Bera, loaned their couches over the next two years. Jenn Marotta and Greg Breen offered a home away from home after I left Kingston. Christine Pittmann, Rainbow Wilson, Cassie Ogilvie, and Shannon and Austin Henry also provided good humour, distraction, and much-needed perspective.

My gratitude to my extended family is impossible to put into words, but I will try. Although this thesis was written at a significant geographical distance from them, I felt their love and support every step of the way. My parents, Linda Grazley and John Grazley, have always encouraged and believed in me, as have their partners, Phil Lowe and Deena Gray, and my uncle, Lindsay Olson. Special thanks to my mum for the many hours she spent discussing this project with me, and for her assistance in researching Frederica Ferguson. My sister, Jana Grazley, also contributed countless hours of conversation, laughter, and good advice, over the phone and in too-infrequent visits with her and her partner, Thomas Överström. My parents-in-law, Ann and Mikkel Schau,
deserve their own set of thanks for emotional and financial support, and for well-placed
reminders that “TTT.”

This thesis is dedicated to my grandmother, Margaret Olson, who passed away in
1997, just as I plunged into Honours History. Among many other things, she passed on
her love of storytelling, a passion for education and knowledge, and the wisdom not to
equate them. I like to think that she would have been proud.

Finally, I thank my partner, Torben Schau, who in so many ways made it possible
for me to finish this thesis. He is the best.
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Chapter 1

Introduction

“Sex” and “Upper Canada” may initially seem like contradictory terms. Established in 1791 in the wake of the American Revolution, the colony is more often associated with images of steadfast farming families who prized order and loyalty to the Crown than with discourses about rampant sexual immorality. Yet only a cursory examination of contemporary writings about Upper Canada, including travellers’ accounts and emigrant guides, the colonial press, and political debates, indicates that sex between men and women was a subject of significant concern. Travellers cautioned readers about profligate behaviour among settlers, including their lack of chastity; one author declared that “an unmarried female with a baby in her arms is as much respected,” and indeed had better “matrimonial prospects,” than if “she preserved her virtue with a Vestal’s fidelity.” Authors of emigrant guides presented Upper Canada as a place where

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1 Edward Allen Talbot, *Five Years’ Residence in the Canadas: Including a Tour through Part of the United States of America in the Year 1823. By Edward Allen Talbot, Esq., of the Talbot Settlement, Upper Canada. In Two Volumes* (London: Printed for Longman, Hurst, Rees, Orme, Brown and Green, 1824), Vol. II, pp. 39-40. Talbot, an Irish gentleman whose father Richard founded the Talbot settlement in the southwestern part of the colony, emigrated to the colony in 1818. *Five Years’ Residence in the Canadas* contains some of the most outspoken commentary on sexuality in the colony; although it was published at the family’s own expense and sales were limited, Talbot’s observations were picked up in other accounts, and pirated translations also appeared in France and Germany. For a brief biographical sketch, see Daniel J. Brock, “Edward Allen Talbot,” *Dictionary of Canadian Biography*; also Bruce S. Elliott, *Irish Migrants in the Canadas: A New Approach* (Montreal and Kingston: McGill-Queen’s University Press, 2004), p. 70 and chapter 4, “The Beginnings of Tipperary Protestant Migration.”
women could easily find a husband, yet the colony’s restrictive marriage legislation, enacted in part to foster a particular model of societal order, cast doubt on the validity of many of its inhabitants’ unions. Press accounts of civil suits for seduction and breach of promise decried families’ laxity in allowing young women to spend time in bed with their suitors, describing them as “if not parties to … prostitution,” then “at least insensible to her dishonour.”

Even defence witnesses in breach of promise cases, however, frequently described intimate bed-based courting practices with the rejoinder that nothing “improper” happened. These juxtapositions clearly indicate that it is time for a renewed investigation of the role of sex in the colony’s history.

This study explores the importance of heterosexual relationships, in theory and practice, to the making of Upper Canada as a British colonial society. Between 1783, when settlers began to enter the territory in the wake of the American Revolutionary War, and 1850, when the transition toward a more powerful colonial state, increasingly integrated with (and attempting to dominate) the rest of the remaining British North American colonies, was underway, contests surrounding marriage, gender, and sexuality

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2 For example, Joseph Pickering, *Emigration or no emigration: being the narrative of the author, an English farmer, from the year 1824 to 1830: during which time he traversed the United States of America and the British province of Canada, with a view to settle as an emigrant; containing, observations on the manners and customs of the people ... and a comparative statement of the advantages and disadvantages offered in the United States and Canada, thus enabling persons to form a judgement on the propriety of emigrating*, by Joseph Pickering (London: Longman, Rees, Orme, Brown, and Green, 1830), p. 126.

3 *Kingston Chronicle and Gazette*, 16 September 1835. The case being reported was Deamud v. Galbraith, 1 September 1835, Niagara District Assizes, John Beverly Robinson Benchbooks, Archives of Ontario [hereafter AO], RG 22-390-2-22-4.

were of great significance. This study considers marriage in a broader context of heterosexual relations, looking at the ways the formation and dissolution of relationships were contested between individual colonists, in local politics, and in international discourse about the British Empire and the value of its colonies of settlement. From the inception of the colony in 1791, marriage was yoked to the building of colonial society in Upper Canada. It figured as both solution and problem, a redress to disorder and the site of that disorder. As numerous other scholars have shown, marriage was never a “natural” or simple process. Nor has it ever been a “private” matter. Appropriate forms of sexual behaviour, and their societal recognition in the form of marriage, were and are undeniably a feature of public debate. Studies of marriage in a variety of contexts, including the work of Nancy Cott, Peggy Pascoe, and other historians of the American colonies and republic, Suzanne Desan’s research on revolutionary France, and Sarah

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Carter’s recent analysis of marriage in the Canadian West, to name just a few, have shown the significance of legally-sanctioned heterosexual relationships to the politics of nation-building and to the making of identities. As Nayan Shah argues, “Marriage has been and is unstable yet central to the production of citizenship … How the norm of marriage has been refracted through religion, ethnicity, and race is an important historical problem.” In colonial societies, some of these debates became particularly salient because of the ways intimate relations raised questions about power.

I begin from the premise that intimate relationships are at once deeply personal and of enormous social significance. In colonial societies, the pressures of cross-cultural contact and a limited European population combined to make heterosociability and the appropriate choice of a marital partner rich with meaning. The “intimacies of empire,” as anthropologist Ann Laura Stoler has termed them, are central to all colonial projects. Indeed, as historian Adele Perry has noted, this is “perhaps the core point to emerge from

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the intersection of feminist and post-colonial scholarship: namely that gender, sexuality and intimacy are constituent of, rather than merely reflective of, colonialism.”

This attention to the enmeshing of sex, intimacy, affect, and the “political” has been marked not only by colonial historians, but increasingly by “national” ones as well. At the same time, as noted above, historians of sexuality are continuing to reimagine “national” histories which no longer cast sex off as “personal,” as opposed to “political.” Some years ago, historian Steven Maynard called for “an exploration of how sex, in different times and in divergent ways, impinged on the history of Canadian state formation ... a history of sexuality that challenges rather than restages how we think and write the history of nation.” This project aims to contribute to such scholarship.

In Upper Canada, marriage itself was part of the problem. Efforts to promote a monogamous “Christian conjugality” in line with a particular set of “British” values met challenges from within the colonial elite, from an early body of settlers, particularly those who were American-born and those associated with Methodism, and from a settler population which for much of the colony’s history refused to adhere to middle-class moral standards, whether through apathy or outright rejection. Many of these categories overlapped. The notion of “neighbourhood” and networks of kinship led community

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regulation, in many respects, to surpass that of the state. The balance shifted between 1820s and 1840s with arrival of large numbers of emigrants from the British Isles, especially those of genteel backgrounds, and their demands for greater inclusion in the running of the colony. Similar debates over marital forms, particularly informal or contract traditions, were also underway in Britain at the time.\textsuperscript{15}

This project concentrates on marriage among newcomers to Upper Canada, as discussion within the colony itself did. The colonial state made limited efforts to interfere with First Nations marriage traditions for most of the period under study, although this began to shift in the 1830s.\textsuperscript{16} Instead, the state chose to concentrate on the unruly behaviour practised by settlers who were supposedly “white.” Unlike other and especially later jurisdictions, in Upper Canada the emphasis in debates on appropriate sexuality focused less on the possibilities of racial mixing than that of white settlers’ behaviour and their place in the matrix of “civilization,” although metissage was necessarily implicated in these discussions.

\textsuperscript{15} These will be further discussed below and in Chapters Three and Four, but see John R. Gillis, \textit{For Better, For Worse: British Marriages, 1600 to the Present} (New York: Oxford University Press, 1985); Rebecca Probert, \textit{Marriage Law and Practice in the Long Eighteenth Century: A Reassessment} (Cambridge: Cambridge University Press, 2009); and Leah Leneman, \textit{Promises, Promises: Marriage Litigation in Scotland, 1698-1830} (Edinburgh: NMS Enterprises, 2003).

This study also concentrates on expressions of heterosexuality as part of efforts to turn a critical eye on categories which were constructed as “natural” or “normal,” but which, as we can see, were not.\(^\text{17}\) This is not to suggest that marriage or heterosexuality were the only intimate relations which were influential, or contested, in making Upper Canada’s colonial identity; however, they did take on a particular significance. Recently, scholars of empire have observed and critiqued a tendency to equate “intimacy” with sexuality, especially heterosexuality.\(^\text{18}\) In taking as its explicit focus heterosexuality, and marriage as its “legal container,”\(^\text{19}\) this study does not attempt to deny the presence or the importance of same-sex activity, nor does it disregard a broader definition of intimacy which incorporates kinship and friendship. Intimacy and sexuality are not synonymous. But there are a number of reasons I have chosen to cast this study in this way. First of all, although ideas surrounding marriage as the “legal container” for appropriate sexuality were contentious in Upper Canada, they have not been thoroughly investigated, either within the colony or with reference to transnational debates about gender and sexuality. Instead, heterosexual relationships and commentaries about marriage and morality have been assumed to have stable meaning, or disregarded in favour of more “legitimate” topics such as partisan politics or religion, which of course were hardly separate from

\(^\text{17}\) My approach owes much to Catherine Hall’s articulation of this strategy in “Feminism and Feminist History,” the introduction to White, Male and Middle Class: Explorations in Feminism and History (New York: Routledge, 1992), pp. 1-40.


\(^\text{19}\) I borrow this term from Shah, “Adjudicating Intimacies on U.S. Frontiers,” p. 134.
sexuality. As historian Sharon Block observes in her study of rape in early America, the “challenge” for scholars of past sexualities “is to recreate the complex meanings of intimate sexual relations without reinscribing a time period’s singular hegemonic view onto the subject of study.”

Studies which address heterosexual intimacies in Upper Canada have not always met this challenge, largely because they have focused too widely on “nineteenth-century Canada,” and too little on placing even dominant understandings of gender and sexuality in historical context. Upper Canada’s status as a discrete settler colony, and especially the distinction in culture between the long eighteenth century and the (late) “Victorian era,” meant that appropriate forms of sexual behaviour were interpreted and contested in ways which may have shaped those of later nineteenth-century Ontario, but were emphatically not the same.

To take one such example, pregnancy figures prominently in discussions of permissible sexual activity and relationship breakdown, but discourse about the effects of “irregular” marriage on children is almost non-existent. Although motherhood was

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21 For example, Peter Ward, *Courtship, Love and Marriage in Nineteenth-Century English Canada* (Montreal and Kingston: McGill-Queen’s University Press, 1990). Françoise Noël, *Family Life and Sociability in Upper and Lower Canada, 1780-1870: A View from Diaries and Family Correspondence* (Montreal and Kingston: McGill-Queen’s University Press, 2003), is more successful in exploring the historically specific aspects of courtship and marriage, but the nature of her source material, mainly family papers, leads her to concentrate primarily on stable relationships among the literate upper middle class. Legal scholar Patrick Brode’s discussion of the colonial context in *Courted and Abandoned: Seduction in Canadian Law* (Toronto: Osgoode Society/University of Toronto Press, 2002) also gives better attention to the specificities of time and place, but like Ward, tends to assume too much continuity with later developments.
presumed to be a component part of wifehood, and men’s identity as husbands and fathers was linked to ideals of Christian manliness, discussions of marriage tended to treat children as a byproduct rather than the object of conjugal union. Much has been made of the occasional bursts of press attention to infanticide in the colony. Production of a hybrid population through the birth of children figured in discussions about intermarriage between Aboriginal peoples and newcomers, and among European immigrants, as well. However, a broader conception of kinship and family relations, rather than one narrowly focused on the conjugal couple and its offspring, was at play in these discussions. Similarly, even traveller and emigrant discourse which lamented the

23 Morgan, Public Men and Virtuous Women.
26 See Perry, “Islands of Intimacy.”
early age at which Upper Canadians married, and the women consequently “faded,” lacked the emphasis on reproduction and the future of the “race” that would come to characterize later nineteenth-century articulations.

Most importantly, marriage itself did not figure as safety; the forms which it took, and the ways in which it was practised, could be as frightening as the notion of marriage as a producer of family and social stability could be reassuring. The process by which the normative and supposedly uncontested category of heterosexuality was negotiated and, through a combination of cultural and legal change, brought more closely under the purview of the state has much to tell us about the ways that colonial and other states enacted regimes to manage intimacies writ large in the second half of the nineteenth century and beyond. While an expansion of both the terms and the imagination of intimacy is critical to generating further understandings of the workings of colonialism, affect, and power, turning a critical lens toward bodies and practices supposedly in the centre must also be a part of “a radical decentering of heterosexuality, domesticity, and monogamy from our historical vision,”\(^{27}\) not least by demonstrating how far from ‘natural’ such things were.

*Placing Upper Canada*

Upper Canada’s conditions of origin made the colony unusual in the British empire. Because much of its early settlement was enacted by newcomers who already

had a generation or more of experience in North America, the first wave of colonists did not necessarily see themselves as “colonial,” but instead claimed a certain amount of “native” status. Upper Canada was intended by its first Lieutenant-Governor, John Graves Simcoe, and many of its subsequent Lieutenant-Governors to serve as a model of loyalty to the British Empire and a bulwark against American democratic “disorder.” Simcoe was devoted to the idea of creating “a little Britain” in Upper Canada, a new and improved British society, with “a Superior, more happy, and more polished form of Government” than that of the American republic. To this end, it was “of the utmost importance to ‘inculcate British Customs, Manners, & Principles in the most trivial, as well as serious matters’ in order ‘to assimilate the colony with the parent State’.”

Fundamental to this colonial project was the presence of an orderly body of white settlers. However, from the start this aim was often complicated and undermined by a diverse settler population which refused to conform to middle-class mores and social norms. Marriage and sexual “morality,” both of which were significant aspects of assessing “race” and “civilization” in this period, were primary sites for these tensions, and figured in Upper Canada in a number of ways. The laws governing the solemnization of marriages were debated, often bitterly, during the colony’s first 40 years. Travel writers and authors of emigrant guides frequently remarked on the dire state of the colony’s “morality,” citing not only Sabbath-breaking and drinking, but a propensity to “loose” sexual behaviour. Political rivalry and allegations of scandalous

sexual conduct intertwined in episodes like the “Gore District outrages” of the late 1820s.\textsuperscript{29} Yet, with a few exceptions, including Lynne Marks’s work on the church disciplinary courts,\textsuperscript{30} Jane Errington’s study of women’s work,\textsuperscript{31} Cecilia Morgan’s research on gender in public discourse on politics and religion,\textsuperscript{32} and Annalee Lepp’s study of marital breakdown, which concentrates primarily on the post-1850 period,\textsuperscript{33} the history of gender and sexuality in the colony has remained shadowy.

This is even more pronounced when we consider the colony in a broader context. Comparisons with other societies reveal similar levels of contest, but also demonstrate the articulations particular to Upper Canada’s colonial project. Upper Canada was a white settler society which, due to its peculiar geography within the largely maritime


\textsuperscript{31} Errington, \textit{Wives and Mothers}.

\textsuperscript{32} Morgan, \textit{Public Men and Virtuous Women}.

\textsuperscript{33} Annalee E. Lepp, “Dis/Membering the Family: Marital Breakdown, Domestic Conflict, and Family Violence in Ontario, 1830-1920” (Ph.D. Dissertation, Department of History, Queen’s University, 2001).
British Empire and its unusual conditions of settlement, downplayed the more obvious power clashes of colonial incursion even as it struggled with attempts to create a specific kind of “British” society. Moreover, the proximity of the United States and a land-based border created additional possibilities for the mobility of people and ideas, as did the neighbouring French-speaking Catholic population in Lower Canada. The Great Lakes region’s long history of mixing through the military and fur trade before the establishment of Upper Canada as a destination for Euro-Americans and Europeans, and the diversity of residents from the beginning of that colonization, also complicated easy readings of “white settler” identity. Upper Canada represented possibilities which were both problematic and encouraging of a hybridized colonial identity which excluded even as it linguistically gathered the “mixed assemblage” of “Canadians” within its boundaries.

Scholars have increasingly emphasized the necessity of approaches to Upper Canada’s history which not only place the colony within an international historiographic context, but also “acknowledge the level of serious concern with which colonists


35 William Lyon Mackenzie frequently referred to the colony’s “mixed” or “motley” population. See, for example, Colonial Advocate, 12 June 1828, and William Lyon Mackenzie, Sketches of Canada and the United States (London: E. Wilson, 1833), p. 89.
regarded the world they were making.” As Robynne Rogers Healey observes, colonial society “was constructed through an intricate web of both vertical and horizontal relationships at various levels … The process of conflict and accommodation that came out of the social, political, and cultural intercourse of various groups over approximately seventy years formed the basis of Upper Canadian identity.”

Likewise, Julia Roberts convincingly demonstrates that the conviviality and conflict of Upper Canada’s taverns was fundamentally connected to the colony’s negotiation of identity:

Cultural rituals and social rules set broad boundaries on the forms of interaction to be encouraged, merely tolerated, or resisted. Because the colony’s mixed peoples were in the process of defining patterns of association, studying the tavern public captures some of the potential conflict or uncertainty in people’s ordinary, everyday lives. Theirs was not a simpler world. It was one in which the terms of admission to public space and membership in public life were under negotiation.

This negotiation also extended to the simultaneously public and private space of heterosexual relationships and marriage.

The growing body of literature which demonstrates the inseparability of “public” and “private,” and the ways that the intimate relations of kinship, household, and sexuality were also constitutive of the political, is also suggestive when considering the importance of marriage in Upper Canada. As scholars increasingly recognize, separating “public” politics from “private” life is, if not impossible, a spurious distinction, especially

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in the context of empire. The sociopolitical arrangements of empire make intimacy key to both the constitution and the understanding of those arrangements. The interweaving of politics and intimacy has also been marked by scholars of metropolitan Europe. Anna Clark’s study of political scandal in Britain during this time period draws similar conclusions about the inseparability of politics and sexuality. Desan argues that the French Revolution both “transformed the most intimate relationships” of family and gender and “was integral to forging the revolutionary state and politics.” In Upper Canada, the intimacy of private and public can be seen in examples from sexual scandal in partisan politics, as in the tarring and feathering of George Rolph, to contests over emigration and imperial preferment. Taking all of these factors into account, it is clear that sex, marriage, and the making of colonial identity intertwined in Upper Canada.

Contests around the regulation of heterosexual behaviour in Upper Canada, as in other colonies, centered around what forms of sexuality and of family would be recognized as acceptable, and between whom. The colony was established and settled by non-Natives during a period of profound upheaval. To many, Upper Canada constituted a backwater of empire, a colony which had potential but lacked development. Yet it would be a mistake to assume that the colony’s lack of overall status within the British Empire meant that its population was not participating in the same profound shifts in

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41 Desan, *The Family on Trial*, p. 3.
political expression, social organization, and understandings of gender, sexuality, and the body. Recent studies of Upper Canada, including Jeffrey McNairn’s work on political culture and the public sphere,\textsuperscript{42} Roberts’s study of taverns and public life,\textsuperscript{43} and Errington’s research on transatlantic migration,\textsuperscript{44} demonstrate that not only were Upper Canada and Upper Canadians far from isolated, although they might occasionally have felt so, but that they were also connected, intellectually and socially, to the currents of change which swept through the rest of the Anglo-American world during the late eighteenth century and the first half of the nineteenth. Many of these changes involved understandings of gender, sexuality, and the meanings of marriage.

The late eighteenth century marked a number of significant shifts in discourses about gender, class, and nation throughout the Anglo-American world, all of which were tied to imperial exploration and expansion.\textsuperscript{45} As Katherine McKenna notes in the prologue to her biography of Anne Murray Powell, in “one short generation dramatic ideological changes took place in attitudes toward gender roles, family life, and sexual behaviour.”\textsuperscript{46} Political revolutions, industrialization, and the need to reenvision the role and significance of empire all contributed to these changes, which were driven by the increasing cultural dominance of the middle classes in Britain. Bourgeois men in


\textsuperscript{43} Roberts, \textit{In Mixed Company}.

\textsuperscript{44} Elizabeth Jane Errington, \textit{Emigrant Worlds and Transatlantic Communities: Migration to Upper Canada in the First Half of the Nineteenth Century} (Montreal & Kingston: McGill-Queen’s University Press, 2007).

\textsuperscript{45} Catherine Hall, “Missionary Stories: gender and ethnicity in England in the 1830s and 1840s,” in \textit{White, Male and Middle Class}, pp. 205-207.

particular began to reject the “cynical moral relativism” of a “decadent aristocratic class.” Instead, as Leonore Davidoff and Catherine Hall have argued, they reconfigured manly ideals to embrace independence, a stern work ethic, devout religious (often evangelical) practice, and a devotion to family. As McKenna notes, it was no longer enough to simply display courtly manners: “Instead of recommending only an outward correctness, [the new advice books] encouraged an inward sense of proper behaviour as well. Virtue came from within, and propriety was its outward display.” In the fledgling United States, similar impulses were being discussed in the language of republican virtue. Both strict paternal authority and a corresponding tolerance for men’s

47 McKenna, A Life of Propriety, p. 5.
50 See Linda Kerber, Women of the Republic: Intellect and Ideology in Revolutionary America (Chapel Hill: University of North Carolina, 1980); Jan Lewis, “The Republican
uncontrolled sexuality were increasingly replaced by a vision of masculine, as well as feminine, purity. This went hand in hand with a shift away from an upper-class masculinity identified with politeness, refined manners, and the art of conversation toward an emphasis on plain speech, honesty, and sincerity becoming celebrated as the defining characteristics of an ideal man. According to this model, men needed to spend some time in the company of women, where politeness was compulsory, to ensure that they did not become unacceptably rough and uncivilized; too much time in mixed company, however, would almost certainly lead to effeminacy. This argument found expression in the creation of social spaces which were distinct from domestic spaces, and gendered masculine and feminine respectively, a shift which was very much connected to middle-class ascendency in this period. The British middle class, as part of its self-identification, rejected the perceived excesses of the aristocracy and aristocratic manhood in particular in favour of a masculinity which stressed the importance of independence, hard work, religion, and family.

Between 1780 and 1850, the distinction between “masculine” and “feminine” space was settled into an ideology which prescribed “separate spheres” for men and women. By assigning “public” activity to men and the “private” world of home and family to women, separate spheres ideology allowed for a manliness characterized by


53 See Davidoff and Hall, *Family Fortunes*, as well as Vickery, “Golden Age to Separate Spheres?”; Shoemaker, *Gender in English Society*, pp. 5-12; and Tosh, *A Man’s Place*, and “The Old Adam and the New Man.”
chastity outside of marriage, fatherly domesticity, and a sober sensibility, as well as independence. Toward the mid-nineteenth century, this emphasis on chastity was exaggerated by increasingly prevalent fears of “racial mixing” between European settlers and indigenous populations in much of the British Empire. “The cumulative result,” as Perry has argued, “was the creation of a dominant white masculine ideal in which European men were complete only when living in heterosexual, same-race, hierarchical unions.”\(^5^4\) The chaste middle-class family man and his wife, the angel in the house, became the fundamental building blocks of an organized, stable, respectable, and “civilized” settler society. By the mid-nineteenth century, imperial observers increasingly stressed the importance of establishing a “clear gender order with bread-winning husband and father and domesticated wife and mother,” an “idealised family, secure in its homestead.”\(^5^5\) While each colony had a specific formation of these gendered ideals, they shared a notion of ‘Britishness’ which helped to shape gender, ethnic, and local colonial identities.

The rise of separate spheres ideology, and its concurrent emphasis on domesticity, also substantially affected middle-class marital ideals, placing increased emphasis on affection between husband and wife.\(^5^6\) Scholars in a variety of contexts have noted the association of companionate marriage with political change in this period, and particularly with movements toward the democratization of political power for middle-

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\(^5^4\) Perry, *On the Edge of Empire*, p. 21.
\(^5^6\) Tosh, *A Man’s Place*, p. 26; McKenna, *A Life of Propriety*.\(^5^7\)
class men. In the early American republic, affection and companionate marriage were linked with republican ardour; as Jan Lewis has argued, “Marriage was the very pattern from which the cloth of republican society was to be cut.”\(^{57}\) The emphasis on free choice of a partner, equality, and affection between husband and wife was bound up with ideals of republican liberty in France as well.\(^{58}\)

The extent to which companionate marriage was practised, however, as well as when and by whom, has also been debated. As Leah Leneman observes, although the rise of companionate ideals presented the primacy of affection between husband and wife as an innovation, “the desire for companionship, affection, and romantic love” was no less a motivating factor in, nor was it inconsistent with, more openly patriarchal marriage models.\(^{59}\) Lisa Wilson suggests for New England that the increased emphasis on affection in marriage was as reflective of a shift in language as in values, as men continued to try “to maintain in the domestic realm” a “delicate balance … between affection and power.”\(^{60}\) Anna Clark claims that while bourgeois conceptions of marriage were influential, the tensions between separate spheres ideology and the necessity of women’s waged work made inconsistencies within companionate ideals more visible.


\(^{58}\) Desan, *The Family on Trial*.


among the British working class.\textsuperscript{61} Similarly, Clare Lyons has noted some of the ways in which companionate ideals were implicated in struggles for political power and campaigns against nonmarital sexuality in late eighteenth-century Philadelphia, and were revealed to be dependent upon “the subordination of women.”\textsuperscript{62} Furthermore, the ideal of companionate marriage, in which husband and wife formed a loving, trusting emotional and economic partnership, was both strengthened and challenged by the increasing demarcation between the sexes.\textsuperscript{63}

These values helped to shape the gender order in Upper Canada, although their influence here too was contested. The economic conditions of the colony, as with the urban working classes in Britain and the United States, precluded a strict separation of spheres within the household; subsistence and prosperity depended on a household-based economy, although tasks were gendered and performed by women and men respectively when possible.\textsuperscript{64} Nevertheless, discourses which promoted both companionate marriage and idealized gender behaviour based on the framework of separate spheres circulated in the colony, through published prescriptive literature and within the colonial press.

Although the ideal of “separate spheres” held some currency among the colony’s elites, it is important to note that the vast majority of Upper Canadians lived, worked, and

\textsuperscript{61} See Anna Clark, \textit{The Struggle for the Breeches: Gender and the Making of the British Working Class} (Berkeley: University of California Press, 1995), chapter 5.
\textsuperscript{62} Lyons, \textit{Sex Among the Rabble}, p. 298, also pp. 171-175, 238, 287.
\textsuperscript{63} Tosh, \textit{A Man’s Place}, p. 26; Jabour, \textit{Marriage in the Early Republic}, p. 4, also p. 22.
loved in what historian Karen Hansen has termed the “social sphere,” a world which was mixed by gender and age. Catharine Anne Wilson has demonstrated the significance of “neighbourhood” in “understanding … the relationship between the individual, the family, and the larger social order” in Upper Canada: “neighbourhood was not just the people who lived near you but the basis for economic activity, social support, and the organization of day-to-day living.” Through activities like reciprocal work bees, “people from diverse backgrounds came together and were incorporated according to their genealogy, wealth, age, gender, and skills.” Françoise Noël argues that “the family life of the literate classes in the Canadas before 1870 was not located in the narrow private world of the domestic sphere but in a much broader social space shared by people of both genders.” Similarly, Marks demonstrates that the colony’s churches “did not make clear distinctions between the concepts of public and private” in their efforts to regulate “the sexual, family, and business behaviour” of their members. In many ways, the contests over appropriate heterosexual behaviour in the colony between the late eighteenth and mid-nineteenth centuries can be seen as a larger societal effort to work out some of these distinctions between “public” and “private.”

Previous scholars have tended to assume, based on elite discourse and on their own lenses, that Upper Canada was a society in which chastity was considered the

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primary female virtue, and expressions of sexual behaviour outside of legal marriage were considered both indecent and detrimental to society itself. A reconsideration of the available evidence, however, suggests that not only were sexual standards in Upper Canada more inclusive than we have previously thought, but also that the notion of community regulation deserves a more nuanced reading. This is not to argue that the colony was a sexually permissive society; communities, churches, and the colonial state all attempted to regulate sexual contact between men and women, and to eliminate other sexual acts which they considered antisocial or otherwise deviant, a category which included bestiality and sexual assaults on female children. Evidence of a “pleasure culture” in Upper Canada like those present in contemporary Philadelphia, New York City, or Montreal is scanty, although this is an area in which more research is needed.

It is clear, however, that in contrast to previous studies which have claimed that Upper Canadians held tightly to ideals of chastity for women especially, a broader spectrum of


sexual activity was tolerated in the colony, within certain boundaries and conditions. Like American historian Martha Hodes, I use the term “tolerate” here deliberately and carefully. Hodes explains:

There is a crucial nuance of language here: *tolerance* implies a liberal spirit toward those of a different mind; *toleration* by contrast suggests a measure of forbearance for that which is not approved.  

My research suggests that Upper Canadians practised, by this definition, both toleration and tolerance of sexual activity outside of marriage. Moreover, as Hodes states, “the phenomenon of toleration, no matter how carefully defined, cannot convey the complexity of responses” to behaviours which crossed societal boundaries. For these reasons, Anna Clark has critiqued Hodes’s use of “toleration,” and particularly the potential it has to confuse readers’ understandings of sexuality in the past. Clark instead proposes “‘twilight’ as a metaphor for those sexual practices and desires that societies prohibit by law or custom but that people pursue anyhow, whether in secret or as an open secret.” Both Hodes’s and Clark’s formulations are useful in assessing the history of sexuality in Upper Canada, where we are still in the process of winnowing out what practices may in fact have been accepted and what were not. Where Upper Canadian settlers drew these lines, and how definitions of acceptability varied within elements of the colony’s diverse population, is one of the continuing threads throughout this study.

It is also critical that we proceed carefully in assessing the notion of sexual “freedom.”

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72 Hodes, *White Women, Black Men*, p. 3.
C.A. Wilson’s analysis of work bees, for example, takes care to show that although some observers have read them as an example of collaboration and collectivity based on equality, bees were not an egalitarian force in themselves; in fact, they often functioned as a tool to entrench and preserve social hierarchy within the neighbourhood.\(^\text{74}\) Similarly, that a broader definition of permissible sexual behaviour in the colony can be observed into the 1840s should not be interpreted as a sign of “liberation,” although in some cases the patriarchal assumptions on which it was based did provide a backhanded kind of freedom for women as well as men.

Historians of England and the British Isles have called attention to the presence, and the persistence into the early nineteenth century, of “informal” marriage traditions. In some of these cases, couples participated in betrothal rituals by which their relationship was recognized by the community; however, discussion of such practices has also included community knowledge of a couple’s relationship and eventual intention to marry.\(^\text{75}\) This understanding of marriage placed emphasis on mutual consent, rather than church or legal ceremony. Recently, however, legal scholar Rebecca Probert has challenged the resulting argument that prior to the 1753 Hardwicke Act, “at least half of all marriages” could be categorized as informal unions based on consent.\(^\text{76}\) Probert also questions broad definitions of informal unions: “the status and function of the practices described is not always made clear. This leads to a number of practices (such as … not marrying until the woman was pregnant) being described as marriages or alternatives to

\(^{74}\) Wilson, “Reciprocal Work Bees,” p. 444.
\(^{75}\) See Gillis, For Better, For Worse; Clark, The Struggle for the Breeches; and Stone, among others.
\(^{76}\) Probert, Marriage Law and Practice, p. 73, and especially chapter 3’s discussion of “informal marriage myths.”
“Pre-marital sex, by itself,” she concludes, “hardly seems to merit the description of an alternate marriage practice.”

Probert’s point is in some respects well taken. Certainly in England, as she demonstrates, neither sex outside marriage nor conjugal unions formed without regard to the standards of legal validity could expect to be recognized as “marriages” by the courts. Nor were they necessarily regarded by churches or neighbours as equivalent to formal, legal marriages. Upper Canada also made clear, through legal and judicial intervention, that “marriage” had a strict definition. This understanding was not always shared by the community, however. As Carter argues, “the term, no matter how imperfect, can be used if it is understood that there were diverse definitions of marriage. Like the term ‘family,’ there is no fixed or homogenous definition.” Marriage did not necessarily have a stable cultural meaning for everyone, as the contests in this study show.

Sources

The character and content of colonial archives has presented challenges as well as felicities for this project. Textual records from “ordinary” Upper Canadians’ lives are far from abundant, and few had time or perhaps the inclination to produce written records

77 Probert, Marriage Law and Practice, p. 9.
78 Probert, Marriage Law and Practice, p. 9.
79 Carter, The Importance of Being Monogamous, p. 127.
which addressed the emotional bonds assumed to be the ideal source for a study of heterosexual intimacy. Probert’s corrective to accounts of “irregular” marriage is based in part on parish registers, another source to which scholars have turned to understand marriage in the past. In Upper Canada, however, the utility of such a demographic approach is limited. As Ward observes, “the available parish records are too few, too fragmentary, and too imperfect to support sustained analysis of this sort.” The colony did not mandate reporting of marriages until 1831, and even then, only dissenting Protestant ministers and magistrates were required to submit an annual list of marriages conducted to the District Clerk of the Peace. Anglican and Catholic clergy were exempt. Before 1831, registration of marriages was voluntary and subject to a fee. Changes to licensing requirements in 1848 produced a more complete set of records, but these again must be interpreted with caution. In any case, demographic records from Upper Canada provide little substantial information about how and why marriages were conducted, much less the discourses which informed them. This study concentrates instead on other kinds of qualitative evidence gained from published travel writing and emigrant literature, as well as private writings, including diaries and letters. Although I have


83 Genealogists Fawne Stratford-Devai and Ruth Burkholder provide a helpful outline of the available records in Vital Records in Ontario Before 1869: A Guide to Early Ontario Vital Records (Milton, ON: Global Heritage Press, 2003), pp. 5-20. As they note, only 17 of the 20 district registers are extant, and only the Home, Johnstown, London, Ottawa, and Western contain any record of marriages before 1831.

84 District Marriage Registers, 1780-1858, AO, RG 80-17-1, MS 248.
drawn on material from the colony’s press, this study does not treat it exhaustively, as both Morgan and Errington have examined press discourse about gender ideals.  

I have turned to legal sources in an effort to get beyond press and published discourse, influenced by numerous historians who have made excellent use of court records as a source for social history. As Barrington Walker observes, legal records have much to tell us about the activities of people who were not “exceptional,” as well as the ways that race, gender, sexuality, and class were constructed in the courts.  

Similar insights have been offered by historians of the American colonies and Britain, as well as studies which analyze specific episodes of legal conflict to understand broader social phenomena. Scholars who have focused more directly on the history of the law have also shown how “common themes” in court cases “were echoed in a much wider discourse.”

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87 For example, Fischer, *Suspect Relations*; Lyons, *Sex Among the Rabble*; and Clark, *The Struggle for the Breeches*.
Legal history occupies a significant place in Upper Canadian historiography. As Peter Oliver has observed, historians’ interest in the “partisan involvement of King’s Bench judges in the Executive and Legislative Councils into the 1820s and 1830s … has had the somewhat astounding effect of moving legal history from the periphery of Upper Canadian historical scholarship to the very centre.”\textsuperscript{90} Scholars of the colony have used its legal records to illuminate political contests and, increasingly, social organization.\textsuperscript{91} Susan Lewthwaite in particular has done much to conceptualize and clarify not only Upper Canadians’ use of the lower courts, but also their understandings of the meanings of law.\textsuperscript{92}


\textsuperscript{91} See in particular Murray, \textit{Colonial Justice}, and Roberts, \textit{In Mixed Company}. Jeffrey McNairn’s research on debt and insolvency in the colony also makes use of legal records, including the judges’ benchbooks.

Shah has observed that “[n]otwithstanding the narrow interpretive parameters of judicial and prison records, an investigation of government management of sex, race, and morality can also reveal lost and fragmented histories embedded within the archive of the state.”

The Upper Canadian judges’ benchbooks, which form a significant part of the source base for this study, constitute such an example. The benchbooks are handwritten records of the civil and criminal trials over which the judges presided. Each judge carried his benchbook throughout the assizes, and in it recorded the testimony of witnesses, the comments of lawyers, and his own instructions to the jury. In the absence of court transcripts, or detailed minutes and filings for many districts, the benchbooks provide some of the only qualitative evidence of Upper Canadians’ testimony. They also convey a substantially different impression of cases than do press accounts of trials.

Seven judges’ benchbooks survive for the period 1827 through 1850. Those of James Buchanan Macaulay and John Beverley Robinson are most complete, covering the entire 1830s and 1840s, although not all of the benchbooks have survived. The judges in question were all affiliated with the Anglican ruling elite, and held official posts which straddled the legislature and judiciary. A number of them, including Macaulay, Robinson, and Hagerman, were former students of John Strachan, the Anglican bishop of Upper Canada. The benchbooks provide a judges’-eye view of Upper Canadian court

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94 For another explanation of the benchbooks, see H. Julia Roberts, “Taverns and Taverngoers in Upper Canada, the 1790s to the 1850s” (Ph.D. Dissertation, Department of History, University of Toronto, 1999), p. 13.
95 AO, series RG 22-390: Benchbooks of Justice James Buchanan Macaulay, 1827-1856 (RG 22-390-1); John Beverley Robinson, 1829-1862 (RG 22-390-2); Christopher A. Hagerman, 1840-1846 (RG 22-390-3); Jonas Jones, 1846 (RG 22-390-4); Robert Baldwin Sullivan, 1848-1853 (RG 22-390-5); William Henry Draper, 1849-1876 (RG 22-390-6); Robert Easton Burns, 1838-1860 (RG 22-390-9).
proceedings, and as such may or may not accurately capture the testimony of witnesses.\textsuperscript{96} However, they do follow a relatively consistent generic pattern; each judge attempted to record what he saw and heard in the courtroom objectively, although Hagerman in particular was more forthcoming with extraneous commentary and personal opinions in the pages of his benchbooks.

The benchbooks are handwritten and not indexed by topic, although individual judges sometimes provided an index by name in the back or front of the book. As a result, this study draws on all of the cases I came across in the seven sets of benchbooks between 1827 and 1850 in which heterosexual relationships were mentioned or implicated. In this way, I uncovered cases of rape, attempted rape, and assault and/or battery which did not reference sex in the charge, but in which sex was clearly present; riot, trespass, and assault cases which were prompted by charivaris; and civil suits for seduction, breach of promise, and general assumpsits for financial support of illegitimate children or separated wives. I have looked at court filings where possible, but have concentrated primarily on using the benchbook notes to explore multiple voices on heterosexual behaviour in Upper Canadian society. I discuss “results” as they indicate standards and opinions, which sometimes differed substantially from the letter of the law, but because they are incomplete, the records themselves do not support a quantitative analysis.

Context and Contributions

This study contributes to the history of Upper Canada, British North America, and the British imperial world. It also, however, must be understood in light of recent developments in Canadian historiography. Over the past two decades, Burton, Hall, Stoler, and other scholars of empire have repeatedly argued the necessity of bringing the metropolitan and colonial into a single analytic frame. In this and other fields, historians have also increasingly identified the limitations of the nation-state as epistemological boundary, emphasizing as a corrective transnational or cross-cultural studies. As Katie Pickles notes, the politics of this transnational turn are complicated in Britain’s former settler colonies, Canada as well as Australia and Aotearoa/New Zealand, by a nation-building historiography which is equally marked by an inferiority complex, or “cultural cringe.”

97 Historians of Canada, particularly those who study the twentieth century, have embraced transnationalism for the productive questions it raises, but also as a way to get around the cringe factor and find international relevance for Canadian stories (which is of particular concern to Canadians themselves). Arguably, however, the necessity of a transnational focus can also be invoked to undermine the value of single-area studies, a

discussion which is further complicated by the very different terms of reference with which colonial historians and those of later periods often approach “Canada.”

This study is informed by transnational movements, both physical and intellectual, as well as discourses and scholarship. Although its explicit focus is on the connections between heterosexual relationships and identity in the making of one colony, I consider Upper Canada in the transnational contexts of the British empire and North America. I attempt to show the specificities of Upper Canada’s local conditions, as well as its place in a larger Anglo-American world, and some of the ways these interactions produced the particulars of the colony’s social and sexual cultures. Upper Canada was a mobile and porous society; these concerns are as appropriate to the worldview of Upper Canadians themselves as they are to twenty-first century historians.

While this study explores similarities and linkages between Upper Canada and other jurisdictions, and is premised on the notion that we cannot understand these cultural ideals and shifts without considering a larger framework of people and places, it is not based on comparative primary research. I maintain that there is value in an area-specific study which takes into account some of these more permeable boundaries alongside transnational studies which explore those boundaries more fully. The unexplored nature of gender and sexuality in this colony necessitates an area-specific study, particularly

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98 For example, compare the essays in *Contesting Clio’s Craft*. See also Jerry Bannister, “Canada as Counter-Revolution: The Loyalist Order Framework in Canadian History, 1750-1850,” in Jean-François Constant and Michel Ducharme, eds., *Liberalism and Hegemony: Debating the Canadian Liberal Revolution* (Toronto: University of Toronto Press, 2009), pp. 98-146.

99 I use this term in preference to “Atlantic world.” Although this study benefits from the insights of Atlantic world scholars, I find the category temporally and geographically limiting in understanding British colonialism.
when we take into account the ways that scholars using alternate frameworks, especially that of “nineteenth-century Canada” or “Ontario,” have “read backwards” or made assumptions based on later evidence about conditions in Upper Canada which are not reflective of the colony’s social setting and culture.\textsuperscript{100} Part of my aim is to understand the ways that sexuality and marriage were part of the effort to shape borders and identities within one colonial space. While these efforts were by no means unusual, they were nevertheless expressed in terms which were specific to Upper Canada and often invoked the colony itself as an entity, and in relationship to other discrete sites.\textsuperscript{101}

As indicated above, this study also identifies some significant differences from previous scholars’ understandings of sexuality in Upper Canada. I argue that public discourse which insisted on women’s chastity outside of marriage cannot be taken as indicative of practice or even of discourse among the population outside the colonial elite, who themselves did not speak with one voice. This study offers contrary evidence as well as some qualified support for arguments about social ostracism or other punitive responses to sex outside of marriage for women. Upper Canadians recognized a broader spectrum of acceptable sexual behaviour, which itself encompassed a range of responses including rejection, “twilight moments,” “toleration” in Hodes’s sense, and acceptance. A similar variety can be seen in Upper Canadians’ acceptance of formal, legal marriage models, which into the 1830s were inextricably connected with political disputes and clashes over loyalty and identity. The visibility of this broader spectrum and its

\textsuperscript{100} For a commentary which raises this issue, see Cecilia Morgan, “‘Old Ontario’ Through the Lens of Feminist Scholarship: 1970s-1990s,” \textit{Atlantis}, Vol. 25 No. 1 (Fall 2000), pp. 87-101.

implication in understanding the empire generated discussion within travel and emigrant literature, where interpretations of “morality” and the gender order were linked to questions about the colony’s utility for Britain and its future. A range of sexual behaviour can also be substantiated by evidence from the colony’s courts, some of it anecdotal in nature. Marriage was not always legally conducted or for life; into the 1840s we can see evidence of social organization which placed relationships above formal models in ascertaining responsibility for illegitimate children.

Contest is perhaps the defining aspect of appropriate sexual behaviour and models of marriage in Upper Canada to 1850. Although irregular forms were never completely eliminated, toleration of multiple models of marriage declined toward mid-century, for a variety of reasons. Foremost among these were the increased accessibility of formal and legal marriage, and ascendancy of middle-class gender ideals and visions of marriage. Records of straightforward, no-testimony seduction cases do continue through the end of 1850, but must be considered in light of a growing number of cases in which testimony suggests that Upper Canadians were becoming less sympathetic to plural

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103 For example, testimony in Orser v. Garratt (Dower), 25 September 1845, Midland District Assizes, Robinson Benchbooks, AO, RG 22-390-2-26-4, indicates that Solomon Orser and his wife, Margaret Roblin, were lawfully married by an Anglican minister, but she left him twice and went to live in Montreal, once with another man.

104 Lepp’s work, for example, shows the continuation of bigamous relationships through the early twentieth century. See “Dis/Membering the Family,” chapter 4 and throughout.
courtships which included sexual intimacy, and that they felt women should in fact hold the line in restricting sex to formalized marriage. The increased prosecution of charivaris and other forms of community regulation also raise questions about the growth of the state, and state power, in the 1840s. Intimate matters increasingly came under the purview of the state in a way that made sense to more of the population.

This study also highlights the importance of reputation and character to considerations of appropriate social and sexual behaviour in the colony. While of course connecting sex with reputation is nothing new, the ways in which Upper Canadians framed their definitions of “good,” “bad,” and “indifferent” character took into account more than chastity, for women as well as men. Rather, the significance of reputation and character was judged on a combination of factors which melded sexual activity with honesty, responsibility, and other virtues. As in the distinctions Roberts notes between “drinking” and “drunkenness” in the colony, I argue that Upper Canadians interpreted sex outside of marriage using similar gradations. Clark’s notion of “twilight” again proves useful, although I argue that Upper Canadians’ repetition of the injunction that nothing “improper” took place should lead us to further probe the boundaries of multiple standards of acceptable conduct. Men who were accused of rape and those who were named in seduction suits sometimes faced questions about their sexual history as well as other aspects of their characters. Moreover, the testimony in actions for seduction and breach of promise of marriage shows that the parties’ appearance in court was frequently a result of failed negotiations at the level of family and neighbourhood. Men’s relationship with the double standard as it applied to women was also complicated; for

105 Roberts, In Mixed Company, pp. 91-94.
instance, George Stover, who was sued for breach of promise of marriage in 1830, reneged when his partner became pregnant and refused to have an abortion because “he did not like that his friends shd. know he was pledged to marry a girl in that situation.”

Chapter Two surveys the landscape of heterosexual sociability and ideas about marriage in the colony, viewed from within and without. Chapter Three examines the formal regulation of heterosexual relationships through marriage law, considering disputes over valid forms and their implications in the colony’s politicization of identity. Chapter Four explores the breakdown and dissolution of heterosexual relationships, both formal marriages and unions which were socially, if not legally, sanctioned, drawing on civil actions for seduction and breach of promise of marriage, as well as prosecutions for bigamy. Chapter Five extends this discussion to sexual scandal and community regulation, looking further at Upper Canadians’ use of civil court actions to settle disputes over sexuality and expressions of community protest, as well as the factors needed to create a scandal. Chapter Six analyzes Upper Canadians’ sometimes contradictory definitions of consent, coercion, and conflict as seen through the records of sexual assault cases. Throughout, we see the intertwining of local conditions, especially social networks and “neighbourhood,” with the wider context of geography and empire in contesting and shaping the politics of heterosexual intimacy in Upper Canada.

Chapter 2

“such a marrying country”¹:
Sociability, sexuality, and the meanings of marriage

The landscape of heterosexual relations in Upper Canada between the 1780s and the mid-nineteenth century resembled that of other contemporary societies, but certain patterns and practices, particularly those which permitted some sexual contact outside of lawful marriage, took on a different resonance in the Upper Canadian context. In debating the appropriate forms of heterosexual expression, Upper Canadians also struggled with identity, on an individual level and in imagining their place within the British empire and the world. Much of the public discussion of sexuality in Upper Canada was linked to marriage, which figured as both an aspirational ideal and a potential site of social disorder. Most commentators worried less that young people would not marry, whether from inclination or opportunity, than that they married too young, or in some cases, too frequently.² Upper Canada, as British emigrant J.W.D. Moodie observed, was “a marrying country.”³

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¹ J.W.D. Moodie, “The Land-Jobber,” in Susanna Moodie, Roughing It in the Bush; or, Life in Canada [1853], ed. Elizabeth Thompson (Ottawa: The Tecumseh Press, 1997), p. 176. Moodie, who had served in the British Army, was the husband of writer Susanna Strickland Moodie; the couple emigrated to the colony in 1832 as part of the wave of genteel English emigrants who sought new opportunities in the colony.
² Bigamy will be taken up in later chapters. For a discussion of bigamy which spans the late colonial period to 1920, see also Annalee E. Lepp, “Dis/Membering the Family: Marital Breakdown, Domestic Conflict, and Family Violence in Ontario, 1830-1920” (Ph.D. Dissertation, Department of History, Queen’s University, 2001), especially chapter 4.
This chapter explores discourses which informed heterosexual sociability in Upper Canada, as well as some of the underlying circumstances which prompted concern among elements inside and outside the colony. First, it considers discourses about marriage, including its social role, the rights and responsibilities of husbands and wives, and what made a good “match.” It then examines the spaces in which Upper Canadians socialized with one another and the role played by sexuality and the promise of marriage within them, and draws out some of the divergence between practice and prescriptive ideals. The last section turns to a discussion of outside views of the colony, and the interpretation and representation of sexual “morality” in the colony by authors of travel narratives and emigrant guides. Their observations illuminate fissures along class lines and suggest some of the complexities of “race” in this period; overall, they point to some of the refractions of sexual intimacy in settler colonies.

Inscribing the Spheres: Gender Ideology and Ideal Marriage in Public Discourse

Courtship, sexuality, and the gender order figured regularly in Upper Canadian writing, whether press, circulating pamphlets, or diaries and letters. Discussions of courting and appropriate relationships between men and women ranged from the prescriptive to the condemnatory; heterosociability was a subject for gossip and intimacies between friends, as well as for jests and popular entertainment. Humorous stories about courting and relations between the sexes which had been published in newspapers or elsewhere were sometimes recopied by Upper Canadians for their own enjoyment. For example, Francis Goring, a merchant and teacher in Queenston, copied a list of toasts purportedly given at a “meeting of a number of young Ladies at the fourth of
June last.” A parody of the ritualized toasts given at meetings of men’s clubs and fraternal associations,⁴ these toasts praised “Matrimony – The truth and Essence of life,” and “Industry Of the young Ladies of Canada, always want to be engaged.” Accordingly, they also derided bachelors as “neither useful nor ornamental, but … a scourge to all creatures,” concluding: “May they all Eat alone, all sleep alone, all die alone, and when buryed have no one to mourn for them and go to the Devil in Hell alone.”⁵

Also among Goring’s papers was a handwritten excerpt from “Jonathan In Search of a Wife,” one in a series of sailor stories by “Hawser Martingale” which had originally appeared in the Boston Mercantile Journal.⁶ “Jonathan In Search of a Wife” chronicled the bumbling courtship of New England farmer Jonathan Brown, the cousin of the story’s narrator, sailor Nehemiah Clover. Goring’s holograph copy picks up at the point where Jonathan, sick of struggling for household dominance with his widowed mother, decides


⁵ Francis Goring fonds, undated F 594 MS 432, Archives of Ontario [hereafter AO]. All quotations from primary sources have been reproduced exactly as they appear in the original, and without the use of sic, which can be distracting. Insertions in square brackets are my own, and have occasionally been used to clarify meaning.

⁶ “Jonathan In Search of a Wife,” which was not credited to its author, was among a few stories and tales which were recopied and now follow Goring’s 1805 diary. The story would have been published significantly later, although it may have circulated in various versions well before; the Boston Mercantile Journal ran from 1837 to 1845, and “Jonathan In Search of a Wife” later appeared in John Sherburne Sleeper, Tales of the Ocean and Essays from the Forecastle ... (Boston: A.N. Dickinson, 1842), pp. 325-336.
he must marry. A “plain straight forward sort of fellow,” Jonathan makes a shortlist of eligible young women and sets off one evening to find a wife.

“Jonathan In Search of a Wife” is fiction, and fiction set in New England at that. Yet the story introduces a number of issues which are significant in examining heterosexual relationships in Upper Canada between the large-scale arrival of non-Native settlers after the American Revolution and the middle of the nineteenth century. In this tale, although a good part of the humour derived from Jonathan’s ineptitude with the ladies, he was also intended to serve as an “Everyman” figure. As such, his search for a wife led him into contact with some of the fallibilities of women. His first choice, Nabby Jones, although seemingly a sweet and modest girl, prefers the flashy Simon Thompson to the honest, forthright Jonathan; however, she has the moral rectitude to keep her promises even when she gets another offer of marriage. Nancy Tompkins and Peggy Pipkin, next on the list, illustrate that “all is not gold that glitters.” Nancy, who has just returned from Boston, represents the affectations of those who aspire to the status of a lady; she is materialistic and desires a romantic suitor given to flowery speeches, a figure who, by this period, was increasingly distant from the masculine ideals of blunt, plain speech, sincerity, and honesty which took hold on both sides of the Atlantic and throughout the British empire. Peggy, about whom “strange stories” circulate, represents a model of courtship which became increasingly contested through the early

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nineteenth century and by mid-century fell out of official favour entirely. As in the practice of “tarrying” or “sitting up,” Peggy’s parents, seeing that she likes Jonathan, retire to their bedroom so the pair can be alone. Jonathan demands “a buss” rather than proposing outright; Peggy protests and threatens to “holler,” which prompts her brother to call out a reassurance: “don’t mind what she says, Mr. Brown. She always says she’ll holler, but never does.” When it turns out that Peggy’s protests merely mask her own willingness to engage in sexual behaviour, Jonathan is repulsed.\(^8\) This turn of the plot serves as both a didactic tool and a reflection of some of the contests surrounding appropriate sexual behaviour in the Anglo-American world, and in Upper Canada, during this period. Sally Johnson, the last stop on Jonathan’s tour of eligible women, represents modesty, humility, and domesticity. The two agree to marry soon, that they may “set up together and court every night in the week if we like.” Not until Sally agrees does Jonathan “plant a hearty kiss upon her ruby lips.” The narrator announces that the two were married a few weeks later, and they made one another “an excellent wife” and “a kind and loving husband.” Goring’s copy tacks on an additional moral to this story: “If a young woman is worth having for a wife, some man who is worth having for a husband will find her out.”\(^9\) Similarly, the character of Jonathan himself, although a figure of fun,

\(^8\) Jonathan’s initial approach in this tale also bears a strong resemblance to many of the accounts of sexual assault complainants, both in Upper Canada and elsewhere. See chapter 7 and Sharon Block, *Rape and Sexual Power in Early America* (Chapel Hill: Omohundro Institute of Early American History and Culture/University of North Carolina Press, 2006), for further discussion.

\(^9\) Goring copy of “Jonathan In Search of a Wife.” A similar tale appears in William Bell’s journals of the marriage of Archy Cameron. See William Bell journals, Queen’s University Archives [hereafter QUA], January 1828.
serves to remind men and women that “a kind and loving husband” was preferable to a romantic rake.

Stories like “Jonathan In Search of a Wife,” along with advice literature, appeared with some regularity in Upper Canadian newspapers. Both Cecilia Morgan’s research into the gendered languages of religion and politics and Jane Errington’s analysis of the work of wifehood provide considerable insight into the ways that middle-class discourses about gender and sexuality circulated within the colony through the press. As Morgan observes, “colonial newspapers provided hints and advice, and, at times, railed about the correct forms of behaviour for men and women.” Although much of this material “originated outside the colony, in Britain and the United States,” it nevertheless “helped shape a public discourse on codes of behaviour.”

Morgan characterizes the colony’s press as oscillating between extolling “the redeeming qualities of married life” and cynically lamenting marriage as “a state of never-ending contractual obligations,” marked by the spectre of women’s “hidden power.” The colony’s newspapers, as Errington has shown, assigned responsibility for happiness in marriage to women, disseminating “considerable and explicit advice from the press and the pulpit on how to secure domestic accord and a well-regulated family.” This advice largely rested on the belief that “[a] woman’s power, which originated in her moral superiority, as well as her happiness, ultimately rested in her husband’s esteem and love. It was in her interests, therefore, to

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preserve and increase his affection for her.”

To this end, women were urged to forbear and forgive their husbands, in love and Christian duty: “A good wife could make a good husband, young wives were told.”

This kind of public discourse on morality and gender ideals, however, responded to, reflected, and attempted to reshape the contours of gender and sexual behaviour. As Morgan notes, prescriptive messages in “both the religious and secular press … shaped a discourse that, as much as it relied on the binary opposites of public and private, and attempted to identify men with the former and women with the latter spaces, hinted at a more complex way of conceptualizing social formation.”

As discussed in Chapter One, although the notion of separate spheres was promoted within public discourse in the colony, and was endorsed by its elites, distinctions between “public” and “private” bore little relationship to most Upper Canadians’ lives. Errington suggests that the attached notions of companionate marriage also posed a contradiction, considering the “openly patriarchal” structure of the Upper Canadian family, and that few marriages in the colony resembled the domestic bliss which prescriptive literature presented:

Many marriages were fraught with tension, dissatisfaction, anger and violence and usually women were the target. Many relationships were not permanent or long-term. And regardless of the circumstances, it was almost always the women who were blamed.

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13 Errington, *Wives and Mothers*, p. 35.
Likewise, McKenna’s work on Anne Murray Powell notes the difficulty women in particular had in achieving companionate marriage in male-dominated Upper Canada, although she suggests the ideal had greater appeal among the colony’s elites in a subsequent generation.\(^{16}\)

\textit{Marital Ideals and the Clergy}

The colony’s clergy was active in promoting companionate marriage. The roles of ideal husband and wife in separate spheres ideology were strongly associated with Christian morality, and particularly with evangelical traditions. The cultural penetration of Christianity, though, was sometimes under scrutiny in the colony; both outside and domestic observers were concerned about behaviour which transgressed Christian morality, such as breaking the Sabbath with work or entertainment, and other forms of “licitiousness,” including extramarital sexuality. As early as 1810, the Rev. John Strachan expressed his worry that “licitiousness” had “already made a most alarming progress” among the colony’s higher orders; some among that elite debated the merits of imposing laws to try to stamp out immorality by the 1820s and 1830s.\(^{17}\) During the same decades, many English commentators reported that “morality” in the colony was a problem. Writer Anna Jameson, for example, claimed that “A—“ and “B—“, two men

\(^{16}\) Katherine M.J. McKenna, \textit{A Life of Propriety: Anne Murray Powell and Her Family, 1755-1849} (Montreal and Kingston: McGill-Queen’s University Press, 1994), pp. 96-97, and on the marriage of Powell’s daughter, Mary Jarvis, pp. 201-206.

\(^{17}\) John Strachan, \textit{Discourse on the Character of King George the Third Addressed to the Inhabitants of British America} (Montreal: Nahum Mower, 1810), p. 50. On morality laws, see, for example, John Beverly Robinson, Toronto, to John Macaulay, 8 December 1835, Macaulay Papers, F 32 MS 78, reel 2, AO. These sentiments within the colony will be further discussed in Chapter Three.
she met in Niagara, “rate the morality of the Canadian population frightfully low.” Jameson’s informants alleged that “lying and drunkenness” were “nearly universal,” and even men who arrived in the colony with “sober habits” would “quickly fall into the vice of the country.” Intemperance, swearing, and lack of industry were all connected with other moral failings, including illicit sexuality. The clergy in Upper Canada emphasized marriage, and their own active role in vetting couples, as a corrective.

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20 Between the colony’s establishment in 1791 and the reform of marriage law in 1831, marriage in Upper Canada could only be solemnized according to the rites of the Church of England, and later, by selected Protestant denominations, with a few important exceptions. Catholic, Jewish, and Quaker marriages were considered exempt. Where an authorized clergyman was not resident in the area, a magistrate or justice of the peace was able to marry couples by license or after banns or public notice had been posted for three successive Sundays. This circumstance sat uneasily with some elements in the colony, as I will discuss in more detail in Chapter Three.
The journals of William Bell provide a valuable insight into courtship and marriage in one corner of Upper Canada from the point of view of a Scots Presbyterian clergyman. Bell estimated that by 1834, he had married 240 couples since he arrived in Perth from Scotland in 1817.21 Bell’s journals convey a great deal of his personality, which was in no way mild or accommodating.22 The village of Perth in the 1830s had a “peculiar social character” marked by class conflict between assisted emigrants from Scotland and the local gentry, most of whom were retired military officers.23 Bell set himself apart from both groups, placing himself solidly among a new moral middle class; he often condemned the “haughtiness, pride, vanity and dissipation of the half-pay officers and their ladies,” whom he felt “minded nothing but dress, visiting and amusement.”24 Bell also criticized the local gentry’s predilection for duelling, which he considered unmanly.25 As a minister, Bell was often called on to enter the lives of others in a more intimate way than another man might. Accordingly, he had much to say on the subject of marital ideals and practices.

On the whole, Bell was enthusiastic about performing marriages, and about marriage itself, which he regarded as “the most important change of circumstances that

24 Bell journal, Vol. 9, June 1833. For similar viewpoints, see Hall, White, Male and Middle Class, and Adele Perry, On the Edge of Empire: Gender, Race, and the Making of British Columbia, 1849-1871 (Toronto: University of Toronto Press, 2001), chapter 3 in particular.
25 Bell journal, Vol. 9, June 1833.
any person can make in this world, and one that is generally attended with much
happiness or misery, according to the nature of the connection formed.”

He frequently recorded his approval or disapproval of the marriages he solemnized. Of one wedding, in May 1834, he observed:

The proverb says, there is no accounting for tastes; and I have often thought of this when performing the marriage ceremony. On the 10th a couple called to be married, the man little and uncultivated, and the woman tall and genteel. I was sorry to see a girl, so young and handsome, married to a little French man, who could neither read nor write. Yet she appeared pleased, and her parents had given their consent.

Bell placed a great deal of importance on parity in marriage, or what he termed an “equal match.” His attention to the couple’s physical differences provides a key to his notion of an ideal marriage. A good match united a man and woman of similar class and background, preferably of the same ethnicity, and definitely in accordance in religious matters; however, it was far more acceptable that the prospective husband be better educated and of higher rank than the wife, than vice versa. Such an imbalance was seen as a reinforcement of “natural” masculine authority. Since this woman’s “parents had given their consent,” Bell resigned himself to the union.

For those above the age of consent, parental permission was not a necessity in Upper Canada. Young men in particular generally sought at least some degree of approval, from the woman’s family and his own, before becoming engaged, since financial success and the achievement of financial independence was often linked to the

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27 Bell journal, Vol. 9, May 1834.
28 See also Vol. 7, April 1830, on the marriage of Andrew Forbes and Margaret Howe.
support of family. As a result, romantic love and independent choice sometimes came into conflict with parental approval. York tavern-keeper Ely Playter’s relationship with Sophia Beman in 1802 was complicated by a period of bad relations between Playter and Sophia’s father, Elisha Beman. “Mr. B.,” as Playter generally referred to him in his diary, was angry with Playter, Sophia, and their friends for returning late from a boating trip with a boat he had loaned them. “Mr. B” placed the bulk of the blame for this incident on Playter, who was disturbed by the older man’s “coolness” throughout the summer, at times losing sleep over it. Beman’s disapproval was compounded by the fact that Playter had financial difficulties. Although the Playters seemed to approve of the relationship, and Ely wanted his siblings, especially his sisters, and Sophia to get along, Ely and Sophia had to overcome her father’s reluctance, and at one point had to carry on a secret correspondence, before they were able to marry. Some couples faced greater obstacles. Jane Parker’s father sued the parents and uncle of John McClure for trespass when Jane refused his orders to return home from the McClures’, where she worked.


30 Ely Playter diary, 23 May 1802, F 556 MS 87, AO. The relationship between Ely Playter and Sophia Beman is also discussed in Ward, Courtship, Love, and Marriage, pp. 69, 73, 122-123, and Roberts, In Mixed Company, chapter 2, especially pp. 50-51.

31 Playter diary, 23 May 1802.

32 See Playter diary, 30 June 1802, September & October 1802.
Jane and John were keeping company, and while his family approved of the relationship, her father did not.\textsuperscript{33}

The engagement of James Bell Lundy, an officer in the British Army Commissariat stationed in London during the early 1840s, was also contingent on parental approval. As Lundy wrote to his friend Frank Shanly, Maria’s father, Col. J.B. Askin, “merely required the consent of my parents before the engagement should be considered final.”\textsuperscript{34} When he arrived at his posting in Quebec shortly after his engagement, Lundy was distraught to find a letter from his father “objecting to our engagement, on the grounds of youth, difficulties, &c.” Worse yet, Lundy’s father had also written to Col. Askin with his objections.\textsuperscript{35} Among the potential problems with the engagement were Lundy’s financial obligations. Lundy was appointed Deputy Assistant Commissary General in 1844, which he felt would improve his circumstances; however, he had some debts, and his letters to Frank Shanly frequently invoked his perhaps unsteady resolve to pay them.\textsuperscript{36} He observed, “I have but a limited income, and much

\textsuperscript{33} Parker v. McClure, Hannah McClure his wife, and Peter Serviss (trespass), 9 October 1844, Eastern District Assizes, Robinson Benchbooks, AO, RG 22-390-2-26-2. In this case, the court upheld Parker’s paternal “right” to “correct” his daughter without interference. See also Queen v. Joseph Bennett, 29 September 1843, Gore District Assizes, James Buchanan Macaulay Benchbooks, AO, RG 22-390-1-7-4, and McCrea v. Haskin, 8 October 1841, Johnstown District Assizes, Robinson Benchbooks, AO, RG 22-390-2-24-4, for two cases in which young women’s fathers or guardians tried to use the courts to uphold their paternal authority in preventing a relationship which was apparently consensual.

\textsuperscript{34} James Bell Lundy, Niagara, to Frank Shanly, 26 June 1844, Francis Shanly fonds, F 647 MU 2719, AO.

\textsuperscript{35} Lundy, Commissariat, Quebec, to F. Shanly, 29 November 1844.

\textsuperscript{36} Lundy, Niagara, to F. Shanly, 20 July 1844. Other potential problems included Lundy’s relationships with other women, of which some of his friends disapproved, and conflicts surrounding both Lundy’s and Askin’s brothers. I discuss this further in “Empires of the Heart.”
time must elapse before I can save sufficient to marry upon respectably.” The association of financial independence with adult status and ideal manliness meant that young men frequently needed the support of family, their own and their future in-laws, in order to become husbands.

Lack of parental consent by no means prevented William Bell from performing a wedding, however. He was generally very sympathetic to couples in which a family member disapproved of the union. When he married Thomas Dobie and Jean Holliday in July 1827, he noted that Holliday’s “father was absent, as he pretended to be displeased with the match, though there was no apparent reason he should be so.” Bell blamed “inordinate family pride” for the rupture between Jean Holliday and her parents, which he considered “not only unreasonable but cruel, for the match was an equal one.”

Bell’s journals reveal courtship and marriage from the point of view of ecclesiastical and paternal authority. Views like his were repeated within the colonial press, with particular emphasis on women’s choices. Some of the better-known accounts of courtship in the colony, such as Mary Gapper’s carefully considered decision to marry Edward O’Brien, support the contention that marriage was indeed “the most important crisis” a woman faced. A closer look at the landscape of sociability in the

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37 Lundy to Shanly, 27 August 1844; also 11 November 1845. For similar commentary by Harry Jones, see Roberts, In Mixed Company, pp. 124-125, and discussion throughout chapter 6.


39 See, for example, Errington, Wives and Mothers, p. 29.

40 See the journals of Mrs. E.G. [Mary Gapper] O’Brien, 1828-1838, MS 199, AO and Errington, Wives and Mothers, chapter 2. The phrase “the most important crisis,” which forms the title of Errington’s chapter, is drawn from “For My Daughter Julia,” Farmers’ Journal, 10 September 1828 (reprinted from the York Weekly Register, 24 March 1825); see Wives and Mothers, pp. 29 and 262 note 3.
colony, though, shows equal evidence that marriage, while it was taken seriously by Upper Canadians, was not always as sober nor as singular a pursuit as those approaching it from the Victorian era on have argued.

Sociability: Courtship and Sexual Contact

Flirtation was a significant aspect of heterosociability in Upper Canada, especially among young and unmarried people. Upper Canadians met potential partners and engaged in flirtations virtually everywhere. Especially in towns, formalized social events like balls drew communities together and provided space for men and women to talk, dance, and flirt. In towns with a British Army presence, such as Kingston, Niagara, and in the 1840s, London, such events were regularly sponsored by the local garrison, as they were throughout the British empire.\(^{41}\) Balls were also sponsored by groups of men who were affiliated by friendship, or by other fraternal organizations. In the “backwoods” near Peterborough, for example, genteel English emigrant John Langton and his friends held “bachelors’ balls.”\(^{42}\) However, even at the military balls, networks of actual or fictive kinship operated to bring people into contact with one another as neighbours,


rather than strangers. Most people met potential partners through their daily contacts with family, friends, and neighbours (often one and the same), or through additional forms of visiting.

Men and women in Upper Canada thus made contact within the “social sphere,” and especially within their own neighbourhood communities. They met one another through informal visiting; especially in the winter months, when work on farms slowed and snow facilitated journeys by sleigh, visiting and socializing was a major form of entertainment for the colony’s residents. Such visits allowed friends and extended families to come together. This also might include contacts from their country of origin, in the case of newer arrivals; as Errington’s recent work has shown, migration often functioned as a network. Not only did people tend to migrate with or seek out their kin, their “friends” in the eighteenth-century sense, but they may also have sought out partners from within these circles rather than intermarrying with settlers from elsewhere.

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Informal social events might also include visitors from outside the neighbourhood, although again, many of them would have been brought at least rhetorically into the sphere of the “known.” Travellers stayed with friends or kin of people they knew, or families might open their homes to passing strangers. As he surveyed lands in the southwestern part of the province in the early 1820s, Samuel Smith frequently spent the night with local residents. In his diary, Smith regularly provided brief accounts of his social afternoons and evenings with these families, mentioning in particular any unmarried women who were present, whether the group sang, danced, or went sleighing, and whether any “huging and kissing” occurred. Moreover, as Roberts has shown, taverns were not necessarily separate from private living spaces, which brought tavern-keepers and their families in contact with those who became their overnight guests. Since taverns constituted respectable space for women, both women in tavern-keeping families and visitors may have socialized with prospective partners within them. Women and men also socialized through organized work activities like bees, in which settlers gathered to shear sheep or spin yarn, raise houses or barns, clear land, process and preserve food, or quilt. As Wilson notes, bees “provided the mechanism for social integration and bonding,” a significant aspect of which was flirtation. At quilting bees, for example, men were often invited to assist and entertain the women as they worked, affording unmarried women the opportunity to show off their skills as well.

47 Samuel Smith diary, especially 16 January 1822. Samuel Smith fonds, F 565, MS 953, AO. For similar accounts of the allure of daughters to visitors, see also J. Sandfield MacDonald diary, 1837-1838, F 1 MU 1769, AO.
as giving both sexes the chance to chat, flirt, and enjoy the “frolics” that usually followed. At other bees where men and women worked together, such as apple paring and corn husking, “flirtations” sometimes “took priority over the actual work accomplished,” and many participants eagerly looked forward to the games which followed the work.\textsuperscript{51} Bees thus “provided an opportunity for courtship under the supervision of the community.”\textsuperscript{52}

The type of community supervision which occurred at bees and in less formal visiting was key to determining appropriate forms of heterosexual intimacy.\textsuperscript{53} Men and women also encountered one another on the street in towns, but social contacts which arose from such meetings carried greater risks.\textsuperscript{54} Socializing through people one knew was most respectable. It also contained, in theory, at least a modicum of safety; since mobility and the possibility of false identity was a concern, couples who were both woven into the social fabric of their community knew more about one another’s background. Ely Playter and his friends, for example, both before and after his marriage to Sophia Beman, socialized in mixed company and occasionally took overnight trips in

\textsuperscript{52} Wilson, “Reciprocal Work Bees,” p. 454. Bees, as Wilson argues earlier, sometimes also resulted in violence, and neither was heterosexual contact exempt here. See Queen v. John Bolton (Assault with intent to ravish & common assault), 25 April 1846, Johnstown District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-8-4.
\textsuperscript{53} Ward has argued that women effectively “controlled” courtship by situating it within the social space of the home. By contrast, events like bachelors’ balls, which occurred in “public” space to remain respectable, could be read as efforts by young men to wrest some control of courtship away from the world of women (\textit{Courtship, Love and Marriage}, chapter 4, especially pp. 68-69). As noted above, though, this understanding of “public” and “private” has limited utility for Upper Canada.
\textsuperscript{54} Complainants in sexual assault cases often testified that their assailants had followed them or otherwise attempted to strike up conversations, on urban streets or rural roads, before assaulting them. See Chapter Six.
mixed company, seemingly without any worry about inappropriate sexual contact.\textsuperscript{55} Such community knowledge, as we will see in Chapter Four, also increased the likelihood that if a sexual relationship produced a pregnancy but not a stable partnership, a man would fulfill his responsibilities, or suffer consequences to his reputation if he did not. This factor was particularly important considering that Upper Canadians frequently engaged in courting behaviour with more than one person.

\textit{Plural Courtship and Available Pleasures}

Physical intimacy was clearly a component of heterosociability, not just courtship. In their letters to male friends, and sometimes even to their sisters, unmarried men sometimes remarked quite frankly in their accounts of social events on kissing and further physical intimacies with the women they knew, or on the intimacies of their friends. James Lundy, the Shanly brothers, and their friends, whom they called \textquotedblleft the Clique,\textquotedblright made \textquotedblleft puttering,\textquotedblright as they called it, a regular subject of discussion in their letters during the 1840s. \textquotedblleft Puttering\textquotedblright was active, and required at least some reciprocal interest from the woman herself; by distinction, being \textquotedblleft spoon[e]y,\textquotedblright or besotted, another term they used frequently, a man could do on his own. The Clique regularly discussed in their letters who was spoony on whom, who was puttering with whom, and to what it might be likely to lead. With \textquotedblleft the inspiration of grog,\textquotedblright one of the men\textquotesingle s favourite pastimes was to \textquotedblleft talk Puttering, ad infinitum.\textquotedblright\textsuperscript{56}

\textsuperscript{55} See Playter diary and Roberts, \textit{In Mixed Company}, pp. 50-51.
\textsuperscript{56} Lundy to Shanly, 20 July 1844; also Lundy to Shanly, 27 January 1845. Lisa Wilson make similar arguments for New England in \textit{Ye Heart of a Man}, pp. 40-45.
Similarly, Samuel Smith, a surveyor, married Sarah Holmes on 25 March 1822. From September 1821 he made repeated mention of her in his diaries, but initially her name appeared as only one of many female friends with whom Smith socialized. His first reference to her as “my intended Wife” took place only a month before they married, on 18 February, about a week before he went to Sandwich to obtain their marriage license.\(^{57}\) A month earlier, however, Smith had recorded having sat up with Polly Crawford during his stay at her family’s home. After an extended sleighing party which began on 13 January, Smith “Returnd on the Ice to Crawfords I stayed all night & [Repaird?] a Clock & I had Polly Crawford on my knee Young & Coming huging & kissing.” The next night, he “rode up to the Street to a Ball,” and “had the Pleasure Miss Crawford as before.”\(^{58}\) Nor was Polly Crawford Smith’s only partner. His relationship with Nancy Shaw, over this same period led to complications for his wedding to Sarah Holmes. During a visit to the Shaws’ on 28 February, Nancy informed Smith that she was pregnant: “She said I had got her with Child the old woman abused me.” Although he denied it, Nancy and her mother refused to go away. On 5 March, the day he had planned to marry Sarah Holmes, Smith recorded in his diary:

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Miss Holmes & my Self dressd ourselves & went to F. Arnold, he took us down to the Church in Chatham Their Ruth Shaw Swore that I had promised to marre her Daughter & the marriage was Deferrd -- we went Back to F. Arnold & [Danced?] till Late in the Evening --
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\(^{57}\) Smith diary, 18 February 1822 and 26 February 1822, MS 953 reel 1. The preserved version of Smith’s diary begins in May 1821.

\(^{58}\) Smith diary, 15 and 16 January 1822, MS 953 reel 1.

\(^{59}\) Smith diary, 28 February, 5 and 6 March 1822, MS 953 reel 1.
To avoid further complications, Smith and Holmes left the jurisdiction. A few weeks later, they went with friends to Sandwich, where they were “married in the church” on 25 March 1822.\footnote{Smith diary, 22-25 March 1822, MS 953 reel 2. Smith records that they started for Sandwich at least twice before making it there on 24 March and marrying the following day.} The outcome of the situation with Nancy Shaw is unclear.\footnote{On 6 March, “Mr. Arnold & myself went to Shaws in afternoon & disputed about the Child that is Layd to me” (Smith diary, MS 953 reel 1), but what happened subsequently he does not say. See further discussion of this case in Chapter Four.} During this winter Smith also broke the news of “her doom” to a Miss Gibson: “Clear day I Stayed at Mrs. Tulls & Told Miss G. her doom Again She Cryed much my feelings was Tutched during her Lament That her Love was Miss placed ...”\footnote{Smith diary, 3 February 1822, also 7 January 1822, MS 953, reel 1.}

The experiences of Samuel Smith, James Lundy and his friends, and others clearly attest that a certain level of physical contact between men and women was tacitly permitted before marriage. Some Upper Canadians who engaged in sexual contact outside of the bonds of marriage no doubt felt they were practising “indecent” behaviour.\footnote{See Anna Clark, Clark, “Twilight Moments,” \textit{Journal of the History of Sexuality}, Vol. 14 Nos. 1/2 (January/April 2005), pp. 139-160.} For others, though, lawful marriage may have been less important than community acceptance in determining the rightful nature of their actions. An examination of limited sexual contact between courting couples through practices such as “bundling” illustrates this tendency.

Bundling was a practice in which an unmarried couple, usually one who intended to marry, spent the night together in bed, usually in the woman’s family home. During the seventeenth and eighteenth centuries it was common among “the labouring classes” and rural people in parts of Europe, including Wales, Scotland, Holland, Scandinavia,
Germany, Switzerland, and France; bundling was also practised in New England and in Pennsylvania, especially among the German-speaking population. A bundling couple spent all night “talking and petting,” perhaps clothed, but potentially only partially dressed. In some areas, like Wales, men retained their drawers, and a woman’s petticoat might be knotted at the bottom to prevent access to her genitals; in the American colonies, a wooden “bundling board” was sometimes used to separate the couple.

The term “sparking,” however, shows up more frequently in descriptions of courting behaviour in Upper Canada. In exchanging news about happenings both in the colony and at “home,” family and friends sometimes used the term to describe developing relationships. “Sparking” also shows up in Edward Talbot’s searing condemnation of the colony’s social mores in his 1824 *Five Years’ Residence in Upper Canada*. Talbot found much to criticize in the colony; he devoted two chapters in his two-volume treatise *Five Years’ Residence in the Canadas*, published in 1824, to outlining the “Manners and Customs of Upper Canada,” including subheadings on “The


67 See, for example, Birdsall Papers, AO, MS 211, Emma to (brother) Anthony Birdsall, 2 March 1837.

68 Talbot, *Five Years’ Residence in the Canadas*. 59
Females -- … Their Low Ideas of Chastity” and “Obsequiousness of Husbands.”

Where many authors, like John Howison, strew dark and unsubstantiated hints about settlers’ “immorality,” Talbot provided, in his words, “a few practical illustrations of Canadian morality, and … the proximate causes of the grossness of manners and … the semi-barbarism, which are much too prevalent …”

The bulk of his commentary centered around the frequency of premarital and extramarital sex in the colony, or, as he framed it, the absence of chastity in Upper Canadian women, both elite and among “the LOWER, or what would, in more civilized regions, be called the MIDDLE CLASS,” and their fathers’ and husbands’ tolerance of it.

Talbot was particularly struck by what he saw as the lack of social censure for “illegitimate” sexual relations. In mixed tones of hilarity and outrage, he described the Canadian courting custom of the “sparking frolic,” in which a man set out “[s]ingly, and without introduction” or the accompaniment of “any friend,” to call on a prospective partner. When he arrived, he spent time with the family until evening, when, if he had been “favourably received … he is permitted a private interview with the young lady.” However, “[t]he object of this interview is not to make a hasty proposal of marriage, but to know if she will condescend to allow him to repeat his visit on the next or any subsequent evening. If the lady is not previously engaged, the prayer of his petition is not often rejected.”

Once accepted as a suitor, the man would visit again, take tea with the family, and wait until after the meal, “when the family retire to rest, leaving the hero and

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heroine in full possession of the supper-room, in which for the convenience of such visitors, a bed invariably occupies one corner. In this apartment they continue until morning.”

Couples who “sparked” in this way, according to Talbot, did so with full knowledge of one another’s previous partners. If things went well, they married within weeks; if they did not, the whole process began again. He concluded, “From the preceding remarks on the conduct and character of the females of Canada, it is altogether likely that you will consider virtue as wholly extinct on this side of the Western Ocean.” Although he claimed to be “speaking only generally, and not particularly,” later references to “sparking” as well as to adultery were intended to convey the impression of a society in which notions of liberty had turned morality upside-down. He added that “several American ladies” who enlightened him as to the full dimensions of “sparking” were appalled by his description of chaste courtship; one, he claimed, described it as “too much for a spirited woman to bear.” She concluded by telling Talbot that “my Betty was two years old before I married; but, I calculate, I am not a bit worse for that, neither.” Talbot regretfully concurred:

an unmarried female with a baby in her arms is as much respected, and as little obnoxious to public animadversion, as she would be, had she preserved her virtue with a Vestal’s fidelity. ... a Canadian female, particularly in the New Settlements, with two or three young ones, ready reared, is much more likely to form an advantageous alliance, than she who has had but one; and that if her matrimonial prospects be compared with those of a poor

solitary girl, who has no such strong title to the appellation of “mother,” they will be found greatly superior.\textsuperscript{78}

Talbot attributed this lack of concern for female “virtue” to the high price of labour in the colony, although the influence of “climate” was a concern as well.\textsuperscript{79} His remarks were intended not only to assail the “virtue” of Upper Canadian women, but also as an attack on their fathers and husbands, who, he implied, were inadequately possessed of the manly qualities to value and enforce their chastity.

No doubt Talbot’s tale was intended to pique readers’ interest. However, he was also likely responding to the fact that Upper Canada’s social sphere, outside of the colony’s elites, provided space for a wider spectrum of acceptable heterosexual behaviour than did British middle-class morality. Although it was generally expected that they would refrain from intercourse, bundling and “sparking” did allow for a limited degree of sexual contact as well as private time in one another’s company. “Erotic contact” was not precisely “forbidden”\textsuperscript{80}, rather, it was channelled into non-procreative activities. Contemporary observers of societies in which bundling was practised often remarked on the comparably low rate of illegitimate births.\textsuperscript{81} Both Lawrence Stone and John Gillis have argued that bundling and its variants functioned as a means to regulate sexual

\textsuperscript{78} Talbot, \textit{Five Years’ Residence in the Canadas}, Vol. II, pp. 39-40.
\textsuperscript{80} Ward, \textit{Courtship, Love, and Marriage}, p. 104.
\textsuperscript{81} Stone, \textit{The Family, Sex and Marriage}, p. 385; Gillis, \textit{For Better, For Worse}. 62
contact in communities where formal marriage by church or civil authority was prohibitively expensive. They also allowed couples to “test” their emotional and sexual compatibility without fully committing to marriage, which took on particular importance in societies where divorce was unavailable.  

Talbot’s comments aside, intimate courtship practices were contentious within the colony as well. William Lyon Mackenzie’s 1824 report in the Colonial Advocate of the seduction case Fuller v. Secord, for example, claimed that bundling was prevalent in parts of the colony, including the Niagara region. Mackenzie ended his account with a meditation on the shocking nature of the testimony “on the state of this country, in respect to sexual intercourse,” a tale which he felt “should have astonished many of my readers, and grieved more” had he printed it in full. He compared the colony unfavourably with his native Scotland, where he claimed an “absence of crime” resulted from education and an active ministry, and particularly “the early religious education of all classes.”

Press discussion of seduction cases like Fuller v. Secord and Hogle v. Ham (1825) implies that bundling was a dark secret among a lower-class population which prompted

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82 Stone, The Family, Sex and Marriage, p. 385.
83 Ward, Courtship, Love, and Marriage, pp. 103-104, argued that bundling was virtually “unknown in English Canada.”
84 Colonial Advocate, 19 August 1824.
widespread public condemnation. The 1837 lawsuit brought by a Miss Snider [also Snyder] against Moses Wilson for breach of promise of marriage, however, suggests a more complex role for intimate courtship practices. Witnesses in the case claimed that Wilson had promised to marry Snider “if she cd. shew she was clear of any improper conduct with Eli Smith.” Although Snider apparently had satisfied Wilson about the nature of her relationship with Smith, “Wilson on the Thursday after that married another & lives with one Eliza Ann Wilson as his wife.” Testimony in this suit revolved around not only Snider’s relationships with other men, but also their social meaning, and in particular, their implications for her “reputation.” Moses Wilson apparently chose another marriage partner because Snider was of “bad character.” In this case, witnesses for the defence were clearly asked to provide evidence that Snider had sexual relationships with multiple suitors. In addition to Eli Smith, whom more than one witness claimed they had seen in bed with Snider at her home two or three years ago, Jane Walker, who used to live at the Sniders’, testified that Miss Snider had more than once spent the night in bed with Simon Shank, at her brother’s home. However, the attempt to produce evidence of bed-based sexual contact actually served to undermine the defence’s case in this instance. The witnesses divided not only over whether Snider had

86 Upper Canada Herald, 30 August and 6 September 1825, and Kingston Chronicle, 2 September 1825.
been in bed with Eli Smith or Simon Shank, but what it actually meant if she had. Smith, for his part, denied that he had ever been alone with Snider, much less had sex with her: “it is false that he spent a night with her in a bed.” Jane Walker testified that although “they came after dark & went in the morning they were sparking,” she did “not think that any thing improper took place.” Moreover, she herself had been in the bed with them. Simon Shank corroborated Walker’s story; he claimed he “never slept with [Snider],” but “was once of the bed with her – perhaps two hours on the bed – the last Ws. was there – went away before daylight.” He “had no improper connection with her.” On cross-examination, Shank offered an explanation for the whole business: “they are Dutch people – It is a custom among them to keep company in that way.”

Although it is possible to interpret the testimony in this case as an effort by the witnesses, especially the men who were rumoured to have “had improper connection” with Snider, to distance themselves from her, the insistence of a majority of witnesses, even those called by the defence, that an unmarried man and woman could spend time together in bed without “improper conduct” suggests an alternative reading. While the occurrence, much less the degree, of sexual contact between Snider and Simon Shank remains ambiguous, the frequency of civil suits which resulted from a relationship which had ended does leave open the possibility that acts other than intercourse were not in fact considered “improper,” and that intercourse in the context of a relationship was excusable. Shank’s explanation that keeping company in bed was a “Dutch … custom” suggests both the presence of bundling, and the notion that there were limits to what

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93 Testimony of Simon Shank, Robinson Benchbooks, RG 22-390-2-23-2
might be considered acceptable. In any case, though, Justice John Beverly Robinson, a stalwart of bourgeois values, found Wilson’s rationale for marrying Eliza Ann instead of Snider unconvincing. He noted, “the defence I think of bad character not supported,” and left the question of damages to the jury, who awarded Snider £50 in compensation.94

Intimate courtship practices like bundling and “sparking” were clearly contested within the colony. As Talbot’s comments indicate, however, when outside observers considered sexual mores in Upper Canada, they were also assessing settlers’ level of “civilization,” much as travel writers did in constructing indigenous peoples in a variety of imperial sites. A reading of travel narratives and emigrant guides is suggestive of the ways that gender and sexuality functioned to produce racial identities among settler colonists.

Views from Outside: Marriage, Morality and “Civilization” in Emigrant and Travel Literature

A wide range of travel writing relating to Upper Canada was produced during the late eighteenth and early nineteenth centuries. Travel narratives were immensely popular in Britain from the later eighteenth century on; readers’ desire for accounts of foreign places and Europeans’ adventures in them reflected a rise in middle-class literacy and an increased interest in the non-European world as Britain entered its “second” phase of empire. Descriptions of the American and Caribbean colonies, “Indians,” and the other fantastical creatures who lived there had been circulating over the previous two centuries, piquing interest in worlds beyond Europe and in migration itself. As Mary Louise Pratt

has shown, from about 1750 on, narratives of travel and exploration increasingly became yoked to the project of imperial expansion, mobilizing the language of both science and sentiment to “produce” the world for European readers. In this process, travel and exploration narratives attempted to normalize the gaze of the “seeing-man,” a “rational” male European observer whose knowledge even of the unfamiliar displayed superiority. Although such narratives exercised a form of normalizing judgement, inscribing a Eurocentric understanding of natural history in geographic and human form, it is also important to highlight the insecurity inherent in their assertions of dominance and superiority.

Authors of travel literature and emigrant guides responded to what they viewed as the familiar and the strange in the colony. That travel writing tells us as much or more about the observer than the observed has become a commonplace in the study of travellers’ accounts of indigenous peoples, and was no less applicable to their

96 Pratt, Imperial Eyes, p. 7.
97 See Pratt, Imperial Eyes, p. 5 and chapter 2 in particular.
98 Pratt and numerous other scholars have pointed to the ways in which the “anti-conquest” hero repeatedly betrayed his own anxieties in an effort to deliberately construct himself as powerful; similarly, Linda Colley posits that the popularity of captivity narratives between 1600 and 1850 indicates that an aggression based on insecurity was a fundamental aspect of Britain’s imperial expansion. On the anxious conqueror, see Pratt, Imperial Eyes; Catherine Hall, “Going a-Trolloping: imperial man travels the Empire,” in Clare Midgley, ed., Gender and Imperialism (Manchester and New York: Manchester University Press/St. Martin’s Press, 1998); Elizabeth Vibert, Traders’ Tales: Narratives of Cultural Encounters in the Columbia Plateau, 1807-1846 (Norman and London: University of Oklahoma Press, 1997). On captivity, see Linda Colley, Captives: Britain, Empire, and the World, 1600-1850 (New York: Anchor Books, 2002), especially pp. 4-12.
descriptions of white settlers. Nevertheless, the portrayal of marriage and sexual mores within emigrant literature and travel narratives is useful for a number of reasons. First of all, the kinds of ideas circulating about the colony had an effect on later emigrants. Many of those who chose to emigrate to Upper Canada, particularly those from the middle classes, familiarized themselves with travel accounts and emigrant literature, as well as the reports of friends and family, before deciding on a destination and embarking. Emigrants who either could not read or were unable to purchase books may in addition have been informed by accounts of the colony through the offices of local emigration promoters. Furthermore, the information which appeared in emigrant guides and travellers’ accounts was part of an active network which circulated information throughout the British empire. As Kirsten McKenzie demonstrates, both government information and “the minutiae of … intimate lives” of colonial officials circulated through imperial networks of information. In consequence, “the stake of reputation in colonial scandals were somewhat higher than we might initially expect. Imperial

99 See Pratt, Imperial Eyes; Vibert, Traders’ Tales. For commentary on the circulation of class-based values in print, see also Susan Branson, “Sex and Other Middle-Class Pastimes in the Life of Ann Carson,” in Middleton and Smith, eds., Class Matters, pp. 156-167.
100 See, for example, Catharine Parr Traill, The Backwoods of Canada [1836], ed. Michael A. Peterman (Ottawa: Carleton University Press, 1997); also Basil Hall, Travels in North America in the Years 1827 and 1828. By Captain Basil Hall, Royal Navy. In Two Volumes (Philadelphia: Carey, Lea & Carey, 1829), pp. 170-171, in which Hall’s “brother officer” makes reference to choosing emigration through “reading every work we could procure, both on these Provinces and the United States of America,” as well as “gaining what information we could from every person who had ever been in Canada.” See also Errington, Emigrant Worlds, pp. 8-9, 25-28, and the introduction to Wendy Cameron, Sheila Haines, and Mary McDougall Maude, eds., English Immigrant Voices: Labourers’ Letters from Upper Canada in the 1830s (Montreal and Kingston: McGill-Queen’s University Press, 2000), pp. xv-xliii.
101 See the collected letters in Cameron, Haines, and Maude, eds., English Immigrant Voices; also Errington, Emigrant Worlds.
bureaucrats in London could be unexpectedly familiar with the details of local gossip, part of the seamless whole the imperial system wove across its domain.”

Upper Canada, one of the few British colonies without an ocean port, may have been at a slight remove from this network, and its governance figured less significantly within the Colonial Office than that of colonies like the Cape or New South Wales; the “tyranny of distance” was at work here in a slightly different form. Nevertheless, Upper Canada’s status and utility for the empire was debated in the pages of travel literature, and the colony was a significant destination for emigrants in the decade just after the Napoleonic Wars in particular. Gender and sexuality were by no means the only factors which contributed to such discourse, but they were nevertheless important. The “private” was public, and the intimate political.

Narration on these matters from the outside thus provides a useful glimpse of a society which frequently struggled to articulate its identity.

Race and ethnicity frequently took on added meaning in the context of emigration and colonization. European settlers, particularly those who were born in the colonies

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103 As McKenzie explains, the issue of forced labour and indentured servitude in both of these colonies attracted considerable attention from the metropole during the 1820s and 1830s. See *Scandal in the Colonies*; also Elizabeth Elbourne, “The Sin of the Settler: The 1835-36 Select Committee on Aborigines and Debates over Virtue and Conquest in the Early Nineteenth-Century British White Settler Empire,” *Journal of Colonialism and Colonial History*, Vol. 4 No. 3 (Winter 2003).
105 For an analysis of travel writing about another British North American site, see Jeffrey L. McNairn, “‘Everything was new, yet familiar’: British Travellers, Halifax, and the
and thus had become “natives,” occupied a vexed position for many metropolitan commentators. Although they were in many respects children of the parent society, they had also taken on variant characteristics from the environment in which they lived. In the case of Americans, especially after the Revolution, the presence of an alternate national identity fascinated travel writers, and provided an explanation for differences in manners, mores, and politics. Similarly, French-speaking Lower Canadians were clearly “other” than Britons. In Upper Canada, though, how exactly to categorize settlers presented a conundrum for many observers. What were they like as a people? Were they akin to other “Canadians”? To “Americans”? How close were they, in culture and in spirit, to the residents of the parent state? Although their purposes were sometimes at odds, the remarks made by travellers and writers of emigrant guides on gender and sexuality in Upper Canada are revealing of tensions around race, class, and identity.

Absence from the familiar brought differences into stark relief for those within the colony as well. As Errington shows, for many emigrants to Upper Canada, participation in networks of kinship and community persisted across the Atlantic; they eagerly sought news from “home.” Moreover, in negotiating the “liminal space between emigration and settlement,” emigrants relied on their origins: “Emigrant settlers consciously depended on their identities as Scots, English, Irish, and Welsh.” 106 The importance of these identities for some fell away as time passed. Those who emigrated as children, for

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example, frequently felt less of a tie to the communities of their birth, and embraced a “Canadian” identity; for them, Upper Canada was “home,” and they prized its ethnic diversity, at least in some respects. Errington calls attention to the letters of John Scott, who told his cousins in Scotland that “after ten years in the colony he and his siblings were ‘all naturalized now’.” Scott’s assertion of “Canadian” identity deliberately encompassed ethnic hybridity, which he attributed to living amidst the colony’s diverse population.

Similar notions of “Canadian” identity produced through diversity and hybridity were also promoted in travel literature. William Cattermole’s advice to prospective British emigrants in 1831, for example, portrayed Upper Canada as a place in which religious diversity created harmony, and “difference of opinion on matters of faith seldom or ever lead to unpleasant feelings – we mutually agree to differ.” He particularly noted the right of Catholics to hold public office. Upper Canadians, who had only just resolved the marriage law debates at the time of Cattermole’s speech, may not have recognized this image of the colony. Yet Cattermole’s emphasis on the virtues of a diverse population may have been seen as necessary reassurance for those who feared leaving “home” for the unfamiliar world of Upper Canada.

While Cattermole did not link his commentary directly to marriage, Royal Navy captain Basil Hall, who toured North America in 1827 and 1828, did. Like many other visitors to North America during the 1820s and 1830s, Hall openly compared the remaining British colonies with the American republic; he offered his opinions on their

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107 Errington, Emigrant Worlds, p. 156. Scott was writing in 1844.
108 Errington, Emigrant Worlds, p. 156.
value to the British empire along with his assessments of manners, character, and the progress of settlement. Hall promoted Britain’s retention of the North American colonies, although he saw many areas in which the metropole’s relationship with Upper Canada in particular could be improved.\textsuperscript{110} Unlike Howison or Talbot, he placed Upper Canadians within the expansive category of “loyal Englishmen,” praising them for their loyalty to the British crown in what he clearly felt were adverse circumstances. In turn, Hall argued, Britain needed to show this “loyal and determined people” that “we are in earnest in our determination to maintain the integrity of the colonies; and likewise, that we place full confidence in their national good faith as loyal Englishmen, -- to all intents and purposes as if Canada were no farther from us than Cornwall.”\textsuperscript{111} “Englishness” here transcended geography and carried with it a particular set of values. Hall’s invocation of this transnational “Englishness” in reference to Upper Canada also underlay his

\textsuperscript{110} This will be discussed further below, but see Hall, \textit{Travels in North America}, Vol. I, pp. 117-124.
comments on the role of marriage in producing an improved settler population within the colony, in turn bringing strength to the empire.

Hall prescribed “intermarriage” as a corrective to the “indolent habits” of Irish settlers in particular. In the voice of an informant, a “respectable” Irish emigrant who had settled in Douro township, he observed that “A great improvement would arise from the settlers of all the different parts of Great Britain intermarrying; and any differences which might have existed would soon wear away.” In a subsequent letter, Hall’s informant cited the Irish of Cavan township, who came to Upper Canada from New York state, assisted by the British government; although they are now “a happy, contented people, firmly attached to the Government from which they have experienced so much kindness,” their settlements displayed little “comfort” or material prosperity because they arrived “wanting … the habits of more civilized society.” Again, he argued that the introduction of “a mixture of the Lowland Scotch and English settlers along with the Irish” would inculcate “steady, moral, industrious” habits. Marriage was fundamental to this form of assimilation:

These circumstances, with the aid of constant intercourse and consequent intermarriages, would effect a sensible and beneficial, though silent change in the parties requiring it, without the danger of contamination, as that would be counteracted by the necessity of exertion in all; and those who, after all these chances to the contrary, should at last be irreclaimable, would sink into their proper station, that of labourers for their deservedly more fortunate neighbours.

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Presumably this writer saw problems with some of Upper Canada’s ethnically distinct communities, as well as the politicization of identity which migration could inspire.\textsuperscript{115}

Gender was also fundamental to understandings of race. Commentary on women, both their comparative beauty and their roles in society, was a generic convention in travel and emigrant literature that was applied as frequently to settler societies as to those composed of “Indians.”\textsuperscript{116} Travellers provided considerably more discussion of settler than indigenous women, however, illuminating some of the ways in which the supposedly familiar was strangest in colonial society. Most observers agreed that Upper Canadian women were “pretty,” and many remarked on the beauty of their “dark eyes.” Talbot, however, claimed that they were “sallow” and “not elegantly formed,” and moreover lacked the “sprightly” conversation that might “atone for the almost total absence of personal attractions.”\textsuperscript{117} Charles Stuart, whom Talbot and others critiqued, claimed that although Upper Canadian women might lack “that greater degree of polish” possessed by “our European ladies,” their “somewhat more domestic tone … amply compensated” for it.\textsuperscript{118} Others remarked that Upper Canadian women’s charms were

\textsuperscript{117} Talbot, \textit{Five Years’ Residence in the Canadas}, Vol. II, p. 17.
fleeting: “They lose their teeth and good looks eight to ten years sooner than the females of Europe; but I am unable to account for this early constitutional failure.”

This notion of degeneration and premature aging among settler women in Upper Canada was persistent in travellers’ discourse. Talbot claimed that women in the colony married “while yet children; and, frequently before they attain to 30 years, exhibit many symptoms of old age. Even at 25, and sometime prior to that period, they have an emaciated and dejected look.” Susanna Moodie concurred with many of the male observers that “Canadian women” in their youth were “exceedingly pretty,” but their “charms soon fade,” whether due to the extremities of climate or “their going too early into company and being exposed, while yet children, to the noxious influence of late hours.” They lacked education, were overly fond of gossip, and had a maturity beyond their years: “A girl of fourteen can enter a crowded ball-room with as much self-possession, and converse with as much confidence, as a matron of forty.” Their lack of “timidity and diffidence,” Moodie thought, derived from growing up too fast: “The early age at which they marry and are introduced into society, takes from them all awkwardness and restraint.” Nevertheless, she saw a potential for improvement “with a little mental culture,” likening Canadian girls to “choice flowers half buried in weeds.”

That Upper Canadians married too young was clearly a concern among observers. Other observers, however, found virtue in the colony’s emphasis on marriage, and

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remarked on the affection between husbands and wives. Scotsman Patrick Shirreff’s *A Tour Through North America* (1835) noted the forthright expressions of affection between husbands and wives in “America” with a measure of approval. Samuel Strickland, brother of Susanna Moodie and Catharine Parr Traill, found expressions of men’s affection for their wives charming, and lauded them as part of the moral superiority which life in the colonies, under the correct circumstances, could promote:

In no country on the face of the earth does the torch of wedded love beam brighter than in Canada, where the husband always finds “the wife dearer than the bride.” I have seen many a beautiful and accomplished English girl, “forgetting with her father’s house,” the amusements of a fashionable life, to realize with a half-pay officer or “younger brother,” the purer, holier pleasures of domestic love in this country, where a numerous issue, the fruits of their union, are considered a blessing and a source of wealth, instead of bringing with them, as in the old country, an increase of care.

Emigration, in Strickland’s view, increased women’s value in a way that was beneficial to society; life in Upper Canada allowed both men and women to more fully embrace domesticity, and the complementary roles of wife/mother and husband/father, than they could in an overcrowded and economically troubled England. Strickland openly promoted emigration, and sought to correct the “lamentable, and perhaps exaggerated accounts” of the harsh conditions and “disadvantages” settlers might face in the Canadas. Indeed, he argued, “The Canadian settler possesses vast social advantages over other colonists. He has no convict neighbours – no cruel savages, now to contend with – no

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124 See Davidoff and Hall, *Family Fortunes*; Tosh, *A Man’s Place*.
war – no arid soil wherewith to contend.”\textsuperscript{125} In his view, by mid-century, the “rough customs” of the colony’s early residents were also in decline, as were “American” manners.\textsuperscript{126}

To others, however, these public displays of affection had negative ramifications for the gender order. Husbands who were too much in love with their wives, as such comments suggest, were vulnerable to a loss of power. Clare Lyons’s reading of popular tales from Philadelphia’s almanacs during the late eighteenth century demonstrates the prevalence of the discourse that men who did not assert their dominion over their wives ran the risk of being cuckolded.\textsuperscript{127} These stories were based on conceptions of uncontrollable female lust, ideas which were falling out of favour by the early nineteenth century, at least for the middle classes, but were still deemed to apply to the “lower orders.” These ideas underlay popular conceptions of female sexuality and marital power even as sensibility and the companionate ideal began to replace them.

The coexistence of these discourses drove Talbot’s visceral response to the sexual culture of Upper Canada. He argued that Upper Canadian settlers did not marry for love: “Marriage, in Canada, is invariably a matter of necessity and expedience, and not of mere choice or taste.”\textsuperscript{128} Men’s and women’s “affections [were] seldom engaged” partly because they married too young and too quickly, and partly because they lacked more delicate sensibilities. Talbot objected to the “levity” with which Upper Canadians treated

\begin{footnotes}
\item[125] Strickland, \textit{Twenty-Seven Years in Canada West}, p. xviii.
\item[126] Strickland, \textit{Twenty-Seven Years in Canada West}, p. 31.
\item[128] Talbot, \textit{Five Years’ Residence in the Canadas}, Vol. II, p. 34.
\end{footnotes}
the marriage bond. He claimed that even when settlers did marry, the “chains of wedlock” were “not always ‘indissoluble,’” and separations were “common.” At the core of Talbot’s objections, though, was the notion that a society not based on the primacy of female chastity emasculated men and gave women an unseemly level of power. To his mind, this circumstance resulted from “the exalted notions of liberty, which every American, both under a Republic and under a Monarchy, imbibes with his mother’s milk”: “Though seldom exempt from calumny while unmarried, [Upper Canadian women] are said to make good wives to indulgent husbands, who have no objections to allow their neighbours a participation in their affections. Indeed, it is thought rather derogatory … to tie down the affections to any single object.”

He painted Upper Canadian men as “the most indulgent husbands imaginable”:

So patient of injuries and so regardless of the levity of their wives that separations, though very common, can seldom be attributed to any harsh treatment on the part of the men. If their “frail ribs” evince a disposition to attend to the domestic arrangements of the house, they will contentedly wear as many antlers as their wives are disposed to plant upon their foreheads.

As evidence, he presented the story of “a respectable farmer” who had come home from a long journey and “surprised his wife in the arms of an old friend.” Rather than becoming angry, the husband asked “the usurper of his bed” for compensation in the form of “two well-fatted hogs,” and their friendship continued unaffected. Lest his readers think he was exaggerating for the sake of a good story, Talbot assured them that this was “a real

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130 Talbot, Five Years’ Residence in the Canadas, Vol. II, p. 27.
131 Talbot, Five Years’ Residence in the Canadas, Vol. II, pp. 41-43.
fact, as well known to hundreds as it is to me; and, singular though it may appear, I could
tell you many anecdotes equally true and equally shocking.”

Talbot’s anecdote was intended to bolster his contention that Upper Canadian
women lacked “virtue,” but more to the point, that Upper Canadian men took insufficient
control of their wives, creating a society open to all kinds of moral decay. This sorry
situation, he implied, might be remedied by lessening the “scarcity” of women, as well as
by cooling the colony’s overheated yet dispassionate marriage market.

“I want a wife very bad”: Female Scarcity and Emigration

Discourses about the scarcity of white women and its meanings for colonial
society were in operation in Upper Canada, but functioned in contradictory ways.
Although much of the literature aimed at potential emigrants addressed and openly
favoured a married man with a family, the emigration of young, single men and women
was a persistent thread. Commentators who addressed themselves to men disagreed on
whether it was best to marry first, or to bring a wife from the British Isles. Howison’s
Sketches of Upper Canada, published in 1821, advised that “Married persons are always
more comfortable, and succeed sooner, in Canada, than single men; for a wife and family,
so far from being a burden there, always prove sources of wealth.”

Patrick Shirreff concurred, especially with respect to Scottish women: “females get sooner reconciled to
their duties, and discharge them with better effects than males. … In almost every case
that came under notice, my countrywomen appeared calculated to stimulate their

133 Talbot, Five Years’ Residence in the Canadas, Vol. II, p. 43.
134 Howison, Sketches of Upper Canada, p. 239. See also Hall, Travels in North
America, p. 175; Doyle, Hints on Emigration, p. 66.
husbands to industrious exertion, and some, under divine Providence, seemed to owe almost all they possessed to their fair partners.” Likewise, Joseph Pickering regarded the emigration of married couples as a winning proposition all around, serving the greater good of the men themselves, the colony, and England: “although there is no very great scarcity, there are more males than females, which is the reverse of England; therefore it would be a pity to increase the number of the latter, already unavoidably doomed to remain single … “Besides,” as Pickering went on to say, “generally speaking, a man will find a woman of his own country more congenial to his habits and taste, as a wife, than any other.” Although his comments were directed toward the comfort and convenience of the male emigrant, Pickering also advised that ‘Canada’ was “not a bad country for single females to come to as house servants.” They could command reasonable wages, “and, if steady, industrious, and deserving, may probably soon (if they choose) become the mistress of a house of their own.”

135 P. Shirreff, *A Tour Through North America*, pp. 165-166. For further remarks on emigrant women’s duties, see also Howison, *Sketches of Upper Canada*, p. 239.

136 Joseph Pickering, *Emigration or no emigration: being the narrative of the author, an English farmer, from the year 1824 to 1830: during which time he traversed the United States of America and the British province of Canada, with a view to settle as an emigrant; containing, observations on the manners and customs of the people ... and a comparative statement of the advantages and disadvantages offered in the United States and Canada, thus enabling persons to form a judgement on the propriety of emigrating, by Joseph Pickering* (London: Longman, Rees, Orme, Brown, and Green, 1830), p. 126; his observations were quoted in Andrew Picken, *The Canadas, as they at present commend themselves to the enterprize of emigrants, colonists, and capitalists: comprehending a variety of topographical reports concerning the quality of the land, etc. in different districts and the fullest general information. Compiled and condensed from original documents furnished by John Galt, Esq., and other authentic sources by Andrew Picken* (London: E. Wilson, 1832), p. 36. For another commentary on this subject, see Errington, *Emigrant Worlds*, p. 41 and note 107, p. 194.

137 Pickering, *Emigration or no Emigration*, p. 126.

138 Pickering, *Emigration or no emigration*, p. 126.
Many of the commentators who addressed the emigration of young men and women linked the opportunities available in the colony with marriage. As a cultural practice, marriage channelled sexuality into controlled forms of expression, which was critical since the emigration of single men, particularly young single men, raised the spectre of “racial” mixing and other “inappropriate” forms of sexual release and family formation. Although much imperial discourse on Upper Canada elided or rhetorically erased the presence of First Nations, the possibility of intermarriage, with Native peoples or other “others,” was woven indelibly into the fabric of the colony. Travel and emigrant writing remained silent on the possibility of same-sex relationships, although their potential perhaps underscored concerns about men “keeping bachelors’ hall in the bush.”

Emigrant guides thus encouraged “family” migration to Upper Canada, a colony which many hoped would be a stable, agrarian, English-speaking bastion against American republicanism.

Toward the mid-nineteenth century, Upper Canada began to figure as a possible “solution” to the growing “problem” of excess population, and particularly single women, in Britain. As Pickering’s comments illustrate, the colony’s fluid marriage market was also implicated in authors’ discussion of the problem of servants. Genteel emigrants and upper-class travellers regularly noted the difficulty of obtaining, and keeping, good “help” in the colony. For many observers, the trouble with servants was that the colony’s relatively small population combined with “democratic” (i.e. “American,” broadly speaking) ideals to give what should rightfully be the lower classes

an elevated concept of their station. Servants regularly departed for better-paying jobs, more congenial situations, or to marry and become “the mistress of a house of their own.” Howison advised his readers that servants brought from Britain “seldom remain long” with their employers after arriving in Upper Canada, “their ideas and prospects being directed into new channels, and by the system of independence and equality which prevails in the country. The women are soon married, and the men become landholders.”

Such discussion, of course, could also serve as an advertising technique for the colony, particularly during the rise in emigration after the Napoleonic Wars, when multiple colonies and the United States were competing for prospective settlers. Some literature written by and directed toward poor agricultural labourers and working-class emigrants advertised the need for white women almost as an indicator of the colony’s prosperity. In a letter reprinted in the Brighton *Guardian* in May 1836, Edward Longley, who had emigrated from Sussex as part of the Petworth scheme the year before, advised prospective emigrants that

> those that can muster large families will do much better than those without; and ‘though last not least,’ I would recommend all young single women to come out as quickly as they can, and I will warrant they will soon meet with an object to fix their affections, for many young men are at this time keeping bachelors’ hall in the bush for want of a wife.

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141 Longley to Mitchell, 28 September 1835 and 20 March 1836, reprinted as Letter 106 in Cameron, Haines, and Maude, eds., *English Immigrant Voices*, p. 203. Although this letter was dated 28 September 1835, according to the editors it was finished 20 March 1836, and sourced from the Brighton *Guardian*, 11 May 1836.
Pickering’s reference to the gender demographics of Upper Canada also indicates that the scarcity of white women was perceived to be an issue. Talbot claimed that women were indeed “a scarce commodity in the Canadian market”; by his reckoning, arriving male emigrants throughout North America outnumbered females by “three to one.” Accordingly, women were “in demand”: “The women in Canada, therefore, though intrinsically at least 75 per cent. below our fair countrywomen, are more highly prized, and much more eagerly sought after.”\footnote{Talbot, \textit{Five Years’ Residence in the Canadas}, Vol. II, p. 27.}

Most observers tended to agree that demographics and inclination made Upper Canada a good destination for women who wished to marry. J.W.D. Moodie observed of an acquaintance, “Mrs. S\ldots,” that she “no doubt, foresaw that she could not expect to keep such fair creatures” as her “two very pretty daughters” for “long in such a marrying country as Canada.”\footnote{Moodie, “The Land-Jobber,” in \textit{Roughing It in the Bush}, p. 176.} William Baker, a Petworth emigrant who settled in Delaware Township, likewise declared that “Young girls that wants to get married, must come to Upper Canada, they will soon get a husband: girls are wanted for wives.”\footnote{William Baker, Delaware Township, Upper Canada, to John and Sarah Baker, Kirdford, West Sussex, England, 3 November 1833, reprinted as Letter 92 in Cameron, Haines, and Maude, eds., \textit{English Immigrant Voices}, p. 156. The editors’ research suggests that Baker was himself single at the time of his emigration, and married in 1846.} George Carver, who also settled in Delaware Township, kept it simple: “tell [Mary Puttick] to come over here for \textit{I want a wife very bad, and women are very scarce here, …}.”\footnote{George Carver, Delaware Township, Upper Canada, to James and Sarah Carver, Bignor, West Sussex, England, 30 June 1834, reprinted as Letter 95 in Cameron, Haines, and Maude, eds., \textit{English Immigrant Voices}, pp. 165-166. Carver married Isabell Marrell in 1842 (p. 166).}
From the opposite end of the class spectrum, T.W. Magrath, an upper-class Irishman who had emigrated with his parents and siblings, agreed:

I must first admit that I do not recommend single gentlemen to come here, where ... the only comforts they can expect are cigars, sour cider, the eternal annoyance of an ugly old housekeeper (one of the greatest plagues on earth), and the glorious irregularity of a bachelor’s house. ... I would more strongly advise them ... to marry before they come out, if they can meet with cheerful, accommodating, and economizing lasses with a little of the needful; indeed whether possessing this last qualification or not, such girls would be in themselves a treasure here.  

This emphasis on the importance of wives, and the need for white female emigrants, was intended to attract a certain class and calibre of settlers.

The perceived scarcity of white women in European colonies of settlement was a persistent topic for discussion across time periods and colonial contexts. Much as indigenous women were portrayed as part of the allure and spoils of empire available to European men, the presence, or absence, of European women functioned as an important indicator of a colony’s level of “civilization,” its “morality,” and its future. These discourses connected white women and civilization in ways which varied by empire and local context, but remained remarkably consistent across time and space. In almost all cases, colonial officials believed that the presence of European women, and specifically,

marriages between European men and women, “would encourage the establishment of a stable and self-sufficient colony.” Schemes which proposed the export of white women from the imperial metropole to become wives for white male settlers were executed from New France to Barbados to British Columbia. In all such schemes, white women’s presence was expected to relieve local tensions surrounding sexual expression and the gendered functioning of race and power, and simultaneously resolve problems of “surplus” population in the home society, whether that surplus was of unmarried or simply unruly women. Although by the second half of the nineteenth century, white women were deployed as a moral check on “rough” white men, the panacea was not always reliant on this image of “‘fair ones of a purer caste’.” Jennifer Morgan points to calls from Barbados, Martinique, and Saint-Domingue during the mid-seventeenth century for “‘loose wenches’ to augment the white population.” Again, this illustrates the significance of the intimate relations of conjugality and reproduction for the exercise of imperial power. As Morgan asserts, no bodies were exempt: “All free

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148 Spear, “Métissage and the Regulation of Sexuality,” p. 35.
150 See Perry, On the Edge of Empire, chapter 6; Morgan, Laboring Women, p. 74.
Gender, Marriage, and Possibility: Discourse on Remaining Single

Even as Pickering’s commentary emphasized the significance of marriage, it also left open the possibility of choice for the reader and prospective emigrant. Both men and women, he implied, could earn enough of a living in the Canadas that they could in fact “choose” whether or not they “intend to marry.” Similarly, Magrath’s audience may have read his rather arch bemoaning of the single gentleman migrant’s lot as a commendation. Errington’s research demonstrates that “unattached or unaccompanied adult men and women” composed “the single largest group of emigrants” between 1815 and 1845. While she notes that “[a]n unknown portion of these were undoubtedly husbands … going ahead to find work” and establish a new home, many such migrants were single adults who emigrated not as lone individuals, but with parents, siblings, or cousins, or who “expected (or hoped) to join kin already in the colony.”

Petworth emigrant Edward Longley, too, qualified his call for women to marry the men “keeping bachelor’s hall in the bush for want of a wife”: “Should they not feel inclined to tie the conjugal knot, they can get good wages and are very much wanted.”

Emigration could, as Magrath’s comments imply, serve as a means to avoid marriage altogether. Many male settlers openly celebrated the ease of bachelor

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151 Morgan, Laboring Women, p. 75.
152 Errington, Emigrant Worlds, p. 39.
housekeeping available in the colony. Shortly after his arrival in York in 1811, Isaac Wilson told his parents: “I wish much to have a home of my own; our next neighbour is a single man and keeps house himself. He says he can live well for less than a dollar a week and any single man may live here with working two days out of nine.”¹⁵⁴ He made it clear to his family that such a domestic arrangement was in fact his preference: “Many of the women in this country are very unwilling that I should remain single. They represent it as the most uncomfortable mode of life that can be led. Some of them are so solicitous to relieve me from it that they give me the most pressing invitations to marry them.”¹⁵⁵ Others who did eventually marry, like Ely Playter and his friends, or the genteel “backwoods bachelors” of the Peterborough area, clearly enjoyed socializing and “romping” with the young women of their acquaintance, but seemed to be in no hurry.¹⁵⁶ Moreover, Errington’s research on “information wanted” notices placed by wives whose husbands had gone ahead to the colony, then disappeared, indicates that for some, emigration was a means to escape previously-established matrimonial bonds.¹⁵⁷ While these and other aspects of relationship breakdown will be taken up further in Chapter Four, it is important to remember that the potential for mobility and social change contained in settler colonies was a critical aspect of discourse on gender and sexual arrangements within them.

¹⁵⁴ Isaac Wilson Papers, Archives of Ontario (AO), MS 199, 19 November 1811.
¹⁵⁵ Isaac Wilson Papers, AO, MS 199, 24 June 1817.
¹⁵⁶ See Playter Diary, AO, MS 87; also Samuel Smith diaries, 1820-1822, AO, MS 953, diaries from. For Peterborough in the 1830s, see Langton, ed., Early Days in Upper Canada, and H.H. Langton, ed., A Gentlewoman in Upper Canada: The Journals of Anne Langton (Toronto: Clarke, Irwin, 1950).
Conclusion

Gender and sexuality, both idealized and transgressive, coloured the colony’s economic, social, and political spheres. Descriptions of flirtations among Upper Canadian women and men convey a sense of plurality. Although prescriptive literature emphasized chaste courtship, with marriage as its object, heterosexual sociability was not necessarily directed toward immediate, monogamous marriage, a fact which was perceived by some commentators as a sign of rampant immorality. Evidence of intimate courtship practices like bundling and sparking emerges from travellers’ discourse and the records of the colony’s courts; these activities, which were often engaged in with more than one partner, were contested within the colony and criticized by outside observers. Nor was marriage itself necessarily the corrective. While some observers embraced the importance of marriage in Upper Canada, positing it as a solution to excess population in the metropole, labour shortages in the colony, and difficulties in creating a strong settler society, others saw settlers’ approach to marriage as an expression of a larger societal disorder. Some of these tropes were picked up in discussions of the colonial state’s role in administering marriage law. The colony’s troubled relationship with formally regulating heterosexual contact through legal marriage will be explored in the next chapter.
Chapter 3

Making Marriage Law: Formally Regulating Heterosexuality

Marriage law was a significant issue in Upper Canada from the colony’s inception. The first statute passed during the first session of parliament, held at Newark in 1792, provided for the introduction of English civil law. The first bill introduced was an act to validate marriages which this statute had made unlawful, and to regulate the celebration of matrimony in the future. These two actions set off nearly forty years of contention over who had the right to perform marriages which would be legally recognized in the colony. While these debates have been examined by a few scholars and remarked on by numerous others, the contention around marriage law in Upper Canada has too often been reduced to a power struggle among Christian denominations and their allies within the colony’s political structure, with little reference to the context in which these struggles existed. The colony’s immediate move to regulate marriage has also been noted in studies which treat imperial developments more broadly, but its significance to Upper Canada’s establishment and development is unexplored.

This chapter attempts to untangle some of the legal mechanisms by which heterosexual relationships were regulated in Upper Canada, and connect them to the colony’s struggles over politics and identity. Creating a legal framework for marriages

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1 Journals of the House of Assembly of the Province of Upper Canada [hereafter JHA], 1792.

was a critical enterprise across colonies of settlement, as Bettina Bradbury asserts:

“Marriage in the colonies and in the politics and discourses of empire was a powerful signifier of stability, respectability, and successful colonization. It was understood as both a civilizing force and as a measure of civilization.”³ As we have seen in Chapter Two, observers’ concerns about “civilization” and “morality” in Upper Canada were linked not only to patterns of sociability which allowed some degree of sexual contact, but to marriage practices themselves. Some of these concerns were echoed within the colony itself, where the legal solemnization of marriage prompted protracted and often bitter debate.⁴ A closer examination of Upper Canadians’ efforts to shape the “legal container for legitimate sexual activity” shows that marriage served as a dense transfer point for a multiplicity of concerns. Contests over the rules which governed marriage, both its solemnization and dissolution, demonstrate the entanglement of religion, politics, and power with conflicting visions of appropriate gender and sexual norms.⁵ Above all,

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⁴ Other scholars have considered these debates, but they are worth revisiting. See, among others, William Renwick Riddell, “The Law of Marriage in Upper Canada,” Canadian Historical Review, Vol. 2 No. 3 (September 1921), pp. 226-248; Annalee E. Lepp, “Dis/Membering the Family: Marital Breakdown, Domestic Conflict, and Family Violence in Ontario, 1830-1920” (Ph.D. Dissertation, Department of History, Queen’s University, 2001), chapter 2 in particular; Peter Ward, Courtship, Love and Marriage in Nineteenth-Century English Canada (Montreal and Kingston: McGill-Queen’s University Press, 1990), chapter 1.

they demonstrate not only the public nature of marriage, but the ways it was implicated in the colony’s negotiation of identity and belonging in public life. A reconsideration of marriage law provides a fuller understanding of the ways that politics, identity, and sexuality intersected in Upper Canada.

Superimposing a “little Britain” on the “howling wilderness”: Establishing Marriage Law

The introduction of English civil law in 1792 provided that, as in the metropole, marriages should be solemnized according to the Anglican Book of Common Prayer, and in the presence of a Church of England clergyman, priest, or deacon. No provision was made for civil marriage. Two interrelated circumstances in the colony made this an immediate problem, however. First of all, as Errington points out, although Upper Canada was “officially and administratively a British colony, its residents in 1792 were a heterogeneous mixture of Germans, Scots, Dutch, English, and French,” in addition to the

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8 As Lepp notes, no provision was made for civil marriage in Upper Canada or Canada West, or indeed in Ontario until 1950: “religious authorities had a social monopoly on the performance of valid marriage ceremonies, the only possible exception being Aboriginal conjugal rites” (“Dis/Membering the Family,” p. 51). England established a system for civil marriage in 1836. See discussion in R.B. Outhwaite, *Clandestine Marriage in England, 1500-1850* (London: The Hambledon Press, 1995), pp. 161-162.
“substantial” Aboriginal population. The colony was as religiously diverse as it was ethnically. Even among Christians, members of the Church of England were in a distinct minority. Secondly, and on a related note, despite the image of Upper Canada at the end of the eighteenth century as a “howling wilderness,” empty but for “the movable hut of the wandering savage” and “the solitary establishment of the trader in furs,” few of the colony’s non-Aboriginal residents prior to the War of 1812 came directly from England or Europe. Many were born in the United States, or had emigrated there from Europe and then moved north out of some combination of financial gain and political allegiance following the Revolutionary War. Others were imbricated in the networks of military and colonial officials involved in the western fur trade, who were often allied with local Aboriginal populations through marriage and kinship. These new Upper Canadians perceived greater continuities in the founding of their “new” society. Their assumptions about gender, sexuality, and interaction with the state soon came into contact with Upper Canada’s first lieutenant-governor, John Graves Simcoe, and his vision of the colony as “a little Britain.”

Simcoe was an eager advocate of British imperial interests in North America, and had served in the Revolutionary War as the commander of the Queen’s Rangers between 1777 and 1781. He firmly believed that “the American Revolution had been a conspiracy instigated by a minority.” Simcoe’s ideal Upper Canada was as a new and improved British society, with “a Superior, more happy, and more polished form of Government”

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10 Richard Cartwright, Letters of an American Loyalist, quoted in Errington, The Lion, The Eagle, p. 3.
than that of the American republic; he imagined that much of the population of the United States could be attracted north to live once again under a “free, honourable British Government.” To create this society, he argued, the colonial state must “assimilate … with the parent State,” and “inculcate British Customs, Manners, & Principles in the most trivial, as well as serious matters.”

In addition to providing for the colony’s military defence, Simcoe set out to cement the Church of England into Upper Canada’s governing structure, in part through marriage law. A similar precedent had been set in Nova Scotia, where, despite the minimal presence of Anglican clergy, the Church of England’s monopoly on lawful marriage was legislated in 1758, and upheld, despite the extension of some solemnization rights to Justice of the Peace, by a 1784 act requiring the publication of banns. In Upper Canada, however, a struggle immediately arose between Simcoe and members of the Legislative Council, among them Richard Cartwright and Robert Hamilton. Both Cartwright and Hamilton were actively involved in the colony’s trade and commerce, and in the local judiciary as well. Although Cartwright agreed with Simcoe on the necessity

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12 Simcoe to Dundas, 30 June 1791, in Cruikshank, ed., *Correspondence*, I, p. 27. See also Craig, *Upper Canada: The Formative Years*, p. 21.
of shaping and clarifying marriage law “in a new Country,” he objected to the investiture in the Church of England. Comparatively few of the colony’s settlers were Anglican; combined with the shortage of clergy, this posed an unnecessary obstacle to formal marriage, which Cartwright felt “should be made as easy as may be consistent with the Importance of such engagements.”

Moreover, Cartwright was concerned that with the introduction of English law, “the Marriages of the generality of the Inhabitants of Upper Canada are not valid in law, and that their children must stricto jure be considered as illegitimate and consequently not intitled to inherit their property.” Cartwright’s own marriage to Magdalen Secord was affected, as were those of a number of prominent loyalists, merchants, and members of the military and colonial elite. As Cartwright explained in a report to the imperial authorities, “from the year 1777 many families of the Loyalists belonging to Butler’s Rangers, the Royal Yorkers, Indian Department and other corps doing Duty at the Upper Posts had from Time to Time come into the country and many young Women of these Families were contracted in Marriage which could not be regularly solemnized, there being no Clergyman at the Posts, nor in the whole country between them and Montreal.” These ceremonies were often conducted according to the Book of Common Prayer by chaplains, military officers, or magistrates, and were assumed by the couples

17 Riddell, “The Law of Marriage,” p. 228; see also George Rawlyk and Janice Potter, “Richard Cartwright,” DCBO.
themselves to be valid rather than “irregular.” Cartwright further queried whether even marriages performed by a clergyman before 1792 were technically invalid, since the Quebec Act “appears … to invalidate all Marriages not solemnized according to the Rites of the Church of Rome, so far as these Marriages are considered as giving any Title to property.”

In the context of the new colony, compensation for losses sustained in the name of loyalty and service to the King increased the importance of legally recognized marriages. Entitlement to land grants and other forms of real property rested on the ability to prove rightful inheritance. To redress these problems, Cartwright introduced the first session’s bill to validate existing marriages. Simcoe, however, objected strenuously to this “hasty and ill digested Bill,” and convinced Cartwright to “withdraw” it with a promise that further attention would be given to the matter that winter.

Simcoe observed that the issue of marriage law “requires the serious and immediate consideration of Government – the people seem very desirous to avail themselves of regular Sanctions tho’ they have but little opportunity.” His insistence on reserving the definition of lawful marriage for Anglican ceremonies, however, contributed to this lack of “opportunity.” Simcoe’s understanding of “regular Sanctions”

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19 Riddell’s observation in “The Law of Marriage,” p. 226, that few of these couples underwent a second ceremony attests to this perception.
23 J.G. Simcoe to Henry Dundas, 4 November 1792, in Cruikshank, ed., Correspondence, 1, p. 250.
was at odds with much of the colony’s population, who were willing to accept a more expansive definition of marriage. At the very least, other Protestant denominations demanded the right, which many of them had in the United States, to solemnize their marriages according to their own religious traditions. While the imperial law officers reviewed Chief Justice William Osgoode’s marriage bill, drawn up on Simcoe’s instructions, the House of Assembly and Legislative Council continued to debate the validation of marriages in the colony. In June 1793 a second bill introduced by Cartwright was rejected by the Legislative Council when the House of Assembly amended it to allow non-Anglican ministers to perform marriages for those of their own faith. After a conference between three members of Council and three members of the Assembly, the Assembly withdrew the amendment on the assurance that the rights of non-Anglicans would be considered in future.25

The Marriage Act 1793 received Simcoe’s assent on 9 July 1793. Under its provisions, marriages “publicly contracted before any Magistrate or Commanding Officer of a Post, or Adjutant or Surgeon of a Regiment acting as Chaplain, or any other Person in any public Office or Employment, before the passing of this Act, shall be confirmed and considered to all Intents and Purposes as good and valid in Law.”26 Those whose marriages were affected were asked to register their marriages with the Clerk of the Peace, as well as the names and dates of birth of any surviving children, within three years.27 The Act stipulated that future marriages were only to be considered lawful if

26 1793 Marriage Act, 33 Geo. III, Cap. 5.
they had been conducted by an Anglican minister, unless no clergyman was “living within the Distance of Eighteen Miles.” If this was the case, “the neighbouring Justice of the Peace within the district” was permitted to perform the ceremony according to Anglican forms. Ceremonies performed by a magistrate were not exempt from the requirement to post banns; notice was to be placed “in the most public place of the township or parish” for three Sundays before the marriage occurred. Justices of the peace were to lose this power once more than five clergymen came to reside in the district.

The 1793 Act clearly characterized lawful marriage as Protestant and, specifically, Anglican. Its preamble noted the “various Disabilities” resulting from “Marriages contracted in this Province at a Time when it was impossible to observe the Forms prescribed by Law … by reason that there was no Protestant Parson or Minister duly ordained” to conduct the ceremony, “nor any consecrated Protestant Church or Chapel within the same.” This deliberate reinforcement of Protestant religion was not out of keeping with metropolitan English marriage law, as Rebecca Probert and others have shown. Nor was it unusual in other colonial contexts, where the Church of England often partnered in upholding “a weak colonial state that needed to ally itself whenever possible with traditional source of authority” through the administration of

28 1793 Marriage Act, III.
29 1793 Marriage Act, III; Craig, Upper Canada: The Formative Years, pp. 30-31.
31 Craig, Upper Canada: The Formative Years, p. 31.
32 1793 Marriage Act.
In articulating a direct connection between lawful marriage with Protestantism, however, Upper Canada’s colonial state not only rhetorically erased the colony’s significant Catholic population, but also distinguished itself from French-speaking Lower Canada.

The Act also attempted to ensure that marriage was public in emphasizing banns. In modelling the statute after English marriage law, the colony not only attempted to entrench the primacy of the Church of England over other Protestant denominations, but also cut off the possibility of legal recognition for informal or irregular marriage practices. In England and Wales, the 1753 Hardwicke Act had introduced measures to clamp down on “clandestine” marriages, in which solemnization did not conform to canon law. Efforts to prevent clandestine marriage came from multiple quarters, and centered around property rights and parental control as well as ecclesiastical authority. “Contract” marriages, in which a couple’s mutual agreement before witnesses sealed the union, were a contentious subject in England by the early eighteenth century, and received little validation from the courts.\(^\text{35}\) Scotland, however, acknowledged a more expansive legal definition. In addition to “regular” marriage \textit{in facie ecclesiae}, in which


banns were read and the ceremony performed publicly by a minister, Scottish law recognized three additional “irregular” forms of marriage. Marriage *per verba de praesenti*, in which a couple solemnly declared that they took one another as spouse, and marriage *per verba de futuro subsequente copula*, in which “a promise to marry in the future” was “followed by sexual intercourse,” were both practised and considered binding in Scottish courts. Evidence of “habit and repute,” in which the couple cohabited and publicly presented themselves as husband and wife, could also outweigh the fact that they had not undergone a legal or ecclesiastical ceremony if the marriage was challenged.36

The action to invalidate irregular marriage forms was nonetheless in step with the laws of both England and Scotland, where tolerance was diminishing by the turn of the nineteenth century.37 The colonial context, however, brought an added layer of meaning to debates about the legal regulation of heterosexuality. Simcoe felt the Act was overly permissive and detracted from the Church of England’s authority, which was fundamental to good governance in Upper Canada: “the best security, that all Government has for its existence is founded on the Morality of the People, and that such

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36 This discussion draws heavily on the work of Scottish historian Leah Leneman. See in particular *Promises, Promises*, p. x and chapter 1. As both Leneman and Probert point out, such contract forms have been confused with accounts of “folk” practices such as “handfasting,” and sometimes construed as trial marriages which could be dissolved at will (Leneman, *Promises, Promises*, p. x, and Probert, *Marriage Law and Practice*, p. 73 and throughout).

37 Leneman, *Promises, Promises*, pp. 5, 13; Gillis, *For Better, For Worse*, pp. 196-228; Probert, *Marriage Law and Practice*, challenges the idea that irregular forms were ever tolerated. I suggest in Chapter Four that juries in suits for seduction may have tacitly recognized contracts *per verba de praesenti* and *per verba de futuro subsequente copula* in assessing damages against men who failed to follow through on a promise of marriage when their partners became pregnant.

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Morality has no true Basis but when placed upon religious Principles.” He made it clear in his dispatch to Dundas, the secretary of state, that he had passed the 1793 Marriage Act only reluctantly:

The General cry of persons of all classes for passing the Marriage Bill was such that I could not longer withhold under the pretence of consulting any opinion at home, having already availed myself of that excuse for delay. There are very few Members of the Church of England in either House and the disposition of the House of Assembly is to make matrimony a much less solemn or guarded contract than good policy will justify.

As his comments indicate, Simcoe feared that any liberalization of marriage laws would be damaging to “morality.” In Nova Scotia and, later, New Brunswick, Bishop John Inglis advanced similar arguments which yoked social order and “the good of the community” to a strongly established Church of England, explicitly naming control of marriage as a fundamental component. These concerns stemmed in part from the possibilities of physical and social mobility which were fostered by colonial settlement. They were also linked to intertwined fears about evangelical religion, particularly Methodism, and the influence of the neighbouring American republic, concerns which

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38 Simcoe to Dundas, 6 November 1792, p. 251.
39 J.G. Simcoe to Henry Dundas, 16 September 1793, in Cruikshank, ed., Correspondence, II, p. 53. Also reproduced in Riddell, p. 245.
40 Bishop John Inglis to Governor Sir John Wentworth, 14 April 1800, reprinted in Moir, ed., Church and State in Canada, p. 61.
41 This will be discussed further below, but see Kirsten Fischer, Suspect Relations: Sex, Race, and Resistance in Colonial North Carolina (Ithaca and London: Cornell University Press, 2002); Kirsten McKenzie, Scandal in the Colonies: Sydney and Cape Town, 1820-1850 (Melbourne: Melbourne University Press, 2004); Elizabeth Jane Errington, Emigrant Worlds and Transatlantic Communities: Migration to Upper Canada in the First Half of the Nineteenth Century (Montreal & Kingston: McGill-Queen’s University Press, 2007); and Morgan, Public Men and Virtuous Women, pp. 141-142.
became particularly politicized during the 1820s.\footnote{For Nova Scotia, see Moir, \textit{Church and State in Canada}, pp. 58-63, and \textit{Report of the Committee of the House of Assembly, upon the Petitions Presented in 1827, by Several Ministers and Congregations of Protestant Dissenters, in Nova-Scotia, Relative to Marriage Licenses, and For Certain Corporate Privileges} (Halifax: Nova-Scotia Royal Gazette Office, 1827).} As would emerge in the 1820s, during the 1790s the dispute between Simcoe and the colonial elite over valid marriage models represented clashes over colonial identity.

Simcoe’s efforts to make a “little Britain” in Upper Canada came into conflict with a colonial elite which considered itself as North American as it was British.\footnote{See Errington, \textit{The Lion, the Eagle}, as well as Romney, \textit{Mr Attorney}, pp. 20-21.} As Errington notes, “newly appointed colonial officers expected to dominate not only the government but all society in Upper Canada.” They “assumed that they stood at the apex of the new colonial community,” and were sometimes shocked to discover, as Simcoe did, “that the members of the local leadership groups were often reluctant to accept his authority or his grandiose plans without question.”\footnote{Errington, \textit{The Lion, The Eagle}, p. 17.} In this respect, Simcoe’s resistance to the validation of preexisting marriages can be linked to his struggle for dominance.\footnote{See Romney, \textit{Mr Attorney}, pp. 21, 19.} Simcoe may also have wished to discourage the types of marriages to which Cartwright referred in his report, as well as disperse the power of the families they represented. Many of the local elites had supported the appointment of “one of their own,” Sir John Johnson to the position of lieutenant-governor.\footnote{Errington, \textit{The Lion, The Eagle}, p. 17.} The Johnson family was prominent in the Indian Department and in the Mohawk valley; John’s father, Sir William Johnson, served as superintendent of northern Indians. The Johnsons also, from Sir William on, formed marital and familial alliances with the Six Nations, most notably through Sir...
William’s long partnership with Konwatsiatsiaienni, or Mary (“Molly”) Brant.\(^{47}\) Like his father, Sir John was attuned to the political significance of marriage. His first marriage, to Clarissa Putman, was not legally solemnized; although he continued to acknowledge and support her and their two children, he separated from Putman in 1773 in order to marry Mary Watts, a member of the “New York aristocracy,” at his father’s behest.\(^{48}\)

The Johnsons represented a more elastic understanding of marriage than Simcoe was willing to accept. Moreover, along with other prominent families like the Askins, Hamiltons, and Cartwrights, they were part of a longstanding network of kinship which linked military and colonial officials, fur traders, French-speaking European settlers, and Aboriginal peoples in the Great Lakes region.\(^{49}\) Although Simcoe may not have deliberately sought to suppress “mixed” marriages, this aspect cannot be discounted, especially in consideration of his distaste for the fur trade, which he thought “would


\(^{48}\) \textit{DCBO}, “Sir John Johnson.”

certainly detract from its population, … ultimately debasing the morals of the Country by the ill habits of the Courreurs des Bois.” As Brown and Van Kirk have demonstrated, the fur trade was built on familial exchange and alliance, forged primarily through sexual partnerships between traders and local women. These partnerships were often formalized through First Nations or hybrid rituals and allowed for separation and divorce. Simcoe’s concern about the fur trade and debased morals almost certainly speaks to these alternate forms of family formation and the level to which they were still perceived as legitimate in some areas of the colony. It is also roughly contemporaneous with efforts to reorder colonial representatives’ sexual relationships in other parts of the British Empire.

Simcoe’s vision of the colony’s disorder may also have related to the aftermath of the Revolutionary War. During the war, women accompanied both British and American troops as sexual partners, with and without formal marriage. Troops were also accompanied by “homeless or runaway women of every description,” who sought refuge with the army in exchange for domestic or sexual work, as well as “badly needed medical services.”

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50 J.G. Simcoe to Henry Dundas, 28 April 1792, in Cruikshank, ed., Correspondence, I, p. 141. See also Craig, Upper Canada: The Formative Years, p. 23.
51 Brown, Strangers in Blood; Van Kirk, Many Tender Ties. See also Carolyn Podruchny, Making the Voyageur World: Travelers and Traders in the North American Fur Trade (Toronto: University of Toronto Press, 2006), chapter 8.
52 As Durba Ghosh shows, British rule in India became increasingly fixated on questions about respectability by 1800; such “anxieties” produced concerns about “interracial marriage,” which was linked with “political corruption and social impropriety” within the East India Company. See Sex and the Family in Colonial India: The Making of Empire (Cambridge: Cambridge University Press, 2006), p. 89 and throughout.
depredations of war. Cartwright’s report calls to mind the number of marriages which took place in refugee camps like the one at St. Jean, Québec. Couples who were married in the camps often subsequently took up lands in Upper Canada, making the validity of their relationships critical to the compensation system. More to the point, this was a period of societal and sexual disorder which affected later marital stability. Although Potter-MacKinnon has characterized post-Revolutionary marital collapse as “unusual,” there is some evidence to suggest that the war did have an effect. As the troubled relationship of Frederica Grout and Richard Ferguson illustrates, marriages made in the camps may have been hasty. Legally requiring such couples to re-register their marriages according to Anglican law may have been an attempt to get away from ad hoc unions in favour of an “orderly” society, but also may have provided a modicum of escape.

Simcoe was reluctant to make good on the promise of future concessions to non-Anglicans. Although the metropole was willing to support the extension of the right to solemnize marriages to clergy beyond the Church of England, Simcoe did not make arrangements to amend the Act in the next session as the Council and Assembly had agreed. He continued to frustrate attempts to broaden denominational rights to solemnize marriages until he left Upper Canada in 1796. He continued to connect refusal to conform to Anglican models with disorder and disloyalty to the British Crown; he responded to a petition from the Presbyterians of the county of Grenville, asking that the

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56 Frederica Ferguson to Sir Peregrine Maitland, undated (likely 1825), John Strachan Papers, F 983 Vol. 1, MS 35 reel 8, AO. See further discussion in chapter 4, as well as Potter-MacKinnon, *While the Women Only Wept*, pp. 121-124 and 152-153.
Church of Scotland, as in Britain itself, be allowed to solemnize marriages, with the admonition that “the petition was a product of a wicked head and a most disloyal heart.”

After Simcoe’s departure in 1797, the legislature amended the Marriage Act. The 1798 Marriage Act extended the right to solemnize unions to “members of the church of Scotland, or Lutherans, or Calvinists,” provided that one of the parties had been a member of that minister’s “congregation or religious community at least six months before the said marriage.”

As Chief Justice Elmsley explained to the imperial authorities, these denominations were specifically selected for their association with order:

“though Non-conformists here, [they] are members of an establishment elsewhere and would for that reason bring with them their sober and regulated modes of thinking in both political and religious subjects which are the usual consequences of habitual conformity to an established ritual which form perhaps the best barrier against the encroachment of either infidelity or fanaticism and, the inseparable companion of each, sedition.”

He defended the colony’s cautious approach, insisting that through selection of churches, the state must retain control over the power to legitimate sexual activity and family formation. To allow “all ministers” to perform marriages, he argued, “would have been to give the power of performing the ceremony of marriage to some of the weakest, the most ignorant, and in some instances the most depraved of mankind.”

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58 38 George Cap. 4 (1798), An Act to extend the provisions of 33 George Cap. 5.
The Act contained an additional set of safeguards. In order to legally solemnize marriages, a minister of one of the chosen denominations must appear before the Quarter Sessions in his District of residence, accompanied by “at least seven ‘respectable persons’” from his congregation who would attest that he was their minister and had been “ordained according to the rites of his religious community,” and swear an oath of allegiance. The justices of the peace present could then choose whether or not to grant him a certificate authorizing him to perform marriages for couples of whom at least one was a member of his congregation. Banns still had to be posted for three Sundays unless the couple had obtained a license from the lieutenant-governor, and the couple was to be provided with a marriage certificate which could be registered with the clerk of the peace.\footnote{1798 Marriage Act; also Riddell, “The Law of Marriage,” pp. 231-232.}

\textit{Confusion and Inclusion: Marriage Law and Defining Validity}

In Elmsley’s explanation and the stipulations attached to non-Anglican performance of marriage, we see again the conflation of deviance from “established ritual” with the threat of political sedition. The notion of order advanced by Simcoe and Elmsley, and later by John Strachan and his former students, depended on the primacy of the Church of England. It also served to set directions for colonial identity by bestowing or withholding certain rights, including the celebration of lawful marriage. The 1798 Marriage Act’s extension of the right to solemnize to “members of the Church of Scotland, or Lutherans, or Calvinists” created further confusion among Upper Canadians about the definitions of lawful marriage. Furthermore, while the colony’s legislation was
explicitly directed at managing Protestant dissenters, it was curiously silent on the subject of other religious denominations.

Roman Catholics were the largest group seemingly disregarded by the colony’s marriage law. Upper Canada never explicitly granted permission to solemnize marriages to the Catholic church, although Catholic marriages were largely treated as valid. The silence around Catholic marriage stemmed from ambiguities regarding the Church’s legal position in British North America. As Cartwright’s comments indicate, members of the colony’s first government believed that rights granted to Roman Catholics under the Quebec Act included the ability to validate marriages. Catholic marriages were thus presumed lawful and ignored by subsequent acts. Others, however, questioned the omission. The legal status of Catholic marriages was one of the issues raised in an 1810 critique of the legislation’s inconsistencies, for example. In a letter to the Kingston Gazette, “Amicus Curiae” pointed to inconsistencies in marriage law to support a case for greater transparency in assessing bail requirements and, more importantly, the ability of the judiciary to freely interpret the colony’s legislation. In addition to the variable understandings of the distance requirement for magistrates, “Amicus Curiae” remarked on the lack of clarity in defining “lawful” marriage:

The provincial statute declares a marriage lawful altho not solemnized in a consecrated church. The word consecrated has occasioned different constructions. One minister understands that the marriage service may be lawfully performed out of a church. Another thinks it must still be in a church, altho’ the church need not have been consecrated.

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63 Kingston Gazette, 18 December 1810.
“[O]ther questions still” included whether Catholic clergy had “any authority to marry” their parishioners, and what consequences or remedies might result from a marriage which was unlawfully performed: “Is the minister or magistrate liable to indictment or action? Are the parties indictable for cohabiting under such an unauthorised marriage? are the issue of such a marriage legitimate? If the wife survive the husband, is she endowable of his estate?” In raising these questions, “Amicus Curiae” drew direct comparisons with England, where, he argued, marriages solemnized outside a church garnered “a severe punishment”; in the absence of the metropole’s ecclesiastical courts, he argued, the Court of King’s Bench should be granted the authority to take an active role in interpreting such legislation. Over the next forty years, the colony’s courts did accept this role in shaping and defining judicial and legislative responses to regulating heterosexual relations, as I will discuss below; however, I have found no surviving evidence to indicate that they attempted to rule on the legitimacy of Catholic marriages.

Questions about Catholic marriage also arose during the House of the Assembly’s discussion of the Marriage Act 1831. In debating the bill’s extension of the right to solemnize to all recognized clergy within their own denominations, Henry John Boulton, then Attorney General, again raised the issue of Catholicism. While he acknowledged that some believed Catholic priests “were already legally entitled to celebrate the marriage ceremony,” he had doubts: “he was of opinion that, as the law now stood,

64 Kingston Gazette, 18 December 1810.
65 Kingston Gazette, 18 December 1810.
66 This must be interpreted with caution, given lacunae in the records of the colony’s courts. However, cases like Davy v. Myers, discussed below, and dower cases suggest that marriages solemnized according to excluded Protestant traditions were treated with greater scrutiny.
Catholic ministers could not marry any persons, unless both parties belonged to that church, and even in these cases he was not satisfied that such marriages were legal.” However, Boulton was “quite satisfied” that marriages between a Catholic and a non-Catholic, performed by a Catholic priest, “were not legal,” providing further ammunition for his argument that “if religious sects were enumerated at all … Catholics should be included.” Again, however, as we will see, the 1831 Act validated Catholic marriage by omission rather than explicit mention, in deference to its ambiguous status.

This kind of treatment of religious “others” was also at play in regard to other traditions, in the colony and in England. The 1753 Hardwicke Act, which governed marriage in England and Wales, was equally silent on the subject of Catholics, but explicitly did not apply to Jewish and Quaker marriages. Instead, as Probert observes, it left their status “ambiguous.” Jewish marriage occupied a similar position in Upper Canada. The comments of Christopher Hagerman, then Solicitor General, in the 1831 Assembly debates indicate that Jews, like Catholics, had long been envisioned as having a valid, if unspoken, exemption from the insistence on Anglican forms. Quaker

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67 *Kingston Chronicle*, 5 February 1831.
68 On the Hardwicke Act’s exceptions, see Outhwaite, *Clandestine Marriage in England*, p. 85, and Probert, *Marriage Law and Practice*, pp. 152-162, 234-235, and 328-329. As Probert notes, “the Act did not declare that marriages conducted according to Quaker or Jewish rites would be valid. Instead, it simply stated that the Act did not extend to such marriages. Just as the Act consolidated many aspects of the existing law, so it could be said to have captured the ambiguous status of Quaker and Jewish marriages” (*Marriage Law and Practice*, pp. 234-235).
marriage in Upper Canada was recognized by the same kind of “special arrangements” which exempted them from oaths and military service, although David Willson’s breakaway sect, the Children of Peace, was regarded differently.

Simcoe did not envision that people who were not Anglican would simply live with irregular forms of marriage; rather, he assumed that Upper Canadians would comply, however reluctantly, with an enforced Anglican hierarchy rather than see their marriages, and their children, considered illegitimate. Following the 1798 amendment to the Marriage Act, the colonial state proceeded on the same assumption. The level of conformity to regular forms of marriage has been contested by scholars of a variety of jurisdictions. The inconsistencies of record-keeping in Upper Canada make the type of analysis conducted by Probert for England, or by Lyons for Philadelphia, somewhere between problematic and inconclusive. Many Upper Canadians did choose to conform period, but do not include marriage in their discussion of “rights.” See also Gerald Tulchinsky, Taking Root: The Origins of the Canadian Jewish Community (Toronto: Lester Publishing, 1992), pp. 17-18.

70 Grant, A Profusion of Spires, p. 88. See also Robynne Rogers Healey, From Quaker to Upper Canadian: Faith and Community among Yonge Street Friends, 1801-1850 (Montreal and Kingston: McGill-Queen’s University Press, 2006), chapter 3, although she does not discuss validity from the perspective of the state.


72 Simcoe may have drawn on English experience in this respect. Probert, Marriage Law and Practice, argues that dissenters and other non-Anglicans generally did what was required in order to marry legally; for contrasting arguments, see John R. Gillis, For Better, For Worse: British Marriages, 1600 to the Present (New York: Oxford University Press, 1985), and Anna Clark, The Struggle for the Breeches: Gender and the Making of the British Working Class (Berkeley: University of California Press, 1995).

73 Based on English parish registers, Probert, Marriage Law and Practice, concludes that most people, even those who were not Anglican, did whatever it took to meet the legal definitions of marriage. Clare A. Lyons, Sex Among the Rabble: An Intimate History of
to the legal requirements, whatever they happened to be, in order to ensure that their marriages were considered valid. Others, like dissenting ministers convicted of illegally solemnizing marriage, pled ignorance of the colony’s laws, in spite of the periodic publication of the Marriage Act and proposed amendments to it in the colonial press. But sufficient evidence exists to demonstrate that for others, the legal form of marriage took second place to religious expression, convenience, or some combination of both.

The breach of promise case [Davy v. Myers (1823)] provides one such example. This case reached the Court of King’s Bench, and was published in the law reports, because of the questions it raised about the legalities of breach of promise as a personal action. The circumstances of the case, though, are highly revealing of some of the contests surrounding legal marriage in the colony before the passage of the Marriage Act 1831. In reviewing the evidence from the original trial, Chief Justice William Dummer Powell observed that it had been “proved and admitted” that Davy and Myers had contracted to marry, and “That in conformity to the contract they did intermarry, and cohabited as man and wife in the face of the world and their families, until the death of

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Gender and Power in the Age of Revolution, Philadelphia, 1730-1830 (Chapel Hill and London: Omohundro Institute of Early American History and Culture/University of North Carolina Press, 2006), used the records of the Overseers of the Poor to ascertain that many Philadelphians engaged in overlapping sexual and conjugal relationships without necessarily marrying.

5 See Upper Canada Sundries, RG 1 A 5, LAC, petition of Joseph Sawyer, 20 August 1820, C 4605, Vol. 4, pp. 24014-24027. On marriage bills, see, for example, Kingston Gazette, 7 April 1818; Kingston Chronicle, 1 May 1822, 31 January 1829, and 25 August 1841. On the colony’s press as public sphere, see McNairn, The Capacity to Judge.

75 Davy v. Myers (Executors of), Report of Cases Decided in the Court of King’s Bench of Upper Canada, By Thomas Taylor, Esq., of the Middle Temple, Barrister at Law. Containing the Cases Determined from Trinity Term 4 Geo. IV., to Trinity Term 8 Geo. IV.; with a table of the names of cases argued, and digest of the principal matters. Second Edition (Toronto: Henry Rowsell, 1862) [hereafter UCKB], pp. 89-112.
the testator, who, in consideration of such marriage, left by will his wife to her lawful
claims on his estate.” 76 The executors of Myers’s estate, however, objected that the
marriage was not legal, since the couple had been married by an unauthorized Lutheran
minister. Davy told the court that she was concerned this made their marriage
“questionable,” but Myers “overruled.” However, when he later expressed “doubts as to
the validity of the marriage” and “proposed to have the ceremony renewed by Mr Stuart,
the church minister,” Davy “declined.” 77 Her inheritance thus denied on the grounds that
she was not Myers’s legal wife, Davy sued her late partner’s executors for breach of
promise of marriage.

The judge in the original trial had declared that in refusing to remarry by Anglican
tradition, Davy herself had breached the contract of marriage and was not entitled to any
damages. The jury found in her favour and awarded her £500 nevertheless. 78 The judges
of the Court of King’s Bench largely agreed with the trial judge’s ruling, particularly
since Davy’s suit did not include a request for “special damages,” a necessary precedent
in cases where one of the parties was deceased. 79 In such a case, Justice Campbell
opined, the “special damage” sustained by a woman through breach of promise could
include “loss of marriage to another person, the relinquishment or loss of certain
pecuniary advantages, or the giving up a profitable trade or employment in consequence
of the promise of marriage.” Since Davy’s case did not expressly ask the jury to take

78 Powell, CJ, Davy v. Myers, UCKB, p. 102. Juries and judges frequently diverged in
breach of promise and seduction suits; see further discussion in Chapter Four.
these matters into account, and she did not insist on resolemnizing the marriage, the court ordered a new trial.\textsuperscript{80}

\textit{Davy v. Myers} not only addressed the issue of whether a personal action, such as promise to marry, died with the actor. It also had much to convey about the legal rights and responsibilities of marriage, in form and intent. In upholding the executors’ decision to disinherit Davy, the judges of King’s Bench made clear that the colony’s courts would adhere to the strict definition of legal marriage, acknowledging neither the couple’s contract nor the ecclesiastical ceremony in which they married as evidence of a valid union. Nor did this stance shift following the expansion of solemnization rights in 1831. In \textit{Campbell v. Carr} (1842), the plaintiff’s case for criminal conversation fell apart when he was unable to produce solid evidence that he and his wife had legally married in Lower Canada.\textsuperscript{81} The evidence in these cases does suggest, however, that unions in which couples publicly cohabited without adherence to the prescribed form were not unusual in the colony. While these unions did not meet the legal definition of a marriage, the jury’s actions suggest that they acknowledged the social legitimacy of the relationship between Davy and Myers, and considered her deserving of compensation. Similarly, while witnesses in \textit{Campbell v. Carr} implied that the Campbells only “passed” as married, the social legitimacy of their union was not in question. Campbell, a private in the 32\textsuperscript{nd} Regiment, was permitted to live out of barracks as a married man, and evidence

\textsuperscript{80} \textit{Davy v. Myers}, UCKB, p. 112.
\textsuperscript{81} \textit{Campbell v. Carr}, 7 October 1842, Home District Assizes, Christopher A. Hagerman Benchbooks, AO, RG 22-390-3-38-4, and \textit{Campbell v. Carr, Queen’s Bench and Practice Court Reports, Published by Christopher Robinson, Esq. (From Manuscript Records in Judges’ Chambers.), Vol. VI} (Toronto: Henry Rowsell, 1858) [hereafter UCQB], pp. 482-483.
was introduced to show that Carr clearly regarded his lover as a married woman.  
Although the courts denied Campbell’s right to damages, which was predicated on proof that he was a legal husband, testimony in this case suggests that such unions were socially recognized, if not always equated to legal marriage.  

The prevention of “irregular” marriage marked discussions of the colony’s marriage law through the first decades of the nineteenth century. During the 1820s and into the 1830s, irregular marriage figured in the political debates surrounding “alien” status and carried ramifications for colonial identity.

Profligates, Aliens, and Oligarchs: Marriage Law and Political Conflict in the 1820s and 1830s

The 1820s was a period of intense turmoil in Upper Canada, with “deep political divisions emerging” around the role of the state, the right to political participation, and the course of the colony’s future.  

83 For a contrasting argument regarding England, see Probert, Marriage Law and Practice, pp. 68-75, 101-104.
84 Craig, Upper Canada: The Formative Years, p. 106. These divisions have been well explored by a number of historians of the colony, although with the exception of Morgan, they have not explicitly considered the significance of discourses on gender and sexuality (see Public Men and Virtuous Women, chapter 2 and 4 in particular). Among others, see Errington, The Lion, the Eagle, chapters 5 through 7; McNairn, The Capacity to Judge; David Mills, The Idea of Loyalty in Upper Canada, 1784-1850 (Montreal and Kingston: McGill-Queen’s University Press, 1988); Romney, Mr Attorney, chapter 3, and “From the Types Riot to the Rebellion: Elite Ideology, Anti-legal Sentiment, Political Violence, and the Rule of Law in Upper Canada,” Ontario History, Vol. LXXIX No. 2 (June 1987), pp. 113-144; and Carol Wilton, “‘Lawless Law’: Conservative Political Violence in Upper Canada, 1818-41,” Law and History Review, Vol. 13 No. 1 (Spring 1995), pp.
sharply polarized: a conservative governing elite comprised of the men of the “Family Compact,” inspired and aided by John Strachan and allied with Lieutenant-Governor Peregrine Maitland, supported a strong established Anglican church, king and empire, while a loosely-organized movement for reform, made up of American-born settlers and new immigrants, pushed for democratic and perhaps even republican-style government, freedom of Christian worship, and local solutions to local problems. Contests over allegiance, citizenship, and political representation also took place in the context of increased emigration to the colony. Immigration from the British Isles rose sharply after 1820, creating a “Canada mania” by the 1830s; meanwhile, British commentators continued to question the value of maintaining colonies in British North America at all. Immigration in turn influenced the growing conflict over political participation and self-government. The appearance of marriage and sexuality in debates over political form and representation was also contemporaneous with a growth in the publication of travellers’ and emigrants’ accounts of the colony, which both fuelled and sought to capitalize on increasing migration. Woven throughout the political upheaval of the 1820s were contests around belonging and the articulation of colonial identity, frequently expressed


85 The scholars listed in the note above, however, show that this is an oversimplification.

in the language of loyalty. The legal regulation of heterosexual behaviour formed one significant component of these contests.

During the 1820s and into the 1830s, several attempts were made to legislate the terms of heterosexual relationships, although not all of them passed into law. These included bills on adultery and infanticide. The continuing contest over lawful marriage, however, was the most prominent. As the 1810 commentary of “Amicus Curiae” indicates, the question of who could legally perform marriages continued to spark confusion and debate through the beginning of the nineteenth century. Although the House of Assembly took no further legislative action until 1821, denominations excluded by the 1798 Act continued to petition the House of Assembly for the right of their ministers to perform marriages, and to validate any marriages already performed. At least twenty-one such petitions were submitted between 1799 and 1829. These efforts were led by Methodists, the single largest body excluded by the 1798 amendments, and the denomination at whom the provisions demanding official accreditation and a court-approved oath of allegiance were targeted. The petitions resulted in at least seven bills to

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87 See in particular Mills, The Idea of Loyalty, and Errington, The Lion, the Eagle.
88 John Rolph introduced “a bill for the punishment of open and common adultery in certain cases” on 21 November 1825, but it was set aside (JHA 1825-1826, p. 18). A bill to deal with infanticide was debated in November 1831, and passed the following month (JHA 1831-1832, p. 24).
89 The split between Anglican/Tory and Methodist/reform has often been used to explain the marriage law debates, and occasionally reduce them to a contest between the Anglican and Methodist churches for control over their parishioners: for example, Riddell, “The Law of Marriage in Upper Canada”; Ward, Courtship, Love, and Marriage, pp. 30-31. Lepp’s analysis is also influenced by this explanation, although she gives credence to the question of why marriage was so significant in the first place. See “Dis/Membering the Family,” chapter 2.
further expand the right to perform marriages before 1818, and the majority of these passed a second reading in the House; nevertheless, all failed to pass into law.\textsuperscript{91} Dissenting ministers and careless magistrates occasionally faced prosecution for unlawfully solemnizing marriages in this period.\textsuperscript{92}

Perhaps prompted by some of these prosecutions, in the first session of parliament in 1821 Attorney General John Beverley Robinson introduced a bill which made the performance of a marriage ceremony by a justice of the peace “or any unauthorized person” a misdemeanor, punishable by a fine and imprisonment.\textsuperscript{93} In response to Robinson’s bill, members of the House of Assembly proposed two alternate bills to reform marriage law. These bills took up the dominant issues of the debate for the rest of the decade: extending the right to solemnize marriages to any Christian minister in the future, and confirming any unlawful marriages contracted before the passage of the act.\textsuperscript{94} Robert Nichol’s bill, which proposed both of these actions, met with particular opposition from the government’s supporters, among them future judges Jonas Jones and Christopher Hagerman. As Hagerman informed John Macaulay,

\textsuperscript{92} For example, \textit{Upper Canada Sundries}, RG 1 A 5, LAC, petitions of ministers Reuben Crandall, 10 September 1820, and Joseph Sawyer, 20 August 1820, C 4605, Vol. 4, pp. 24014-24027. Crandall is also briefly discussed in Patrick Brode, \textit{Sir John Beverley Robinson: Bone and Sinew of the Compact} (Toronto: Osgoode Society/University of Toronto Press, 1984), p. 63. Justice of the Peace David Breakinridge was prosecuted in 1818 for unlawfully marrying James Olds and Mary Pinock of Augusta “at the House of Phillimon Pinock … incontempt of our Lord the King his Crown and Dignity” (see Johnstown District Court of General Quarter Sessions, RG 22-14 Box 4, AO. See also RG 22-13, Johnstown District Court of General Quarter Sessions of the Peace rough minutes, envelope 5).
There has been a good deal of discussion on the subject of a Law introduced by Robinson defining the punishment to be inflicted on persons solemnizing marriage, contrary to Law, and another introduced by Nichol which is intended to extend the authority to marry to ministers of every religious denomination, this we of course oppose, being willing to extend it to the established ministers of the Methodist society only, which you will say is going far enough. Nichol & his party on the most absurd grounds … too lengthy to detail here, oppose the other bill.  

Hagerman’s comments echo the concern of Simcoe, Elmsley and Inglis in the 1790s with reserving the power to confer marriage for “established” churches. There was no question in Hagerman’s mind that “punishment” should be “inflicted” on those who conducted marriages without the benefit of law. Moreover, he associated even the discussion of a broadening of social power with a terrifying social disorder. He “feared that what has occurred has lead to one of the most vile outrages that was ever committed in any Country.” The “very night” that “Nichol in the course of his remarks took occasion to say that he did not think we had any established Church in this Province,” someone “broke into the Church through one of the windows, threw down the bible & prayer book – trampled on them, tore the covering from the Communion table, voided their excrement upon it, reversed the Kings Arms … & committed various other acts equally horrible.”

As Wilton points out, though, political allies of the Church of

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95 C.A. Hagerman to John Macaulay, 17 February 1821, AO, Macaulay Papers, MS 78, reel 1.
96 Hagerman to Macaulay, 17 February 1821. See also Brode, Robinson, pp. 63-64, as well as Patricia U. Bonomi, The Lord Cornbury Scandal: The Politics of Reputation in British America (Chapel Hill and London: Omohundro Institute of Early American History and Culture/University of North Carolina Press, 1998), pp. 119-120, and 125. Bonomi’s discussion of gossip, satire, and slander as they were used “where politics was embittered between Anglicans and Dissenters” calls attention to Androboros (1714), a play written by Robert Hunter, Cornbury’s Whig successor as governor of NY. She describes it as “coarse,” noting that “Grub Street is perhaps too low a term for
England also engaged in an escalating campaign of political violence throughout this period.⁹⁷

The 1821 amendment to the Marriage Act kept valid ceremonies in the hands of Anglican clergy, Presbyterian, Lutheran, and Calvinist (including Baptist and Dutch Reformed) ministers who had sworn the oath of allegiance, or by a magistrate in remote settlements. Although Hagerman, at least, was at this point willing to consider some extension to Methodists, they increasingly became the focus of this exclusion, for several reasons. First of all, the Methodist churches were the primary competition for the Church of England. Many of the itinerant preachers who came through Upper Canada were working circuits that also included the United States, and were themselves Americans. As Simcoe’s equation of good government with “morality” in Anglican form attests, anxiety about the influence of American-born Upper Canadians who were not members of the Church of England had flared periodically since the colony’s inception.⁹⁸ Methodism provided a particular touchstone for such anxieties because of the value it placed on individual experience rather than hierarchy and mediation through ordained clergy. Methodism, “Americanism” and democracy were also associated in the minds of their critics with “intemperate” and uncontrolled sexuality. Itinerant Methodist preaching was associated with an unseemly display of emotion; camp meetings in particular were thought to foster uncontrolled expressions of religious and also sexual passion.⁹⁹

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⁹⁷ *Androboros.*” The play was apparently based “on a real incident, the defiling with excrement of Trinity Church’s clerical robes.”
⁹⁷ Wilton, “‘Lawless Law’. “
⁹⁸ Errington, *The Lion, the Eagle*, p. 167.
Methodism also had potentially alarming implications for the gender order, although in practice it posed little challenge to paternal household order in the colony.\textsuperscript{100}

Methodism and political reform became increasingly allied by the mid-1820s, as their interests aligned around increased political rights and representation. The continued blockage of reforms to marriage law was one of these issues, along with the controversy over the Alien Question. Following the War of 1812, concerns about the loyalty of Americans in Upper Canada coalesced in government policies which discouraged immigration from the United States and imposed oaths of allegiance on those whose loyalties were considered suspect.\textsuperscript{101} By the early 1820s, questions arose about the legal status of Americans in Upper Canada, and whether or not they needed to become naturalized. This culminated in the Alien Bill, passed in 1828 as an \textit{Act to Secure and Confer upon Certain Inhabitants of this Province the Civil and Political Rights of Natural Born British Subjects}. This law prevented American-born residents of Upper Canada from holding property or exercising political rights unless they swore an oath of allegiance. Many of those who were affected by and involved in contesting the alien controversy were also active in pushing for the reform of marriage law. Marshall Spring Bidwell, who, along with his father Barnabas, had been at the centre of the controversy over the right of “aliens” to hold public office, three times introduced bills to expand the right to solemnize marriages, but even in a reform-dominated house, they were blocked

\textsuperscript{101} Mills, \textit{The Idea of Loyalty in Upper Canada}, pp. 34-35; Errington, \textit{The Lion, the Eagle}, pp. 166-167.
after passage by special committees.¹⁰²

Methodist ministers convicted of illegally solemnizing marriages emphasized both ignorance and loyalty in their petitions for clemency, before and after the Alien Bill. In so doing, they contested the vision of colonial identity which was enshrined in marriage law. Joseph Sawyer of Matilda, in the Eastern District, pointed out that his father “retained his Loyalty to His Majestys Government during the American Revolution and that your Memorialist has always been bred in, & entertained the same sentiments.” Moreover, he was “connected by a Marriage with a Family of U.E. Loyalists resident in this Province and fondly hoped to pass the remainder of his days therein, in a quiet and predictable society & in the enjoyment of domestic comfort with his Family and Connexions.”¹⁰³ Sawyer apologized for both his “Error” and his “Ignorance” in “conceiving himself authorised to marry Persons desirous of intermarrying.” He explained “That your Memorialist till within a very short time since, was not aware of the illegality of a Marriage thus solemnized, that he had been so informed by Persons, whose sources of Information were not perhaps equal to his own, but that he is now unfortunately too sensible of his Error in that respect.” Describing himself as “deeply sensible of the impropriety of his Conduct, and the bad effects of it,” he asked Lieutenant Governor Maitland to revoke his sentence of 14 years’ banishment, a period which he felt “may equal or probably exceed his term of Life.”¹⁰⁴

¹⁰³ Upper Canada Sundries, Vol. 4, p. 24019, 19 August 1820.
John Willson’s petition on behalf of Isaac Smith, who was convicted of illegal solemnization in 1826, also cited lack of knowledge about the prohibitions against Methodist marriage, although he took a more critical stance. Willson served as speaker of the Assembly and was involved in some of the political disputes which raged in the Gore District during the later 1820s. He argued that “all Religious privileges have been fully engaged and exercised by the Ministers and people of the Episcopal Methodist in this Province for more than twenty years without … hindrance or molestation Amongst which is the Celebration of Matrimony.” This being the case, Methodists in Upper Canada assumed they had the right to solemnize marriages; had they been notified “at an earlier period they would Most submissively have desisted from the performance thereof and no evil would have existed.”

Willson, like Sawyer, also emphasized Methodists’ loyalty, characterizing them as “Conscientious subjects to the King and Lovers of the Laws and government of the Province and of the Nation not for Wrath but for Conscience sake.” Methodists were not only among the colony’s founders, having “grown with its growth from its earliest Settlement and Strengthened with its strength,” but its most moral residents:

[they] have been almost the only People (until recently) to with stand the whelming tide of Infidelity Immorality and Licentiousness with which this Country in the early stages of its Settlement Appeared to be threatened and that have successfully withstood as their increasing numbers and Quietness of Living will testify. these People commit no violence upon any Man’s person or Property, not given to wine or strong drink or Brawlers no busy bodies in other Mens matters. And Rarely very rarely troubling Magistrates or found in Courts of Justice on their own account or conduct.

105 Upper Canada Sundries, p. 42418.
106 Upper Canada Sundries, p. 42417.
Willson’s comments must be read in the context of debates about loyalty and “alien” status which were ongoing at this time, as well as the morality and “native” Upper Canadian identity which Willson claimed for Methodists. As Errington, Mills and others have discussed, loyalty as a concept had implications for identity, as so-called “British” and so-called “American” values were invoked to promote viewpoints or discredit opponents.107 “British” and “American” could be shorthand for far more than just forms of government, of course; these terms also carried social, religious, and “moral” connotations. Marriage, sexuality, and the family provided both endorsement and critique, from reformers and tories alike. William Lyon Mackenzie’s “Patrick Swift” commentaries in the *Colonial Advocate*, which prompted the Types Riot in spring 1826, made “outrageous and often ribald” jibes at members of York’s ruling elite, including James Buchanan Macaulay and John Beverly Robinson; reformers implied that the family itself, as in the Family Compact, was the actual source of corruption.108

Critiques based on sexuality were also levelled at reform politicians, as Morgan has shown.109 However, Wilton and Romney, among others, have argued that the political events of the 1820s caused a crisis of faith in the colony’s institutions, tipping the balance toward reform-oriented politicians by the end of the decade. Implicated in this shift was not only the Alien Bill, but the pattern of conservative violence which Wilton terms “lawless law.” These actions, Romney argues, contributed to a loss of faith

107 See Mills, *The Idea of Loyalty*; Errington, *The Lion, the Eagle*.
109 Morgan, *Public Men and Virtuous Women*, p. 82.
in the colony’s institutions.\textsuperscript{110} The election of 1828 returned a reform-dominated House, which was instrumental in facilitating the passage of the revised 1831 Marriage Act.

\textit{The 1831 Marriage Act and Dissolution}

The 1831 Marriage Act had been dispatched for royal assent in 1829, by the tenth parliament, and a variant version of the bill was being debated by the eleventh parliament when word came that it had been approved. This law effectively allowed for all Christian clergymen to solemnize marriages, provided that those who were not Anglicans obtained a certificate from the Court of Quarter Sessions; it also validated any previous marriages which had taken place in the colony before any minister, clergyman, or justice of the peace. House of Assembly debates surrounding the variant bill, introduced by Attorney General H.J. Boulton, illustrate some of the ways that marriage solemnization, rights, and identity in the colony continued to be interwoven.

Christopher Hagerman, then Solicitor General, continued to resist the extension of the right to perform marriages to all ministers, invoking images of depravity and disorder. Hagerman argued that in England, even dissenters understood the necessity of keeping marriage in the hands of the Church of England. By comparison, he pointed to the “evils” resulting from “the loose state of marriage laws in Scotland.”\textsuperscript{111} Along with Attorney General Boulton, who introduced the bill, he debated with Marshall Spring Bidwell about whether Bidwell’s 1829 bill or the variant version was more “liberal,”\textsuperscript{112}
by which they meant inclusive. As noted above, Boulton castigated the absent references to Catholics, Quakers and Jews in Bidwell’s bill, saying “he … would never consent to any bill which excluded these or any other sects, for even though there might not be 20 persons in the Province who belonged to those sects, they should be entitled to the same right as those who had the most numerous adherents.”

Hagerman noted that he would allow for the “Church of Scotland” to be placed “on a par in this respect with the Church of England, because it was one of the established religions of the Empire,” and “other Presbyterians” too. Like Boulton, he was willing to exempt Jews, “because they were acknowledged as the people of God, although they had fallen from their high estate; but he would never allow it to every class of infidels who might spring up, under some designation or other.” Boulton and Hagerman’s invocation of “minority” rights in this debate, however, was premised on minimizing the proportion of the population which fell outside a Protestant “majority.”

House of Assembly debates about the revised Marriage Act also drew in concerns about the dissolution of marriage. Calls for more stringent licensing procedures following the revised Marriage Act were premised on preventing the “abuses” of irregular unions and particularly multiple marriages, a “well known and crying evil … which was not only

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113 *Kingston Chronicle*, 5 February 1831.
114 *Kingston Chronicle*, 5 February 1831.
a religious and moral, but a civil evil, affecting the legitimacy of children and the rights of property, against which it was the interest of every person in the country to guard.”

The mobility of settlers within North America and the British empire made this a particularly salient concern during this period. Nova Scotia’s House of Assembly struck a committee to consider extending marriage rights to dissenters; their 1827 report noted that “in a new settled colony,” the publication of banns might not be sufficient to deter “those who seek to engage in illegal marriages.”

Boulton addressed the argument that denominational restrictions were necessary to prevent “clandestine, or improper marriages,” and particularly bigamy. Cases involving second or subsequent marriages, whether bigamous or informal, provide further evidence that conformity to legal marriage was not always present, nor was it necessarily seen as socially illegitimate. Jane Keeler, for example, had been living with her second “husband,” a farmer and innkeeper, for at least a decade when her first husband, apparently motivated by financial difficulties, decided to sue Mr. Keeler for criminal conversation in 1850. Witnesses for the prosecution and the defence acknowledged that Vanvolkenburgh had abused Jane and turned her away over 20 years before; not only was he well aware of her relationship with Keeler in the decade before the suit, but it was Vanvolkenburgh’s subsequent conjugal relationships, rather than Jane’s, that were described as “a matter of notoriety” in Camden and Ernesttown. Keeler, by contrast, was

116 *Kingston Chronicle and Gazette*, 5 February 1831. See also Lepp, “Dis/Membering the Family,” p. 239.
described as “a man of good character.”

The couple clearly regarded themselves as married, and their family and neighbours concurred.

In the 1831 debates, Boulton argued that if the colony allowed ministers to marry “persons of every denomination … without limitation,” it would be necessary “to establish a system of licensing and to make it incumbent on agents for selling marriage licences, to satisfy themselves of the eligibility of the parties, and that there were no legal disqualifications to the marriage.” However, he argued that naming and endorsing certain denominations in fact encouraged “misrepresentation,” for those who were not among the specified groups could only “obtain a marriage licence by representing themselves to belong to one of the sects.” For this reason, he concluded, the province must solve the problem “not by adding the names of additional sects or denominations, but by conferring the right upon all religious denominations without restriction.” In passing the 1829 version of the Marriage Bill, however, the colony retained a system in which marriage was granted to specific denominations, and understood for others. Rather than establish a secular system of licensing, authorized dissenting ministers were required to forward a list of all marriages they had performed to the Clerk of the Peace in their district, along with a fee for each marriage. Adherence to this requirement was not

119 Kingston Chronicle, 5 February 1831. This type of licensing system was increasingly being established in the United States, where it was linked to laws prohibiting “interracial” marriage. See Pascoe, What Comes Naturally, pp. 138-140.
120 Kingston Chronicle, 5 February 1831.
uniform, however, and this system did not prevent bigamy, as the prosecution of Gilbert McIlvaine suggests.\(^{121}\)

McIlvaine had been lawfully married to Isabella Brown in 1840 by a minister of the Church of Scotland following the publication of banns. Two years later, however, as “Thomas Johnson,” he obtained a license and married Margaret Hillock in an Anglican ceremony. Witnesses for the prosecution and the defence agreed that Hillock was complicit in the bigamy; she not only knew McIlvaine was already married, but she was acquainted with Isabella Brown.\(^{122}\) The McIlvaine case cast doubt on the efficacy of the colony’s marriage laws to prevent the “crying evil” of bigamy. Revd. H.J. Grassett, who officiated at the second ceremony, claimed he was unable to say definitively whether Gilbert McIlvaine was the “Thomas Johnson” whom he had married to Hillock. Nor was Andrew Mercer, who issued the license, able to “recognize” the prisoner.\(^{123}\) McIlvaine’s defence further submitted that even if it had been proven that the same person entered into both marriages, “the license is void by reason of the Prisoners fraud in using a fictitious name.”\(^{124}\) Nevertheless, McIlvaine was found guilty.

Despite the rhetoric about social disorder which so often accompanied objections to marriage law reform, however, strict definitions of legal marriage were in some cases employed to set aside socially legitimate, and in some cases, religiously solemnized, unions. Although the marriages of Davy and Myers, and the Campbells, had already


been set asunder by death or other means by the time their validity was questioned, second and subsequent marriages during the first spouse’s lifetime were sometimes justified by arguments that the first marriage was unlawful, as the 1840 correspondence between Bishop John Strachan and Revd. Saltern Givens, a missionary in the Bay of Quinte area, indicates. Givens had been approached by a Mohawk couple who wished to marry by Anglican rites; however, the woman had been married before, and her first husband was still living. It is unclear from the correspondence whether the first marriage was conducted according to Mohawk tradition, by a missionary of another denomination, or by another method.\textsuperscript{125} Concerned about the prospect of bigamy, Givens sought Strachan’s advice.

Strachan initially cautioned that the first marriage might be perceived as “equally binding” in the community; he recommended that Givens consult “the Missionary … who dwells among them” in order to reach the decision which would best suit “the moral & religious feeling of the Indian tribe.”\textsuperscript{126} In a subsequent letter, however, marked “private, because it is for your private guidance,” he advised that the couple could be married “regularly.” The first marriage, he declared, was “illegal.” More to the point, though, were the circumstances of the case. In addition to the fact that the couple had separated amicably, Strachan called attention to the age difference between the first husband, to whom he referred as “the old Indian,” and his wife, who was fourteen years old when they married. His rationale was also clearly based on upholding patriarchal

\textsuperscript{125} John Strachan to Revd. Saltern Givens, 3 March 1840, F 983-2, John Strachan Letterbook, AO, MS 35 reel 11.
\textsuperscript{126} Strachan to Revd. Saltern Givens, 3 March 1840, F 983-2, John Strachan Letterbook, AO, MS 35 reel 11.
authority. In addition to the emphasis on the first husband’s agreement to the separation and his lack of “enmity” toward his wife’s new partner, Strachan noted that the woman’s mother had allegedly “forced” her into the first marriage, and that “her Father was quite opposed.” The case in favour of the second marriage would be further bolstered if they could prove that “the old Indian treated the woman cruelly.” On this basis, he told Givens, it was permissible to conduct the marriage: “You will however observe that unless these different facts are clearly substantiated you are not to interfere.”

This incident illustrates the entangled nature of form and function in determining “legitimate” marriage in the colony. In this light, Anglican cleric John Langhorn’s offer “to marry a couple who had been joined to other partners by the local Lutheran pastor” appears not entirely out of context. That the couple involved were Mohawk likely influenced Strachan’s interpretation of the first marriage. However, the form of the first marriage may well have been Christian, and the same pattern can be glimpsed with non-Aboriginal couples as well. Similar confusion abounded in the case of Elizabeth Spring.

Elizabeth Spring was successfully prosecuted for bigamy in May 1850. Horace Dean, the Wesleyan Methodist clergyman who had performed her second marriage to

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128 Grant, A Profusion of Spires, p. 43.
Alexander Cameron, was also tried and convicted as an accessory. Elizabeth had married Benjamin Spring at her father’s home in Cramahe in 1838. Questions were raised in both trials about the legality of this marriage, and, in particular, the authorization of Methodist Episcopal minister Joshua Webster to officiate. Much of the testimony, however, centered around the fact that Elizabeth believed “she had a right to marry agn.” She claimed that Dean told her the “abuse” committed by her first husband, along with the fact that he “had taken another wife,” gave her the right to remarry. According to a neighbour, Elizabeth was concerned about the legality of her second marriage, admitting that it was a “bad job.” Nevertheless, she “sd. she was told she cd. marry agn. in consequence of her first husband’s ill usage of her.” As we will see in Chapter Four, and as the example of Jane Keeler illustrates, domestic abuse could be interpreted as a failure to fulfill the duties of a husband. In the Spring case, however, it was clear that abuse was not considered sufficient to excuse bigamy. Nor did it sanction divorce.

The resistance to marriage as dissoluble by anything but death extended to efforts in the 1830s to reform divorce legislation as well. During the 1830s, Upper Canada

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130 Queen v. Elizabeth Spring and Queen vs. Horace Dean, 22 May 1850, Toronto Assizes, Robinson Benchbooks, AO, RG 22-390-2-28-3.
131 See testimony of Joshua Webster, Queen v. Spring and Queen v. Dean. Dean’s defence made sure to introduce the fact that Webster had been born in the United States, illustrating the lingering effects of the Alien controversy.
132 Testimony of Elizabeth Spring, Queen v. Dean, 22 May 1850, Robinson Benchbooks, RG 22-390-2-28-3.
133 Testimony of Tobias Maybee, Queen v. Spring, 22 May 1850, Robinson Benchbooks, RG 22-390-2-28-3.
instituted a number of law reforms, not the least of which were the 1833 revisions to the penal act. This act, which brought Upper Canada into line with other jurisdictions in moving from a system of harsh, shame-based punishments to the notion of penitentiary service and reform, reduced the number of capital offences from 127 to less than twenty. Some of these reforms, most notably attempts to create a legal framework for divorce and the Seduction Act of 1837, affected heterosexual relationships both inside and outside marriage. Although none of these reforms garnered the kind of public attention which followed debates over the marriage laws, they nevertheless show the continuity of contests in Upper Canada over appropriate expressions of gender and sexuality and the role of the state in determining them.

After 1831, efforts were made to bring Upper Canada “into line with divorce practices in some of the other British North American and American jurisdictions.” These initiatives were sponsored primarily by lay members of the Church of Scotland. Nova Scotia, New Brunswick, and Prince Edward Island, like New England and many of the middle colonies, all had divorce courts by the 1830s. A bill “to enable married people to obtain divorce in certain cases” was submitted to the House on 28 November 1833, but although it was printed, it did not proceed. As with marriage legislation, attempts to

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arguments for the role of marriage in Virginia between 1774 and 1851, which he connects to the influence of “colonial Anglicanism.” See The Great Catastrophe of My Life, pp. 4, 7-8, and throughout.


138 JHA 1833-1834, p. 17.
legislate divorce frequently ended in the failure of committees to report or bills dying with the dissolution of the House after three months’ hoist, suggesting that resistance to liberalization of marriage and divorce laws was shared by a majority of Upper Canadian officials, especially those appointed to the upper chamber. Some, like House of Assembly member E.W. Thomson, argued that allowing divorce would undermine the morality of Upper Canadian society, especially among women: “It would open the door to dissolve all marriages in the country; for a woman who wished to be released from her husband had nothing to do but become an adulteress, and she would get a divorce from him and be at liberty to marry whom she pleased.”

Only one legal divorce was granted between the colony’s inception in 1791 and 1853, to lawyer John Stuart; he and his wife Elizabeth Powell Stuart, granddaughter of William Dummer Powell and Anne Murray Powell, were divorced in 1839 following a scandal which rocked the colony’s elite. Elizabeth’s mother inadvertently discovered her plan to elope with her lover, John Grogan, an Irish lieutenant in the British Army; Elizabeth soon after left Stuart and their three small children to live with Grogan. She compounded the scandal by giving birth to a son of indeterminate paternity. The Stuarts became the first couple in the colony to be granted a divorce, by act of Parliament, and unusually, both parties were given permission to remarry. Certainly, the two families’ prominence would have had much to do with this. Petitions from J.D. McMurdo and

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Reuben Parkinson in 1836 were rejected, and following the Powell-Stuart divorce, no formal structure was set in place to allow divorce. The establishment of the Court of Chancery in 1837 did provide some ease for formal separations. It served as a forum in which married women could petition for a legal separation and even for alimony, provided that they could prove they were “virtuous” wives who lived apart from husbands whose behaviour was justifiably intolerable (cruelty, neglect, flagrant adultery, or desertion). However, as the next chapter shows, Upper Canadians whose relationships broke down more frequently encountered the state in other capacities.

Those identified with the Tory elite also pondered the efficacy of legislating against adultery during this period. In response to John Macaulay’s query in 1835 about making adultery, as well as bigamy and incest, “a penitentiary offence,” John Beverley Robinson claimed that he “had long a bill by me drawn, for the purpose”: “but I never found encouragement to propose the inflation of temporal punishment for these offenses.” Robinson noted the colony’s “abominable state of morals in these particulars,” and sympathized with Macaulay’s desire to make adultery legally punishable: “you long to spread your net where you know there will be an abundance of game.” However, he cautioned that although some might “say we live in the midst of an ‘adulterous generation’ – this is tender ground.” He concluded: “I am not surprised at your suggestions … but my dear … should you not consider that an Irishman, or any other

141 McMurdo sued his wife’s lover for criminal conversation in 1834. See discussion in Chapter Four.
man who has two or three wives pays already the penalty of hard labour -- & as to ‘solitary confinement,’ I should think far from punishment it would come as a relief to him.”

Robinson’s jests aside, an 1836 petition from Thomas McIlmoyle of Edwardsburgh also suggests that perceptions of the colony’s “abominable state of morals” troubled others from within. McIlmoyle, who identified himself as “[H]aving been forty three years a Church Warden in the Episcopal Church of this place,” declared that he “noticed with much regret” the presence of “profaneness and immorality in the country such as fornication profanation of the Lords day swearing drunkenness and such like, there being no law as yet to provided to punish such offences, I would suggest and earnestly beg that your Excellency may be pleased to recommend to the legislature to pass such a law as Your Excellency may think best for the punishment of such offences and to promote the practice of virtue.”

Conclusion

Thomas McIlmoyle’s petition requesting that the colonial government legislate an end to “immorality” conveys some of the complexities which surrounded the formal regulation of heterosexuality in Upper Canada. From inception to the 1830s, the definition of lawful marriage sparked debate about who was included and who was excluded within colonial society. Although the terms of reference shifted throughout the period, the insistence from some quarters that “morality” in the colony must be rectified through state action remained remarkably consistent, as did resistance to that notion.

143 Robinson to John Macaulay, 8 December 1835, AO, Macaulay Papers, F 32 MS 78, reel 2.
144 Upper Canada Sundries, C 6892, p. 94683.
Contest over lawful marriage and loyalty also provides an indication of the ways that a dominant Upper Canadian identity, associated with an orderly Protestantism, was articulated and challenged. The difficulties of making marriage law thus suggest the variable understandings of appropriate behaviour regarding not only sexuality, but also Upper Canadians’ engagement with the state. These understandings will be more fully explored in the next three chapters with reference to informal relationships, scandal, and sexual assault.
Critics of the settler population’s “morality” charged that Upper Canadians treated marriage with levity. For commentators like Talbot, the speed and informality with which courtships were conducted, along with practices like “sparking” which allowed for sexual intimacy prior to marriage, were alarming. This suspicion also extended to the unions themselves, which, like the courtships that preceded them, were not always conducted in as chaste, somber, or linear a manner as bourgeois observers would have liked. The persistence of irregular marriage forms signified a broader level of societal disorder. The colonial government’s efforts to regulate marriage according to specific patterns, as we have seen in the previous chapter, indicate that these concerns echoed within the colony as well.

The notion that marrying more than once without the death of a spouse was an “evil,” however, was not entirely accepted by the colony’s settler population. In practice, the indissolubility of marriage was a fiction, as promoters of “Christian conjugality” were well aware. Despite ideals which emphasized the necessity of marriage, and laws which

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2. *Kingston Chronicle and Gazette*, 5 February 1831. See also Annalee E. Lepp, “Dis/Membering the Family: Marital Breakdown, Domestic Conflict, and Family Violence in Ontario, 1830-1920” (Ph.D. Dissertation, Department of History, Queen’s University, 2001), p. 239.
attempted to enforce those ideals, Upper Canadians did not always marry according to law or for life. This chapter addresses the dissolution and reformation of heterosexual relationships in the colony, including legal and socially recognized marriages as well as engagements and less formalized relationships which resulted in pregnancy, which can be found in the records of civil suits for seduction (before and after the Seduction Act of 1837) and for breach of promise of marriage. In the process, this chapter reexamines Upper Canadians’ reactions to separation and informal divorce, mutually agreed upon or otherwise, and to bigamy. While there is considerable evidence to support the argument that Upper Canadians both practised and tolerated a broader spectrum of marital behaviour, including breakdown, than we have previously supposed, reactions to dissolution and reformation of marital relationships in the 1830s and 1840s reflect changing discourses about gender ideals and sexual morality.

Unsolemnized Relations: Reading Relationship Breakdown in Seduction and Breach of Promise Suits

Seduction and breach of promise of marriage cases, as they appeared in the Upper Canadian judges’ benchbooks, have much to tell us about ordinary practices of sexuality in the colony. Although they are inherently evidence of conflict, the testimony within them illuminates both the parameters of acceptable behaviour and the level of contest around such behaviour during the 1830s in particular. Seduction figured both as a moral and legal concept in Upper Canada. The colonial press from time to time printed tales of predatory men and ruined women, some drawn from British or American newspapers, others closer to home, which emphasized the dangers inherent for women, usually young,
unmarried, and “foolish” women, in letting flattery tempt them into a sexual relationship outside the safe confines of an approved marriage.³

Although these tropes were picked up in press reports of seduction suits, the tort of seduction was legally and operationally distinct. Seduction was one of the so-called “heartbalm torts,” civil suits which “provided a legal remedy for interference with the status of a family member” and which were based on the notion that a man held property rights in the person, services, and companionship of his wife and children. English common law recognized four “heartbalm torts”: alienation of affections; breach of promise of marriage, in which a person, usually a woman, could sue an erstwhile suitor for failing to follow through on a promise to marry; criminal conversation, in which a married man could sue another man who had sexual relations with his wife; and seduction, in which a father, usually, could pursue legal action against a man who impregnated his daughter outside of marriage, thus depriving the father of his daughter’s services.⁴ Seduction rested on the notion that a father, like any other master, was legally entitled to the benefit of his daughter’s labour; moreover, he was legally entitled to control sexual access to his daughter until such time as she became the property of


another man, i.e. through marriage. If through the “wrongful act of a third party” he was
“deprived of the services of his servant,” then, he had the right to make application to the
courts to recover damages from that third party. Damages in a seduction suit were
theoretically awarded “in compensation of [the father’s] distress and anxiety, for the
dishonor to his family, for the loss of his daughter’s society, and for the expenses relating
to the pregnancy, the birth, and the maintenance of the child.”

Seduction was undoubtedly part of a patriarchal structure, in which fathers
retained legal control of their daughters’ bodies, in labour and in sexual expression.
Feminist scholars have characterized the tort as “overtly feudal and patriarchal,” noting
of the later nineteenth century that “prosecutions of men often turned into inquisitions
into women’s moral conduct.”

Legal scholars’ concentration on the later nineteenth
century and on the tort as a tool of patriarchy, as well as its application to employer-
servant relationships, has led them to emphasize the ramifications for Canadian law and
late twentieth-century feminist politics over the social and cultural history of the colony,

5 Martha J. Bailey, “Servant Girls and Masters: The Tort of Seduction and the Support of
6 Lykke de la Cour, Cecilia Morgan, and Mariana Valverde, “Gender Regulation and
State Formation in Nineteenth-Century Canada,” in Allan Greer and Ian Radforth, eds.,
Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada (Toronto:
University of Toronto Press, 1992), p. 171. On seduction in the later nineteenth century,
see Constance Backhouse, “The Tort of Seduction: Fathers and Daughters in Nineteenth-
Improper Advances: Rape and Heterosexual Conflict in Ontario, 1880-1929 (Chicago:
Women: Prosecutions for Consensual Sex,” pp. 64-85. For a discussion of patriarchal
“mastery” as it affected sexual assault, see Sharon Block, Rape and Sexual Power in
Early America (Chapel Hill: Omohundro Institute of Early American History and
however; in the process, this approach has distorted the use and meanings of actions for seduction in Upper Canada.

More importantly, legal scholars’ analysis tends to rely on cases which were published in provincial law reports for the edification of members of the legal profession and, by extension, the reading public. As Lori Chambers points out in her study of married women’s property law, reported cases were selected for their social implications as much as their impact on the law:

Cases were selected for reporting often as much because they dealt with exceptional points of law or circumstances as because they set important precedents. In this context, reported cases involving family law must be viewed as intended lessons not only on the specifics of law but on gender roles and marital expectations. The scripts in reported cases were structured in such a way as to legitimate and reinforce specific standards of conduct and to illustrate that deviance from such ideals would be punished.

Under these circumstances, the genesis of the stubborn view of Upper Canada as a society which harshly punished women for sex outside the context of marriage is clear. Publication of a case like Beadstead v. Wyllie (1823) or Hogle v. Ham (1825), in which judges chastised the parents of “seduced” women for allowing “immoral” practices like bundling or sparking, was undoubtedly intended to serve as a warning and a deterrent.

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7 Brode does make reference to cases which appear in the Macaulay and Robinson benchbooks, but the counts in his Appendix A suggest that he did not consult all extant seduction cases for the period 1823-1850.
9 *Beadstead v. Wyllie* (1823) and *Hogle v. Ham* (1825), *Report of Cases Decided in the Court of King’s Bench of Upper Canada. By Thomas Taylor, Esq., of the Middle Temple, Barrister at Law. Containing the Cases Determined from Trinity Term 4 Geo. IV., to Trinity Term 8 Geo. IV.; with a table of the names of cases argued, and digest of the principal matters. Second Edition* [hereafter UCKB] (Toronto: Henry Rowsell, 1862), pp. 60-62 and 248-263. The cases are also discussed in Backhouse, *Petticoats &
Yet, as I will discuss below, such an attack was not typical of most of the extant seduction cases as they appear in the judges’ benchbooks, particularly prior to the implementation of the Seduction Act in 1837.

Actions for seduction, examined within a broader continuum of heterosexual relationships, help reveal Upper Canada’s sexual culture. The application of the tort is reflective of a particular set of concerns which related to local conditions during the colonial period, as well as to broader concerns throughout the empire about morality and the legalities of marriage. Viewed against or alongside other markers of social and cultural change, actions for seduction serve to illuminate some of the ideals and practices in Upper Canada between the 1820s and the 1840s. The legal records show us more than merely circumstances in which people fell afoul of the law or attempted to use it to redress wrongs, or efforts at state discipline; they provide a window into informal methods of conflict resolution by showing us instances in which those negotiations broke down, as well as how the law was adapted to serve local conditions, and created conflict among lay usage and colonial officials.

*Seduction before and after 1837*

In contrast with the later nineteenth century, the majority of seduction cases during the colonial period involved consensual relationships between people whose relationship was social rather than that of employer-servant. Although the latter were

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represented, and the 1837 Act made provision to deal with them specifically, the majority of the 58 cases I have consulted between 1823 and 1850 involved a social or romantic relationship between the defendant and the seduced woman. Moreover, the extant records strongly indicate that in most cases, the community was well aware of the relationship, and considered that the father of the illegitimate child had failed to assume his responsibilities.

Among the cases which came to trial before the Seduction Act of 1837, testimony tends to follow a relatively predictable pattern. The plaintiff was usually the woman’s father, although in some cases the suit was brought by another guardian who would be legally entitled to the woman’s services. In 1830, Cornwall resident William A. Johnson sued on behalf of his sister Mary, who testified that her brother was “ye head of ye family,” and she was “next to him in charge,” helping to rear their younger brother and sister. Agnes Cavin, a widow, sued George Welsh for the seduction of her daughter Eliza; Welsh was the brother-in-law of Eliza’s eldest sister. In contrast with other civil

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10 Cases in which the relationship was clearly that of employer and servant include Raymond v. LaValle, 6 August 1833, Western District Assizes, Robinson Benchbooks, AO, RG 22-390-2-21-7, and Tuke v. Reaman, 26 May 1838, Home District Assizes, Robinson Benchbooks, AO, RG 22-390-2-23-4. See also Davis v. Houghman, 5 September 1835, Niagara District Assizes, AO, Robinson Benchbooks, RG 22-390-2-22-4. Davis had been employed to care for Houghman’s children after the death of his wife, and sued him for breach of promise of marriage after she became pregnant.

11 Fifty of these 58 cases were decided unequivocally in favour of the plaintiff. Dubinsky also found that the majority of seduction cases she consulted in Ontario between 1880 and 1929 “were the result of ongoing and mutual relations between two lovers,” although both legal and social change shifted the meaning and operation of the tort in this period. See Improper Advances, p. 72.


suits, the plaintiff in a seduction case rarely testified. The seduced woman, however, was usually the first witness, and provided an account of the circumstances under which she met and entered into a sexual relationship with the defendant, when she became pregnant and gave birth, and what expenses, if any, were incurred in delivery. If she was ill during her pregnancy and unable to work, or was confined for a significant amount of time, usually more than two weeks, she mentioned that as well. The seduced woman also stated where she lived and outlined her family’s circumstances.\textsuperscript{14} Testimony was also recorded as to the alleged seducer’s circumstances, whether he lived with his family, whether he was single, married, or had married someone else in the time intervening, and what his “circumstances” might be: if he had a trade, owned property, or had access to other sources of wealth. This last was taken into account in assessing damages.\textsuperscript{15}

The records of seduction suits reveal that for many couples, a sexual relationship was a component of courtship. Given that seduction suits were predicated on a pregnancy, this is perhaps not surprising. But the testimony in these cases indicates that for some couples, a promise to marry sanctioned sexual intercourse.\textsuperscript{16} In numerous cases,

\textsuperscript{14} Place of residence was of particular importance before the 1837 Act, as the plaintiff was required to prove loss of the daughter’s service in order to fulfill the terms of the charge. Juries interpreted this requirement broadly, however.

\textsuperscript{15} In Corbett v. Allen, witness John Parry testified that James Allen, “supposed a single man – is in pretty good circumstances,” and damages of £100 were assessed, without any figures on the Corbetts’ part. (Macaulay Benchbooks, Gore District Assizes 18 September 1827, AO, RG 22-390-1-1-4). William Hill, who by Mary Johnson’s own account was “a poor man” without trade or property, was nevertheless assessed damages of £55 (Johnson v. Hill, 2 August 1830, Macaulay Benchbooks, RG 22-390-1-1-6).

\textsuperscript{16} This argument is supported by O’Marrah v. Colvin, 28 September 1842, Bathurst District Assizes, Macaulay Benchbooks, RG 22-390-1-7-2, as well as Whitney v. Whaley
a seduction suit followed the breakdown of a years-long relationship when the proposed marriage did not follow the birth of a child. Many of the women involved in seduction suits testified that their child from the relationship, if living, was between one and three years old, suggesting that women may have waited to see whether a marriage would follow before seeking support by other means. For others, the extension of limited contact to intercourse was clearly framed as a “mistake,” but one which again had been based on the assumption that the couple would eventually marry. Thus, pregnancy outside of wedlock was not always viewed as “proof of incontrovertible personal depravity,” although such criticisms might apply to a pregnancy which resulted from a relationship which was not socially sanctioned.

Most women involved in seduction suits did testify that they had “yielded” under promise of marriage. Mary Johnson of Cornwall told the court in 1830 that she had waited a few months into her courtship with William Hill, until she had known him about a year, before they began a sexual relationship; Johnson felt “His attentions were honourable,” and that he “Led” her “to expect honourable treatment.” However, Hill stopped seeing Johnson “about 4 months before ye birth of ye Child,” moved to the home of the next neighbours, “and then went up ye Country” and married another woman. Justice Macaulay, who heard the case, found Johnson’s testimony convincing, observing, (breach of promise), 15 May 1847, Home District Assizes, Robinson Benchbooks, AO, RG 22-390-2-27-2.

17 Backhouse, Petticoats and Prejudice, p. 41.
18 For one striking exception, see Wm. Brown & wife v. Thos. Devlin, Perth Assizes, Macaulay Benchbooks, AO, RG 22-390-1-11-1, in which Maria Lambert testified that she had “declined” to marry Devlin “owing to our near relationship.” Devlin was a second cousin. The jury nevertheless found in the plaintiff’s favour and awarded £50 damages.
“I disallow … of a promise of marriage [suit] tho I think it may be shewn that [Hill] addressed her as a Suiitor -- & that owing to the expectations created by such conduct she yielded, relying upon ultimate marriage.”  

Women like Johnson almost certainly framed their stories in terms that would both satisfy the nature of the tort and hopefully evoke sympathy in the gentlemen of judge and jury. Nevertheless, Macaulay’s comments suggest a recognition of the moral, if not legal, power of contracts per verba de praesenti in sanctioning premarital sexual activity.

Samuel Smith’s account of the 1822 pregnancy of Nancy Shaw, introduced in Chapter Two, also supports this interpretation. Smith’s diary states that he had already determined to marry Sarah Holmes before he found out about Shaw’s pregnancy. Although Smith denied that he was the father, her parents’ reaction clearly suggests they were aware that the two had some degree of sexual relationship. Ruth Shaw publicly disrupted Holmes and Smith’s first attempt to marry in Chatham by announcing that Smith “had promised to marre her Daughter.” Again, the notion of contract per verba de praesenti may have been invoked here; Shaw may have been referring to a tacit rather than a formal proposal of marriage, suggesting that once a pregnancy was involved, Smith had a responsibility to become a husband. In any case, the Shaws clearly felt that Smith was shirking the responsibilities which came with being Nancy’s sexual partner.

20 Johnson v. Hill, 2 August 1830, Macaulay Benchbooks, RG 22-390-1-1-6. See also Coulthard v. Hame, in which a proposal of marriage was directly followed by “criminal connexion” (Robinson Benchbooks, Colborne District Assizes, 29 October 1846, AO, RG 22-390-2-27-1).

21 Similarly, James Lundy cautioned Frank Shanly that he was “better not” to “‘putter’ … on divers people … unless you can marry.” James Bell Lundy, Montreal, to Frank Shanly, Forest Hill, near Delaware, 23 October 1845; also Lundy to F. Shanly, Niagara, 20 July 1844, Shanly Papers, AO.

22 Samuel Smith diary, 28 February, 5 and 6 March 1822, AO, MS 953 reel 1.
On 6 March, Smith recorded, “Mr. Arnold & myself went to Shaws in afternoon & disputed about the Child that is Layd to me.” The nature of this “dispute” is unclear, but leaves open the possibility that Smith had admitted paternity. Since there are no further records of this matter, the parties may have reached a mutual agreement.

Testimony in other seduction cases, particularly those where the man had chosen to marry another woman, suggests that families often tried to reach a settlement specifically for financial support of the child. In Crowther v. Hawn (1834), Benjamin B. Hall, who delivered Mary Crowther’s child, testified that “It was sd. deft. & ye Girl had settled” before the child’s birth; according to her father, “ye notes were not good,” and negotiations had broken down. Hawn did, however, go before a justice after the birth “& did give security that ye child shd. not become a charge.”

Similarly, in Minaker v. Wellbanks (1839), Hiram Wellbanks “had been paying attention to both girls -- i.e. his wife,” whom he married in March 1838, and Hannah Minaker, who gave birth to their child in November of the same year. Wellbanks told Minaker’s brother-in-law, Hazleton Richards, that she was “a fine girl” and admitted he was the father of her child, “but

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23 Smith diary, 6 March, AO, MS 953 reel 1.
24 It should be noted, however, that the extant evidence of seduction cases outside the judges’ benchbooks is minimal, and the benchbooks cover the period from 1827 on.
26 Jno. Crowther v. Nelson Hawn, 2 September 1834, Niagara District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-2-10. Whether it was Hawn’s display of good faith or that Macaulay managed to instruct the jury that no proof of service had been provided, the jury awarded minimal damages of less than £7.
[said] that he could not marry her being married already.”27 Another witness, neighbour Joseph Striker, told the court that at Wellbanks’s request, he had tried to arrange a settlement with Minaker’s father, Andrew, a “religious man” who was in “mental Anguish” over the situation. Andrew Minaker refused to accept money from Wellbanks, telling Striker “no Sum wd. satisfy him”; he made it clear Hannah “should never want a home,” and instead proposed that Wellbanks deed a plot of about 50 acres of land, worth upwards of £50, to Hannah’s child. Wellbanks, however, had sold the land in question a few years previously. Although he “was willing to give its value,” in the absence of land Andrew Minaker decided to take the matter to court, where he was awarded £125.28

Minaker v. Wellbanks case stands out among other benchbook accounts of seduction trials in its emphasis on Andrew Minaker’s “anguish” over his daughter’s pregnancy. Hannah Minaker herself, who was described as “timid,” did not testify, which was highly unusual.29 Records of other cases, by contrast, point far more to the practical application of seduction suits, particularly before 1837. The disparity between judges and juries in deciding seduction cases has been well noted. In numerous cases, judges instructed the jury that sufficient proof had not been introduced to support the

27 Andrew Minaker v. Hiram Wellbanks, 19 September 1839, Prince Edward District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-4-5. This case is also discussed in Brode, Courted and Abandoned, p. 27.
28 Minaker v. Wellbanks, 19 September 1839, Macaulay Benchbooks, RG 22-390-1-4-5.
29 All four witnesses made reference to the respectability of the family; both Striker and another neighbour, John Lane, used the word “anguish” to describe the father’s reaction. Minaker v. Wellbanks, 19 September 1839, Macaulay Benchbooks, RG 22-390-1-4-5. A similar emphasis on the respectability of the woman’s family emerges in Carscadden v. Edwards, 21 April 1845, London District Assizes, Robinson Benchbooks, AO, RG 22-390-2-26-1, although unlike Hannah Minaker, Lydia Carscadden did testify. Nevertheless, Brode’s discussion in Courted and Abandoned, p. 27, presents this case in support of the argument that seduction cases, true to their legal intent, functioned primarily to make reparation for a father’s loss of his daughter’s chastity.
charge, and that, as a result, they must find for the defendant. Juries, however, largely ignored these instructions and awarded damages, sometimes considerable amounts, to the plaintiff anyway.\(^{30}\) Scholars have generally concluded that this distinction between judge and jury rested on a difference of interests: judges wanted to uphold the letter of the law, while juries, in sympathy with either the seduced woman herself or her “humiliated” father, sided with the plaintiff.\(^{31}\) In Upper Canada, these distinctions may also have reflected the greater adherence of judges, who were members of the Anglican Tory elite, to middle-class moral values which disavowed sexual behaviour outside of marriage. Jury members, for their part, may have taken into account the social, if not legal, power of a promise to marry. In practice, however, it was clear that in most cases, the practical application of a suit for seduction was to secure a sum for the support of the child and its mother. This was a backhanded process, to be sure, and relied on a woman’s already having the support of her family. However, the testimony as recorded in the extant


judges’ benchbooks undermines the argument that “unwed mothers” in Upper Canada were condemned to a life of poverty and social ostracism.\textsuperscript{32}

The kind of brokering we see in Minaker v. Wellbanks and other cases where pregnancy occurred outside of marriage is highly suggestive. The reaction of family and community members indicates that a marriage, or at least an ongoing relationship, was considered preferable to single parenthood, but this is hardly surprising in a society based on a household economy, and in which both men and women were urged to marry for financial security as well as social order. The extent to which couples whose relationship had resulted in pregnancy were pressured to marry is unclear, however. Considering the plural patterns of courtship which were common in the colony, as well as the fact that about half of the extant suits for breach of promise of marriage did not involve a pregnancy, we must give credence to the argument that the dissolution of the relationship, and the consequent failure to fulfill social responsibilities, carried greater social significance among Upper Canadians than an out-of-wedlock pregnancy itself.

Perhaps the most striking aspect of seduction cases before 1837 is the general lack of demand for proof of paternity, or, for that matter, previous chastity.\textsuperscript{33} In many cases, few witnesses at all testified, and the woman’s word that the defendant was the baby’s father was often enough to carry the case. Neighbours and family members, especially brothers or brothers-in-law, were also called upon to verify the relationship between the

\textsuperscript{32} Brode, Courted and Abandoned, pp. 32-33.
\textsuperscript{33} My findings contrast with Brode’s argument that proof of paternity constituted a “formidable hurdle” (Courted and Abandoned, p. 33).
seduced woman and the defendant. In *Corbett v. Allen* (1827), for example, James Corbett’s daughter, Mary, who allegedly had been seduced by James Allen, and a neighbour, John Parry, were the only recorded witnesses. Rebecca Wright of Sandwich was able to make a successful case against James Shaw for the seduction of her daughter, also named Rebecca, on the testimony of Rebecca the younger and a couple of additional witnesses who stated briefly that the child was Shaw’s. The acceptance of allegations of paternity is also confirmed by other suits for child support in which seduction was not invoked. When Josiah Bennett sued William Comfort for the support of Ann Lewis’s child, the jury accepted Comfort’s paternity and awarded damages in spite of the suggestion that Bennett might himself be the child’s father.

Defendants’ lawyers rarely engaged in protracted attempts to attack the sexual reputation of the seduced woman, despite the law’s stipulation that the woman had to be “of previously chaste character.” In an effort to cast doubt on her contention that Hill

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34 In *Johnson v. Hill*, 2 August 1830, Macaulay Benchbooks, RG 22-390-1-1-6, John Kelly, who admitted on cross-examination that he was William and Mary Johnson’s brother-in-law, testified that Hill was often at the Johnsons’ and “was considered as a Suitor of” Mary’s.


37 *Bennett v. Comfort*, 4 June 1840, Home District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-5-1. Lewis had lived with Bennett, who was separated from his wife, since before the child was born. Testimony in this case suggests they may have had a conjugal relationship.

38 By comparison, reported cases *Beadstead v. Wyllie* (1823), *Hogle v. Ham* (1825), and *Monk v. Casselman* (1835) all contained substantial commentary on the immoral conduct of the seduced women, including allegations about multiple sexual partners, and that of their parents in allowing it. See UCKB and UCQB.
had promised to marry her, William Hill’s lawyer asked Mary Johnson whether Hill had not been clear with her that “she was not to consider him as a Suitor,” but did not push this line of inquiry further.\textsuperscript{39} Examination of a woman’s sexual reputation was more likely to occur in cases where the parties were employer and servant. When Pauline Raymond of Sandwich accused her employer, Mr. LaVallee, of impregnating her, his lawyer presented so much evidence to cast doubt on her story that the prosecution recalled witnesses to testify that Raymond was “a virtuous girl.” Despite the attempt to malign Raymond’s character, though, and the fact that her baby died, the jury awarded damages of £40 to the plaintiff.\textsuperscript{40}

The Seduction Act of 1837 passed into law on 4 March 1837. It represented several significant changes to the operations of the tort under common law. First of all, in sharp contrast with the 1834 Poor Law in England, which shifted financial responsibility away from the parish and onto mothers, Upper Canada’s Seduction Act made fathers financially responsible for the support of illegitimate children. It also dispensed with the need to provide proof of a daughter’s service, allowing for fathers whose daughters lived and worked elsewhere to sue for damages as necessary. Thirdly, although there was some contention in the Assembly regarding this provision, the Act also provided clear applicability in cases where a woman’s employer was also her seducer.\textsuperscript{41}

\textsuperscript{40} Raymond v. LaValle, 6 August 1833, Robinson Benchbooks, RG 22-390-2-21-7.
Understanding the Seduction Act of 1837 has presented scholars with something of a conundrum, enhanced by the limited records of legislative debate on the subject. The Act was noticeably out of step with related efforts at reform within England and other jurisdictions in placing responsibility for the support of illegitimate children on their fathers, provided a successful suit could be made. The decision to take Upper Canada’s legislation in this direction has been interpreted in a variety of ways. Bailey points out that the labour shortage in British North America, in concert with the absence of poor laws in Upper Canada which placed a financial burden on the parish or the state, may have decreased hostility toward unwed mothers: “the greater value placed on children in a sparsely populated country” prompted the Assembly to take a less punitive approach toward women.42 Bailey’s arguments are heavily influenced by Backhouse, who, drawing largely on later nineteenth-century cases, emphasizes the classed angle of legal reform in the colony during this period. By removing the requirement for a daughter’s proof of service to her father, she argues, the legislation was intended to help “working-class” men redress a situation in which their daughters had to go out to work, but might find that an employer expected sexual access to be a component of the domestic service for which she was hired. Moreover, she links such efforts at reform to the “class-conscious discourse and demands” of the 1837 Rebellions.43 Brode points out, however, that the Act, from debate to passage, predated the rebellions by at least a


43 Backhouse, Petticoats and Prejudice, p. 60.
year, and that reform of the seduction laws was of little interest to reformers.\textsuperscript{44} He instead explains the Act as part of this larger wave of legal reforms sweeping the Anglo-American world, moving away from punishment toward penitence.\textsuperscript{45}

Without some emphasis on the broader spectrum of heterosexual relationships in Upper Canada, the appearance of the Seduction Act of 1837 can be only partially understood. Two aspects in particular are critical. First of all, the Seduction Act’s assignment of financial responsibility to fathers effectively formalized what was already customary practice in the colony. As Lewthwaite has observed, “The laws were used by ordinary Upper Canadians in a variety of ways.”\textsuperscript{46} Cases before 1837 clearly show that the action was interpreted by lay people, whether prosecutors, defendants, or juries, as a means to induce otherwise reluctant men to provide for their illegitimate children.\textsuperscript{47} The frequency with which witnesses made reference to the breakdown of negotiations for support outside the courtroom before a suit was brought to trial provides additional support for this interpretation; as Lewthwaite notes, “legal officials encouraged people to solve problems by means other than recourse to the courts.”\textsuperscript{48} As Bruce Kercher has argued, “the legal ideas of ordinary people are an essential part of a full picture of the law.” He points out that “local” civil law in New South Wales during this period developed “as a product of … debates” between “three main groups of actors: the

\textsuperscript{44} Brode, \textit{Courted and Abandoned}, pp. 38-39.
\textsuperscript{46} Lewthwaite, “Violence, Law, and Community,” p. 372.
\textsuperscript{47} By contrast, Brode, \textit{Courted and Abandoned}, pp. 36-38, interprets the use of seduction to obtain child support as a result of the 1837 Act.
Imperial officials, local officials, and local people.”

Upper Canada’s Seduction Act of 1837 was one instance of law being produced by the interaction of conflicting groups, in this case lay practitioners and the colonial elite, especially the judiciary.

Secondly, the Act must be considered in combination with the shifting discourses about gender and sexuality in operation during this period. The statute can be read as both an attempt to create changes in sexual mores and a manifestation of changes which were already occurring. The interaction of local conditions and global forces is again at play here. Middle-class moral attitudes which emphasized women’s passionlessness and enforced their chastity were increasingly shared by the Upper Canadian population. Although colonial elites had been working with such assumptions for at least a decade, the tide of emigrants from the British Isles in the late 1820s and early 1830s had some influence. Although commentators like Susanna Moodie continued into the 1850s to remark on Upper Canadians’ vices, lax religious practice, and poor manners, the growth of an educated middle-class population, who would have been exposed at home to the kind of bourgeois morality described by Davidoff and Hall, had significant effect. The emphasis placed within the Act on family relationships allowed greater scope for sexuality to be regulated within the domestic sphere. It may also have reflected a declining tolerance for irregular unions after the 1831 reforms to the Marriage Act made formal marriage more widely available. Furthermore, although it was contentious, the

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Bruce Kercher, *Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict New South Wales* (Sydney: The Federation Press, 1996), pp. 9-10. New South Wales’s courts regularly permitted actions which defied the letter of English law: for example, in ordering maintenance payments for deserted wives (p. 20), or allowing married women to enter into contracts on their own behalf (pp. 65-77).
Act’s provision for the “protection” of working women, especially domestic servants, effectively cast the “problem” of extramarital sexuality as a class issue.

In any case, sexual standards were in the process of being redefined in the colony during this period. Courtship was coming under greater supervision, although family policing to prohibit sexual contact to the end of the 1840s among most Upper Canadians has been exaggerated. Practices like “sparking” persisted, and private writings indicate that heterosociability continued to incorporate some degree of physical contact, although again, usually stopped short of intercourse unless there was an intention to marry. This redefinition of acceptable behaviour affected men as well as women. English writer Anna Jameson, who spent 1837-1838 in the colony, denounced the Seduction Act’s failure to hold women and men to a higher moral standard. She argued that women must be “the sole responsible guardians of our own honour and chastity”; however, seduced women had originally committed “misconduct,” she observed tartly, “into which, in nine cases out of ten, they are betrayed by the conventional license granted to the other sex.”

Commentators like the Presbyterian Rev. William Bell, although they judged women’s

51 See, for example, the letters between Lundy and the Shanly brothers, Shanly fonds, F 647, AO.
52 Anna Brownell Jameson, Winter Studies and Summer Rambles in Canada [1838] (Toronto: McClelland and Stewart, 1990), p. 94. For a contrasting interpretation, see Brode, Courted and Abandoned, p. 38.
moral transgressions more harshly, also criticized men who stepped outside the bounds of monogamous Christian marriage, and who engaged in duelling and drinking.\(^5^3\)

Actions for seduction after the 1837 statute display both continuity with the previous tradition and a few differences. Seduction continued to operate as a method to secure child support. A greater proportion of the cases between 1837 and 1850 involved employers and servants, but the majority were still cases in which a social relationship had broken down. Recorded testimony, however, indicates that although juries still generously awarded damages to the plaintiff, considerably more emphasis was placed on establishing that the defendant was in fact the illegitimate child’s father, and that he was the only man with whom the seduced woman had a sexual relationship. Diantha Eaton charged that her employer, Josiah Woodhull, took “improper liberties with her” while his wife was away on an extended visit; when Eaton gave birth to a child in 1842, he allegedly asked her to go to the magistrate and swear that it was another man’s. Woodhull’s defence countered that Eaton was sexually involved with a number of men, one of them a prosecution witness.\(^5^4\) Post-1837 suits involving relationship breakdown also demonstrate a more extensive evaluation of the woman’s character, although again, this tendency is not as pronounced as reported cases suggest. In *Woodhall v. Hayden*


(1845), several witnesses were called to rebut Margaret Woodhall’s claim that William Hayden had seduced her, given her presents, and promised to marry her. Hayden’s brother-in-law, John Grange, went so far as to provide Hayden with an alibi for the date on which Woodall supposedly became pregnant. Clearly, the Act’s assignment of responsibility to fathers led men to mount more forceful defences after 1837, fearing that they had more to lose.

_Breach of Promise of Marriage_

The records of suits filed for breach of promise of marriage are also revealing of relationship breakdown in Upper Canada. In contrast with seduction, contractual obligation was the basis of an action for breach of promise. The action arose when the 1753 Hardwicke Act removed jurisdiction from ecclesiastical courts in England and placed responsibility for the regulation of marriage under common law. Redress in cases

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where a contract to marry was broken thus came under the action of assumpsit.\textsuperscript{57} The development of commercial law, in tandem with discourses which increasingly emphasized individual choice in marriage and affection between husband and wife, helped sponsor a legal interpretation that a promise to marry was as akin to other types of contract made by “individuals in a free market,”\textsuperscript{58} although the principle also rested on irregular contract forms. The agreement to marry “created binding obligations” between the parties that theoretically could necessitate legal redress.\textsuperscript{59}

Although the voices of the couple themselves are not heard, breach of promise cases nevertheless illuminate women’s direct use of the legal system in an effort to protect their interests in a way that other actions do not. Breach of promise was, in practice, a woman’s action. In all 23 of the cases I have examined in Upper Canada between 1824 and 1850, the plaintiffs were female.\textsuperscript{60} The plaintiff was not permitted to testify on her own behalf,\textsuperscript{61} but instead produced witnesses who supported her claim that the defendant had approached her as an honourable suitor, that they had agreed to be married, and that the defendant had later refused to follow through. Defendants attempted


\textsuperscript{58} Coombe, “Breach of Promise in Nineteenth-Century Ontario,” pp. 70-71.

\textsuperscript{59} Brode, \textit{Courted and Abandoned}, pp. 104-105.

\textsuperscript{60} Again, it must be stressed that the extant legal records cannot provide a complete picture, but all evidence suggests that breach of promise was an infrequent action in comparison with both actions for seduction or other civil suits.

\textsuperscript{61} Plaintiffs were not permitted to testify in breach of promise suits until 1882 in Canada, and Brode notes that changes to evidentiary rules in 1867 specifically excluded women from the right to testify as breach of promise plaintiffs, reflecting the discomfort of legislators and to some extent the judiciary with the action during the second half of the nineteenth century. See \textit{Courted and Abandoned}, p. 110. On virulent responses to breach of promise suits and the women who launched them between 1850 and 1900, see Coombe, “Breach of Promise in Nineteenth-Century Ontario.”
to counter these charges with a variety of strategies. In most cases, they presented reasons that the marriage should not go ahead, such as “mental or physical infirmities in the plaintiff or false representations” about her family, rather than deny that a proposal had been made.\textsuperscript{62} By far the most reliable defence, however, was the allegation that the defendant had discovered the plaintiff’s lack of chastity after their engagement and subsequently broke off the relationship.\textsuperscript{63}

A limited number of breach of promise suits reached the colony’s courts, indicating that it was a strategy to which women turned only under certain conditions; as with suits for seduction, which were far more numerous, testimony clearly indicates that most participants would have preferred to resolve the matter out of court.\textsuperscript{64} For some, the action seems to have served the same informal function as seduction: to obtain child support from a former partner after the relationship broke down.\textsuperscript{65} Of the 23 extant suits I have examined, however, pregnancy was cited as a determining factor in just under

\begin{footnotes}
\item[64] See, for example, Palmer v. Davis (1847), in which Margaret Palmer attempted to prevent her father from bringing a seduction suit against her lover, and only decided to sue Hiram Davis for breach of promise after he married her cousin instead. In Willis v. Cribb (1835), McBride … v. Howard (1844), and Lake v. Stover (1830), evidence was presented that each of the defendants tried to settle the matter privately.
\item[65] Brode, drawing on actions from the mid- to late nineteenth century, has argued that most breach of promise suits were “initiated by a pregnancy out of wedlock” (Courted and Abandoned, p. 105). Although she does not discuss breach of promise directly, Lepp also connects the action to pregnancy in the later nineteenth century Ontario (“Dis/Membering the Family,” p. 81, note 137). This interpretation is not borne out in the records from the colonial period, however.
\end{footnotes}
half, suggesting that suits for seduction, for which pregnancy was a precondition, may have been considered more likely to be successful in securing costs for child support.

Certainly, in some of these cases the plaintiff might not have met the standards for a seduction suit, or been sympathetic to the jury as a seduced daughter. Sally Attwood, for example, was a widow when she sued Robert Holmes for breach of promise in July 1835. According to Attwood’s brother-in-law, Levi Warner, and her father, William Brooks, Holmes had “pd. his addresses” to Attwood since the previous March; Brooks suggested Holmes had courted her “before her first marriage,” and after she was widowed “renewed his suit.” Holmes backed out of the marriage, however; he provided “no reason” to Attwood’s parents, but allegedly told Warner that “ye reason was that a Young Man had been found in bed with her.” Attwood’s mother, Lena Brooks, “supposed” Holmes backed out because “he was engaged to another,” and subsequently “he admitted he had married another.” The parties had met, in the company of defence witness William Taylor, to try to negotiate a settlement which all agreed was “for raising the child” which had resulted from the relationship. According to Taylor, Attwood “had

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66 The plaintiff was pregnant or had borne a child fathered by the defendant in the following: from Macaulay’s benchbooks, RG 22-390-1, Willis v. Cribb (1835), Attwood v. Holmes (1835), O’Marrah v. Colvin (1842), and Palmer v. Davis (1847); from Robinson’s benchbooks, RG 22-390-2, Lake v. Stover (1830), Davis v. Houghman (1835), Jeffrey v. Laurence (1836), Whitney v. Whaley (1847), and Wadsworth v. Clement (1849); and from Hagerman’s benchbooks, RG 22-390-3, Jordan v. Claus (1841).


69 Testimony of Lena Brooks, Attwood v. Holmes.
sworn ye child against” Holmes, and he does not appear to have disputed paternity.\footnote{Testimony of William Taylor, Attwood v. Holmes. All four witnesses agreed that the settlement they had attempted to negotiate privately was for child support, rather than damages to Attwood for the broken engagement.} Justice Macaulay felt that Attwood’s “character was not impeached” by Holmes’s refusal to marry her on the grounds cited, and the jury, likely taking into account the fact that money had already changed hands, awarded her £10 in damages.

Similarly, the plaintiff in \textit{Jordan v. Claus} (1841) appears to have chosen breach of promise over seduction. Both of her parents had died, although her brother James was available to testify on her behalf. However, Jordan, like Robert Holmes, had clearly been involved in the kind of overlapping plural courtship that we see in the diary of Samuel Smith. In addition to her relationship with Claus, who was her first cousin, she was engaged to marry John Gardiner. The engagement was broken off “in consequence of the particular attentions of Mr. Claus,” however.\footnote{Testimony of John Gardiner, Jordan v. Claus, 26 October 1841, Victoria District Assizes, Hagerman Benchbooks, AO, RG 22-390-3-38-2.} Claus had apparently promised Jordan “that if any thing occurred, that she was to let him know if she found herself with child and that he would make all right.” James Jordan “understood … that [Claus] had seduced his sister.”\footnote{Testimony of James Jordan, Jordan v. Claus, 26 October 1841, Hagerman Benchbooks, RG 22-390-3-38-2.} Jordan had given birth to a child in Albany on 23 April 1841, but although Claus admitted he had “seduced” her, he denied being the father, and claimed he was unaware of the pregnancy, which, he implied, meant that Jordan herself did not think he was the father. James Jordan’s testimony indicates that there was additional confusion
within his family as to whether his sister had reconciled with Gardiner, or whether she intended to marry Claus.\textsuperscript{73}

For others, whether or not a pregnancy was involved, the likely object of a breach of promise suit was to publicly clear up gossip or unresolved questions about the nature of the relationship, reaffirming the woman’s good character, undermining the man’s, or both. Financial motivations, which Brode sees as increasingly pivotal in cases from the later nineteenth century, seem to have been less prevalent in Upper Canada, although most of the extant suits were successful and carried with the verdict for the plaintiff damages ranging from £2 to £500.\textsuperscript{74} Speculations about character in a broken engagement could carry significant ramifications for women. In \textit{Smith v. Sandford} (1835), Sandford had allegedly called off the marriage out of concern for his debts. Smith, “who kept a school,” may have sued him to address gossip about her character, which potentially endangered her livelihood. According to witness Joseph Turton, Smith asked Sandford when the parties met “if he had anything agt. her character – he sd. not in the slightest.”\textsuperscript{75} Although the parties in this case settled on a nonsuit, making any questions about her character a matter of public record may have been a conscious strategy on Smith’s part to counter any damaging speculations. A lengthy engagement which ended could also prompt a suit, whether to counter any rumours about defects or to

\textsuperscript{73} Testimony of James Jordan, Jordan v. Claus, 26 October 1841, Hagerman Benchbooks, RG 22-390-3-38-2.

\textsuperscript{74} Of 18 cases won by the plaintiff between 1830 and 1850, the average award was just over £70. The lowest award, £2.10, was returned in McBride … v. Howard (1844), in which the collapse of the engagement was seen to be mutual. The highest award, £500, was returned in Palmer v. Davis (1847).

rectify the loss of other opportunities to marry.⁷⁶ Elizabeth Tupper’s 1840 suit against James Johnson rested on the allegation that after courting Tupper for three years, Johnson had married another woman. Johnson’s defence was that he had not courted Tupper seriously because she was in ill health; one witness, Dr. McGillis, testified that Tupper had leprosy.⁷⁷

In both Snider v. Wilson (1837) and Young v. Lefleur (1835), the plaintiffs appear to have sued to address gossip about their participation in bed-based courting practices. Snider’s suit against Wilson, as we saw in Chapter Two, was clearly a response to Moses Wilson’s public statements that he had refused to marry Snider because of her “improper conduct” with Eli Smith.⁷⁸ Similarly, Young’s engagement to one of the Lefleur brothers was allegedly scuttled at least in part by rumours that her character was “not good,” although none of the witnesses would swear that she had taken part in anything “indecent.” Like Snider and Jordan, Samuel Smith, and a number of the men who appear in these cases, Young had “kept company” with more than one person over a period of three or four years.⁷⁹ The defence attempted to use this against her, producing male witnesses who claimed to have kept company with her as well as a woman who claimed

⁷⁷ Tupper v. Johnson, 14 October 1840, Eastern District Assizes, AO, Macaulay Benchbooks, RG 22-390-1-5-4. The jury nevertheless felt that enough of a promise had been proven to award Tupper £60.5 in damages.
⁷⁸ Snider v. Wilson, 5 April 1837, AO, Robinson Benchbooks.
⁷⁹ See also Jane Ralston v. Alexr. Wilkinson, 14 May 1847, AO, Robinson Benchbooks, RG 22-390-2-27-2. Unlike Snider and Young, however, evidence of Ralston’s having “kept compy. with other young men” was not cited as a deterrent to the marriage, but rather “thought proper” by witness Catharine McNeil.
she had seen Young in bed with her own sister’s husband. As in *Snider v. Wilson*,
though, the testimony about Young’s participation in sparking does not appear to have
swayed the jury. Nor does it appear to have been held against her by the witnesses. As
in other such cases, evidence of bed-based intimacies was accompanied by the statement
that no “improper conduct” occurred. Furthermore, although one witness claimed that
in the defendant’s position he “wd. not marry her, on acct. only of what they heard,” no
one was willing to say anything “bad of her” under oath. The jury awarded Young £75,
indicating that not only did they believe Lefleur had reneged on his promise of marriage,
but the attempt to smear her character had backfired.

The influence of “character,” for both men and women, bears further analysis.
Testimony in these cases shows that sexual mores in Upper Canada cannot be assumed to
conform to middle-class discourses about marriage and gender ideals, although those are
represented, nor do we see evidence of a strict “double standard.”

80 Testimony of William Claridge Jnr., Alexr. Belcher, Hiram Lefleur, and Elizth. Hicks,
Young v. Lefleur, 27 October 1835, Home District Assizes, AO, Robinson Benchbooks,
RG 22-390-2-22-1. Young’s sister was married to William Lefleur, the defendant’s
brother, and Young lived with them. William Lefleur testified for the plaintiff and was
recalled after the defence to counter Hicks’s statement that she had seen them in bed.
81 Testimony of Wm. Claridge Jnr., Young v. Lefleur, 27 October 1835, AO, Robinson
Benchbooks. Claridge stated that he had not only “kept company” with Young, but had
also seen her in bed with another man, John Scott. Yet Claridge told the court he knew
“nothing to the contrary of her being a virtuous woman.”
82 Testimony of Alexr. Belcher, Young v. Lefleur, 27 October 1835, AO, Robinson
Benchbooks.
83 This was one of the larger awards. Coombe notes for the later period that allegations
against a woman’s character could work against a defendant if his witnesses were
84 Lynne Marks has posited that the colony’s churches attempted to enforce a single
standard of morality for men and women, but discourses circulating in the larger culture
about femininity made that standard more effective in regulating women’s behaviour than
men’s. See Marks, “No Double Standard? Leisure, Sex, and Sin in Upper Canadian
cases are highly mediated sources; neither the plaintiff nor the defendant spoke directly to the courtroom, and their stories, as represented by the witnesses called on each of their behalf, were no doubt crafted to create narratives which judge and jury would find convincing. Men’s commentary on women’s sexual behaviour must be examined through this lens. The colony’s judges were members of the elite, and many of them, Robinson, Hagerman, and Macaulay in particular, staunch Anglicans. Defendants in breach of promise cases, or their legal representatives, may have sought to emphasize “inappropriate” behaviour on the part of the plaintiff in order to discredit her or otherwise excuse the man’s withdrawal from the proposed marriage. Assessments of character did play a significant role in determining damages. As Justice Hagerman instructed the jury in *Jordan v. Claus*, if the defendant “promised to marry a person of bad character knowing her to be so, … he would be still liable,” but for a smaller amount. Even taking this into account, though, the testimony in breach of promise cases reveals the shifting nature of discourses about permissible courtship and sexuality during the 1830s. Whether they felt it would help their case or were genuinely telling the truth as they perceived it, Upper Canadian men in particular struggled with competing expectations of sexual behaviour.

Some of these contests are particularly evident in Vasti Lake’s suit for breach of promise against George Stover. According to her father, James, Vasti had been about 15 years old in 1827 when their neighbour in Norwich, George Stover, began “paying his

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85 *Jordan v. Claus*, 26 October 1841, Hagerman Benchbooks, RG 22-390-3-38-2. The jury appears to have preferred this option, awarding the plaintiff £15.
addresses.” Stover was in his late 20s. The Lake family felt it was clear that Stover was courting Vasti with the intention of marrying her; they, and she, were “willing” that a marriage should take place.\(^{86}\) When Vasti became pregnant in 1828, however, the terms of the relationship changed. Vasti’s father recalled that on 15 June 1828, shortly after he had learned of his daughter’s pregnancy, he was approached by Dr. Cowie, who “came to him & made a proposal as from Stover that he shd. be allowed to take means with yr. daughter to prevent her having a child.” Stover apparently said he would still marry Vasti afterwards, “but he did not like that his friends shd. know he was pledged to marry a girl in that situation.”\(^{87}\) James later spoke to Stover directly, who assured him that “he had a regard for the girl & for the famy.,” but again “intimated … that he did not wish his friends to know he wd. marry a girl in that situation.”\(^{88}\) He made it clear to Vasti’s father that it was his preference that Dr. Cowie perform an abortion, seemingly to save Stover’s reputation rather than Vasti’s. James Lake, however, “utterly refused.”\(^{89}\)

George Stover’s defence in this case likely reflects that the community was well aware of the entire situation. Rather than claim that he was not the father of Vasti Lake’s child, or that he had not approached her as a suitor, the witnesses called to testify on his behalf all claimed that a settlement had previously been reached between Stover and

\(^{87}\) Testimony of James Lake [Sr], Lake v. Stover, 16 August 1830, Robinson Benchbooks, RG 22-390-2-20-3.
\(^{88}\) Testimony of James Lake [Sr], Lake v. Stover, 16 August 1830, Robinson Benchbooks, RG 22-390-2-20-3. For another case in which the father of an illegitimate child attempted to make arrangements for an abortion, see Bennett v. Comfort, 4 June 1840, Macaulay Benchbooks, RG 22-390-1-5-1.
\(^{89}\) Testimony of James Lake [Sr], Lake v. Stover, 16 August 1830, Robinson Benchbooks, RG 22-390-2-20-3. See also testimony of Jane Lake.
James Lake, and Vasti herself had no remaining right to bring a suit. The testimony of John Bartlett and Rebecca More, who were present when the agreement was made, was perceived to be especially damaging, as both of Vasti’s parents and her brother were recalled to rebut it, as were two additional witnesses. According to these witnesses, Vasti was willing to settle for the amount her father thought best, and even “wished they wd. settle it, if she only got 20 dollrs.”\(^9^0\) The jury ultimately sided with Vasti, though, awarding damages of £75. This award was roughly in line with damages in successful seduction suits in the early 1830s, suggesting that the jury was attempting to place some censure on George Stover for worrying more about what his friends might think than about fulfilling his responsibilities as a father.

Like the records of seduction cases, breach of promise suits show ample evidence of community knowledge of and involvement in individuals’ relationships. As later in the century, these actions often resulted when couples were “caught” having transgressed social norms,\(^9^1\) but in the majority of cases the transgression was less the sexual activity itself than the way that relationship breakdown was handled. Breach of promise suits too were often a final resort when negotiations at the level of the neighbourhood broke down. Hagerman’s notes indicate that the parties in *Jordan v. Claus* (1841) had come to a settlement previously, but a delay in the court’s proceedings gave the defendant a chance to change his mind and refuse his assent.\(^9^2\) In *McBride ... v. Howard* (1844), Lewis Evans tried to broker a settlement between Sarah McBride and Howard, whose planned

\(^9^0\) Testimony of Rebecca More, *Lake v. Stover*, 16 August 1830, AO, Robinson Benchbooks. This sentiment was echoed in the testimony of both John Bartlett and Giles Milliken.

\(^9^1\) See Dubinsky, *Improper Advances*, p. 75.

marriage in 1843 was scuttled by his concern about his debts.\textsuperscript{93} According to other witnesses, Jenny McBride, Sarah’s mother, asked Howard for “£25 for the sake of settling the matter,” but he “refused.”\textsuperscript{94} Howard tried to keep the matter out of court by meeting with the McBrides the following month with a renewed offer of marriage, but Sarah declared “she would not marry [him] if he was the last man that ever stood.”\textsuperscript{95} Howard, “unable to pay the money,” later offered to raise the money from his land, or transfer an acre of land in lieu, but arrangements broke down and the matter ended up in court.\textsuperscript{96}

Women who sued for breach of promise during the colonial period do not seem to have been regarded as “speculators in marriage” or “designing women,” as they were later in the nineteenth century, although Hagerman’s benchbook notes indicate some discomfort with the action.\textsuperscript{97} Nor does the charivari or “circus-like” atmosphere of late nineteenth-century trials seem to have prevailed.\textsuperscript{98} This description implies that either

\textsuperscript{93} Testimony of Lewis Evans and [Ariae?] Beaton, McBride v. Howard, AO, Hagerman Benchbooks. Debt was also a factor in Smith v. Sandford, 23 October 1835, Home District Assizes, AO, Robinson Benchbooks, RG 22-390-2-22-1. See also Lucy Ann Boulton v. Joseph Clark, 22 October 1846, Home District Assizes, AO, Hagerman Benchbooks, RG 22-390-3-40-4, in which Clark allegedly promised to marry Boulton if her father would “buy the license” for a brewery near Newmarket that Clark wanted to acquire, then reneged.
\textsuperscript{94} Testimony of [Ariae?] Beaton, McBride v. Howard, AO, Hagerman Benchbooks.
\textsuperscript{95} Testimony of William McKibbie and Herman Elliot, also Charles Mansel, McBride v. Howard, AO, Hagerman Benchbooks.
\textsuperscript{96} Testimony of William McKibbie, McBride v. Howard, AO, Hagerman Benchbooks.
\textsuperscript{97} See Jordan v. Claus, 26 October 1841, RG 22-390-3-38-2, and Van Buskirk v. Carpenter, 23 September 1845, RG 22-390-3-40-2.
there was something transgressive about these relationships, which was not always the case – the putative marriage of Sarah McBride and Mr. Howard, for example, was considered “an eligible one for both parties”\(^{99}\) -- or about the process of intimate testimony in court. The records of breach of promise cases do reveal, however, that men were also concerned about public censure and attacks on their reputation, which may have been why so many wished to settle out of court, and why, as a model of gender and sexual behaviour which emphasized differences between men and women took hold in the colony, the men who made law increasingly viewed women’s direct action as threatening and feared its implications.

Breach of promise records have a great deal to tell us about where, and why, relationships broke down, although their silences are equally profound. Even though it was a legally permissible strategy, and increasingly, the only legally permissible strategy in response to a suit for breach of promise, it is clear that the definition of “chastity” for Upper Canadian women was variable. In Young’s suit against Lefleur, the evidence of her participation in plural and physical courtship was not considered “indecent” by the witnesses who provided it, and did not meet the standards the jury required to excuse Lefleur from his promise of marriage. By comparison, the evidence presented in Glynn \textit{v. Laurence}, which was tried by Robinson two months earlier in Niagara, resulted in a verdict for the defendant. The crucial difference seems to have been not just the openness of Glynn’s sexual relationship with Laurence, which was enough to make her “a girl of bad character” according to some witnesses, but the fact that she was not

\footnote{caution, see Jno. O’Hare, Belleville, to A.N. Buell, undated [c. 1852-1860], Andrew Norton Buell Family Papers, 1808-1881, F 62 MU 309, AO.}

\footnote{McBride by next friend \textit{v.} Howard, 12 April 1844, Hagerman Benchbooks.}
present at the trial, having “gone to Haldimand … 3 weeks ago … with one Calvin Brown a single man.”

Again, though, *Glynn v. Laurence* stands out in comparison to the rest of the extant cases. During the 1830s, Upper Canadians were clearly contesting the bounds of appropriate courtship behaviour, and a broader spectrum of heterosexual relationships were tolerated in the community than simply a linear progression from non-sexual social contact to lifelong, monogamous marriage.

*Envisioning marital breakdown in the colony*

As discussed in Chapter Three, Upper Canada’s efforts to make marriage law specified a union which was dissoluble only by death. The colony made no provision for divorce, granting only one exceptional divorce in 1839 and rejecting two other petitions during the 1830s. Scholars have generally agreed, however, that in spite of the legal proscriptions against divorce, marital breakdown was hardly unusual. As with marriage itself, the lack of consistent documentary records, in concert with the presence of informal marriage, frustrate efforts to quantify the frequency of separations. However, Upper Canadians’ writings, public and private, and the evidence preserved in court records suggest that separation, informal divorce, and the formation of subsequent marital relationships were, if not common, nevertheless well within the bounds of imagination.

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and experience. Reactions to relationship breakdown, as we will see below and in the next chapter, varied by case as well as by individual. But even in instances where the community acted to censure the parties, the act of separation or even a bigamous marriage alone was not enough to trigger a scandal. Other factors were involved.

Some unhappy couples simply separated, either coming to terms mutually or one party abandoning the marriage, a phenomenon which has been termed “self-divorce” or “frontier divorce.” It is probable, although not quantifiable, that a significant proportion of couples who separated actually did so relatively amicably, by which I mean that they allowed one another to carry on with their lives. Such separations were unlikely to leave direct records, as they did not come into conflict with the state. Indirect evidence from testimony in other court cases, though, makes it clear that couples could and did agree to separate without attempting to engage any formal procedure, and many went on to form new conjugal relationships. Some of these were extra-legal marriages which seem to have been recognized and generally accepted within the community. The testimony of Jane Keeler’s family and neighbours in Camden indicates that the bad behaviour of Vanvolfkenburgh, her first husband, was regarded with far greater

104 For a contrasting argument, see Errington, Wives and Mothers, p. 43.
disapproval than her subsequent relationship with Keeler.\textsuperscript{105} Other separated men and women did formally marry again, thus engaging in bigamy. Clergy attempted to guard against this in their parishes, as did magistrates.\textsuperscript{106} However, as the case of Samuel Smith and Sarah Holmes illustrates, couples who expected to face resistance sometimes chose to leave their home parish to be married without the interference of neighbours. In some cases, couples who expected problems left the jurisdiction entirely, crossing the border to marry in New York.\textsuperscript{107} As Lepp has noted, “it is extremely difficult to ascertain how many such illegal marriages existed yet remained undetected by legal authorities, particularly since ‘successful’ bigamists effectively wrote themselves out of history.”\textsuperscript{108}

A discussion of separation and self-divorce in Upper Canada is in many ways inseparable from a discussion of bigamy, since the colony provided no legal mechanism by which marriages could be dissolved. Taking into account the presence of informal and irregular marriages among settlers, many couples who separated and formed new relationships were technically not practising bigamy, since their marriages were not

\textsuperscript{105} Vanvolkenburgh v. Keeler (criminal conversation), 2 May 1850, AO, Draper Benchbooks, RG 22-390-6-47-2, especially testimony of Jotham Huff, Julia Ann Lake, and Allan Vanvolkenburg, and discussion in Chapter Three.

\textsuperscript{106} Before he would marry Rebecca Babcock Lewis and Alexander Humphry in 1816, magistrate Joel Stone took Lewis’s oath that despite “It having been reported that I have been Married -- and that my Husband may still be alive -- I hereby certify on the Holy Bible; That I have been Informed by Letter, that my Husband is Dead -- and that I verily believe -- that he (whos name was Dennis Lewis) is Dead, & that he separated this Life at York Upper Canada.” 11 April 1816, Joel Stone family fonds, F 536 MS 519 reel 1, AO.

\textsuperscript{107} In addition to William Bell’s tale of Mary Cameron and Goodfellow (Bell journals, QUA), see Queen v. Elmore (bigamy), 23 October 1844, Midland District Assizes, Hagerman Benchbooks, AO, RG 22-390-3-39-4, in which one marriage had been conducted at Watertown. In Queen v. Joseph Bennett (abduction of a girl under 16), 29 September 1843, Gore District Assizes, Macaulay Benchbooks, RG 22-390-1-7-4, the defendant, who was already married, was apprehended on his way to Lewiston to marry fifteen-year-old Hannah King.

\textsuperscript{108} Lepp, “Dis/Membering the Family,” p. 221.
legally solemnized. Although bigamous marriage was a concern of the colonial state, as shown in Chapter Three, it was infrequently prosecuted.\textsuperscript{109} Between 1827 and 1850, extant court records include only six cases of prosecutions for bigamy, most of which were tried during the 1840s; an account of a seventh case, against Alexander Ely of Kingston, can be drawn from the \textit{Kingston Chronicle and Gazette}.\textsuperscript{110}

Prosecutions for bigamy were often inconclusive, as the case of John Longworth, who was tried in August 1835, indicates. Longworth, a former sergeant of police, was alleged to be married to both Esther Bruce and Ellen Maxwell. Longworth’s daughter, Elizabeth, testified that her father had emigrated to Upper Canada from Ireland some years previously, leaving Elizabeth’s mother, Esther Bruce, and five children behind. The family had “Recvd. no more letters from him after he left.” It was rumoured that John had remarried in the colony. Although the family “did not beleive it,” Elizabeth acknowledged that these rumours had “induced” her mother to emigrate in search of her husband. When they arrived in 1834, they found John living “at Goderich with another Woman.”\textsuperscript{111} As Justice Macaulay noted, “The Wife came out about a year ago & P. refuses to receive or acknowledge it – … All live with P. he acknowledges the Children - but denies ye Marriage.”\textsuperscript{112} Esther Bruce Longworth, perhaps at her wits’ end, approached magistrate John Brewster and, as “his proper wife,” demanded to have John

\textsuperscript{109} This argument contrasts with Backhouse, \textit{Petticoats and Prejudice}, p. 170.

\textsuperscript{110} \textit{Kingston Chronicle and Gazette}, 4 November 1835, and discussion in Lepp, “Dis/Membering the Family,” pp. 229-230. Lepp does not discuss other cases of bigamy which came before the courts prior to 1851.

\textsuperscript{111} See also Queen v. John Park, 28 October 1847, Macaulay Benchbooks, AO, RG 22-390-1-9-3. Errington, \textit{Emigrant Worlds}, chapter 4, notes that this happened regularly.

\textsuperscript{112} King v. John Longworth, 1 August 1835, Gore District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-1-3.
charged with bigamy. Despite the testimony of witnesses who had known the couple in Ireland, however, John Longworth was acquitted of bigamy because only his marriage to Ellen Maxwell was documented.\textsuperscript{113} His defence further suggested that John and Esther’s marriage was invalid because Esther had a previous living husband.\textsuperscript{114} 

Couples who wished to end their relationship could create a formal separation agreement, in which they acknowledged one another’s right to live separately and perhaps divided property or family assets, but such arrangements were unusual. Errington found a few such notices published in the colony’s newspapers to 1840, but observes that given the “trouble and expense of formally working out and publicizing an agreement,” not to mention the limited assets many couples would have to divide, such agreements were “rare.”\textsuperscript{115} Nor were such agreements, as contracts between husband and wife, legally enforceable should one of the parties refuse to abide by their terms.\textsuperscript{116} The common law treated a married person as one entity, in the person of the husband; on marriage, women became\textit{femes covert}, their identities subsumed within their husbands’.\textsuperscript{117} A woman whose marriage had ended was potentially as “dependent on the

\textsuperscript{113} King v. Longworth, 1 August 1835, Macaulay Benchbooks, RG 22-390-1-1-3.
\textsuperscript{114} Similar defences were raised in the Ely case,\textit{Kingston Chronicle and Gazette}, 4 November 1835, and in Queen v. Gilbert McIlvaine, 31 October 1843, Home District Assizes, Hagerman Benchbooks, AO, RG 22-390-3-39-2.
\textsuperscript{115} Errington,\textit{Wives and Mothers}, p. 43. For an example, see Joel Stone’s notice of separation from his wife Leah Moore, 15 June 1789, Stone family fonds, F 536 MS 519 reel 1, AO.
\textsuperscript{116} Chambers,\textit{Married Women and Property Law}, p. 29.
\textsuperscript{117} As Chambers notes, “In all common-law jurisdictions, marriage, for women, represented civil death.” The consequences of this “civil death” could be severe for women who separated from their husbands, even if they did so by their own choice. A wife did not own any property that had not been excluded by a prior marriage settlement, and although she was entitled to one-third of her husband’s estate in dower should she survive him, that did not include moveable property, and in most cases left her unable to
goodwill and sense of responsibility of her estranged husband” after separation as she had been when they lived together.\textsuperscript{118}

More common, Errington explains, were public notices of separation, or “cautions,” which appeared in the colony’s newspapers between 1793 and 1840. Talbot claimed that such “cautions” could be seen in the colony’s newspapers every week, which to him constituted further proof of the weakness of the colony’s men and the depravity of its women.\textsuperscript{119} In these notices, a man announced that since his wife had “left” his home, usually, by his interpretation, “without any provocation,” he was no longer responsible for any debts she might accumulate.\textsuperscript{120} Some husbands “used the occasion … to air specific grievances against their wives,” including accusations of infidelity or having taken up with a new partner, who in a few instances was named.\textsuperscript{121}

\textit{Adultery}

Talbot almost certainly had in mind notices like those in which a husband declared that his wife had “absconded” with her lover. Adultery for women in particular figured prominently in arguments against the liberalization of marriage and divorce. Like marriage more broadly, adultery carried political implications, especially in the 1820s, when loyalty was increasingly politicized in the colony. Some men who felt the need for redress when their engagements were broken off by their fiancées turned to sell or otherwise liquidate land. Any children of the marriage were also considered to be the father’s property. See Chambers, \textit{Married Women and Property Law}, p. 3, and Errington, \textit{Wives and Mothers}, pp. 45-46.

\textsuperscript{118} Chambers, \textit{Married Women and Property Law}, p. 29.
\textsuperscript{119} Talbot, \textit{Five Years’ Residence in the Canadas}, Vol. II, p. 4
\textsuperscript{120} See Errington, \textit{Wives and Mothers}, pp. 44-51.
\textsuperscript{121} Errington, \textit{Wives and Mothers}, pp. 44-45, 47-48.
extralegal remedies, like gossip, to assuage the wound. Husbands rarely, but occasionally, turned to the courts for redress in cases where their wives had committed adultery, suing their wives’ new partners for criminal conversation. In 1834 J.D. McMurdo launched a suit against his wife’s lover, Walker, after the two “absconded” in July 1833. Thomas Keating, the landlord at the British Coffee House, where Walker was staying, testified as to the “improper” relations which occurred in McMurdo’s absence. The jury evidently found this story both convincing and sympathetic: they awarded McMurdo £1500 in damages. McMurdo petitioned Parliament for a divorce in 1836, but was unsuccessful.

In other cases, suits for criminal conversation seem to have resulted from longstanding marital difficulties, and possibly a continuation of plural courtship patterns. In Black v. Hutcheson (1841), the plaintiff’s brother, Lyman Black, told the court that his sister-in-law, Sarah Ann Garside, “had run away with Plffs bar Keeper some years ago – placards were posted up stating that she had done so.” Garside had apparently left Black for Hutcheson the previous August; another witness, Ann Lindsay, said that Garside “had been reported” to have lived with Hutcheson before her marriage to Black in 1832.

Witnesses in Van Every v. Shannon (1841) also suspected an ongoing relationship between the defendant and Elizabeth Markle Van Every. Like Sarah Ann Garside,

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122 This may have been prompted by men’s concerns about their own reputations in the aftermath of a broken engagement, as Lisa Wilson argues for New England in the late eighteenth century. See Ye Heart of a Man: The Domestic Life of Men in Colonial New England (New Haven and London: Yale University Press, 1999), chapter 2.
Elizabeth Van Every was known to have engaged in overlapping relationships. More than one witness pointed out that she “had a child before marriage,” which was assumed to be her husband’s.\footnote{Testimony of John Green and Wm. Green, Van Every v. Shannon, 2 October 1841, Gore District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-6-2.} The paternity of Elizabeth’s other children, however, was less clear. Peter Van Every had served five years in the penitentiary at Kingston, during which time Elizabeth supported herself by renting Van Every’s sawmill to Shannon. Although their relationship seems to have been conducted quietly, when Elizabeth became pregnant, the community gossiped; as one neighbour put it, “It was noised all over the Country that she had a Child while Plf was in Prison.” Suspicion fell on Shannon, who himself was married with a “large family.”\footnote{Testimony of John Green and Oston Markle, Van Every v. Shannon, 2 October 1841, Macaulay Benchbooks, RG 22-390-1-6-2.} William Green claimed that he had discussed the situation with Shannon shortly before Peter’s return; Shannon allegedly told Green that he feared Peter “will prosecute me,” but also declared that if Peter “turned her away” over the affair, he “wd support her & child while he cd raise a dollar.”\footnote{Testimony of William Green, Van Every v. Shannon, 2 October 1841, Macaulay Benchbooks, RG 22-390-1-6-2.}

The reasons behind Peter Van Every’s suit, however, are less transparent. Unlike McMurdor or Black, who clearly felt wronged by their wives and their wives’ lovers, Peter Van Every seems to have accepted his wife’s affair with Shannon and reconciled with her on his return from Kingston. According to Oston Markle, Elizabeth’s brother, Peter “recvd her as usual,” and they had “been living togr. since … with their children –
including ye one laid to dft.” Elizabeth had since given birth to another child, which neighbours believed was her husband’s. Markle told the court that the family lived together “in apparent harmony,” and that Peter “treats all ye Children alike as far as he knows.” He also claimed that “The Neighbours do not think the less of Plf or family owing to ye slip.” While this viewpoint may have been optimistic, neither did the testimony of the other two witnesses rebut it. Van Every was awarded £55 in damages.

As the legal mechanism of criminal conversation indicates, adultery was legally constructed as a violation of men’s property rights. The corresponding implication in middle-class discourse was that wives must accept, and perhaps accept responsibility for, a husband who strayed. Legally married women did not have access to the same instruments to seek redress when their partners wronged them. Women whose husbands had deserted them were left in a particularly vulnerable position. As married women, they remained *femes covert*, even though the legal personage of the husband was no longer present. Moreover, as Chambers points out, Upper Canada left separated women “excessively vulnerable, even by comparative nineteenth-century standards.” Unlike England or most American states, the colony made no provision by which women could gain legal separations which were enforceable by the courts, nor could they claim alimony until after the establishment of the Court of Chancery in 1837. Nor, from the judges’ benchbooks, do the colony’s courts appear to have ignored the jurisdictional issue

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in order to deal with separation agreements and orders for maintenance, as they did in New South Wales.130

Nevertheless, some women who separated from their husbands did turn to the courts or the Crown, directly or indirectly. Many women relied on the support of family and friends; some women returned to their parents’ homes or went to live with siblings, a situation which might enrage husbands. Archibald McDonald of Alexandria successfully sued Alexander MacDonald, as well as number of Alexander’s cousins, for trespass in 1840 after an incident which had occurred the previous April. Alexander and Archibald’s daughter Mary had married, although there was some dispute about the marriage’s validity, but had not been living together. Mary returned to her parents’ home, and refused to leave; an enraged Alexander and his cousins broke in to try to take her away.131

When family members assumed the cost of supporting a separated woman and her children, if present, they did so at their own risk. A person “who had supported a separated woman could sue the woman’s husband for maintenance costs,” although, as Chambers notes, “such suits had no guarantee of success, and the wife herself could not sue her husband.”132 In practice, though, as with seduction suits, judges and juries often

130 Kercher, Debt, Seduction, and Other Disasters, pp. 75-77. In New South Wales, separation agreements were interpreted to revive a woman’s legal status and thus her ability to contract on her own behalf. This was not the case in Upper Canada.
132 Chambers, Married Women and Property Law, p. 29. In addition to Dewitt v. Wood, discussed below, see also Henderson v. Walker, 27 September 1837, Newcastle District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-3-6.
showed at least some sympathy for the separated wife, and the testimony addressed both the cause of the separation and whether or not the husband had abused his authority.133 In one such case, Dewitt v. Wood (1841), Wood was sued for the support of his second wife, Hannah, who had left him after three years of marriage to live with her milliner sister, for reasons which were not clear to the witnesses. The presiding judge, Robinson, left it to the jury to decide “whether deft. turned away his wife – or refused to receive her … or whether he treated her so ill that she cd. not reasonably be expected to live with him.” If so, Wood was liable for the damages. Several members of Wood’s family, including a granddaughter, a grand-niece, a son and a nephew, all of whom had lived with the couple, insisted that although the couple had “disagreements,” and Hannah herself was prickly and “difficult with the servants,” she had been “well treated” and “comfortably maintained.” The witnesses for the plaintiff, one of whom was Wood’s granddaughter Esther Proud, offered no competing evidence that Hannah had been mistreated, and offered no explanations for her decision to leave her husband. The jury nevertheless opted to award damages to the plaintiff.134

As Dewitt v. Wood illustrates, domestic abuse could become an issue in marriage breakdowns. As Errington has noted, “Upper Canadians assumed that some men abused their wives. Though the practice was never officially applauded, it was usually ignored and unreported.”135 Historians often cite the story of Mary Wyatt, the wife of surveyor-

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133 William Walker’s abuse of his wife was central to the testimony in Henderson v. Walker.
135 Errington, Wives and Mothers, p. 41; see also Backhouse, Petticoats and Prejudice, and Lepp, “Dis/Membering the Family.”
general C.B. Wyatt, to support the statement that violence between husband and wife was considered “a private affair.” The abuse Wyatt suffered at her husband’s hands was well-known among her social circle, but although acquaintances chronicled it in their diaries, no one seems to even have attempted to intervene to help her.\footnote{136} Errington argues that many Upper Canadians “carefully avoided becoming involved” even when they were aware of domestic abuse, accepting that no one had the right to come between husband and wife; for Wyatt and other elite women in particular, leaving an abusive husband would have resulted in being “ostracized by society.”\footnote{137} Backhouse’s analysis of Sheldon Hawley’s 1826 suit against his daughter Esther’s abusive husband, George Ham, paints a similar picture for Upper Canadians outside the elite. Although the Hawley family demonstrably sided with Esther, trying to help her escape her abusive marriage and gain custody of her child, Chief Justice William Campbell, who tried the case, publicly chastised Sheldon Hawley for infringing on his son-in-law’s rights as a husband in his efforts to assist his daughter.\footnote{138} Backhouse notes that “Campbell’s decision in Hawley v. Ham set the stage for a century of Canadian judicial precedent denying women basic protection against ruthless mistreatment.”\footnote{139}

Backhouse’s conclusion is indisputable. Women were subjected to horrifying abuse at the hands of their partners, and the courts did little to help them. Judicial precedent, however, does not tell the entire story. As Lepp has pointed out, some Upper Canadian women did attempt to make use of the courts for self-protection, bringing articles of the peace against their abusive husbands. Nor were the Hawleys alone in their efforts to help family members or neighbours who experienced domestic abuse. While in all likelihood some Upper Canadians accepted Campbell’s vision of husbandly authority, we do have evidence to show that others did not. The testimony in *Dewitt v. Wood* and a similar case, *Henderson v. Walker* (1837), indicates that, however backhandedly, husbands’ behaviour was on trial in cases where women left their marriages and found support amongst the community. In *Vanvolkenburgh v. Keeler*, both Justice Draper and the jury made clear their disgust with Vanvolkenburgh’s behaviour by awarding him only a farthing in damages. Although the evidence that Keeler was involved in a sexual relationship with Vanvolkenburgh’s legal wife was hardly in dispute, Vanvolkenburgh had treated Jane so poorly that Draper felt there was “much evidence to be considered in mitigation.” He went so far as to instruct the jury that “I do not consider they are bound to find for the plaintiff,” nor that Vanvolkenburgh was entitled to any damages if they did.

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141 Errington also speculates on this possibility in *Wives and Mothers*, p. 47.

Women who did not have male family members willing to sue on their behalf, though, did not have access to these strategies. Some women sought to get around the restrictions on their legal actions by petitioning for Crown support. J.K. Johnson found that 51 of 266 petitions to the Crown in Upper Canada came from women; while many of these were from widows, or from women whose husbands had been injured in the service of the Crown, he marked two from women who sought protection or financial support from abusive or improvident husbands.\(^{143}\) Another such petition, resulting from the unhappy marriage of Frederica and Richard Ferguson, can be found among the papers of John Strachan.

*The unhappy marriage of Frederica Ferguson, 1769?-1847*

Frederica Grout’s record of her unhappy marriage to Richard Ferguson provides an account of one Upper Canadian woman’s experience of marital breakdown, illustrating both the irrevocable effect that an unhappy marriage could have on a woman’s life, as well as some of the ways women responded to their circumstances. Although her letters were at times sporadic, Frederica maintained an almost lifelong correspondence with her friend Margaret Rogers Greeley, once her neighbour in Sophiasburg.\(^{144}\) She also petitioned Lieutenant-Governor Sir Peregrine Maitland for


\(^{144}\) These letters can be found in the Rogers Family Papers, F 533, MS 522, AO.
financial support, a document which was drafted by John Strachan sometime between 1825 and 1828.\textsuperscript{145}

Frederica Grout and Richard Ferguson, Jr., married in the shadow of the Revolutionary War.\textsuperscript{146} Both had Loyalist backgrounds. Frederica’s father, John Grout, fled Vermont in 1775, and his wife and children joined him at St. Jean, Québec, in the autumn of 1778. Shortly thereafter, John Grout was murdered on his way to Montreal to purchase winter supplies, leaving his family, in Frederica’s words, “among strangers almost entirely destitute.”\textsuperscript{147} In winter 1784, Frederica and Richard married at St. Jean; she was “then only 15 Years old.”\textsuperscript{148} They settled in Fredericksburgh Township, along with Richard’s extended family. Richard, “an Ensign in Major Rogers Provincial Corps,” had served with his father, brothers, and likely several cousins in the King’s Rangers during the American Revolutionary War, under the command of Major James Rogers (Margaret’s father). Rogers was granted a large section of lands above the Cataraqui River in return for his service to the King, which he distributed among the men in his


\textsuperscript{146} Ferguson to Maitland, Strachan Papers, AO

\textsuperscript{147} Ferguson to Maitland, Strachan Papers, AO.

\textsuperscript{148} Ferguson to Maitland, Strachan Papers, AO. See also Henderson, “Captains of the Canadian Fencibles,” paragraph 34. Based on Henderson’s information, Richard Ferguson was born in 1762, making him 22 at the time of his first marriage.
regiment. The couple “settled on a Farm” near Sophiasburg, and Richard Ferguson received half pay for his service.

Their marriage seems to have been troubled from the beginning. Frederica later recalled that “during this time she was much grieved by his neglect and infidelities yet bearing all in patience she earnestly prayed to God for his reformation.” Richard’s return to active military service seems to have brought the situation to a crisis point. In summer 1794 he was appointed as a lieutenant in the Royal Canadian Volunteers, and “soon after went with his recruits to Montreal.” Frederica joined him there in the spring of 1795. In October, a letter to Margaret Rogers conveys her deep distress over the state of her marriage. “Oh my freind,” she wrote, “must I break my long silence only to tell you that I am the most wretched of sorrows ample house.” She continued, “I have been long sencible that happiness was never to be my lot – in this life. Yet so Cruel, so undeserv’d (and from a quarter so unexpected) and so heavy a blow has almost crush’d me into the Grave –” Her problem, as she saw it, was that in marrying Richard Ferguson, God had assigned her the “duty” of “indeavoring to reform an unprincipled libertine.” “[H]arsh as the term may be,” she wrote, “I can give it no other with propriety at present.” When she joined her husband in Montreal, Frederica “had the

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149 For a brief account of the King’s Rangers, see Mary Beacock Fryer, King’s Men: The Soldier Founders of Ontario (Toronto: Dundurn Press, 1980), pp. 237-262.
150 Ferguson to Maitland, Strachan Papers.
151 On the Royal Canadian Volunteers, see Benjamin Sulte, Histoire de la milice canadienne-française (Montreal: s.n., 1897), pp. 18-20; J.L. Hubert Neilson, The Royal Canadian Volunteers 1794-1802: an historical sketch (Montreal: s.n., 1895).
152 Frederica Ferguson, Montreal, to Margaret Rogers, Sophiasburg, U.C., 9 October 1795, Rogers Papers.
153 Frederica Ferguson, Montreal, to Margaret Rogers, Sophiasburg, 9 October 1795, Rogers Papers.
misery of discovering that he had formed an improper connexion with a wicked woman.” He refused to support his wife, and “threaten[ed] to desert her entirely unless she consented to live in the same house with him & his vile Companion.” As her comments to Rogers indicate, Frederica clearly assumed that her feminine duty was to reform her errant husband. Richard, for his part, appears to have simply wanted out of the marriage.

The Fergusons did reconcile by 1796, and Frederica accompanied Richard and the regiment to Quebec City. It appears they separated again sometime in 1797. In October 1798, Frederica wrote to Rogers from Kingston, informing her that she was leaving shortly for Niagara, where the regiment was next posted: “... I intend to spend the winter with Mr. Ferguson let the consequence be what it will -- ” This attempt at reconciliation was spectacularly unsuccessful. As Frederica later recalled in her petition to Maitland, since Richard’s relationship with his partner in Montreal had “been broken up through ... the removal of the Regiment to Fort George,” she “began to cherish some hopes of domestic comfort but alas they were immediately blasted for her husband debauched an orphan Girl whom she had taken out of Charity.” Richard “kept” this young woman “openly as his Mistress threatening to murder your Memorialist unless she consented to leave him.” Frederica persisted, however, and soon Richard’s conduct became so bad that he was expelled the Mess for his low treatment of Your Memorialist at which he was so much enraged that but for the interference of [another officer] ... he would have strangled her.

154 Ferguson to Maitland, Strachan Papers.
155 Frederica Ferguson, Kingston, to Margaret Rogers, Hallowell, October 1798, Rogers Papers.
156 Ferguson to Maitland, Strachan Papers.
She further explained “[t]hat his ill usage of Your Memorialist called the attention of the Col. of the Regiment” who, unable to broker a solution, “advised a separation to which your Memorialist with a bleeding heart was obliged to consent.”

Unusually in the colony, the Fergusons formally separated, by deed, in May 1799. By this agreement, Richard agreed to support Frederica as long as he remained in His Majesty’s service and not to trouble her, or anyone who took her in. With the assistance of friends and family, including her brother-in-law, Rozel Ferguson, Frederica settled in Kingston, where she remained for the next few years. The dissolution of her marriage caused a lasting instability in her living arrangements, although her difficulties appear to have been financial rather than social. On her return to Kingston, she “established a small School to [augment] her Scanty means in which she was patronised by all the principal families of the place.” However, Richard refused to pay her “allowance if she presumed to teach,” and “she was forced to give ... up” the school.

In 1803 she tried again, this time opening a millinery shop in Amherstburgh “by the aid of Some Friends,” but was forced to close it in 1806 because she was unable to collect debts owed her without Richard’s consent, “which he refused to give.”

Ferguson continued to seek paralegal redress, but was unsuccessful. She noted in her petition that since 1806, she had “resided in several places ... having maintained at all times an irreproachable character & been blessed with many Sincere Freinds wherever

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157 Ferguson to Maitland, Strachan Papers.
158 Ferguson to Maitland, Strachan Papers; see also Henderson, “Captains of the Canadian Fencibles,” paragraph 35.
159 Ferguson to Maitland, Strachan Papers.
160 Ferguson to Maitland, Strachan Papers.
161 Ferguson to Maitland, Strachan Papers.
she has sojourned.” In 1811 she wrote to Rogers, who was by then married to Aaron Greeley and living in Detroit, from Boston. In 1830 she wrote from Newmarket, and in 1841, she was nursing a sick friend. Having “no Father, Brother or protector” after her separation, she depended on the goodwill of friends for a home. This goodwill was clearly there during much of her life. Frederica maintained ties with some of the prominent families in Kingston during her residence there, and does not seem to have been ostracized from society. Her petition asked Maitland to force Richard to continue to provide for her financially.

During the first 10 or 15 years after their separation Richard seems to have been willing to acknowledge Frederica when it suited him, especially financially, but ignore her at other times. He changed his name to “George R. Ferguson” when he joined the Canadian Fencibles in 1805. In 1823, he married Clarissa Sherwood in Ogdensburg, New York, a situation which outraged Frederica. It is clear that although she still regarded them as married for life, Richard had moved on. When he died in 1842, his will made clear that all his goods were to pass to Clarissa, whom he considered his only legal wife. Frederica, by this time in her 70s, contested the right to Richard’s estate as his legal spouse, but the outcome was not clear. She died five years later, in 1847.

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162 Ferguson to Maitland, Strachan Papers.
163 Frederica Ferguson, Boston, to Margaret Greeley, Detroit, 2 April 1811 and 11 April 1811; Ferguson, Newmarket, to Greeley, Haldimand, 27 January 1830; and 2 September 1841, Rogers Papers.
164 Ferguson to Maitland, Strachan Papers. See also Henderson, “Captains of the Canadian Fencibles,” paragraphs 34 and 35.
165 Will of George R. Ferguson, Elizabethtown Twp., 27 September 1842, Court of Probate estate files, AO, RG 22-155, MS 638 reel 48.
Conclusion

The breakdown of heterosexual relationships in Upper Canada was both more frequent and more widely tolerated than has previously been assumed. In examining cases in which both formal and informal unions intersected with the colony’s courts, some of the practices and strategies Upper Canadians employed to negotiate the dissolution and reformation of sexual relationships become clear. The role of community knowledge was essential. The records of actions for seduction, breach of promise, and bigamy show that Upper Canadians generally preferred to settle disputes about intimate matters at the neighbourhood level. Cases which reached the courts were largely those in which negotiations had broken down. Nor was the courtroom itself exempt from the neighbourhood, which often frustrated the colony’s judges. Juries’ willingness to award damages in cases which did not meet the legal standards for an award illustrate the power of community knowledge, as well as the limits of acceptable behaviour for both men and women. The significance of reputation and responsibility in the context of heterosexual relationships is evident in the use of seduction, in particular, as a method to obtain child support when a relationship broke down beyond repair. Interpreting the law to suit local conditions, however, also met with resistance, especially toward the end of the period under study; definitions of reputation and responsibility were not always shared. The next chapter explores these divergences further, addressing where Upper Canadians drew the lines of morality.
Community standards in Upper Canada regarding sexual behaviour between adult men and women were in a state of flux during the first half of the nineteenth century. Intimate courtship practices like sparking, as well as informal conjugal relationships, became the subjects of contest in efforts to shape the colony as an orderly and self-governing society. Levels of tolerance for this broader spectrum of heterosexual practices ranged widely, and often according to individual situations and circumstances. This was the case even within the legal establishment. However, one should not characterize Upper Canada as a sexually permissive society. Vacillating between the poles of “repression” and “liberation” does not create an accurate reflection of the specifics of sexuality in any society, much less one like Upper Canada, in which rapidly changing discourses about gender, the body, and social order were magnified and refracted through the lens of settler colonialism. Rather, to fully understand the contours of sexuality within this colonial society, it is more useful to look closely at where Upper Canadians drew the lines of morality, where they disagreed and where they found points of consensus.

As we have seen in previous chapters, outside the colonial elite there was a wide divergence between the middle-class moral standards presented in prescriptive literature
and those practised by the general population.¹ Even where Upper Canadians acknowledged and appeared to accept these definitions of “improper” heterosexual behaviour, it is evident from private writings, testimony in the colony’s courts, and the reactions of juries to civil actions involving intimate matters that responses to “impropriety” varied substantially. Contests over acceptable heterosexual behaviour changed noticeably by the 1850s, however.² These changes were an outgrowth of several related factors.

First of all, the growth of Upper Canada’s population, largely through immigration, created a shift in definitions of appropriate gendered and sexual behaviour, tipping the scales toward the kind of middle-class morality represented in prescriptive literature. Increased immigration into the colony meant a potential disruption of familiarity within existing communities, as well as a rise in concerns about mobility and identity. It is important to note, however, that the growth of the settler population did not

¹ Julia Roberts notes that the “plethora of etiquette and behavioural guides” available in Upper Canada “constituted one of the most conservative bodies of colonial literature.” See In Mixed Company: Taverns and Public Life in Upper Canada (Vancouver: UBC Press, 2009), p. 144.
in itself eliminate social regulation based on face-to-face dealings. The preference for kin- and community-based migration patterns, notable among settlers from the British Isles and African-Americans, reinforced and may even have facilitated the possibility of similar kinds of neighbourhood regulation.\(^3\)

The character of migrants was also of significance. Genteel middle-class Britons brought their more entrenched acceptance of bourgeois moral standards with them; because of the colonial setting, these values were thrown into relief by their experiences of displacement. Marital practices which were not in fact uncommon at “home” appeared quaint or even primitive, “American” or degenerate in Upper Canada. Moreover, as in Britain and other colonies of settlement, middle-class moral superiority was linked to battles for political ascendancy, and to demands for greater representation among new middle-class immigrants who bumped up against the elites already present, a phenomenon impossible to disconnect from social practices.\(^4\)

Also connected to increased immigration and the attendant shifts in culture was the rise of the liberal state, and, concomitantly, a greater demand for political representation and a growing belief that the state could and should regulate intimate

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matters such as marriage. The 1831 decision to bring all religious solemnizations under the colony’s legal umbrella facilitated this view. Rather than emphasizing distinctions among denominations, effectively separating church and state for non-Anglicans, the law governing marriage in Upper Canada after 1831 redefined categories to distinguish those whose unions were formally approved by any church from those whose conjugal relationships were not. By broadening the category of state-sanctioned marriage, those who chose not to marry formally and thus went unrecognized increasingly became a minority.

Finally, as we will see in this chapter’s discussion of two scandalous episodes of community regulation, the role of the neighbourhood in policing sexual conduct was itself contested between the 1820s and the end of the 1840s. The interconnected forces of changing discourses regarding appropriate gendered behaviour and the growth of the regulatory state combined to reshape not just acceptable expressions of sexuality in the colony, but acceptable expressions of community approval or disapproval. This chapter, then, addresses another set of voices on community standards and forms of community regulation in Upper Canada, focusing on scandal. First, I discuss some of the markers by which Upper Canadians determined acceptable or unacceptable sexual behaviour, and the role of slander and the power of speech in revealing some of these boundaries. I then consider when speech spilled over into action, examining community activity intended to police or punish sexual activity, and what it reveals not only about where Upper Canadians drew the lines of morality in terms of sexual behaviour, but also, increasingly, their ability to determine acceptable behaviour based on interpersonal relationships.
Contest and Consensus: Unacceptable Practices

Many aspects of appropriate sexual behaviour in Upper Canada were contested. However, there were points of consensus. Certain acts or behaviours met with resistance from the state, churches, and much of the population, while others seemed to excite little anxiety unless other factors were involved. Although an extramarital pregnancy might create talk in the neighbourhood, or condemnation from some members of the community, community censure came in degrees.\(^5\) William Bell recorded a clash in 1827 with Mr. Matheson and Captain McMillan, who “in consequence of my declining to baptise their illegitimate children privately, were endeavouring to raise discontent in my congregation, and to get the discontented to join them in a petition for a kirk minister.”\(^6\) The actions of Bell’s parishioners suggest that although they tried to avoid publicly acknowledging their illegitimate children, they nevertheless accepted a certain amount of responsibility for them.

It is difficult to imagine, however, that the residents of Perth were unaware that Matheson and McMillan had fathered children with women to whom they were not married. Upper Canadians of all classes frequently gossiped about their neighbours; they were well aware that any fixation on respectability masked a good deal of unsanctioned

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\(^5\) Anna Clark suggests that “unmarried motherhood” might also be characterized as a “twilight moment”; rather than toleration or acceptance of extramarital sexuality, she argues, the continuing presence of women who bore children out of wedlock in some communities indicates that they may have been “regarded as unfortunates who experienced a momentary lapse, who were shamed but forgiven” (“Twilight Moments,” Journal of the History of Sexuality, Vol. 14 Nos. 1/2 (January/April 2005), p. 157). While I acknowledge that the place of unmarried mothers in Upper Canada may in some cases or communities have shaded into twilight, I nevertheless argue that there is sufficient evidence to support the use of the word “toleration” to describe many incidences of extramarital pregnancy well into the 1840s.

sexual activity. As Lynne Marks has shown, the records of the evangelical churches’
disciplinary processes, like the testimony in civil and criminal trials, reveal that Upper
Canadians were knowledgeable about the activities of their neighbours, and habitually
exchanged that information with one another. Among Methodists, Baptists, and
Presbyterians, gossip and rumour could lead to disciplinary action against those who had
contravened the boundaries of good Christian behaviour. Marks argues that the
“churches were willing to define as sinful, and thus proscribe, a much broader range of
sexual and leisure activities than the state sought to regulate through the legal system.”
Gossip was most often the source of information about sexual activity; in a society
largely governed by oral communication, rumours were usually considered to have some
basis in fact. However, the churches also attempted to carefully police their
congregations’ speech in order to prevent false accusations, and disciplined those who
were deemed to have transgressed.

Neither was the power of speech curtailed by the boundaries of neighbourhood or
geography. Information exchanged through social networks at the neighbourhood level

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7 Lynne Marks, “No Double Standard? Leisure, Sex, and Sin in Upper Canadian Church
Discipline Records, 1800-1860,” in Kathryn McPherson, Cecilia Morgan, and Nancy M.
Forestell, eds., Gendered Pasts: Historical Essays in Femininity and Masculinity in
Canada (Don Mills: Oxford University Press, 1999), p. 49.
8 Lynne Marks, “Railing, Tattling, and General Rumour: Gossip, Gender, and Church
Regulation in Upper Canada,” Canadian Historical Review, Vol. 81 No. 3 (September
2000), pp. 393, 388, and throughout. See also her “Christian Harmony: Family,
Neighbours, and Community in Upper Canadian Church Discipline Records,” in Franca
Iacovetta and Wendy Mitchinson, eds., On the Case: Explorations in Social History
(Toronto: University of Toronto Press, 1998), pp. 109-128. For church discipline among
the colony’s Quakers, see Robynne Rogers Healey, From Quaker to Upper Canadian:
Faith and Community among Yonge Street Friends, 1801-1850 (Montreal and Kingston:
McGill-Queen’s University Press, 2006), chapters 3 and 5. On gossip and the law, see
Willeen Keough, The Slender Thread: Irish Women on the Southern Avalon, 1750-1860

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could easily pass to those outside the colony through the conduits of friendship, kinship, and imperial service, all of which were intertwined.\(^9\) Upper Canada’s colonial identity was likewise “constructed under the constantly imagined gaze of the metropole,”\(^10\) but with an important added dimension: the cultural and physical proximity of the United States. The border created additional possibilities for social and information networks, political, cultural, and religious forms, and the language which was used to debate the values and characteristics of Upper Canadian society.

*Slander and Unacceptable Practices*

Upper Canadians also attempted to control the circulation of information about their activities through the civil courts. The vast majority of suits for slander in Upper Canada involved accusations of theft of property: ‘you stole my … and I can prove it,’ or ‘you are a d__d thief.’ Many slander suits also resulted from persistent allegations about perjury, generally within the context of civil suits involving broken contracts, and a few from rumours that a person had committed crimes in the “old country.”\(^11\) In one unusual case, James Manley sued Matthew Corry for spreading the rumour that Manley “had

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burnt Knox's barn because one of ye Girls wd not marry him.” In comparatively few instances did Upper Canadians turn to the courts to seek redress for accusations of sexual misconduct. Civil cases did result, however, in response to words which were particularly damaging to the parties’ reputation. A consideration of the use of slander suits involving sexual behaviour reveals much about where Upper Canadians drew the lines of morality, what rumours were considered especially damaging, and how the politics of reputation functioned in the courtroom and in the neighbourhood.

Some of the slander suits which involved sexuality responded to rumours about “improper” heterosexual relationships. Few of these, however, addressed sexual relationships between men and women who were not married to each other, provided they were not ineligible to be married to one another. To be worthy of trial at the district assizes, additional factors were needed to catapult neighborhood gossip to the level of legally punishable slander. In Upper Canada, the factors most commonly invoked were incest, infanticide, and adultery. In 1830, for example, Patrick Nowlan sued John Fallon for spreading the rumour that Fallon had seen him “between his Sisters Thighs as ever he was with his wife,” and threatening to “come into Perth & publish [it] in ye Perth papers.” Rumours about sibling incest also prompted Isabella Crossett of Bayham to sue George Best for slander in 1843. Best had previously quarrelled with Crossett’s

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12 James Manley v. Matthew N. Corry (Slander), 17 April 1847, Niagara District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-9-1.
13 Again, some of these cases were no doubt handled by church discipline. See Marks, “Railing, Tattling, and General Rumour,” and “No Double Standard?”; Healey, From Quaker to Upper Canadian.

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brother Peter, and had sued him for slander over a rumour involving Best’s improper actions with a heifer. Peter and Best had engaged in more than one public “altercation” on the road during the past year, during which Best responded to Peter’s “twitting” him about the heifer that “Peter had done as bad as that – that he had had a young one by [Isabella] and she had killed it, & he could prove it.”

Jacob Jones had also heard Best taunting Peter about “being too great with his Sister”; when Jones “asked what reason he had to make such reports of” Isabella, Best told him “she had 2 Children by Peter & had murdered them or made away with them.” Jones told him “it did not become a man to make such charges,” but Best felt “it made no odds – he could prove it.” Jones also claimed that Best had tried to prevent him from testifying in the suit, going so far as to offer him “a nice present of a horse to keep out of ye way.”

_Crossett v. Best_ illustrates the engagement of the community in exchanges of information about illicit sexuality, as well as the lines of allegiance among neighbours and kin. Witnesses for the defence attacked the character of the prosecution’s witnesses, but not of the plaintiff, Isabella Crossett. According to John Norton, Best claimed that his story, which in this version involved only one child and excluded the allegation of murder, was only what Isabella’s “own folks said … he sd. it was a strange story for her own folks to tell.” Norton further observed that “it would be a hard case to believe [Peter

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15 Testimony of John Crossett, Isabella Crossett v. Geo. Best (Slander), 20 May 1843, London District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-7-3. Christiana Robertson, who was unmarried, sued John Miller and his wife in 1847 over Mrs. Miller’s repeated taunts to go and “pick her murdered bairns out of the fire.” The alleged infanticides had occurred in Scotland. Robertson and Mrs. Miller were sisters. See Macaulay Benchbooks, Colborne District Assizes, 29 October 1847, AO, RG 22-390-1-9-3.

Crossett[on his Oath.”\textsuperscript{17} Martha Rice likewise impugned Jones’s character, stating she had “heard him say he wd as leif take a false Oath as a true one.”\textsuperscript{18} James Malcolm, “from Personal Knowledge and hearsay,” also declared the Crossetts untrustworthy, and described Jones as a man who “gets drunk – quarrelsome.”\textsuperscript{19} The jury, however, found Best’s words slanderous and thus “actionable,” and awarded Isabella Crossett £25 in damages.

Rumours about infanticide and incest, often combined with adultery, were also considered actionable by married couples. A conflict between Jacob Staley and David Ingalls in 1835 brought the pair into the courts. In discussing the payment of board for Staley’s wife while he was in prison, Ingalls had announced that she “was not his Wife but his whore,” and “that he had Murdered his Child between him and his wife.”\textsuperscript{20} Allegations of incest, albeit in a statutory sense, flared in 1843 when married couple Henry and Maranda Nugent sued William Ward the younger. The Nugents claimed Ward had been telling people that he had seen Maranda Nugent “in the Act of Adultery” with her husband’s brother Samuel.\textsuperscript{21} They further objected that Ward had publicly called Maranda a “whore” or “common prostitute,” and that his mother had added that

\textsuperscript{17} Testimony of John Norton, Crossett v. Best, 20 May 1843, Macaulay Benchbooks, RG 22-390-1-7-3.
\textsuperscript{18} Testimony of Martha Rice, Crossett v. Best, 20 May 1843, Macaulay Benchbooks, RG 22-390-1-7-3.
\textsuperscript{20} Jacob Staley v. David Ingalls, 25 August 1835, Gore District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-3-3.
\textsuperscript{21} Henry B. Nugent & Maranda his wife v. William Ward ye younger (Slander), 26 May 1843, Western District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-7-3, testimony of James Frazer and Joseph Stafford. The case was dismissed on insufficient evidence.
Maranda “kept a bad house,” for which Henry “had beaten” her.⁴² William and Ann Smith of Toronto sued their neighbour John Collins after a quarrel which culminated in them shouting at each other from their front doors in Toronto. Collins allegedly called Ann Smith a “d__d whore” and her eldest son a “Bastard,” and claimed that William had “caught her in bed with another man,” one of their boarders.⁴³

As these cases show, slander suits often resulted from protracted disagreements or even feuds between neighbours. George Best’s verbal attack on Isabella and Peter Crossett originated in an ongoing quarrel. While of course it is possible that there was some element of truth to his story, it was clearly intended maliciously. Likewise, the encounter between the Nowlan siblings which John Fallon claimed to have witnessed had taken place four years earlier; that the rumour was fresh suggests Fallon’s combative speech had as much to do with a dispute between the Nowlan and Fallon families at a recent bee as any genuine concern about the nature of the Nowlans’ family relationships.⁴⁴ Nevertheless, “improper” sexual behaviour was considered solid grounds on which to attack an enemy and attempt to injure his or her reputation in the neighbourhood. Both men and women were vulnerable to this kind of injury; as we have seen in suits for seduction and breach of promise, “reputation” in Upper Canada, as in

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⁴³ Wm. Smith & Ann his wife v. John Collins (Slander), 23 October 1845, Home District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-8-3; testimony of Mary Hill, John Ellis, and William Hill. See also the 1850 suits for libel brought by John and Mary Brass against John Lawrie and John Martindale, in objection to a song depicting them as lewd. Sullivan Benchbooks, Niagara District Assizes, 9 April 1850, AO, RG 22-390-5-43-5.
other societies during this period, cannot be narrowly equated to the sexual double standard. Although sexual continence certainly formed a stronger component of a good character for Upper Canadian women, it was not absent in assessments of men, nor was it the only factor in assessing character for either sex.  

A person who had a reputation for lying, and whose word on oath could not be believed, or one who had a reputation for drunkenness, could damage his or her character as much or more than a man or even a woman who was known to be sexually promiscuous.

Chastity and a reputation for truthfulness could work at cross-purposes, as John Quin’s 1850 suit against Bernard Hacket shows. Quin, a smith, had formerly lived at the Hackets’, and one of Bernard Hacket’s sons was his apprentice. Henry Argue, who had known the parties about twenty years, in Ireland and in Norfolk County, testified that during a visit to Hacket’s tailor shop the previous November he had inquired about a falling out between them, and was met with a barrage of invective:

[Hacket] spoke disparagingly of him – He called a thief … villain & a perjurer -- & cursed scoundrel – a curse of God scoundrel – Mrs. Hacket told me to go out -- spoke similar words – Dft seemed enraged.

25 My interpretation differs slightly from that of Morgan and Marks. Morgan argues that while “reputation” for men “might encompass a wide range of characteristics … women’s ‘good names’ were reducible – indeed – essentialized – to one element: chastity” (Public Men and Virtuous Women, p. 174). Marks, while acknowledging the evangelical churches’ efforts to subject men and women to the same standards of chastity at least in theory, argues that women were more subject to discipline for sexual ‘misconduct’ within their churches because secular society embraced the double standard (“No Double Standard?”).

26 See below, Chapter Six.

Argue continued, “I did not understand what perjurer meant till Mrs. H. came in & sd. he had stolen her daughter.”28 There was some confusion amongst the witnesses about what precisely had happened, but they agreed that “There was a serious dispute about [Quin] courting ye daughter.”29 Hacket contended that Quin had “abducted” his daughter, going so far as to lodge a complaint with a magistrate; the accusations of perjury resulted from Quin’s having sworn “before Squire Coventon that he had connexion with ye daughter.”30 Magistrate Simpson McCall, who had also attempted to adjudicate the dispute, said Quin had said nothing to him “about his having laid with ye girl,” but he clearly suspected that they did have a sexual relationship: “after ye disturba

Quin’s suit against Hacket appears to have riled James Buchanan Macaulay, who heard the case. Macaulay’s instructions to the jury, and his comments on the verdict in Hacket’s favour, indicate that he found Quin’s suit somewhat distasteful. To find in Quin’s favour, he stated, the jury must be “satisfied ye dft accused him of being a thief –

28 Quin v. Hacket, 2 May 1850, Macaulay Benchbooks, RG 22-390-1-10-5.
29 Testimony of John Gordon, Quin v. Hacket, 2 May 1850, Macaulay Benchbooks, RG 22-390-1-10-5.
30 Testimony of Simpson McCall, Quin v. Hacket, 2 May 1850, Macaulay Benchbooks, RG 22-390-1-10-5. See also testimony of John Gordon.
31 Testimony of Simpson McCall, Quin v. Hacket, 2 May 1850, Macaulay Benchbooks, RG 22-390-1-10-5.
or perjured – in a civil sense – meaning to impute such offences to him & without explanations that shewed it was not Larceny or Perjury.”

The accusation of having “stolen” Miss Hacket’s virtue, he implied, was not worthy of a suit to repair the damage to Quin’s reputation. Although Macaulay may have intended to effectively dismiss the significance of sexual reputation for a man, it is equally possible that he saw Quin’s actions in publicizing the nature of his relationship with Miss Hacket as unmanly and reprehensible. The jury found for Hacket, “Very properly,” Macaulay noted.

Persistent rumours about a sexual relationship also led Mary Convey to sue her former employer, Mr. Britten, for slander. Although questions about Convey’s character were causing her social and professional difficulty in Belleville, this case also complicates a straightforward reading of the function of “morality” and “character.” According to a number of the witnesses in this case, Britten had told them that Convey had a sexual relationship with Andrew Brady, who also lived at the Brittens’: “Andrew has been riding her, that’s sure.” Britten’s story affected Convey’s relationships with several people in the community. Catherine Misette, with whom Convey “had been in the habit of visiting” for some time, “discontinued” the friendship after hearing the story. Convey approached Misette offering assistance after Misette’s child died, “a time … when [Misette] would otherwise have employed her in sewing,” but Misette refused to

33 Quin v. Hacket, 2 May 1850, Macaulay Benchbooks, RG 22-390-1-10-5.
34 Quin v. Hacket, 2 May 1850, Macaulay Benchbooks, RG 22-390-1-10-5.
35 Convey v. Britten, 6 May 1842, Victoria District Assizes, Hagerman Benchbooks, AO, RG 22-390-3-38-3. At various points in Hagerman’s benchbook notes the plaintiff’s name was also recorded as “Connolly” or, in one case, “Ryan.” I have rendered it as “Convey” because this is the first and most frequent usage.
36 Testimony of Hugh Scallan [also “Scanlan”], Convey v. Britten, 6 May 1842, Hagerman Benchbooks, RG 22-390-3-38-3. See also testimony of Catherine Misette and Daniel Kerwin.
hire Convey or “take her into her house until her Character was cleared up.”\(^{37}\) Hugh Scanlan testified that he had “liked the girl well enough to marry her before this report but he would not do so afterwards”; however, he “continued to keep company with her afterwards not chusing to drop her acquaintance at once.”\(^{38}\) Britten’s allegations also caused Convey difficulty with another witness, Mrs. Ryan, who “refused to admit the Plff into her house or into her pew at Church” after hearing the story.\(^{39}\)

At first glance, *Convey v. Britten* appears to confirm the contention that Upper Canadians harshly punished women who were known to engage in nonmarital sex. Britten’s allegation that Mary Convey “had suffered improper liberties to be taken with her” cost her friendships and gainful employment. Convey’s action for redress,\(^{40}\) however, again suggests a variable definition of “improper” behaviour. She appears to have admitted to at least one of the witnesses, the Revd. Mr. Brennan, that she had in fact come “down stairs and from the hay loft” at the time Britten stated, which Brennan characterized as “imprudent.” This suggests that the slanderous speech was the implication of intercourse with Brady, leaving open the possibility of a physical

\(^{37}\) Testimony of Catherine Misette [also “Mogette”], Convey v. Britten, 6 May 1842, Hagerman Benchbooks, RG 22-390-3-38-3.

\(^{38}\) Testimony of Hugh Scanlan, Convey v. Britten, 6 May 1842, Hagerman Benchbooks, RG 22-390-3-38-3.

\(^{39}\) Testimony of Mrs. Ryan, Convey v. Britten, 6 May 1842, Hagerman Benchbooks, RG 22-390-3-38-3.

relationship. Brennan had become involved when Convey “complained of her situation” to him. He attempted “to reconcile the parties, and proposed to Britten that he should retract the charge that any improper intercourse had taken place between [Convey] and Brady.” Brennan felt that his effort to settle the matter was scuttled by John O’Carroll, however, who advised Convey not to accept Britten’s written apology. In any case, Brennan refused to give the document to Convey until Britten paid the costs and she withdrew the suit, and later “destroyed the papers” when the suit went to trial.

Convey’s difficulty in finding work among the women of the community, with whom she had formerly had good relations, initially suggests a reaction akin to Anne Murray Powell’s 1817 condemnation and expulsion of her unmarried and pregnant servant. Catherine Misette, however, testified that she had “heard reports” of Convey’s “misconduct … some time but paid little attention to them” before Britten visited her with the story. Misette, “believing Britten’s story,” subsequently rejected Convey. Stephen O’Brien, however, who along with Mrs. Ryan was also present that night, stated that “he thinks as well of [Convey] now as before.” Misette and Ryan may have adhered to feminine ideals which made it their responsibility to enforce social censure on

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44 Testimony of Catherine Misette, Convey v. Britten, Hagerman Benchbooks, RG 22-390-3-38-3.
a woman who appeared to be having a sexual relationship with no intention of marriage. Their response may have had something to do with Andrew Brady himself as well. However, both the support of Revd. Brennan and Misette’s comment that she would not house Convey “until she had cleared up her Character” suggest that doing so was in fact a possibility.

The vehemence with which Britten broadcasted his conviction that Brady was “riding” Convey is also indicative that there may have been more to the story than a “fall” followed by consequences. The testimony of Scanlan and Misette in particular suggests that Britten felt somehow personally affronted by the alleged relationship between Convey and Brady. According to Scanlan, he referred to her as a “blackguard,” and repeatedly said that he wished he had “kicked her out of the house.” Britten regarded Convey as bearing “an excellent Character” before he saw her going to Brady’s room, and the suggestion that they were sexually involved appears to have disturbed him greatly. Britten followed up his story with the declaration that “he would not now put confidence in his own sister”: “who can depend on a woman after Mary?” he asked. Britten’s palpable sense of betrayal suggests that his individual relationship with Mary Convey, rather than any abstract transgression of moral codes, may have been at the heart of this dispute.

The relative acceptance of heterosexual activity outside marriage is also confirmed by the treatment of other sexual acts which were clearly considered antisocial.

or otherwise deviant. Sexual assaults on female children, although they do not appear in slander cases, were treated seriously by the colony’s courts. Same-sex activity, by comparison, is difficult to place. The history of same-sex relationships in Upper Canada remains frustratingly elusive. Sexual intimacy between women, as in other jurisdictions, was unimagined in law and obscured by discourse about femininity and female sexuality. Male same-sex activity is slightly more visible, making a fleeting appearance in the extant records of Upper Canada’s courts. The judges’ benchbooks record few cases which involved homosexuality, however, and these were all prosecutions for assault. They provide a limited indication of conditions under which male same-sex

48 Benchbook accounts of prosecutions for sexual assault of female children under the age of consent suggest that such assaults were taken seriously, by parents and by the courts. Of 17 cases for rape or attempted rape during the 1830s and 1840s which clearly involved children under the age of 12, seven men were found guilty, and another five convicted of a lesser charge. Four were found not guilty. Cases involving women aged 12 to 14 varied sharply; in some, like R v. George Isser, 21 April 1843, Robinson Benchbooks, the complainant was considered a “child”; in others, like R. v. John O’Boyle, 22 April 1849, Robinson Benchbooks, she was treated as an adult.


50 I have found no records of slander suits which referenced same-sex activity between 1827 and the end of 1850. In all of the extant trials, the alleged assault took place in a male homosocial work environment. In Queen v. John Brewster (21 May 1840, Home District Assizes, Hagerman Benchbooks, AO, RG 22-390-3-38-1), Brewster, a soldier in the 32nd Regiment stationed in Toronto, was accused and convicted of “Assault with intent to commit an unnatural crime” on one of the men in his barracks. See also Queen v. Richard Yeo, 29 May 1841, Home District Assizes, Robinson Benchbooks, AO, RG 22-390-2-23-5, and brief discussion in Gary Kinsman, *The Regulation of Desire: Homo and Hetero Sexualities*, 2nd edition, revised (Montreal: Black Rose Books, 1996), pp. 99-100. In Queen v. Lewis (17 October 1844, Midland District Assizes, Hagerman Benchbooks, AO, RG 22-390-3-39-4), 14-year-old Andrew Kelly, a new emigrant and cook’s mate aboard the steamboat Phoenix, alleged that Lewis, with whom he “slept in
activity could become public and prosecutable; however, the extant cases show a marked reluctance on the part of witnesses and the courts to engage with the details of the case. Moreover, since these were prosecutions for assault, they provide only a fragmentary indication of the place of male homosexual activity within the culture as a whole. Given the more complex picture of heterosexual behaviour which emerges from this study, I suspect that a fuller consideration of homosexual activity in Upper Canada may also indicate a greater range of experiences and attitudes than we have previously assumed to exist. However, that awaits another study.  

Rumours about “unnatural” sexual practices like bestiality also prompted a few Upper Canadians to use the courts as a public forum to address their disputes.  

Bestiality was clearly considered a serious transgression, “ye highest crime,” as one  

the same berth,” had “used [him] as a woman.” Although Kelly said he had complained to other crew members, those called to testify denied it, emphasizing the prisoner’s “good character” and the close quarters aboard the ship. Lewis was found not guilty. Kinsman also discusses the prosecution for sodomy of Lance Corporal Samuel Moore and Private Patrick Kelly, of the 89th Regiment of Foot in the Eastern District in 1842 (The Regulation of Desire, p. 100).  


witness described it. Witnesses to sexual assaults on animals were obliged by law to report them, and conviction carried a capital penalty. Accusations of bestiality as they appeared in the courts most often involved young men, in their teens or early twenties, and horses or cows which belonged to a neighbour; as with other slander suits, the allegations of sexual transgression often grew out of an ongoing poisonous relationship between the parties. William Macdonald of Rainham, for example, had asked magistrate Edward Evans to sign out an arrest warrant for Jacob Fight more than two years before Fight v. Macdonald came to trial in 1834. Macdonald “frequently … [used] ill language of” Fight, and “spoke vindictively” of him as a “horse cuckold”; he alleged that Fight “had fucked Henry Miller’s mare & he would prove it,” and, moreover, that he had also been “caught with his Fathers mare.” Although the parties had previously settled out of court, Macdonald continued to ridicule Fight, complaining that he “had to pay that damn scoundrel” for committing the offense. Peter Johnson also brought a slander suit in an effort to counter the allegation of George Hedge and his 13-year-old son, Joshua, that they had seen Johnson in the woods attempting to have connection with one of their

53 Testimony of Murdoch Ross, Queen v. Wm. Doneghan, 23 September 1842, Eastern District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-7-2.
55 Quotations from the testimony of Edward Evans; see also Mw. H. Harris, Wm. Henry Langford, and Jno. Evans, Fight v. Macdonald, 2 September 1834, Macaulay Benchbooks, RG 22-390-1-2-10.
56 Quotation from testimony of Wm. Henry Langford; see also Jno Evans.
heifers. Johnson was to be tried for sodomy over the same incident later in the assize, so the stakes were particularly high.

Reputation and character were of great significance in prosecutions for bestiality. These prosecutions are worth briefly considering in tandem with slander cases, as the evidence on which they rested came from gossip and community observation. Both prosecution and defence offered evidence about the character of the accused and his accuser(s), as well as the prior relationships between them. The record of testimony in bestiality cases again confirms the importance of knowledge in the neighbourhood about people’s sexual doings, and particularly the role of the community in examining and policing sexual behaviour which was considered inappropriate. Although witnesses occasionally expressed reluctance, whether out of politeness or embarrassment, to

58 Queen v. Peter Johnson, 21 October 1848, Prince Edward District Assizes, Robinson Benchbooks, AO, RG 22-390-2-27-5. Both decisions were in Johnson’s favour.
59 For a suggestive discussion of the “quasi-legal aspects of gossip networks” in Newfoundland during this period, see Keough, The Slender Thread, chapter 5, 55.
60 In addition to the cases discussed above, see King v. James Blakely, 24 September 1834, Newcastle District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-3-1; Queen v. Wm. Doneghan, 23 September 1842, Eastern District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-7-2; Queen v. John Pickard, 25 September 1843, Brock District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-7-4; Queen v. Joseph Badgley, 12 October 1843, Niagara District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-7-5; Rex v. Ephraim Singer, 6 September 1832, Niagara District Assizes, Robinson Benchbooks, AO, RG 22-390-2-21-3; Queen v. Antoine Russell, 23 April 1847, Johnstown District Assizes, Robinson Benchbooks, AO, RG 22-390-2-27-2;
61 For discussion of this in the American context, see John M. Murrin, “‘Things Fearful to Name’: Bestiality in Colonial America,” Pennsylvania History, 65 (1998), pp. 8-43; Richard Godbeer, Sexual Revolution in Early America (Baltimore: Johns Hopkins University Press, 2002).
explicitly name the activity itself or repeat the terms others had used to describe it,\textsuperscript{62} it is clear that bestiality was openly discussed across lines of gender and age. Several of the witnesses in the Peter Johnson case, for example, were women; the testimony of Laura Brooks, who worked for the Hedges, was central to both Johnson’s slander suit and the prosecution against him.\textsuperscript{63} Prosecutions often relied on the testimony of boys in their early teens, who had witnessed daytime incidents in the course of their work tending livestock.\textsuperscript{64} A man found in suspicious circumstances was likely to be physically examined by a group of men for evidence, as William Wintimute was when David Boyle discovered him asleep in his barn in 1841. On several previous occasions Boyle had been alerted by a barking dog to an intruder in his barn, and on investigation discovered an unusual pile of wood behind one of his mares; however, it was not until the night he called John Bully, George Cheever, and Francis Bullen to come with him that he found Wintimute in the barn, “his trousers down,” and his clothes covered in bay hair. The men “examined the mare” as well and concluded there “was no doubt, prisr. had connection with her.”\textsuperscript{65}

Bestiality, like rape, was a hanging offence. In contrast with rape, though, the courts did not allow for bestiality charges to be lowered to ensure punishment by

\textsuperscript{62} See, for example, testimony of Edward Evans, Fight v. Macdonald, 2 September 1834, Macaulay Benchbooks, RG 22-390-1-2-10.
\textsuperscript{64} See Queen v. Johnston; also Fight v. Macdonald (Dettrick Hoover).
imprisonment or fines, rather than death. Although the legal response to bestiality indicates that Upper Canadians generally viewed such activity as highly problematic, as with other instances of sexual transgression, clemency could occasionally be requested and granted. Even where such pardons rested on a protestation of innocence, this response indicates a certain level of flexibility in notions of character and respectability; although these were intertwined, they did not always function in predictable ways.

*Words and Deeds: Community Regulation and Forms of Action*

The currency of information had considerable value, at the neighbourhood level and beyond. The transmissibility of information through imperial networks, and the indivisibility of public and private made for ramifications in communities of origin throughout the Anglo-American world and in circles of power. As Anna Clark observes in her study of sexual scandal and British politics during roughly the same period, although political sex scandals are often perceived as “trivial and prurient,” “contaminating the public world of politics with private lives,” in fact,

> Scandals force us to question the division between the public and the private. This distinction, of course, is one of the foundations of modern political thought, but as feminists have long demonstrated,

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66 See, for example, the case of Daniel Ellsworth (1828), discussed in David Murray, *Colonial Justice: Justice, Morality, and Crime in the Niagara District, 1791-1849* (Toronto: Osgoode Society for Canadian Legal History/University of Toronto Press, 2002), pp. 47-48. From Murray’s notes 95 through 97, p. 235, see UC Sundries, vol. 96, pp. 53447-8, petition of Niagara inhabitants to L-G Colborne, 18 September 1829; *Ibid.*, vol. 98, pp. 54960, 55031, 55067, Woodruff to Z. Mudge, with enclosed petitions, 29 January 1830; *Niagara Gleaner*, 26 September 1829. For a discussion of clemency in regard to rape, see Connor, “‘The Law Should Be Her Protector’.”
it is a shaky one. Sex scandals could become symbols for larger political concerns.\(^{67}\)

In Upper Canada, sex scandals indeed have a great deal to tell us about the political conflicts of the 1820s and 30s, and the contests over colonial identities in this period.

A number of factors made “morality” a charged issue during the 1820s and 1830s. Scandals relating to forced labour and slavery in the Cape and New South Wales contributed to a politicization of “morality” throughout the British empire. In Upper Canada, political debates about loyalty combined with increased immigration and competition for migrants and imperial investment. The 1837-8 rebellions and the subsequent visit by Lord Durham also prompted a questioning of the value of the Canadas and other British North American colonies to the imperial metropole.\(^{68}\) As we have seen in Chapter Three, appropriate expressions of sexuality were bound up with articulations of loyalty and morality in the colony. William Lyon Mackenzie regularly employed allegations of sexual immorality in his calls for reform in the colony.\(^{69}\) Similarly, insults based on a dissolute sexuality figured in Mackenzie’s attacks on the


\(^{69}\) *Colonial Advocate*, 19 August 1824.
“Family Compact,” such as those published in the “Patrick Swift” commentaries.70 Tories too made ample usage of the conceit that they alone could protect the upstanding British subjects of the colony against an encroaching moral disorder. For others, however, the definition of community standards was more laissez-faire and dictated to a greater extent by personal relationships.

What prompted individuals and communities to move beyond talk to actively attempt to discipline their neighbours’ behaviour? In some cases, individuals ran afoul of the law when they attempted to settle disputes over heterosexual relationships. Organized expressions of discontent were also common in the colony. Charivari and tarring and feathering were the most prominent forms of organized community response when talk failed to enforce certain boundaries. Examining these practices tells us about what Upper Canadians were willing to censure, but also about informal community regulation itself and its contested place in the colony. The charivari prosecutions from the 1840s are an indication that intimate matters were increasingly passing into the realm of formal regulation by the state, rather than by communities or church courts.71

The charivari, a social ritual which had its roots in early modern Europe, has generally been understood as a response to a marriage which was perceived to cross social boundaries in some way, often a remarriage or some kind of mismatch in age or

71 See Marks, “No Double Standard?”, p. 62.
status. Susanna Moodie’s fictionalized dialogue with “Mrs. O__” in *Roughing It in the Bush* regarding the charivari of “Old Satan” and “his fourth wife …, a young gal of sixteen,” describes the practice as

> a custom that the Canadians got from the French, in the Lower Province, and a queer custom it is. When an old man marries a young wife, or an old woman a young husband, or two old people, who ought to be thinking of their graves, enter for the second or third time into the holy estate of wedlock, as the priest calls it, all the idle young fellows in the neighbourhood meet together to charivari them.\(^{72}\)

Charivaris also turned a public spotlight, simultaneously celebratory and shaming, on sexual desire. In a typical charivari, in Europe or the colonies, a group of men and sometimes also women gathered on the wedding night and went to the couple’s home, or the place where they were staying. The members of the charivari party were often disguised, their faces blackened or masked, and “fantastically dressed,” their clothes on backwards, or men “dressed in women’s clothes.”\(^{73}\) With a variety of instruments, from drums and tin horns to pots and pans and sometimes guns, they set up a “discordant music” outside the home until the couple appeared. They then demanded money or alcohol to drink the health of the couple, especially the bride. If treats were given, the party usually went on its way, but violence could often result if the bridegroom refused to play his role in the ritual. Reluctant participants might find their windows shot out, or doors broken down; sometimes they were physically assaulted. In Upper Canada, these

\(^{72}\) Susanna Moodie, *Roughing It in the Bush; or, Life in Canada* [1853], ed. Elizabeth Thompson (Ottawa: The Tecumseh Press, 1997), pp. 151-152.

\(^{73}\) For one such description, see Queen v. James Johnson & others (Riot), 26 May 1843, Dalhousie District Assizes, Hagerman Benchbooks, AO, RG 22-390-3-39-1, quotation from the testimony of Simon Fraser.
assaults usually took the form of being ridden on a rail, in which the victim was tied to a sharpened plank and paraded around while being beaten.

Charivari and its variants did not always follow a new marriage, however. In parts of England, the “skimmington” or “rough music,” practices similar in form, were used to shame couples whose marriages were seen to invert the gender order. Clark notes that “community action” meant to punish desertion or adultery was also intended to reinforce the gender order by displaying symbols of its “reversal.” Rough music could also be used to protest other violations of social norms within marriage, such as undue violence. Skimmington rituals were also used to shame women who cuckolded or beat their husbands, and the husbands who accepted such “unmanly” punishment. Rough music may also have been turned against abusive husbands, although the extent to which this occurred has been debated by scholars. Ultimately, Hammerton cautions that charivaris and rough music “provide a frail and uncertain vehicle for reading changes in attitudes to gender relations and domestic conflict. … they need to be read alongside

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other evidence of popular attitudes to gender relations and changes in private behaviour.”

Scholars have disagreed as to the extent and the power of the charivari as an instrument of social control in nineteenth-century British North America. Bryan Palmer traced charivari and its variants throughout the North American colonies in the eighteenth and nineteenth centuries, noting its cultural origins beyond early modern France; nevertheless, the strong associations between French-speaking Lower Canada and charivari continue to persist. As a social practice, charivari was more prominent in Lower Canada, or at least more easily categorized as a “folk” practice by late eighteenth- and early nineteenth-century Anglophone travellers. Allan Greer has argued, however, that Lower Canadian charivarises were “not part of any larger pattern of collective regulation of marriage and domestic life through public demonstrations.” Instead, charivarises before 1837’s expressions of political discontent usually followed a wedding which was considered a “mismatch,” often a significant age difference between the partners or a prior marriage, and infrequently resulted in violence or permanent markings of the targets. In Upper Canada, however, the practice figures quite differently.

79 Greer, *The Patriots and the People*, pp. 72-80. Greer concludes that charivarises in Lower Canada were above all else a ritual exorcism of “Catholic misgivings about remarriage”; since marriage was a sacrament and thus should be approached in a state of spiritual purity, unions which became the focus of a charivari were generally those about which priests and the community registered discomfort about the couple’s motivations, rather than a method to police sexual behaviour.
Upper Canadian travellers and authors of emigrant literature tended to discuss charivari in the Lower Canadian context, or to associate it, as Moodie’s “Mrs. O___” did, with “the French,” despite ample evidence of similar practices in the British Isles and in contiguous areas of the United States, such as the Hudson Valley.\(^\text{80}\) The resulting emphasis on carnivalesque ritual and a particular set of triggers or social meanings, in conjunction with source-based limitations, has subsequently clouded understandings of the operation and meaning of charivaris in Upper Canada.\(^\text{81}\) As a closer examination of charivaris during the colonial period suggests, rituals and regulatory practices have as much to tell us about the community’s investment in the formation of conjugal unions as about where Upper Canadians drew the lines of morality. More than anything else, they reveal the multiple fissures within communities and between communities and the nascent colonial state over what constituted appropriate sexual and social behaviour.

*Tar and Feathers*

The related tradition of tarring and feathering also deserves some attention. The history of tar-and-feathers as a punishment stretches back to the medieval era, although “its precise origin is uncertain.”\(^\text{82}\) Hilary Moss has described it as “a quintessentially

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American form of ritualized violence, but, as Benjamin Irvin demonstrates, like colonial American society, the practice had its roots in Europe; incidents can be found throughout “the folk culture of the seventeenth- and eighteenth-century transatlantic rim,” from the British Isles to the Caribbean. In Irvin’s view, tar-and-feathers was likely introduced to the “mainland American colonies” through the culture of sailors. Tarring and feathering was strongly associated with the Revolutionary era, during which the practice was used to mark those perceived as traitors for their allegiance to the British Crown. As Moss observes, “colonists – including free blacks – had seized upon the practice of tarring and feathering as a means of asserting their incipient identity as Americans.” Although incidents of tarring and feathering “declined” during the first half of the nineteenth century, “it still occasionally emerged … largely as a means of defining a community’s moral boundaries.” The “primary purpose,” as Irvin notes, “was to shame the victim by holding him up to the derision of the crowd.”

Unlike charivaris, which could be explained as pranks, or celebrations gone awry, tarring and feathering was never presented as an amusement. Tar-and-feathers attacks,

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89 In his discussion of law enforcement in the Western District, R. Alan Douglas attributes tar-and-feathers assaults like the 1831 attack on Penuel K. Stevens to the abuse of alcohol, implying that they were prankish rather than traceable to conflict among neighbours, but this interpretation is not well supported either by the extant cases I have consulted or by studies of alcohol use in the colony. See Douglas, Uppermost Canada:
whether or not they were paired with other disciplinary practices like riding the rail, thus constitute a more easily interpreted expression of censure against a person who had crossed a social boundary. Despite its strong associations with political disputes in British North America around the time of the American Revolution, tar-and-feathers was rarely used to publicly brand political traitors in Upper Canada, although these resonances did factor into one prominent case, the 1826 attack on reform politician George Rolph. Assaults involving tar and feathers were not by any means frequent, but sufficient evidence survives to indicate that the practice did form part of the repertoire of community action in the colony through the end of the 1840s. Upper Canadians generally used tarring and feathering to punish behaviour which was considered antisocial in some regard, and their tar-and-feathers attacks tended to combine elements of charivari and rough music, as Irvin suggests for the American colonies in the Revolutionary era. The element of parading the victim was far less significant in Upper Canada, although most victims were dragged from their beds and the attack committed in front of their homes or on the street.

Although they do not appear to have been constructed as responses to any specific set of transgressions, a number of tar-and-feathers attacks contained sexual elements, or represented efforts to discipline people whose relationships or living arrangements were seen as suspect. Although he was unable to find records of similar activity in the Niagara

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District, David Murray refers to an incident which occurred in Colborne in 1845, in which neighbours tarred and feathered Gilbert, a house painter, for “grossly abusing his wife.”

The 1844 tarring and feathering of Samuel Monger seems to have been prompted by something similar. When Monger’s wife, Elizabeth, “jumped out of the window” to try to help her husband, his attackers asked her why she protested “when it was all done for your sake.”

In Maidston, Benjamin Stanbury was ridden on a rail and tarred and feathered following an incident in which he was alleged to have “maliciously gelded” some of George Stevens’s horses.

The 1828 attack on Ann Tyrell also seems to have been prompted by community disapproval. Tyrell lodged a complaint against William Hardy, who was charged and tried for a misdemeanor regarding the incident in August 1830; John Beverly Robinson, who tried the case, felt the evidence was insufficient, and Hardy was found not guilty.

According to Tyrell, however, on the night of 22 July 1828, when she was living at Mt. Pleasant, several men broke into her house. She “went to the window and holloed murder,” but they “seized” her and “threw her on the floor,” warning that “they wd. kill her if she made any noise.” They next “stuck tar on her body,” then “ran a stick up her

91 Murray, Colonial Justice, p. 159.
93 Stanbury charged some of his assailants with assault, and others were brought to trial on riot charges. Stanbury himself faced criminal charges for “maliciously killing and gelding the property of George Stevens,” but was found not guilty. See Stanbury v. Struthers, Hart, and Martindale, 12 September 1848; Queen v. Richard Crozier and 11 others, and Queen v. Benjamin Stanbury, 13 September 1848, Western District Assizes, Robinson Benchbooks, AO, RG 22-390-2-27-5.
body.” They also assaulted a nine-year-old girl, possibly Tyrell’s daughter, who was asleep in the bed when they broke in. Although it is unclear what specifically prompted this incident, Henry Petit, who was present that night, testified that the attack was planned in advance. The questions which Ann Tyrell was asked on cross-examination suggest, however, that her marital status may have been a factor. Tyrell claimed that she had previously been married, to Tyrell, but that they were not living together when the “injury” occurred; if Petit’s testimony is any indication of information in the neighbourhood, she “had no husband” as far as people knew. Ann Tyrell also stated on cross-examination that she had since married again in March 1829, but “can’t say who married her to her 2d. husband,” suggesting that her second marriage may have been informal or bigamous.

Why Ann Tyrrell was singled out for such an attack is unclear, although the fact that she lived alone with the little girl likely led her assailants to regard her as a target. As I will discuss further in Chapter Six, women who headed households without other adults present were at an increased risk of attempted rape from men of their acquaintance. Tyrell may have been anticipating, or possibly covering up, a rape; her testimony does include the observation that the men who broke into her house had “their shirts out of their trousers.” That they beat her, tarred her, and “ran a stick up her body,” however,

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96 Testimony of Henry Petit, R. v. Hardy, 26 August 1830, RG 22-390-2-20-4. Petit stated that seven people, including himself, “started from one McAllister’s” that night, and that Hardy and two others “separated from the rest.” He claimed that Brown, one of the other men, “sd. they were going to Mrs. Tyrrells for the purpose described” [presumably the assault as presented in Ann Tyrrell’s testimony].
suggests that they sought to convey an elevated level of contempt and inflict additional humiliation.

*The Gore District “Outrages” and Community Discipline*

Tarring and feathering in Upper Canada, however, is almost synonymous with the case of George Rolph. This episode, part of the Gore District “outrages” of the late 1820s, combined political battle and sexual scandal. Rolph, an English emigrant who had been appointed Gore District’s clerk of the peace in 1816, sided with those who favoured reform in Upper Canada. He was also the brother of physician, lawyer, and politician John Rolph, who became leader of the reformers in 1826. On the night of 2-3 June 1826, a party of men, many of them members of the local Tory elite, gathered at the home of Dr. James Hamilton, where they “disfigured” their faces by blacking them with cork. They then went, with tar and feathers, to Rolph’s, where they pulled him from his bed and “shamefully abused” him, leaving him “daubed over with tar & feathers,” his “night gown torn to pieces” and scattered in the field near the house. The attack was ostensibly prompted by the presence of a married woman, known as Mrs. Evans, at

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Rolph’s home. Although her husband was present in the colony, Mrs. Evans had come from England with Rolph, who was himself unmarried, and was living in his home; the two were rumoured to be involved in an adulterous relationship.\(^\text{101}\)

Rolph’s efforts to prosecute his attackers were frustrated by a number of factors, not least the allegiance between the local magistracy and the men who organized the attack. However, Rolph was able to bring a civil suit for damages against three of his attackers, Colonel Titus G. Simons, Dr. James Hamilton, and Alexander Robertson, which was heard by Macaulay at the Gore Assize in August 1827.\(^\text{102}\) All three of the men Rolph accused had ties to the Tory elite and several more men, many of them “prominent Hamilton Tories,” were involved. In fact, four of the witnesses called, among them Allan Napier MacNab, refused to give evidence, as they might incriminate themselves.\(^\text{103}\) During the trial, both sides cast themselves as defenders of “morality” in the colony. While John Rolph, W.W. Baldwin, and Robert Baldwin for the plaintiff characterized the attackers as lawless “banditti,” taking advantage of the opportunity to smear an upstanding man who had only extended hospitality to a woman in distress, Solicitor-General Henry John Boulton, who represented the defendants, claimed their actions were not outrageous but necessary, even laudatory:

> In this country, where there is no other punishment for so gross a breach of public morals and public decency, than public opinion


and public rebuke, the men who stood forward to vindicate the rights of an outraged community, deserved praise, rather than punishment.  

The defendants, in removing Rolph “from a polluted bed, into the cool air, where a lecture on morality and decency was read to him,” had merely acted in accordance with the community’s wishes, in keeping with the ideals of a patriotic, Christian manliness.

The tarring and feathering of George Rolph can be seen as an intersection of politics and fears of sexual disorder. The allegations about Rolph’s irregular relationship with a married woman were in no way separable from his political opponents’ objections to his actions as clerk of the peace. Moreover, his assailants’ decision to punish him using a ritualized form of community justice illustrates some of the contests surrounding marriage and its implications in the politics of the period. Curiously, however, none of the commentators on this incident and its political ramifications within the colony has given much consideration to the adulterous relationship which was alleged to be taking place between George Rolph and Mrs. Evans. Some have accepted a version of it at face value, while others have denied the allegations altogether. All have characterized it as a convenient pretext, however manufactured, to

104 *Gore Gazette*, 25 August 1827. See also W.W. Baldwin to Attorney General, 31 May 1828, William Warren Baldwin Papers, B103, Metropolitan Toronto Reference Library. 
105 *Gore Gazette*, 25 August 1827. On this model of manliness and its appeal to Upper Canadian Tories, see Morgan, *Public Men and Virtuous Women*. 
107 Weaver, *Crimes, Constables, and Courts*, p. 39, proceeds as though the reports were correct, although he states that Rolph too was married; Phelan dismisses them entirely, primarily based on Baldwin’s comments (“The Tar and Feather Case,” pp. 17-18). Romney views it as instrumental; his discussion focuses primarily on the way Macaulay
attack a political rival. The split between Tories and Reformers and the ongoing debates about judicial corruption are instead given primacy. These issues are highly significant to the case, but the implications of sexual impropriety and, in particular, the interference in another man’s dominion over his wife are also highly germane to the content of the colony’s political contests in the 1820s.

Assaulting Rolph in this way was a clear attempt to undermine his authority and subject him to a humiliating form of community censure.\(^{108}\) That the “community” was in this case an elite one does not undermine this conclusion; Rolph’s political office made this community a significant one in which he moved. However, the humiliation inherent in the attack does not preclude the possibility that at least some of his assailants may well have been outraged by the possibility of his relationship with Mrs. Evans, and the open breakdown of the Evans marriage. Initially, the defence attempted to blame the attack on Mrs. Evans’s husband, who had come to the colony after his wife did, was resident at an inn in Dundas at the time of the attack. Jane Stoddard, Rolph’s housekeeper, was asked in some detail on cross examination about where exactly she and Mrs. Evans slept. She denied hearing Rolph say “oh Mr. Evans – Mr. Evans spare my life and you may take your child away.”\(^{109}\) Macaulay interceded at this point to prevent further questioning about the relationship between Rolph and Mrs. Evans. He noted: “I ruled that the alleged Adultery of [Mrs. Evans] can not be given in [evidence] in Mitigation – there being no

\(^{108}\) Romney explicitly characterizes the incident as “a charivari,” although he disentangles Rolph’s alleged sexual misconduct from both the form and function of the attack. See Mr. Attorney, pp. 114-115.

connection in the circumstances – I said if Evans was the ring leader – it might be a different thing.”

Macaulay directed the jury that Robertson, against whom little evidence was presented, must be acquitted. In dealing with Simons and Hamilton, he noted, “I charged the jury ... that what they knew as matter of Public notoriety [i.e. the relationship between Rolph and Mrs. Evans] I could not withdraw from them and that they understood [to be] the alleged cause of the Trespass.” However, Macaulay drew the same line he had earlier in excluding information about the Rolph-Evans relationship: since Mr. Evans, who in Macaulay’s view had the moral and legal right to seek redress for his wife’s adultery, was not involved, he thought the situation “no legal matter to mitigate damages – not being a provocation naturally or reasonably inducing the Act – nor conduct out of which it might arise.” Simons and Hamilton were both declared guilty, and assessed damages of £40.

The effort to blame Evans could be construed as simply strategic on the part of the defence, but for the fact that Evans himself was paid a visit by men affiliated with the tar-and-feathers party that same evening. John Ferris testified that on the night of the “trespass,” he was at the inn when “a man named Evans was taken out of ye room where [Ferris] slept.” Ferris, “alarmed,” at first “thought they came to Murder him for his money.” When he “jumped up & asked what was the matter -- one of them sd. this damd. rascal [Evans] had sold his Wife and that they were going to Punish him.” This story was corroborated by another witness, Jesse Cooper, who stated according to the

*Gore Gazette* that Evans “was carried into the street, where the party gave him some ‘wholesome advice,’” presumably on good husbandly conduct.\(^{113}\)

The concurrent attack on Mr. Evans as a wife-seller, and the delivery of “wholesome advice” about his conduct as a husband, suggests that this episode cannot be dismissed as mere political expediency. The Tory stalwarts who were involved in this attack had a far greater investment in bourgeois values, and in the efforts (which were ongoing at the time of the attack) to block the extension of the right of Methodists and other to solemnize marriages. Among many of their cohorts, this possibility produced real fear of societal disorder, as the debates over marriage law illustrate. Wife-selling, a form of popular divorce in England, allowed plebeian couples without access to legal forms of separation to publicly and symbolically end their union. Couples often pre-arranged the sales, which took place at Smithfield cattle-market or at an inn, so that the wife would be “purchased” by her lover or her new intended partner; thereafter, the new union would be regarded as legitimate.\(^{114}\) The action against Evans as a wife-seller indicates that notions about appropriate husbandly behaviour, and especially husbandly authority, were at stake in the tarring and feathering of George Rolph. Political

\(^{113}\) *Gore Gazette*, 25 August 1827.

\(^{114}\) Some historians have interpreted this practice as beneficial to both men and women, allowing for an amicable and socially-sanctioned parting when legal means were unavailable; others have called attention to the bald nature of women’s role as movable property in such exchanges. For a reading of wife-selling as agency, see Thompson, *Customs in Common*, pp. 413, 441; Gillis, *For Better, For Worse*, pp. 211-219. On wife-selling as an ethnographic practice, see Samuel Pyeatt Menefee, *Wives For Sale: An Ethnographic Study of Popular Divorce* (Oxford: Basil Blackwell, 1981). For a critique of Thompson’s reading of wife-selling, see Clark, *The Struggle for the Breeches*, pp. 85-87.
convenience is in this sense inseparable from outrage among some members of the community.

The Rolph case provides one example of the way that community action, sexual scandal, and colonial politics intertwined. The allegation of “impropriety” which undergirded the attack was perceived as a serious threat by some members of the community, and seemingly, as less significant by others. Public response to the Rolph case was mixed. While it did not trigger overwhelming cries for vengeance, necessarily, neither did this episode hurt Rolph’s credibility as an elected official. Much as the identity of the attackers was publicly known, so were the rumours about the nature of his relationship with Mrs. Evans. Had she remained in the community and in his home, it is possible that sympathy for Rolph may have diminished, but we also need to include the possibility that many in the community simply did not regard it as their business, or were waiting for a cue from Mr. Evans to do so. By contrast, the handling of charivari cases toward the end of the 1840s suggests that attitudes toward community involvement underwent considerable change between this scandalous episode and the mid-nineteenth century.

Charivaris

The frequency with which charivaris occurred in Upper Canada is unclear. As Palmer notes, the “evidence defies quantification.”¹¹⁵ Surviving accounts of charivaris, as in England, are fragmentary, which may account for some of Ward’s dismissal: on the surface, charivaris in Upper Canada appear uncommon. Nevertheless, evidence of their

existence can be found ‘hiding’ in plain sight in the records of the colony’s courts. Charivaris contained significant potential for violence: the gathered crowd and the combination of alcohol, guns, and possibly “moral” outrage created a potentially explosive situation. Although there is no way to assess what percentage of occurrences they represent, charivaris did sometimes result in charges of riot, assault, and/or trespass.\(^{116}\) In some of these cases, the targets sought recompense for damage to person or property; in others, the targets’ attempt to defend themselves or otherwise retaliate against the charivari party led to their being tried for illegal activity.\(^{117}\) In a few cases, a charivari resulted in serious criminal charges, such as rape and manslaughter.\(^{118}\)

Some evidence does suggest that rough music rituals were occasionally employed to discipline abusive husbands, as in the tarring and feathering of Mr. Gilbert of Colborne.\(^{119}\) By contrast, there is little evidence of skimmington or rough music being directed at women who abused their husbands, although organized violence was sometimes directed at women who were perceived to have transgressed marital norms in other ways. Some of these episodes were clearly charivaris, although others were not. Such violence was largely episodic in nature; numerous other cases, as I have argued in Chapter Four, suggest that Upper Canadian society was considerably more

\(^{116}\) Murray, in his study of the Niagara region, observes that “riot and assault” charges “could occasionally disguise” a charivari, which he categorizes as “a moral order offence” (Colonial Justice, p. 147). Charges of riot, assault, and/or trespass were the legally appropriate instruments, however, and the records of assault and other charges, as he demonstrates elsewhere, show that violence could be triggered by a variety of factors.

\(^{117}\) For legal actions against members of the charivari party, see Queen v. Watson et al; Queen v. Geo: James Lee, Jonathan Putnam, and Joseph Betts, 19 September 1843, Talbot District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-7-4;

\(^{118}\) See Queen v. Buck and Hooey (Rape), to be discussed below, and Queen v. Henry & Spurrill (Manslaughter).

\(^{119}\) Murray, Colonial Justice, p. 159.
tolerant of a broader spectrum of heterosexual behaviour and marital forms, for women as well as men, than we have previously understood. Community regulation could also cut against such toleration, however, for reasons which are not always clear. The assault on Ann Tyrell, for example, seems to have been prompted by the absence of her husband. Several of Elizabeth Sly’s neighbours were charged with arson in 1835 after they set fire to her house and said they would “have thrown her in also.” It was noted in court that Sly “had no husband,” and some claimed “[i]t was a house resorted to by bad people.”

In some cases, women’s independence and control of economic resources could occasion violent retaliation from male neighbours, especially when it was seen to infringe on husbands’ “rights.” After Mary McDonald refused to see him, Alexander MacDonald was able to rally the support of his cousins and others to storm the home of his in-laws, demanding the return of “his lawful wife.” Phoebe Lathrop of Haldimand also experienced repeated difficulty with her neighbours following her separation from Charles Eddy. Lathrop was in the courts in 1829 and 1831 over an attempt by several men, among them John Rogers, Elijah Purdy, and Elijah Buck, to evict her from the house and land she argued were rightfully hers. The group had come to Lathrop’s on the afternoon of 10 August 1829 to take possession of the house, which was then to be

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120 King v. Peter Cornelius, Margaret Maria Patterson, Moses Hinckley & Catherine Hinckley, 22 August 1835, Gore District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-3-3. A cursory reading of arson cases suggests this was an atypical response to allegations about a disorderly house, and not all witnesses agreed that Sly kept a “bad house.” All except Catherine Hinckley were found guilty.

121 McDonald v. MacDonald et al, 15 October 1840, Eastern District Assizes, AO, Macaulay Benchbooks, RG 22-390-1-5-4. See also discussion in Chapter Four.

122 Rex v. Elijah Purdy and others (Riot), 5 September 1829, Newcastle District Assizes, Robinson Benchbooks, AO, RG 22-390-2-20-1, and King v. Elijah Buck & Jno. Rogers (Traverse – Riot), October 1831, Macaulay Benchbooks, AO, RG 22-390-1-2-1. In both cases, the name Eddy is also rendered “Eddie,” “Edy,” and “Eady.”
handed over to William Solomon.\textsuperscript{123} When Lathrop and her daughter Almeda Eddy refused to leave, the men broke in, injuring Lathrop’s arm and damaging the house and her furniture.\textsuperscript{124} In the 1831 trial, defence witnesses endeavoured to show “there was no unnecessary violence”; however, one member of the party did admit that he “Knew Mrs. L. was in peaceable possn.” of the land, and that “she would not give it up quietly.”\textsuperscript{125} The eviction was clearly tied to Lathrop’s marital status. She “was married to her first husband Lathrop lawfully,” and insisted on using his name although “aftwds. she was in June married to Chas. Eddie.”; one witness said he had “heard her called Eady but heard her deny the name.”\textsuperscript{126} Lathrop testified that she “forbid” the men from coming to her property, but they had disregarded her: “[Lathrop] told Buck not to come, that ye Land was hers – Buck sd. he wd. take her to her husband to live with him.”\textsuperscript{127} Charles Eddy had been present at the eviction, but “did not come in” the house.\textsuperscript{128} The charivari directed at Martha Simons, an innkeeper in the Midland District, appears to have been prompted by a separation as well, although in this case rumours of adultery were also at play.\textsuperscript{129} Simons did not know her husband’s whereabouts; “he had left town the Octr. before” a group of men, including James and David Gerow, Samuel

\textsuperscript{123} Testimony of Peter Maybee (R. v. Purdy & others) and Jacob Vanalstine (King v. Buck & Rogers).
\textsuperscript{124} Testimony of Phoebe Lathrop (both cases). Almeda Eddy’s two children were also present.
\textsuperscript{125} Testimony of Jacob Vanalstine, King v. Buck & Rogers.
\textsuperscript{126} Testimony of Phoebe Lathrop and Peter Maybee, R. v. Purdy.
\textsuperscript{127} Testimony of Phoebe Lathrop, King v. Buck & Rogers.
\textsuperscript{128} Testimony of Phoebe Lathrop, R v. Purdy.
\textsuperscript{129} Queen v. James Gerow, David Gerow, Samuel Lawrence, and William Harrington (Riot), 6 October 1848, Midland District Assizes, Robinson Benchbooks, AO, RG 22-390-2-27-5. Similar circumstances were at play in Queen v. Bobier (Assault, Misdemeanor), Robinson Benchbooks, RG 22-390-2-28-4.
Lawrence, and William Harrington, approached Simons’s house about 10 p.m. on 24 May 1848 “and began playing drums bugle & fife.” A few hours later, “they began to fire guns,” then, shouting, they attempted to breach the door and break the windows: “they sd. if [Simons] did not come out of the house – [Simons] & a man there, they wd. drag them out.” As far as Simons was concerned, she “had no quarrel with any of them.”

She had, however, “heard the young men were coming,” as had William Snyder, who was at Simons’ “on business” that night. Although one witness, William Johnson, thought “if they had got something to drink, there ed. have been no more of it,” the questions Simons was asked during cross-examination suggest that the “Chiravari” had something to do with Simons’ relationship with one of her lodgers, John Lusk. “Lusk was living with [Simons] the summer before,” and was present that night; some of the witnesses for the defence tried to attribute the broken windows to Lusk having fired shots at the charivari party from within the house. The implication was that Simons’s adulterous relationship with Lusk, conducted in the house “built” and “owned” by her husband, prompted the Gerows and company to organize a charivari.

The majority of charivaris, however, were tied to a wedding ceremony. The “tumultuous assemblage” which followed the wedding of William Taylor in August 1842 went on for three nights, at one point drawing in more than 100 people; it caused such a disturbance that justice of the peace Simon Fraser later described it as “calculated to

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disturb the peace and quiet of the Town, and to frighten horses that might be used in driving about the streets." In some parts of the colony, along the northeastern shore of Lake Ontario in particular, charivaris seem to have been relatively commonplace following a wedding. Daniel Johnson claimed that he and other men who went to charivari James Parks’s daughter and her new husband “agreed to go as it was a customary thing.” Joseph Rogers agreed, noting, “Cheravars are common.” Many such incidents likely did not result in formal charges of assault or riot being lodged against the participants, and not all of those which did necessarily reflect community dissention, over the marriage or over the charivari itself. The trial of William Henry and Robert Spurrill in May 1850 provides one such example. Henry and Spurrill were charged with manslaughter in the shooting death of Thomas Lawrie, one of the “boys” present at a charivari directed at James Thorndyke, a recently married man. When Thorndyke refused to pay the men five dollars, according to his brother William’s testimony, the men “commenced firing” their pistols and muskets. The men “kept firing and shouting – and beating pans & kettles.” According to William Thorndyke, Lawrie was shot accidentally; moreover, he claimed that neither he nor his brother was “alarmed” by the charivari, stating on cross-examination, “We did not regard it as more

than a joke. One of the boys said it was only for fun – that they did not want money.”

John Walker admitted that some of his brothers were “with ye party” that charivaried his sister Caroline and her husband in Wyndham in August 1842, and his “wife helped make a noise the first night” as well. It was the second night, when the bridegroom ran out of whiskey, that George Lee “swore he wd break ye door if he did not get more liquor.”

The extent to which charivaris punished “mismatched” couples is inconclusive from court records.

Charivaris could trigger community reaction about correct behaviour in ways beyond making a correct match, however, as the trial of James Parks of Camden for shooting at and wounding Ira Wren illustrates. The conflict, which followed the charivari of Parks’s daughter and her new husband in August 1850, reveals more about masculinity and acceptable levels of community intervention than it does about the couple themselves. On the night of the wedding, Parks had asked the party to leave, saying the couple was not there and he had no alcohol with which to treat them; they did, and went to another home in search of the bride and groom. At a bee the next day, Ira Wren, who had not been present at the charivari, mocked the men who had been among the party. Daniel Johnson stated that Wren had called them “cowards,” deriding them because Parks had “scared them” off. Dennis Donahue said Wren was one of a number of men “at the bee … [who] were laughing about our being frightened by Parks the night before,” but Wren in particular seemed to have taken offense at Parks’ reaction: “Wren … said

138 Queen v. Lee, Putnam, and Betts, 19 September 1843, Macaulay Benchbooks, RG 22-390-1-7-4.
we should have been treated decent.”¹³⁹ Although Johnson insisted that Parks had called to the party and invited them up for grog before the shooting, several witnesses, including Dennis Donahue, did not believe that an invitation had been issued, and suspected that Wren intended to make trouble. David Rogers claimed that Wren came back and taunted the men who stayed at the gate, rather than approach Parks’s house, again calling them “cowards” and insisting that “Parks has called us down to help to drink some grog.”¹⁴⁰ When Parks fired his gun, Wren sustained severe injuries to his face and the right side of his body.

The reaction of the participants in this incident reveals some of the tensions surrounding charivaris in Upper Canada. For some, like Daniel Johnson and, if the testimony about him is to be believed, Ira Wren, charivaris, like bees, served as a mechanism to reinforce community standards and social hierarchies. Wren, Johnson, and some of the participants believed that Parks was obliged to “treat” his neighbours. In the words of the fictional “Mrs. O____,” “A charivari would seldom be attended with bad consequences if people would take it as a joke, and join in the spree.”¹⁴¹ When Parks refused to participate, whether because he himself did not drink or for other reasons relating to his place in the community, some of his neighbours evidently decided that he should be given another chance to adhere to the rituals of the charivari. Others, however, were clearly uncomfortable with the decision to approach Parks’s home again, whether or not they believed that he had invited them. James Rogers stated that he did not anticipate trouble from the party’s second visit, as “they were invited and there was but few of

them,” but expressed discomfort with the entire process: “I was reluctant to go to the house because I was against Cheravaris.”

Nor were the lines clearly drawn. Many of the witnesses in this case were relatives, a number of them brothers, and they often disagreed as to what precisely had taken place. Daniel Martin, who testified for the defence, admitted on cross-examination that both his brother “and the brother of the man who married Parks daughter were at the Chrawari on the 20th.”

Charivaris may have been regarded as fun by some of the participants, but even in cases which did not culminate in members of the party attacking the couple, presence of the mob and the threat of violence could terrify the targets, and any family members who might be in the house with them. Perhaps fittingly, the jury was unable to reach a verdict in the Parks case. Sullivan noted: “The jury being out all night and refusing to agree, I discharged them.”

142 Queen v. Parks, 28 October 1850, Sullivan Benchbooks, RG 22-390-5-44-3. Anti-charivari viewpoints were expressed by witnesses in other cases as well. See Queen v. Watson et al, 7 April 1845, Robinson Benchbooks, RG 22-390-2-26-1 (David Prosser).

143 Queen v. Parks, 28 October 1850, Sullivan Benchbooks, RG 22-390-5-44-3.


A charivari of a newly married couple did not always signify community disapproval of the union; in some areas of the colony, charivaris appear to have followed weddings almost as a matter of routine, a celebratory but also menacing reminder of the neighbourhood’s role in regulating sexual behaviour. In a few notable cases, however, discomfort or even outrage over a marriage deemed inappropriate could be directed into a charivari. In 1841, the issue of “mixed-race” marriage between black men and white women prompted two outbreaks of violence in the form of a charivari.

“Lynching in Canada”: The Charivari at Cobourg

Marriages between black men and non-black women in Upper Canada were, to scholars’ best estimates, not uncommon. Michael Wayne’s analysis of census data for a slightly later period has yielded the much-cited statistic that one in seven married black men in the colony had a white wife. Wayne suggests that this estimation is itself conservative; taking into account the demographics of the colony and the increase in migration by African-Americans from the 1830s on, he argues that the incidence of intermarriage between blacks and others in the colony may in fact have been considerably higher than one in seven.146 Outbreaks of organized violence against

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mixed-race couples, then, may not be indicative of widespread condemnation of intermarriage. Rather, they more likely reflect the politics of race, in combination with gender and sexuality, in particular regions of the colony.

One such incident occurred in St. Catharines in October of 1841. James Ferinson, a black man and a private in the 67th Regiment, was killed on a Saturday night when he crossed paths with a crowd who had gathered at Stinson’s Inn in St. Catharines to charivari a “Black man who had married a white woman.” Ferinson, who was merely looking to buy a quart of whiskey, was set upon by members of the charivari party and suffered a head wound; he was found dead the next morning. As Julia Roberts points out in her discussion of this case, the behaviour of the crowd at Stinson’s can be read as an instance of the assertion of whiteness through exclusion and violence: “Such explosions

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147 Anecdotal evidence from the colony’s courts suggests that interracial relationships did not always create scandal in Upper Canada. However, scandal was more likely if the white partner was female. The Ojibwa Methodist minister Kakhewaquinaby (Peter Jones) and Eliza Field, an English woman, found that news of their marriage in 1833 was widely reported and frequently condemned; an editorial in the Kingston Chronicle and Gazette described Field’s conduct in marrying an “Indian” as “improper and revolting” (21 September 1833). For further discussion of Jones and Field, see Donald B. Smith, Sacred Feathers: The Reverend Peter Jones (Kakhewaquinaby) and the Mississauga Indians (Toronto: University of Toronto Press, 1983), and Cecilia Morgan, “Creating Interracial Intimacies: British North America, Canada, and the Transatlantic World, 1830-1914,” Journal of the Canadian Historical Association, Vol. 19 No. 2 (2008), pp. 76-105, especially pp. 81-88.

148 Queen v. William Henry Byron and Farrel Foy, Murder, 27 October 1841, Niagara District Assizes, Hagerman Benchbooks, AO, RG 22-390-3-38-2. The quotation is from the testimony of Patrick Tuite. Both Byron and Foy were found not guilty. As Roberts observes, there was some confusion about the identity of the dead man, who was identified during the trial as both James Ferinson and his brother-in-law, William Bruce (In Mixed Company, note 52, p. 191). The Kingston Chronicle and Gazette identified the victim as William Brown (13 October 1841).
of group violence were defining moments in the discordant history of identity politics in early Canada.”

At least some of the crowd who chased Ferinson down the street as he went out in search of a drink were aware that he was not the prospective bridegroom, but attacked him nevertheless. Dugald James Murray, who saw Ferinson “running” past Stinson’s, “followed by a parcel of boys helling at him” and “some of the Chervari party,” remembered them “calling out there is one of the darkies going up the street.” Charles W. Holmes, who had come out of his house to complain that the party was disturbing “a sick person” at his neighbour’s house, was asked by “some of the party … if he knew Ball the black man, that it was supposed was to marry the white woman, and at the same time said they had run down one d__n Nigger, but he was not the right one.”

Disquiet about “mixed-race” marriage figured even more prominently in another charivari which had occurred in Cobourg three months previously, following the marriage of Moses and Ellen Carter. Moses, a grocer, and Ellen, a “young white

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150 A press report of the incident suggested that the report of the marriage itself was false, and that the party knew it, and, “disappointed in their expected game,” attacked the next black man they met. See *Kingston Chronicle and Gazette*, 13 October 1841.
153 The Carter charivari bears a strong resemblance to Susanna Moodie’s tale of “Tom Smith” in *Roughing It in the Bush*, p. 154, another version of which appears in Mary Tilberg’s novel *Oonagh* (Toronto: Cormorant Books, 2009; thanks to Karolyn Smardz Frost for bringing this novel to my attention). Lepp discusses the “Tom Smith” story in “Dis/Membering the Family,” pp. 58-59, and links it in note 82 to the *British Colonist*’s coverage, but does not explicitly connect the events, or address the possibility that Moodie fictionalized her account. Similarities between the circumstances of the Carter
woman” who worked as a “servant,” were married by the Revd. Mr. Bethune on 13 June 1841, a Sunday.154 “Before dark on … the day she was married,” Ellen later remembered, “an old man was going about the street beating a kettle – she anticipated from this circumstance and others that there would be an alarm that night, She had heard of a Cherivari (the meaning of which she did not understand) being about to take place.”155 The Carters’ wedding had apparently given “great offence … to the prejudices and feelings of a portion of the community,” afterwards characterized by the editor of the Cobourg Star as “a party of thoughtless … wicked young men, [who] assembled together” that night to “mark their indignation at so flagrant an insult to their prejudices by the mysteries of a Chariveri.”156 Later that night, “about 12 or 1 OClock as she supposed,” Ellen was woken from her sleep by the sound of stones breaking the glass of her bedroom window, and a crowd gathering “in the street” outside. Ellen “called her husband and told him the mob was coming and that he should go downstairs and give them whatever they wanted.” Moses went downstairs to find more windows broken. The crowd told him they wanted money, but his offer of “$4 ¼ dollars” was met with

charivari and the “Tom Smith” story have convinced me that Moodie based her tale on this event, but altered a number of details, most notably transposing the ultimate act of violence from rape of the wife to murder of the husband. This shift may have been calculated to better appeal to a middle-class British reading public; by placing the black husband as the tragic figure, Moodie may also have hoped to rally support for abolitionist causes. John Thurston suggests the rhetorical significance of Moodie’s having followed the charivari with a morality tale about the racism of Mrs. Dean, an American. Thurston, The Work of Words: The Writing of Susanna Strickland Moodie (Montreal & Kingston: McGill-Queen’s University Press, 1996), p. 144.

154 Cobourg Star, 30 June 1841, and testimony of Moses Carter, Queen v. Rowe Buck and Robert Hooey [also Hoey], Rape, 9 October 1841, Newcastle District Assizes, Hagerman Benchbooks, AO, RG 22-390-3-38-2.


156 Cobourg Star, 30 June 1841.
derision: “they said that was not enough and called out money! Money! you old Negro.” Then they asked for Ellen. This was not in itself uncommon – many charivari parties, when met by family members or husbands, demanded to see the bride in particular – but the Carters clearly anticipated trouble from this crowd. Moses initially tried to tell them that Ellen “was gone away,” but she soon went downstairs to meet the party.

Moses and Ellen Carter remembered the next series of events differently, but they, and others present, did agree on the basic pattern. Ellen, sensing danger, asked more than one of the assembled men, “will you protect me for the night?” She received no assistance. The charivari was intent on punishing her:

> The party then called out we have the whore – we have the whore – and said they would have her out – She then told her husband to give them all he had to get them away, they then swore that would not do, that the witness would have to suffer before they left.\(^\text{157}\)

The men pulled Ellen “by the hair” from her house, beat her, and attempted to put her on a rail with her husband, but the rail collapsed as she struggled. The men called to “throw her down”; Robert Brown, who was not disguised, and three other men pinned her to the ground. Rowe Buck, one of the accused, “then came forward”:

> he said will none of you have connection with a woman, or words of that import – if none of you will, I will. Upon this he violated her against her will, holding his hand upon her mouth to prevent her crying out – When she was permitted to speak she said carry me to the Lake and drown me, rather than use me so – four other persons held her while Roe Buck violated her. When Rowe Buck left her Brown, treated her in the same manner. Two other persons also violated her, but she does not know who they were. At this time she did not know where her husband was.\(^\text{158}\)

\(^{157}\) Testimony of Ellen Carter, Queen v. Buck and Hooey, 9 October 1841, Hagerman Benchbooks, RG 22-390-3-38-2.

\(^{158}\) Testimony of Ellen Carter, Queen v. Buck and Hooey, 9 October 1841, Hagerman Benchbooks, RG 22-390-3-38-2.
Moses, however, was close by, restrained by other members of the party. Henry Terry, a neighbour, said he had heard the noise, went to see what was happening and saw them carrying Ellen, in her “night cap” outside to the rail. According to Terry, “not less than 14 or 15 persons were present,” many of whom were inciting the rape: “heard some of the party call out frig her damn her frig her.”\textsuperscript{159} The attack was broken up by Robert Hooey, who seems to have been charged as “present aiding and assisting” because others escaped. Ellen was clear that although Hooey had refused to protect her and prevent the attack, she did “not consider Hooey as one of the party” who raped her; she credited him with having “released her” ten or fifteen minutes later and “help[ing] her into the house.”\textsuperscript{160}

The attack on Moses and Ellen Carter attracted considerable attention in Cobourg and beyond; unlike other charivaris discussed above, the attackers’ intent to punish Ellen in particular for making a mixed marriage was clearly understood by observers and participants. Lilly Lewis testified that he had seen a number of the men at Height’s Tavern before the charivari, and urged them to stay out of it: “Some time before the night, [Lewis] told Rowe Buck if they would let the matter alone till next night the Coloured people would Cheravari Carter themselves, Buck laughed and said yes.”\textsuperscript{161} Ellen testified that “Several people called on her on Monday [the day after] and enquired what had happened, several saying that Row Buck had said he took her out of bed from a

\textsuperscript{159} Testimony of Henry Terry, Queen v. Buck and Hooey, 9 October 1841
\textsuperscript{160} Testimony of Ellen Carter, Queen v. Buck and Hooey, 9 October 1841, Hagerman Benchbooks, RG 22-390-3-38-2.
\textsuperscript{161} Testimony of Lilly Lewis, Queen v. Buck and Hooey, 9 October 1841, Hagerman Benchbooks, RG 22-390-3-38-2.
black man.”

The repeated references to Moses Carter’s age, as well as the fact that he had been married before and had separated from his previous wife, opens the possibility that other definitions of “mismatch” were operating in this case. Ellen Carter was asked on cross-examination to account for her sexual history. In particular, she was confronted with the allegations of another witness, the barber Turner Boyd, that not only had she been sexually involved with another black man, Eli Breakenridge, but she had been seen in Breakenridge’s shop the morning of her wedding, “lying under his Counter” with him. The Attorney-General objected to Boyd being called as a witness “for the purpose of impeaching [Ellen’s] evidence … and to affect her Character,” but Hagerman allowed the examination to proceed. According to Boyd, people spoke of Ellen “as not being a woman of Chastity and that her Character is bad in this respect.”

The charivari of the Carters and the gang rape committed against Ellen roused as much indignation in Cobourg as the marriage itself had done. The Cobourg Star condemned “the portion of the community” which objected to the marriage as “yclep’d anti-abolitionists, who eschew with pious abhorrence the opinion that the freedom and protection of the British Constitution, are like the privileges of all Her Majesty’s subjects, be their distinction in colour or origin what it may.” According to the Star, “the universal abhorrence of so foul a deed, has been expressed by our whole community, and it gives us pleasure to add, it has been very properly manifested in a liberal subscription

165 Cobourg Star, 30 June 1841.
to make up the loss of property entailed upon the sufferers.” Similarly, in returning an indictment for Rowe Buck and Robert Hooey on the charge of rape, the grand jury roundly condemned the attack and charivaris themselves as threats to order and the colony’s reputation:

> Whether the Magistrates or the Constables were to blame the Grand Jury have not the means at present of ascertaining but that the charge of neglect and gros neglect too attaches to someone is certain—and they trust that the Magistrates of this District will be pleased in future to exert the authority invested in them to suppress these riots and unlawful assemblages carried on under the name of Chirevaries as the Jury are apprehensive that the lives & property of her Majestys Subjects will be no longer safe & the laws of our Country will become a Bye-word and a laughing stock —

The grand jury, like the *Cobourg Star*, called particular attention to the fact that most of the participants had been “allowed” to escape prosecution; according to the grand jury, one of the attackers was known to be “openly living in Rochester.”

However, while the *Star* apologized for its “delay” in “noticing in terms of becoming indignation and sorrow” the “most horrible and wicked outrage,” it ultimately participated in quieting published discussion of the case. The *Star*’s reluctance to discuss “the disgusting particulars” of the incident meant that at least one letter to the editor on the subject was not printed. The *British Colonist* justified “occupying the columns of a public journal, with proceedings so disgraceful” by casting the real crime as corruption in

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166 *Cobourg Star*, 30 June 1841.
167 Presentment of Grand Jury relating to riots at Cobourg, July 14, 1841, District of Newcastle, Cobourg General (Quarter) Sessions, AO, RG 22-38-3. I am grateful to Jeff McNairn for initially drawing this presentment to my attention.
168 Ibid.
169 *Cobourg Star*, 30 June 1841.
the judicial system. The magistrates’ complicity in letting the accused escape, according to the *Colonist*, ought to be “the subject of Executive enquiry”:

> When Justices of the Peace are found to be the prevaricators of the law, instead of enforcing it – when they are found to take part with criminals of the most abandoned description, instead of aiding in their conviction and punishment, it is full time that they should be made an example of.\(^{170}\)

The silencing of discussion around sexual assault in favour of narratives about judicial corruption is telling. Moreover, the grand jury’s concerns about the effects on Upper Canada’s reputation of this kind of “improper” behaviour suggest further connection between the handling of intimate matters, writ large, and international status. Press reports took care to distance themselves and the “respectable” Upper Canadian public from the perpetrators of the attacks on the Carters and on James Ferinson. Buck and his cohorts were branded “a gang of ruffians” or “enfuriate demons,” not at all representative of sentiment in Cobourg, and the men who attacked Ferinson were “of a certain class of our population, (many of whom are transient persons),” probably an implication that they were Irish.\(^{171}\) Press silence on this case also may have been premised on an unwillingness to publicly acknowledge the incidence of mixed marriage in the colony.

**Conclusion**

Charivaris in Upper Canada, at least those which entered the historical record through counter-protests of violence, can be read as expressions of community opinion. However, we cannot assume that the protests they embodied were representative of the

\(^{170}\) *British Colonist*, 21 July 1841.

\(^{171}\) *Kingston Chronicle and Gazette*, 13 October 1841.
entire community’s attitudes, as charivaris were themselves a contested practice. They were objectionable to some on class grounds, since they were associated with an unruly plebeian culture in the British Isles which was itself under attack. Like the descriptions which appeared in travellers’ accounts of the colonies, contemporary accounts from parts of the British Isles consigned such “customs” to the “repository” of folklore, rendering them distant and “quaint” as part of the middle class’s effort to distance itself from the ‘backward’ aspects of “rural and traditional culture.” These aspects of self-construction figured doubly in the white settler colonies, where distinctions of class and race were not easily read, further complicated by mobility and the uncertain effects of climate. In the context of the Canadas, as noted above, the charivari as “custom” also carried associations with the Lower Province, adding an overlay of French “peasant” culture and the carnivalesque aspects of Catholicism. The mob violence angle also bothered some members of the community; charivaris tapped into concerns about large groups of young and often single men engaged in disorderly behaviour, as well as into concurrent shifts in discourses about alcohol consumption and the correct way to mediate or police unacceptable behaviour. We also must keep in mind the individual nature of these incidents. Much as Roberts observes in her discussion of race-based violence in the colony, Upper Canada was a society in which mixed company might produce conviviality, albeit within certain hierarchies, under most circumstances; however, “public space was fickle and polymorph,” and those circumstances could easily shift

and combine or break apart to reveal instances of racially-motivated violence.\textsuperscript{173} The plurality and polyphony of Upper Canadian society can be frustrating to scholars – in many ways, it defies categorization – but this may in fact be a clue to revising our understandings of social history more widely. As Hammerton notes in his critique of the literature on rough music and domestic violence in England during this period, “the individual targets were selected very carefully, usually in terms of their known personal history within the community. Hence, while not all wife-beaters might be punished, those who had already committed aggravating acts, or who had antagonized influential neighbours, would be the most likely victims.”\textsuperscript{174} In a similar fashion, charivaris and other expressions of community opinion in Upper Canada reflect a combination of social frictions within the neighbourhood and variable understandings of where the lines of morality lay. They illustrate the depth of conflict within the community itself over what constituted appropriate sexual and social behaviour, but can also be linked to increasing efforts by the nascent liberal state to assume responsibility for the regulation of sexuality, a discursive shift which was debated amongst the Upper Canadian populace.

\textsuperscript{173} Roberts, \textit{In Mixed Company}, p. 117.
\textsuperscript{174} Hammerton, \textit{Cruelty and Companionship}, pp. 18-19.
Chapter 6

Consent, Coercion, and Conflict: Placing Sexual Assault in Upper Canada

The gang rape experienced by Ellen Carter following her 1841 wedding, intended to punish her for marrying a black man, reminds us that consensual and coercive sex occupied the same landscape.¹ This chapter considers sexual assault against women in Upper Canada within the context of heterosexual relationships, ideally and in practice. It engages with the previous historiography on rape and sexual assault in the colony, reviewing some of the overall trends as we currently understand them on the basis of evidence from the colony’s courts. It is not, however, a systematic study of rape, sexual assault, and sexual abuse. Rather, this chapter focuses on understanding sexual violence within the larger culture of heterosexuality in Upper Canada, and as part of a continuum of acceptable and unacceptable practices. As Sharon Block asserts in her study of rape in early America, “Normative practices of consensual sex are understood only when we know where the category of consensual sex ended and that of rape began.”²

Scholars of rape in other contexts have demonstrated the necessity of understanding the historically specific meanings of sexual assault. As Karen Dubinsky has argued,

¹ Queen v. Rowe Buck and Robert Hooey [also Hoey], Rape, 9 October 1841, Newcastle District Assizes, Hagerman Benchbooks, AO, RG 22-390-3-38-2; also Cobourg Star, 30 June 1841, British Colonist, 21 July 1841, and Chapter Five, above.
² Sharon Block, Rape and Sexual Power in Early America (Chapel Hill: Omohundro Institute of Early American History and Culture/University of North Carolina Press, 2006), p. 4.
Rape is … an act which contains a different meaning at different moments of history, shifting according to prevailing standards of sexual conduct, gender relations, and class and race contexts. To truly appreciate the history of sexual violence requires that we make some attempt to understand the historical meaning of assault from the perspective of those involved.³

By definition, the records of sexual assault in the colony tell us about conflict, but they also have much to say about the contours of heterosexual cultures in Upper Canada. Prosecutions for sexual assault, regardless of their success, had an impact on understandings of acceptable sexual behaviour. As Jennine Hurl-Eamon has observed for early modern London, “even the unsuccessful prosecution of sexual violence had an impact on men.”⁴ In conjunction with the sources discussed in earlier chapters, they help us map the limits of acceptable behaviour, providing some indication of how Upper Canadians understood sexual violence: what was considered prosecutable, and who was a convincing witness, complainant, or defendant, as well as the crossover between the role of sexuality and the role of violence in Upper Canadian society. This chapter also continues to address and define the politics of “reputation” in the colony; as well, it further explores the notion of sexual agency and its limits for women in particular, and the ways in which men and women negotiated the often contradictory and shifting discourses about consent over the first half of the nineteenth century.

Distinguishing between consensual and coerced sex was a fraught enterprise in Upper Canada. Although the law clearly defined rape as “the carnal knowledge of a woman, forcibly and against her will,” the practical interpretation of rape and related

charges, including assault with intent to rape or ravish and, where a sexual dimension could not be proven, common assault, was rarely simple. The efforts of historians such as Anna Clark, Dubinsky, and, more recently, Block to understand sexual violence in the past have highlighted the importance of discourses about gender to cultural conceptions of rape.\(^5\) Rape was not, as earlier historians posited, an inherent outgrowth of male sexuality or patriarchal power.\(^6\) Rather, as Sandy Ramos observes, “the recent historiography presents sexual violence as a much more ordinary occurrence and conceptualises sexuality as the setting for the expression and negotiation of uneven gender relations.”\(^7\)

Like Ramos, my analysis is primarily concerned with “the multiple discourses … that informed nineteenth-century notions of sexual violence.”\(^8\) Cultural understandings of male and female sexuality, as well as appropriate forms of heterosexual intimacy, are critical in contextualizing assault in the colony; so too is the importance of the


\(^{7}\) Ramos, “‘A Most Detestable Crime’,” p. 33.

\(^{8}\) Ramos, “‘A Most Detestable Crime’,” p. 33.

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“neighbourhood,” and community knowledge of the parties involved. Many Upper
Canadians, especially men, viewed consent and coercion as much closer on the
continuum of acceptable behaviour than did the colony’s women. Social relationships
and understandings of heterosexual intimacy are thus particularly salient in probing the
often blurred lines between coercion and consent as they were perceived within the
colony’s courts. They also influenced connections between sexual violence and marriage,
which removed the legal possibility of coerced sex being defined as rape.9

Based on court records, press reports, and petitions to the colony’s Lieutenant
Governors for clemency, Patrick J. Connor has argued that although many of the same
barriers to the criminal prosecution of rape observed in other jurisdictions were present in
Upper Canada, the colony’s legal culture was surprisingly sympathetic toward victims.10
In his view, “Upper Canadian women, backed by supportive kin and community
networks, made use of a sympathetic legal system through which they were able to
vigorously, and often successfully, assert their demands for sexual autonomy and
personal safety.”11 Connor’s research provides a useful map to the criminal prosecution
of rape in Upper Canada, identifying several important characteristics of the patterns of

11 Connor, “‘The Law Should Be Her Protector’, ” p. 104.
rape and sexual assault in the colony. His focus on criminal prosecution, however, leads him to overemphasize fairness in assessing Upper Canadian rape complainants’ engagement with the legal system. While the available records clearly show that many women believed they had the right to seek redress for acts of violence committed against them, the treatment they received was not always “sympathetic.” Moreover, while Connor correctly points to markers suggesting that the colony’s sexual culture was not as restrictive as many scholars have claimed,\textsuperscript{12} his efforts to disentangle acts of rape from other legal actions and, indeed, from less quantifiable abuses of power, are less successful. In particular, his efforts to separate “a criminal charge of rape” from civil actions “featuring scheming seducers or unfulfilled marriage proposals”\textsuperscript{13} not only minimizes some of the slippage between civil and criminal actions involving sexuality in the colony, but also undervalues the wider context of heterosexual relationships and community in defining “the forcible and often violent assault of a woman against her will.”\textsuperscript{14}

Drawing conclusions about rape in the colony on the basis of this distinction conveys only a limited perspective on the sexual culture of Upper Canada. Block’s study of rape in early America considers what Block terms “the gap between the personal coercion of sex and the public classification of rape”:

\textsuperscript{12} Connor, “‘The Law Should Be Her Protector’,” p. 120.
\textsuperscript{13} Connor, “‘The Law Should Be Her Protector’,” p. 110.
This two-tiered conceptualization (with “coerced sex” on one hand and “rape” on the other) reveals that social and economic relations underwrote sexual power, both through the act and through a community’s reaction. The identities and relationships of the participants, not the quality of a sexual interaction (which was largely unknowable to all but the participants) most easily defined rape. Matrices of gender, ethnicity, race, and socioeconomic status were inseparable from early Americans’ sexual practices and ideologies.\textsuperscript{15}

Similarly, my analysis of sexual assault cases suggests that the perception of “sympathy” within the court system arises largely from its handling of assaults committed in public, and by strangers and acquaintances rather than friends or lovers. Cases in which the parties had a prior relationship, whether or not it involved sexual intimacy, demonstrably complicated the courts’ understandings of consent,\textsuperscript{16} largely through the operations of the same “neighbourhood” relations that allowed juries to enforce \textit{de facto} child support in seduction cases, or to evince toleration for sexual activity within recognizable consensual relationships. The extant judicial records in which sexual violence made an appearance, when considered in light of discourses surrounding heterosexual relationships in the colony more widely, suggests that the act of defining rape has much to tell us about attitudes toward sexuality, both licit and illicit.

\textsuperscript{15} Block, \textit{Rape and Sexual Power}, pp. 2-3.
\textsuperscript{16} Connor’s comments indicate that he is not unaware of this point, although it is given limited space in his analysis. See “‘The Law Should Be Her Protector’,” p. 119.
Consent, Coercion, and Prior Relationships: Prosecuting Sexual Assault in Upper Canada

Nowhere is “the gap between the personal coercion of sex and the public classification of rape”\(^{17}\) more visible than in prosecutions for sexual assault in which the parties knew one another. Connor’s conclusion that Upper Canadian women were able to “rely on the colony’s criminal justice system, if not to protect them then at least to redress the wrong done to them by their attackers,” is certainly supported by cases like that of Eleanor MacMoran.\(^{18}\) In 1850, MacMoran was assaulted on a Kingston street by a stranger, Henrich Dour. MacMoran “resisted as well as [she] could” while calling for help, which arrived before Dour could “take [her] clothes up” in the form of “two orderlies” from the nearby hospital. Dour ran from the scene as the men approached. MacMoran immediately went home and alerted her husband, Corporal William MacMoran of the Artillery, and together they searched until they located Dour in Mrs. Donavan’s tavern.\(^{19}\) No attempts to malign MacMoran’s character were made during the trial, and her husband testified on her behalf. Nevertheless, Dour was convicted of the lesser charge of common assault.\(^{20}\)

MacMoran’s complaint against Dour was dealt with speedily. Her social position and that of her husband no doubt helped her establish her good character before the court. However, accounts like MacMoran’s also represent some of the more straightforward

\(^{17}\) Block, *Rape and Sexual Power*, p. 2.
\(^{18}\) Connor, “‘The Law Should Be Her Protector’,” p. 128.
\(^{19}\) Queen v. Henrich Dour, 22 October 1850, Kingston Civil and Criminal Assizes, Sullivan Benchbooks, RG 22-390-5-44-3.
\(^{20}\) Queen v. Dour, 22 October 1850, Sullivan Benchbooks, RG 22-390-5-44-5. Hiram Haynes was equally speedily convicted of the rape of Flora McRae in 1843 based only on the testimony of McRae and her husband. See Queen v. Hiram Haynes, 31 March 1843, Home District assizes, Robinson Benchbooks, RG 2-390-2-25-1.
cases to prosecute. MacMoran was one of many women in the colony who was sexually assaulted in public space, in the course of going about her daily business. As Connor notes, although sexual assault could and did occur anywhere, numerous reported rapes and attempted rapes occurred while women were walking alone, whether on rural roads, through woods, or, less commonly, on urban streets.21 Some of their assailants were men they knew; others were strangers. Even when their attackers were unknown to them, however, women frequently reported that their assailants had tried to create a point of connection prior to the attack. Often they “halloed,” asked a woman her name or where

she lived, and if she knew certain people in the area. In very few cases did a stranger, or group of strangers, suddenly appear and without preamble launch an attack.

The consistency in women’s courtroom narratives of sexual assault is indicative of both behavioural patterns and the kinds of allocution and evidence representatives of the legal system found convincing. Upper Canada lacked an organized police force, nor did it have a public prosecutor. Women who laid charges of sexual assault did so with the local magistrate, at whose discretion the deposition was passed on to the grand jury. If the grand jury returned an indictment, the case went forward to be tried at the next Assizes. No doubt many complaints did not proceed through this system to a formal trial. This early process of vetting, however, as well as the possibility of a magistrate’s assistance in framing the complaint in a way that was likely to convince a jury, may have

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22 For example, Queen v. Tisdale, 1 May 1844, Hagerman Benchbooks, RG 22-390-3-39-3; Queen v. Archibald Bell, 1 November 1836, Home District Assizes, Robinson Benchbooks, RG 22-390-2-23-1.

23 One case in which this did occur was the 1849 attack by Lewis Miles and several other men on Hannah Davey and her sister. See Queen v. Miles, 29 September 1849, Robinson Benchbooks, RG 22-390-2-28-1. On attacks by strangers in Ontario in a later period, see Dubinsky, Improper Advances, pp. 37-43; in the American colonies, see Block, Rape & Sexual Power, pp. 55-63.


canted the cases which did come to trial toward a greater likelihood of conviction.\textsuperscript{26} In any case, they reveal some of the markers by which Upper Canadians understood and defined rape.

Manly ideals in Upper Canada emphasized the protection of women.\textsuperscript{27} Occasionally, disputes among men over the treatment of a woman, including attempted rape, erupted into other forms of violence which surfaced in the colony’s courts. In October 1849, Arthur Boyle and Philip Leary became embroiled in a conflict with Edmund Harrigan outside Noble’s Tavern in Toronto over who would go home with an unnamed “girl,” likely Jane Russell. Boyle and Leary claimed they were merely trying to protect Russell after “Harrigan abused the girl & struck her.” Russell, however, said the “abuse” came from Boyle and Leary.\textsuperscript{28} In another such case, George Corbett of Bathurst

\textsuperscript{26} Connor in 2001 found that 54 percent of men charged with rape in Upper Canada were convicted; 30 percent were found guilty, and 10 percent convicted of a lesser charge. Prosecutions for attempted rape returned 60 percent convictions, with 23 percent acquitted and 18 percent guilty of common assault or another lesser charge. He contrasts this with Constance Backhouse’s description of guilty verdicts as “atypical” in Ontario during the nineteenth century (\textit{Petticoats & Prejudice: Women and Law in Nineteenth-Century Canada} (Toronto: Osogood Society/Women’s Press, 1991), p. 99). See “‘The Law Should Be Her Protector’,” pp. 108-109. It should be noted, however, that without the option of a lesser charge, this rate is not substantially different from Dubinsky’s finding of 49 percent conviction in Ontario between 1880 and 1929 (Tables 3 and 4 in the Appendix to \textit{Improper Advances}, pp. 172-173). I am reluctant to engage in a debate on the statistical rate of conviction in Upper Canada primarily because Connor’s criteria in generating these numbers is not transparent. In particular, if he included cases charged as rape in which the victim was a child, the rate of conviction will be skewed upwards.


\textsuperscript{28} Queen v. Edmund Harrigan, 20 October 1849, Home District Assizes, Sullivan Benchbooks, AO, RG 22-390-5-43-4, testimony of Arthur Boyle and Jane Russell. See also Queen v. Samuel Stone, 30 May 1838, Home District Assizes, Robinson
laid charges against Thomas Fox for “felonious assault” and stabbing. Corbett and another man had entered the house of a neighbour, Mrs. Towers, when they heard her children “screaming,” then saw Fox remove “the children from their mother’s bed & got into the bed with her.” When they tried to throw Fox out, “a scuffle ensued,” and Corbett “was struck in the neck” as he tried to take the axe away.

Upper Canadians could be easily convinced that women in the absence of adult male protection faced an increased risk of sexual assault. The attack on Ann Tyrell, discussed in Chapter Five, provides one such example. Although it was tried as a tar-and-feathers assault, Tyrell lived alone with a child, her marital status was dubious, and her testimony suggests that she experienced a sexual assault. Many of the cases which came to trial involved women who lived alone with their children, either on a permanent basis or whose husbands were known to have left the household for a time due to work or other reasons. Mary Anne Mitler had known John Robinson about a year and a half before she charged him with attempted rape in 1845; since “he used sometimes to come to her house,” he would have known that Mitler was a widow who lived alone with her children, and there was “no man living” there. Mitler awoke “between 3 & 4 O’Clock

Benchbooks, RG 22-390-2-23-4; Stone was charged with attacking Charles Leman with his bayonet after Leman tried to interfere in Stone’s quarrel with a woman.

30 Testimony of George Corbett, Queen v. Fox, 24 October 1850, Robinson Benchbooks, RG 22-390-2-28-4.
31 Testimony of George Corbett, Queen v. Fox, 24 October 1850, Robinson Benchbooks, RG 22-390-2-28-4.
33 Queen v. John Robinson, 12 September 1845, Niagara District Assizes, Robinson Benchbooks, AO, RG 22-390-2-26-4, testimony of Mary Anne Mitler and John Mitler.
AM” one night “in haying time” to find Robinson trying to enter her house. She told the court that she might have been raped “if it had not been for her children”: “they caught hold of him and pulled him off.” Maria Clue’s husband, Edward, was working in Kingston and had been “absent … 2 Months” when two men broke into her home and raped her in the presence of some of her children. Jane Gardwood’s husband was also away when Patrick Irving came to her house in Elizabethtown and asked to stay the night, saying he owed a debt to her husband. Gardwood, suspicious of his intentions, told him to leave, but allowed him to return when “he promised faithfully to behave himself.” Once back in the house, however, he “spoke improperly, he would not sit down, but walked about taking liberties, and using indecent language.” When he “attempted to force her,” Gardwood struck him. Unmarried women were also vulnerable to attacks when they were at home alone or caring for small children. When John Murray and his wife were away one day and their young servant, Harriett Brooke, remained behind to

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34 Testimony of Mary Anne Mitler, Queen v. Robinson, 12 September 1845, Robinson Benchbooks, RG 22-390-2-26-4. See also Queen v. Gallagher, 20 September 1845, Robinson Benchbooks, RG 22-390-2-26-4.
35 Testimony of Maria Clue, Queen v. Way and Way, 19 September 1839, Macaulay Benchbooks, RG 22-390-1-4-5. Clue’s 11-year-old daughter, Arabella, and another child were in bed with her the night of the rape.
look after their baby, she was raped by John McPhee, a teacher who boarded with the Murrays. 37

As Brooke’s case illustrates, a number of women charged unrelated men with whom they lived and worked, including hired men and boarders. Julia Ann Wright was raped by Harvey Newell, who “had taken a job” chopping wood at her place and the night after the attack slept in the same room with her and her husband. 38 Similarly, Martha Day told the court that her boarder, John O’Connor, had “offered to get into bed” with her one night in March 1842, when her husband was away. When she refused, saying that “if he was going to get in – she wld. get out,” he grabbed her, “partly dragged her to his bed … & tried to take improper liberties with her.” Day fought him off and went outdoors to call for help. Her actions scared O’Connor sufficiently that he apologized and promised not to do it again. Day nevertheless “took a knife to bed.” 39

The 1841 trial of Abel Conat for the attempted rape of fourteen-year-old Frances Burgess perhaps best illustrates the ways that shared household space could lead to both consensual and coercive sexual activity. Conat and the Burgess family, which included Frances, her mother, Henrietta, and an older brother, as well as younger siblings, had

38 Queen v. Harvey Holton Newell, 18 May 1844, Newcastle District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-8-1, testimony of Julia Ann Wright and William Wright. This case is also discussed in Connor, “‘The Law Should Be Her Protector’,” pp. 107 and 111. See also Queen v. George Noble, 6 October 1847, Gore District Assizes, Robinson Benchbooks, AO, RG 22-390-2-27-3; and Queen v. Gillen, 26 April 1847, Robinson Benchbooks, AO, RG 22-390-2-27-2. The assault & battery charge against hired man Walter Burke also centered around the attempted rape of Ann Milner, although it was not charged as a rape. See King v. Walter Burke, October 1831, Newcastle District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-2-1.
39 Testimony of Martha Day, Queen v. John O’Connor (Assault with intent to ravish), 27 April 1842, Newcastle District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-6-4.
lived together in a variety of places since the death of Burgess’s father three years before. At the time of the rape complaint, Conat was a paying boarder in the Burgess “shanty,” which was built “on Indian land” in Cooksville. “All” the Burgess family “had to go out & work hard for a living – Conat did not supply it.” Conat was married, but had separated from his wife Mary in 1812.

Frances Burgess’s first round of testimony suggests a pattern of threatening and domineering behaviour directed against a family which had little stability and limited financial resources. In addition to the incident which led her to charge him with rape, she told the court that “He had frequently taken liberties with” her, and her “Mother knew it.” However, she clearly stated that he had “never had his will” of her, nor had “any one else,” and she was not pregnant. She also testified on cross-examination that Conat had frequently beaten her and her mother “with ropes and shingles”; although he had not slept in the bed with her and her mother previously, “He slept with them at ye Indian

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41 Testimony of Frances Burgess, Queen v. Conat, 28 October 1841, Macaulay Benchbooks, RG 22-390-1-6-3.
42 See York Gazette, 18 March 1812, caution notice for Abel and Mary Cooet, also cited in Elizabeth Jane Errington, Wives and Mothers, School Mistresses and Scullery Maids: Working Women in Upper Canada, 1790-1840 (Montreal and Kingston: McGill-Queen’s University Press, 1995), p. 272 note 117. Mary Conat renounced all claim to Abel’s estate in 1849, five years after his death, in favour of their eldest surviving son, Barnabas Conat, suggesting that the couple had not reconciled. See RG 22-155, will of Abel Conat, Yeoman, Pickering Township, 16 November 1849, AO, MS 638 reel 44. Conat was also charged with assaulting Ebenezer Hartwell in the Newcastle District in 1809 (Newcastle District Quarter Sessions filings, AO, RG 22-31, Box 1).
43 Testimony of Frances Burgess, Queen v. Conat, 28 October 1841, Macaulay Benchbooks, RG 22-390-1-6-3.
house whenever he had a mind to – not always."\(^{44}\) Although Conat did not imprison them in the bed when he slept with them – her testimony indicates that she was asked repeatedly by the defence whether Conat allowed her and her mother to leave the bed when he was in it – they were likely intimidated and frightened by his potential for violence.\(^{45}\) The circumstances in which the family lived – in one room, with a number of family members and a paying boarder sharing a limited number of beds – were far from unusual in the colony. Although some commentators linked Upper Canadians’ propensity to sleep together with sexual incontinence and other forms of debased morality among settlers, sharing beds for practical and social purposes was a contentious, but hardly uncommon, activity. That shared beds regularly became the location of a sexual assault is instead suggestive of the fact that “rape … could occur at almost any time and in almost any place,” an “intrusion … into daily activities.”\(^{46}\) Frances asserted that “Nothing improper ever happened during these nocturnal visits,” which is highly suggestive of other accounts of limited sexual contact. She may have been using the same operative definition of “improper” behaviour as intercourse which witnesses in

\(^{44}\) Testimony of Frances Burgess, Queen v. Conat, 28 October 1841, Macaulay Benchbooks, RG 22-390-1-6-3.

\(^{45}\) Testimony of Frances Burgess, Queen v. Conat, 28 October 1841, Macaulay Benchbooks, RG 22-390-1-6-3.

\(^{46}\) Connor, “‘The Law Should Be Her Protector,’” pp. 114, 111. See also Queen v. Geo. Elliott, 6 May 1846, Western District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-8-4, in which Elliott was alleged to have climbed into the bed of fourteen-year-old Emma Sagerman at Sellers’ Tavern in Windsor and raped her. Elliott was supposed to be sharing a bed with Sagerman’s brother, Henry. Travellers also commented on the frequency with which Upper Canadians shared beds; for example, Richard Barrett’s Journal, New York and Canada 1816: A Critique of the Young Nation by an Englishman Abroad, ed. Thomas Brott and Philip Kelley (Winfield, Kansas: Wedgestone Press, 1983), pp. 73, 79, and \(^{46}\) Julia Roberts, In Mixed Company: Taverns and Public Life in Upper Canada (Vancouver: UBC Press, 2009), pp. 27-28.
breach of promise and seduction suits brought to bear on sparking and other bed-cased intimate courting practices. Her initial reference to Conat’s having “taken liberties” with her previously supports this interpretation.

The attempted rape occurred one night after Conat came home from fishing. Henrietta Burgess, Frances’s mother, “told ye Girl – she cld. go in to Conats bed” to sleep while he was out fishing: “when they went fishing they never retd. till morning.”47 Conat came back during the night, however. Frances got up and went outside, then rejoined her mother in bed. According to Henrietta, Conat then “called to [Frances] to come to him – [Henrietta] sd. she shd. not go – he sd. Frances if you don’t come I’ll --”48 Frances recalled that Conat threatened to “hide her,” but maintained that she “did not want to have any thing to do with him.”49 Conat got into bed with them, then “put his knees on” Henrietta, who “desired [Frances] to call for help,” but Conat “swore if she did he would shoot the first one who came to assist” them.50

Henrietta’s testimony both corroborated and complicated her daughter’s account. She recounted having “complained” to Conat about his getting into bed with them; according to her, he replied that “it was nothing to [Henrietta] if he had to do with ye Girl every hour of ye day.” Henrietta insisted, however, that Conat “did not meddle with the girl that night.” Nor had he “had improper intercourse with her or ye Girl,” although

47 Testimony of Henrietta Burgess, Queen v. Conat, 28 October 1841, Macaulay Benchbooks, RG 22-390-1-6-3.
48 Testimony of Henrietta Burgess, Queen v. Conat, 28 October 1841, Macaulay Benchbooks, RG 22-390-1-6-3.
49 Testimony of Frances Burgess, Queen v. Conat, 28 October 1841, Macaulay Benchbooks, RG 22-390-1-6-3.
50 Testimony of Henrietta Burgess, Queen v. Conat, 28 October 1841, Macaulay Benchbooks, RG 22-390-1-6-3.
Henrietta admitted she “Could not keep him from improper intercourse.” The case was abandoned by the Attorney General shortly after Henrietta admitted on cross-examination that she and Conat had once taken lodgings at an inn in Toronto, where they said they were husband and wife, and “slept in one bed … No Coercion that night.”

The testimony in *Queen v. Conat* did not, in the eyes of the court, support a charge of assault with intent to commit rape on Frances Burgess. In many ways, this is not surprising. The ongoing pattern of abuse which both Frances and Henrietta described did not lend itself to legally supporting an assault charge based on one such incident. More than likely, the Attorney-General realized he did not have the evidence to support the charge and thus abandoned the case; as the records of seduction cases illustrate, however, the fact that the charge did not meet the legal definition may not have precluded jury sympathy. It does, however, tell us about social arrangements and the vulnerability which women, especially women with children, could face without the kinds of family support networks which can be witnessed in suits for seduction. Although the charge of

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51 Testimony of Henrietta Burgess, Queen v. Conat, 28 October 1841, Macaulay Benchbooks, RG 22-390-1-6-3.
52 Testimony of Henrietta Burgess, Queen v. Conat, 28 October 1841, Macaulay Benchbooks, RG 22-390-1-6-3.
53 Connor argues that the evidence of “truly egregious sexual behavior” presented in this case, including Frances Burgess’s “extramarital relations with several men – including her accused rapist – as well as illegitimate children,” led to the case being abandoned because Frances “possessed no credibility as a witness” (“The Law Should Be Her Protector,” p. 114). Although Connor’s notes indicate that he consulted the same record of this case that I discuss above (see his note 46, p. 131), I found no such evidence. Frances Burgess was 14 years old, by both her testimony and her mother’s, was not married, and claimed that she had never had intercourse. Connor may have confused Frances’s testimony with that of her mother, although such a characterization is largely inappropriate to Henrietta’s testimony as well. As Frances was asked whether Conat had ever “passed as [her] husband,” such confusion may also have been present in the courtroom.
assault with intent to commit rape was sworn in regard to Conat’s behaviour toward Frances Burgess, the testimony of both Frances and her mother suggests that Henrietta might as easily have been Conat’s intended victim. Henrietta Burgess’s testimony in particular suggests that she had at least an occasional sexual relationship with Conat, one which may have been romantic or primarily practical in nature. Conat does seem to have regarded himself as entitled to the sexual services of the women in the family.

As the Conat case suggests, the attack being prosecuted was not always the first one. Sarah Sherman Nelson, for example, charged Frederick Fick after he took “an unwarranted liberty … with her” on two occasions in 1839, assaulting her once at his father’s home, and again a few weeks later, at his sister’s, where Nelson was “keeping house for his sister while away.” Jane Gardwood, too, complained that Patrick Irving “had laid hand on her once before” she charged him with assault in October 1848.55 During Ethan Card’s trial for the attempted rape of Mary Switzer, the court heard evidence that Card “had before used indecent language to her.” Switzer pressed charges following an incident in September 1839 when Card dropped by her house in Whitby, ascertained that her husband Matthew was at work, and then returned with “the flap of his

54 Testimony of Sarah (Sherman) Nelson, Queen v. Frederick Fick, 29 September 1840, Talbot District Assizes, Robinson Benchbooks, AO, RG 22-390-2-23-5. Fick was originally charged with assault with intent to commit a rape; by the time the case came before Robinson six months later, however, the charge had been lowered to common assault. See Recognizance in Queen v. Fredrick Fick the Younger, 23 March 1840, Talbot District Assizes, Hagerman Benchbooks, AO, RG 22-390-3-38-1.

55 Testimony of Jane Gardwood, Queen v. Irving, 4 October 1848, Sullivan Benchbooks, RG 22-390-5-43-1. Likewise, Maria Clue stated that she “had been attacked once before by a person in disguise.” Although she originally “suspected” George King, following the June attack she “accused Danl. Way of both the successive rapes,” which may have undermined her case against him and his brother. See Queen v. Way and Way, 19 September 1839, Macaulay Benchbooks, RG 22-390-1-4-5, testimony of Maria Clue, Edward Clue, Robert Smith, and Jacob Howell.
trousers down” and “askd. ... if she wld submit to his will.” On cross-examination, the court learned that Switzer had charged Card with rape before, but he was “discharged”: “the reason given by ye Justice was because [Switzer] did not leave her house.” The defence asserted that Switzer intended to entrap Card in revenge for the dropped charge, suggesting that she held “friendly or private conversation with him” and encouraged him to visit her at home so she could charge him again.

Like other cases which involved social relationships, Mary Switzer’s complaint against Ethan Card shows both the depth of community involvement and the degree to which Upper Canadian women might experience sexual harassment on a daily basis. The Switzers had lived in a house belonging to Card in Darlington, and left “[o]wing to the previous complaint.” Michael McLean, who answered Switzer’s “hallows” for help in the second incident, testified that Mary Switzer had been “pitied” the first time Ethan Card reputedly attacked her, but was “latterly disapproved.” He explained: “The people blamed both [Switzer and her husband] – thöt there was scheming on ye part of Switzers.” However, he knew “nothing of her being reported unchaste – heard nothing agst her virtue.” Although McLean clearly disapproved of the Switzers and of Mary’s having complained about Card’s behaviour, he was forced to admit that, having “lived in

56 Queen v. Card, 2 June 1840, Macaulay Benchbooks, RG 22-390-1-5-2. This case is also discussed in Connor, “‘The Law Should Be Her Protector’,” p. 115, although the date of the trial is given as 1839.
57 Queen v. Card, 2 June 1840, Macaulay Benchbooks, RG 22-390-1-5-2.
58 Queen v. Card, 2 June 1840, Macaulay Benchbooks, RG 22-390-1-5-2, testimony of Mary Switzer; such allegations were also made by defence witness Mary Robinson.
59 Queen v. Card, 2 June 1840, Macaulay Benchbooks, RG 22-390-1-5-2, testimony of Mary Switzer and Michl. McLean.
both houses of Switzer & [Card],” Mary had not provoked Card: McLean “Saw nothing improper in her conduct.” As in the case of Lois Thomas and Nixea Walker (1833), which will be discussed below, the objection among many of Mary Switzer’s neighbours seems to have been the openness with which she protested the unwanted sexual advances of a man she knew, and one who was at least to some degree respected in the community.

Lydia Crysler’s 1841 complaint of assault and battery against Squire L. Corles illustrates a similar phenomenon. The dispute between Crysler’s husband Walter and Corles was in part over a fence between their lots and some hay, but more than likely had its roots in what according to Lydia was an ongoing pattern of sexual harassment by Corles. On the March day in question, Crysler charged that Corles had first visited her at home while her husband was away, “asked to see [her] Baby – and” used “language [Crysler] did not like.” Later that day, he “tried to get her on the road side” as she walked to her father’s and “coaxed her to consent” to sex before striking her. On cross-examination, the defence queried the age of Crysler’s child and the date of her marriage, perhaps in suggestion that she and Corles had a prior sexual relationship. For her part, Crysler told the court that she “Had complained of [Corles] before her marriage – tried to get ye better of [her] – but could not – she wld. not let him get ye better of her – never any one else.” The defence disagreed, however, questioning Crysler’s statement by calling witnesses like William Walker and John Wilson. Walker said he “wld. distrust

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62 Queen v. Corles, 1 May 1841, Talbot District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-5-5, testimony of Lydia Crysler [also Chrysler].
63 Testimony of Lydia Crysler, Queen v. Corles, 1 May 1841, Macaulay Benchbooks, RG 22-390-1-5-5.
her oath – under ye circumstances of this case – her general character for chastity was bad before marrying, dft. is a married man – she has been accused of falsehoods.” Wilson agreed, noting Crysler was “not a good character as respects chastity & veracity.” “[I]n a case of this kind,” he opined, “she wld swear false if she had a motion in view.”

Again, although the incident clearly had sexual dimensions, Crysler had charged Corles with assault only, not with intent to rape or ravish. Nevertheless, the broader dimensions of the case were evident to all those present in the courtroom. Macaulay summarized: “It all depends on the credence given to the Prosecutrix. – if believed – it proves the Case – if not believed – it fails.” The jury found Corles not guilty, thus reinforcing the notion that under certain circumstances, women should not complain. Under certain circumstances Upper Canadian women could choose to say yes, but found they had much less support when they chose to say no.

*Courtship, Seduction, and Coercion*

As the cases above illustrate, any prior social relationship between the complainant and the accused could cloud the issue of consent. Defining sexual assault was further complicated if the parties had been romantically or sexually involved. For example, the court was at something of a loss as to how to interpret Julia Johnson’s charge of attempted rape against Thomas Johnson in May 1842. Thomas and his wife and child lodged with Julia; Julia’s husband Michael “was absent in Prison.” Julia complained that Thomas had “abused” her on previous occasions. This time, she stated,

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64 Testimony of Wm. Walker and John Wilson, Queen v. Corles, 1 May 1841, Macaulay Benchbooks, RG 22-390-1-5-5.
he “kicked ye door in” and announced that “if [Julia] wld. not consent to go to bed with him he wd put in her ye Stove.” He then “laid hold of her & offered to put her head in ye Stove,” but “desisted” trying to remove their clothes when a child began to cry. Samuel Shaw, who took Julia’s statement after the incident, agreed that “she seemed to have been abused.” Mr. McFarlane, who was called by the defence, concurred: “The Morng after ye alleged assault she came in a damaged state.” McFarlane pointed out, however, that Julia and Thomas were “constantly quarreling,” and Julia herself provided testimony that the relationship between the two was far from clear-cut. Although she declared that she “Never slept with [Thomas] before,” she had at one point agreed to “desert with him”:

He wanted [Julia] to go with him & leave his wife & child behind
… His wife had been in ye Station house that night – about ½ past 9 O.C at night – ye first time persuaded [Julia] to desert with him
… used no violence – sd he wd not force her agst her will --

Macaulay left it to the jury, stating “there was Ev: to support one or both counts if believed.” The jury opted to convict “of An Assault only.” Similarly, Harriet Nelson’s allegation that she had been raped by Harrison Thomas in 1847 was complicated by her declaration that he “had done the same thing before with [her] consent – often,” a statement which she later recanted.

65 Queen v. Thomas Johnson, 21 May 1842, Midland District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-6-5, testimony of Julia Johnson. It is unclear from the records of this case whether Thomas and Julia’s husband Michael were any relation.
66 Testimony of Saml. Shaw and Mr. McFarlane, Queen v. Johnson, 21 May 1842, Macaulay Benchbooks, RG 22-390-1-6-5.
67 Testimony of Julia Johnson, Queen v. Johnson, 21 May 1842, Macaulay Benchbooks, RG 22-390-1-6-5.
68 Queen v. Johnson, 21 May 1842, Macaulay Benchbooks, RG 22-390-1-6-5.
69 Queen v. Harrison Thomas, 29 September 1847, Gore District Assizes, Robinson Benchbooks, AO, RG 22-390-2-27-3. Thomas was convicted of an assault.
Courtship and the possibility of marriage offered even further complications to the issue of consent, as Sarah McFarlane’s 1843 complaint against James McArthur illustrates.\(^ {70} \) According to McFarlane, McArthur, who was a cousin, had convinced her father to allow the two of them to go visit some relations at Brock, including Allan Campbell, McArthur’s uncle. McFarlane testified that “as they came along this road [McArthur] asked her to marry him – she sd. she must have her parents’ consent – he sd. she must consent -- : or it wd. be worse for her.” Then, “he took hold of [her] & abused her badly … the [marks] of his hands were on Ws. arms for a month aftds.” McFarlane “resisted, scratched his face … it was all agt. her will.” They went on to Campbells’, and though McArthur “offered to go with her” when McFarlane said she wanted to go home, she insisted that “she wd. wait for her father.”\(^ {71} \)

Sarah McFarlane’s consent, to sex and to marriage with James McArthur, was fundamentally at issue in this case. Both McFarlane and her father Neil stated McArthur was insistent that the two should marry. Neil McFarlane told the court that McArthur had asked his permission to marry Sarah when the family returned home after the attempted rape, claiming that they had sex, but McFarlane referred the decision to his daughter.\(^ {72} \) James McArthur may have regarded his promise of marriage as sufficient to gain Sarah McFarlane’s consent; as we have seen in the previous chapters, his offer had legal ramifications should Sarah become pregnant, or the marriage otherwise fall through. In


\(^ {71} \) Testimony of Sarah McFarlane, Queen v. McArthur, 2 November 1843, Robinson Benchbooks, RG 22-390-2-25-4.

\(^ {72} \) Testimony of Neil McFarlane, Queen v. McArthur, 2 November 1843, Robinson Benchbooks, RG 22-390-2-25-4.
this light, the attempted rape appears as an effort to use sexual contact to leverage a promise of marriage from a reluctant partner. McArthur’s assumption that Sarah McFarlane would or should consent if marriage was proposed seems to have been shared by other relations, including Allan Campbell. When she was recalled as a witness after the defence, Sarah told the court that Allan Campbell had come to her following the incident “to see if [she] wd. make it up” with McArthur. Specifically, Campbell “proposed to [Sarah] to marry [James] & make it up.” However, she “wd. not.” It should also be noted that Neil McFarlane’s support rested on Sarah’s insistence that no sexual contact had occurred. Sarah testified that when her father came to get her, he asked whether McArthur’s claim that they had sex was true: “Ws. sd. no -- father sd. if true she had better marry him.” Neil McFarlane admitted that he had also been fined twice for assaulting McArthur for speaking “improperly” of his daughter.

After much testimony, the jury in the McArthur case found him guilty of a common assault. This verdict, while not uncommon, suggests a discomfort with adjudicating the issue of sexual consent in a situation that looked like a courtship. Notions of female sexuality which cast women as secretly lascivious and vindictive may have been involved here, as this item which appeared in the colonial press suggests:

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76 See also Queen v. Allan McInnis, 24 October 1849, Colborne District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-10-3, and discussion in Connor, “‘The Law Should Be Her Protector’,” p. 119, also p. 115. McInnis’s defence suggested that he and Euphemia Brown were involved in an ongoing consensual relationship, which Brown denied. The jury, unconvinced of the courtship, found McInnis guilty of rape.
A man was committed to the common jail of this district last week for the unenviable crime of rape. He refused to marry the young lady until he found himself in the jailor’s hands, when he promised to accede to his former proposal, but the fair one declined – very politely thanked him, and walked off, leaving the poor fellow to suck his thumbs until the Court of K. Bench.77

Upper Canadian courts, while largely “sympathetic” to women who were attacked in the course of daily activities, or because they were perceived as vulnerable, had greater difficulty with cases where the possibility of consensual sex was imaginable.

This difficulty is particularly clear in the case of Landon Heney and Hannah Wheat, where the definitions of consent and coercion were heavily blurred.78 Wheat, who was 15 years old when the case came to trial in 1832, alleged that Heney had raped her twice in the bushes near her family’s home, once at “sugar time” in the spring of 1831, and again later that summer; he cautioned her to keep quiet, saying “he wd. take her life if she told.” Heney worked for Wheat’s father. Wheat gave birth to a child in April 1832, two months before the trial, which she stated “was [Heney’s] by the consequence of ye connection.” She claimed she had told no one “whose ye Child was” until Heney

77 British Whig (reprinted from the Cornwall Observer, 3 March 1837). See also Queen v. James McKee, 6 April 1832, Home District Assizes, Robinson Benchbooks, AO, RG 22-390-2-21-2, in which the defence alleged that the complainant, Mary Bann, had offered to drop the charges if the defendant married her. On marriage as a method of redress for rape in Ireland, see Martin J. Wiener, Men of Blood: Violence, Manliness, and Criminal Justice in Victorian England (Cambridge: Cambridge University Press, 2004), pp. 86-87.

78 King v. Landon Heney, 31 July 1832, Sandwich District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-2-2. Connor discusses this case briefly in “‘The Law Should Be Her Protector’,” pp. 119-120, but renders the defendant’s surname as “Henry.”
“came there” after the birth, “abusing her – calling her all sorts of things -- & then she told.”79

Heney was found not guilty of rape, possibly because he was able to convince the jury that he and Hannah Wheat were courting.80 This case, however, conveys considerably more about the context of courtship and sex, consensual and coercive, than Heney’s acquittal initially suggests. Wheat’s credibility as a witness was almost certainly damaged by her admission on cross-examination that she originally “[charged] the Child to one Sandford – a white Man,” but “The Child spoke for itself as not so.”81 The real damage to her account of rape, however, came through the testimony of her own family. Hannah’s younger sister Minerva corroborated the threats on her sister’s life, but also testified that she had often seen Heney at their home, “seemingly on good terms,” before the baby was born, and that he had even “Slept there once or twice.”82 Hannah’s mother

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80 This interpretation is taken by Connor, “‘The Law Should Be Her Protector’,” p. 120.
81 Testimony of Hannah Wheat, King v. Heney, 31 July 1832, Macaulay Benchbooks, RG 22-390-1-2-2. Macaulay recorded no commentary on race in this case. Connor observes that the association between black men and the rape of white women in particular was less prominent in Upper Canada than it was in other jurisdictions, particularly the United States (“‘The Law Should Be Her Protector’,” p. 127, also p. 135 note 107). His findings, with which I concur, provide a sharp contrast with Canada West/Ontario between 1858 and 1958, as Barrington Walker demonstrates. See Walker, “The Gavel and the Veil of Race: ‘Blackness’ in Ontario’s Criminal Courts, 1858-1958” (Ph.D. Dissertation, Department of History, University of Toronto, 2003), chapters 5 and 6. Nevertheless, the colony’s press did from the time to time link “men of colour” with crime, including rape: for example, Kingston Chronicle and Gazette, 24 August 1836. Historians have debated the genesis of the “rape myth” in American society as well. Some argue that it did not become prominent until after the Civil War. Block, however, disputes this claim, tracing associations between black men and rape back well into the colonial period (Rape and Sexual Power, chapter 5 in particular).
Sarah told the court that her daughter “never complained … of any violence” from Heney, but also allowed that she “had no suspicion of illicit intercourse between” the two, “never suspected” her daughter’s pregnancy, and had been away from home when her grandchild was born.83 Neither did Hannah’s father, Benjamin, suspect “violence” until Minerva reported Heney’s “threats”; he “thöt [Hannah] had ye dropsy – never suspected her with child.”84

Hannah’s parents’ actions may have been regarded as negligence by the jury. Benjamin Wheat’s comment that “The law was taken in satisfaction of H’s sickness &c.” may have left open the possibility that an action for seduction was considered. Benjamin’s acknowledgement that Hannah had falsely named Sandford as her child’s father, even out of “fear,” may also have undermined his credibility.85 Perhaps more damagingly, Sarah Wheat recounted a subsequent conversation with Heney about the child: “The child resembles [Heney] – Ws. charged the P. with ye child being his – sd. he thöt Hannah too young to have one, & he could have given her something in his chest to destroy it.”86 The circumstances around the conception and birth of Hannah Wheat’s child more than likely added up to reasonable doubt, rather than a convincing case in favour of a consensual relationship between her and Heney.

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Heney’s working relationship with the Wheat family – he had worked for Benjamin Wheat, and Sarah Wheat had worked for him – no doubt facilitated the encounters which were disputed in *King v. Heney*. The conditions of work in Upper Canada, often involving overnight stays and/or live-in “helps” or apprenticeships, brought Upper Canadians in contact not only with potential partners in consensual sex, as we have seen in previous chapters, but also created the conditions for coercion, as this case and a number of those discussed above show. As noted in Chapter Four, although actions for seduction in Upper Canada largely stemmed from the breakdown of consensual relationships, the Seduction Act of 1837 was intended to offer better redress to the families of women who encountered sexual abuse in the workplace.\(^87\)

Especially after the Seduction Act of 1837, which reoriented the tort toward redress for women who were “seduced” by their employers, some families tried to bring suits for seduction in circumstances where sexual assault might have been the more appropriate charge.\(^88\) Nancy Cooke was eighteen when her stepfather brought a seduction suit against her employer, John Reaman. Cooke had been apprenticed to Reaman eight years previously, and was supposed to stay until she came of age. Although the suit involved the birth of a stillborn child the previous spring, Cooke testified that her sexual relationship with Reaman had begun when she was 12 or 13, and


\(^88\) In addition to the following, see *Hayle v. Hayle* (1834), UCQB, *Queen’s Bench and Practice Court Reports*, Vol. III (Toronto: R. Carswell, 1878), pp. 295-297, in which the court set aside a nonsuit in a case for seduction. Robinson had ordered the nonsuit based on evidence that the defendant’s sexual relationship with his stepsister was not consensual. A grand jury refused an indictment for rape, however, and Robinson agreed with the Court of Queen’s Bench that he should have left the jury to decide in the original trial.
unwilling. She claimed she had told Reaman’s wife, but Mrs. Reaman did not believe her.\textsuperscript{89}

In \textit{Vincent v. Sprague} (1846), the case for seduction fell apart when Ann Vincent told the court that she had never consented to sex with Sprague. Sprague, who “came from the state of New York [and] said he was a Gentleman,” had lived with the Vincents for two years, during which time he became engaged to Ann “with the assent of her Parents.” A date was set for August 1843, and then pushed forward to September 1844 because Sprague claimed “he had not means to support her.” In the meantime, Vincent became pregnant; Sprague left the house in October 1844, when their child was born, and “was married to another person in January 1845.” According to Vincent, their sexual relationship began “in harvest in 1843,” but she never gave consent: “The liberties were taken with her by force and wholly against her will – by his promises she kept it a secret … On each occasion that he had connection with her it was by force and against her will – she never told of it, because he promised & swore to marry her.”\textsuperscript{90} It is possible that Ann Vincent emphasized her reluctance in an effort to appear “virtuous.” However, the body of seduction cases demonstrate that even though the courts were displaying increasingly less sympathy for women who engaged in premarital sex, they still recognized a clear distinction between those who “yielded” under promise of marriage

\textsuperscript{89} Testimony of Nancy Cooke (Prentiss), Thomas Tuke v. John Reaman, 26 May 1838, Home District Assizes, Robinson Benchbooks, AO, RG 22-390-2-23-4. Nancy Cooke’s testimony provides further evidence of informal marriage traditions in the colony. She noted that her surname was Prentiss, but that since her father, Hiram Prentiss, and her mother had not been married, she used her mother’s surname of Cooke [also given as Coke]. The suit was brought by her stepfather, Thomas Tuke.

\textsuperscript{90} Vincent v. Sprague, 2 June 1846, Newcastle District Assizes, Jones Benchbooks, AO, RG 22-390-42-1, quotations from the testimony of Ann Vincent.
and those who were raped. The defence objected that a “civil remedy” could not be used as a substitute for a criminal prosecution. Justice Jonas Jones agreed: “I thought the proper way to leave it to the Jry was to find for Dft if by the testimony of the witness a rape was committed.”\footnote{Vincent v. Sprague, 2 June 1846, Jones Benchbooks, RG 22-390-4-42-1. Jones’s reasoning here draws on the Hayle case; see note 98 above.} Unusually in seduction suits, the jury did find for the defendant, whether because they took Ann Vincent at her word or because her strategy backfired.

Mary Harper’s case should have been more clear cut. Harper’s father brought a seduction suit against Fraser in June 1842; Mary had given birth to a child which she claimed was fathered by Fraser in June 1840.\footnote{Harper v. Fraser, 3 June 1842, Bathurst District Assizes, Robinson Benchbooks, AO, RG 22-390-2-24-6.} However, Mary Harper told the court that at a fair in October 1839, Fraser had asked her to take a walk, then “had … connection, with her agt. her will.” The two were not courting; she had met him in passing only a few times, although her brothers knew him and “had a good opinion of him.”\footnote{Testimony of Mary Harper, Harper v. Fraser, Robinson Benchbooks, RG 22-390-2-24-6. Similarly, Henry Sagerman testified that he and George Elliott were “good friends” before Elliott assaulted Sagerman’s sister Emma at a family wake. See Queen v. Elliott, 6 May 1846, Macaulay Benchbooks, RG 22-390-1-8-4.} Harper even “complained to a Grand Jury” about the rape, but “nothing further” came of it.\footnote{Testimony of Mary Harper, Harper v. Fraser, Robinson Benchbooks, RG 22-390-2-24-6.} As with Vincent v. Sprague, the defence objected that the circumstances described a criminal rather than a civil act. Robinson agreed, but opted to let the jury decide the case because Fraser had not been tried and convicted of rape: “I told the Jury they might perhaps not believe that part of her evidence … [they] might believe in the witness but not the felony & if they did really think so – then the legal objection wd. not
occur.” The jury found for the plaintiff, and awarded Harper’s father £22.10 in damages.95

The willingness on the part of many Upper Canadian women to publicly declare a sexual assault as a wrong illustrates that they had an expectation of being able to consent. Consent and coercion were overlapping categories in the minds of many of the colony’s men, however, particularly when romantic relationships were involved.

_Masculinity and Understandings of Coercion_

Rape and violence in Upper Canada were synonymous, but also curiously separable. The legal definition of rape demanded evidence of force, both by the assailant against the complainant and by the complainant in response to the attack. In their accounts of sexual assault, Upper Canadian women, as in Britain and the United States, emphasized the violence used against them and their efforts to resist their attackers. But the discourses circulating in the colony about sexuality and consent left space for rape, by definition a forcible act committed against a woman’s will, to be recast as non-violent. Identifying and defining rape, as Block asserts, could vary by social and subject position.

In the surviving court records, not one of the men accused of rape or attempted rape in the colony to 1850 testified in his own defence.96 While the defendants’ voices remain inaccessible, the accounts of complainants and witnesses, albeit mediated by the judges’ notes, reveal much about men’s attitudes toward sexuality, consensual and

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95 Harper v. Fraser, 3 June 1842, Robinson Benchbooks, RG 22-390-2-24-6.
96 See also Connor, “‘The Law Should Be Her Protector’,” p. 121.
coercive, in the colony.\textsuperscript{97} As Ramos argues in her study of sexual violence in early nineteenth-century Montreal, men accused of rape conceptualized their actions “in the context of negotiation of their sexual access to women.”\textsuperscript{98} Testimony in these cases reveals the slippage between consent and coercion that was perceived or at least understood by many of the colony’s men, whether participants in a sexual assault or in a sexual assault trial.

As noted above, few of the sexual assaults which came to trial to the end of 1850, and for which records survive, present evidence of an attack committed by strangers who attempted to remain strangers. Many complainants testified that their attackers, whether known to them or not, tried to obtain some modicum of consent before assaulting them.\textsuperscript{99} Mary Ann Rolph was on her way to visit a sick neighbour in 1846 when Amos Dunt joined her on the road, saying “a little company was better than none.” They had not gone far before Dunt asked “to kiss her.” Although Rolph “said she did not want to be kissed,” Dunt “kissed her whether or no – and then took her by the shoulder and laid her across his knee on to the ground and violated her person.”\textsuperscript{100} Mary Clavin stated that Dennis Manning entered her home while her soldier husband was at parade and “offered her \(\frac{1}{4}\) of a dollar, which she refused,” before “he tried to throw her on the bed … he had his trousers unbuttoned and exposed his person.”\textsuperscript{101} Some men asked women to accompany them into the woods, an abandoned house, or a stable before forcing the

\textsuperscript{97} For a contrasting view, see Connor, “‘The Law Should Be Her Protector’,” p. 121.
\textsuperscript{98} Ramos, “‘A Most Detestable Crime’,” p. 28.
\textsuperscript{99} See also Connor, “‘The Law Should Be Her Protector’,” p. 121.
\textsuperscript{100} Queen v. Amos Dunt, 24 September 1846, London District Assizes, Jones Benchbooks, AO, RG 22-390-4-42-1. See also Queen v. George Alexr. Franklin, 23 April 1845, Johnstown District Assizes, Hagerman Benchbooks, AO, RG 22-390-3-40-1.
\textsuperscript{101} Queen v. Manning, 28 September 1843, Hagerman Benchbooks, RG 22-390-3-39-1.
issue. Others, whether on the road or in a tavern, offered a drink, a subject which will be discussed in further detail below. Some women also testified that their assailants had insisted they had not hurt them. John Guyatt reportedly told Jane Edgar after assaulting her on the street in Hamilton that “he had done [her] no harm.” Julia Ann Wright testified that Harvey Newell had “tried to get it out” of her that “she consented – or liked it … but she did not.” Newell told others, including Asa Hill, who testified for the prosecution, that he “had connection with her & that she was willing.”

Newell’s comments do leave open the possibility that he was telling the truth as he understood it. As historians of the early American context in particular have shown, men’s private writings during the eighteenth and into the early nineteenth centuries describe sexual encounters which to twenty-first century sensibilities clearly indicate a sexual assault without assigning the same meaning to their partners’ resistance. Clare Lyons observes of one such account from Philadelphia that the diarist perceived the use of “coercion and force in attaining access to a sexual experience” as “consistent with his understanding of his sexuality as an exercise in pursuit, insistence, and the ultimate submission of his partner.”

102 For example, King v. Shavalier, 17 September 1831, Niagara District Assizes, Macaulay Benchbooks, AO, RG 22-390-1-1-10; Queen v. Tisdale, 1 May 1844, Hagerman Benchbooks, RG 22-390-3-39-3.
103 Testimony of Jane Edgar, Queen v. Guyatt, 29 September 1843, Macaulay Benchbooks, AO, RG 22-390-1-7-4. See also Queen v. O’Connor, 27 April 1842, Macaulay Benchbooks, RG 22-390-1-6-4.
James Lundy and his friends in the 1840s emphasize men’s pursuit of “frail fair ones.” Lundy regularly bemoaned his “passion” for a variety of women besides his intended wife, Maria Askin. Once they became engaged, Lundy veered between “Scipio-like chastity” in rejecting the advances of previous partners, most notably a woman he called Buffy, and bouts of venereal disease contracted in the company of more than one “young and pretty, though perhaps not strictly virtuous female.”

Lundy openly struggled with fidelity prior to his marriage. He told his friend Frank Shanly in 1845:

… I am really anxious to marry, for altho’ as sincerely and devotedly attached as any man can be, my constitution is constantly leading me into the society of frail fair ones, and if the truth must be known I didn’t leave Harriette’s arms, until 10 this morning! I feel remorse afterwards, but still. I can’t avoid temptation, and when tempted always fall.

Lundy saw marriage as a corrective. He later mused, “I want marriage – I am afraid I am disposed to be wild, and I want to be quiet, and to effect this I know no means but a gentle companion whom you must respect as well as love.”

While the majority of his relations appear to have been consensual, and he certainly regarded them as such, it is difficult to know how his partners may have regarded these episodes of “puttering.”

Lundy’s embrace of marriage as a solution to his “wild” desires points to another relevant issue in contextualizing sexual assault. It seems evident that rape was linked in Upper Canadians’ minds to unsated sexual desires. Character witnesses for men accused

107 For example, James Bell Lundy to Frank Shanly, Shanly Papers, AO, 11 November 1845.
108 See Lundy to F. Shanly, 26 June 1844, 27 August 1844.
109 Lundy to F. Shanly, 11 November 1845.
110 Lundy, Montreal, to F. Shanly, Delaware, UC, 13 December 1845.
of rape or attempted rape often mentioned that the defendant was a married man.\footnote{See, for example, Queen v. Way & Way, 19 September 1839, Macaulay Benchbooks, RG 22-390-1-4-5; Queen v. Kennedy, 12 October 1841, Robinson Benchbooks, RG 22-390-2-24-5 (not only was he a “married man,” but he had “a daughter married,” and was “a grandfather”); Queen v. Card, 2 June 1840, Macaulay Benchbooks, RG 22-390-1-5-2; Queen v. Corles, 1 May 1841, Macaulay Benchbooks, RG 22-390-1-5-5. Sometimes complainants and witnesses for the prosecution were also asked about the defendant’s marital status. See Queen v. William Tuke, 29 October 1842, Robinson Benchbooks, RG 22-390-2-24-7; Queen v. John Gallagher, 20 September 1845, Midland District Assizes, Robinson Benchbooks, AO, RG 22-390-2-26-4.} This information was likely intended to suggest respectability as well as evoke sympathy for the defendant’s wife and children, if he had them, who would themselves be left unprotected if he was convicted. Furthermore, the implication was that a married man, who after all had a socially sanctioned sexual outlet in the person of his wife, would not need to commit a rape. On the other hand, married men sometimes attempted to use their marital status to open an opportunity for another sexual relationship. Mary Anne Button stated that when Alexander Mowat Greig, a business associate of her husband Martin, called on her while Martin was away one afternoon in August 1834, he “asked sevl. impertinent questions – talked disgracefully of his own wife,” then “took hold of [her] hands & attempted to it into his trousers – speaking indecently.”\footnote{Queen v. Greig, 21 October 1834, Robinson Benchbooks, RG 22-390-2-22-3. Greig protested his conviction for common assault to Lieutenant Governor John Colborne, arguing that the jury should either have found the prosecution’s evidence credible and convicted him of attempted rape, or found him not guilty. Upper Canada Sundries, C 6884, pp. 79945-79953.} Nor was a man’s status as husband always enough to deflect him as a potential rapist. Humphrey Crowley was convicted of raping Margaret Douglas in 1843 while she stayed at his mother-in-law’s home in Douro. Although Catharine Cleggatt (also known as Elliott) appeared as a witness in her son-in-law’s defence, neither she nor the other witnesses
could provide him with an alibi for the time of the rape, nor did they say much against Douglas. Women also attempted to use marital status or the threat of a husband as a deflection, as Jane Edgar did on the night of 1 May 1843 when John Guyatt grabbed her “& sd she wd make a good Match.” Edgar responded that “she was a married woman” and claimed her husband would “beat him,” but neither her warning nor the appearance of Edgar’s nephew deterred him. After a few minutes, however, he gave up, unable to restrain her, cover her mouth to prevent her screaming, and undo his breeches at the same time.

Reputation and Character

Attacks on a woman’s sexual reputation were not as pronounced in Upper Canadian rape trials as they were in other jurisdictions during this period, or later in the nineteenth century. Unlike England, or contemporary Montreal, the prosecution of sexual assault seems to have been less dependent on the performance of middle-class feminine ideals. From time to time such attacks were employed, but they did not

114 Testimony of Jane Edgar, Queen v. Guyatt, 29 September 1843, Macaulay Benchbooks, RG 22-390-1-7-4.
always constitute an effective defensive strategy. Moreover, whether such questions were asked depended on the circumstances of the assault and the nature of the evidence presented, as well as the community’s familiarity with the parties involved. Neither Sarah Jane Shaw, who was raped by a stranger, nor Margaret Douglas, who was raped by the son-in-law of a friend, were asked direct questions about their reputations, nor were they portrayed in the courtroom as untrustworthy witnesses.\textsuperscript{116} Chester Parmentier’s declaration that he “heard ill” of Julia Ann Wright’s character since her marriage did not sway the jury from convicting Harvey Newell of rape.\textsuperscript{117}

During the trial of John O’Connor, on the other hand, complainant Martha Day was asked on cross-examination about her sexual history; in particular, she was asked to confirm that her “first child was born in October before [Day] was married.”\textsuperscript{118} Defence witness Andrew Rusk also stated that Day’s “character is not good,” and that he “has heard it questioned.” He suggested the attempted rape was fabricated because of a dispute between the Days and O’Connor, their boarder, over the meals they provided, which were “insufft. for hard work.”\textsuperscript{119} Richard Leech also claimed that “All talked freely & had play” following the alleged assault, and that Martha Day was “not worthy of credit.”\textsuperscript{120}

\textsuperscript{116} Queen v. Michael Sheehan, 29 October 1846, Colborne District Assizes, Robinson Benchbooks, AO, RG 22-390-2-27-1 (Shaw); Queen v. Crowley, 7 October 1843, Robinson Benchbooks, RG 22-390-2-25-3 (Douglas).
\textsuperscript{117} Queen v. Newell, 18 May 1844, Macaulay Benchbooks, RG 22-390-1-8-1.
\textsuperscript{118} Testimony of Martha Day, Queen v. O’Connor, 27 April 1842, Macaulay Benchbooks, RG 22-390-1-6-4.
\textsuperscript{119} Testimony of Andrew Rusk, Queen v. O’Connor, 27 April 1842, Macaulay Benchbooks, RG 22-390-1-6-4. See also testimony of Robt. R. Perry.
\textsuperscript{120} Testimony of Richd. Leech, Queen v. O’Connor, 27 April 1842, Macaulay Benchbooks, RG 22-390-1-6-4.
Macaulay instructed the jury that they “must decide … if Mrs. Day is believed”; if so, he felt that a charge of assault, certainly, was “sustained.” The jury evidently found Day at least somewhat credible, as O’Connor was convicted of an assault.\(^\text{121}\) Nor were women who were separated from their husbands or who had children outside of marriage necessarily considered incredible witnesses. Maria Griffin told the court that her husband Thomas had “deserted” her, but no effort was made to cast doubt on her assertion that soldier Henry Clayton had attempted to rape her on the road to Montreal.\(^\text{122}\) Mary Ann Milman declared on cross-examination that she was unmarried and “had a child – the father of it promised to marry her, the matter is not settled yet.” The jury nevertheless convicted Thomas McGovern of pulling her off the road to Brantford into an “uninhabited house,” where he tried to rape her.\(^\text{123}\)

These cases, however, were attacks committed by strangers. By contrast, Nixea Walker’s defence suggested that Lois Thomas, who had known him for years before she accused him of attempted rape in 1833, was an untrustworthy witness whose “Character [was] not very good.” The court heard testimony from several witnesses that Thomas’s “character” was “very bad as to chastity.” She “Keeps compy. with young men,” although “not with ye Walker Boys,” in a way that was “not decent,” and “once had a

\(^\text{121}\) Queen v. O’Connor, 27 April 1842, Macaulay Benchbooks, RG 22-390-1-6-4.
\(^\text{123}\) Queen v. McGovern, 10 April 1844, Hagerman Benchbooks, RG 22-390-3-39-3.
child – 3 yrs. ago.” Thomas did state on cross-examination that she “[h]ad no illicit intercourse with any man last year – nor at any time except with one man.”

These attempts to discredit Thomas’s testimony, however, are revealing of the ways in which reputation in Upper Canada was not strictly about chastity, even for women; moreover, they suggest some of the ways in which personal relationships within the neighbourhood could colour and define what separated a “good” character from a “bad” one. Both Andrew Pike and Ira Marshall admitted to having “difficulties” with Thomas’s family. Pike explained that he was “at variance with the father of Lois T. & Thomas has variance with others.” He admitted that “The ill rumors may arise in some respects from such animosities.” Marshall, like Pike, had “his reasons for not believing -- Saw her once in Court as a Wit. – heard her Evdce.”

The Crown called witnesses on reply to counter this damaging testimony. Among them was Thomas’s cousin, Peter Secar, who stated that Thomas was “down hearted” rather than “angry” about the attempted rape. Secar acknowledged that while “[t]he talk round is that she is a pretty bad girl,” he knew “nothing agst her character since” the birth of her child. Benjamin Chapman agreed, stating that “Some years ago [Thomas] went astray,” but he

had “not since seen any thing wrong in her.” Clark notes the absence of discourses about shame from the assize depositions of women from the North-east of England, where women’s economic agency was interconnected with sexual agency and the existence of irregular marriage forms. She compares this with contemporary prosecutions from London’s Old Bailey, in which she found that “14 per cent of the rape victims explicitly stated they felt rape had brought shame upon them.” Clark suggests that the increased emphasis on shame in London women’s depositions may have resulted not only from the public conditions under which their statements were made (as opposed to northern women, who were usually deposed privately in the magistrate’s home), but from the economic insecurities of London, which “often forced women to exchange their sexuality for subsistence.” It should nevertheless be noted that even this figure places a comparatively low value on invocations of shame. As with cases for seduction, those who chose to seek redress in court focused not on a woman’s “ruined” character, but on the deviation from standards of acceptable (not ideal) behaviour on the part of the male defendant. In cases for sexual assault, women emphasized physical injury, especially that which impaired their ability to work, and violence.

Few Upper Canadian women made reference to shame in their testimony. Louisa Bellair’s declaration that she was ashamed to tell her husband that she had been raped is

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130 Clark, Women’s Silence, Men’s Violence, pp. 26-27.
unusual among the bulk of extant cases, in which complainants instead articulated the violence that had been done to them, and their offence at having been attacked while going about their business.\textsuperscript{131} This kind of narrative framing is present in the majority of cases whether or not the defence attempted to mount an attack, sexual or otherwise, on the complainant’s character. Lois Thomas, for example, told the court that when Nixea Walker tried to rape her in the woods as she walked home from his father’s house, she said “nothing except to remonstrate with him – Told him to be away or he wld. be sorry for it.”\textsuperscript{132} Mary Switzer, too, was reputed to have declared that she would “scold” Ethan Card “if he molested her again.”\textsuperscript{133} More women, especially single women in their early teens, began to invoke shame toward the end of the 1840s in narrating both rape and attempted rape.\textsuperscript{134} This shift in terminology suggests greater acceptance of gender ideals which emphasized premarital chastity for women and presented male sexuality as an overwhelming force which needed to be tamed.

Neither were men exempt from assessments of character. As Carolyn Strange observed in her study of rape in York County, Ontario, between 1880 and 1930, feminist historians’ early emphasis on the ways discourses about female chastity worked against rape complainants created a situation in which “we know much less about why some men

\textsuperscript{131} See testimony of Louisa Bellair [also Blair], R. v. Samuel Wilson, 4 April 1832, Home District Assizes, Robinson Benchbooks, AO, RG 22-390-2-20-8.
\textsuperscript{132} King v. Walker, 9 August 1833, Macaulay Benchbooks, RG 22-390-1-2-7. See also Connor, “‘The Law Should Be Her Protector’,” pp. 111-112, although the date of the assault is given as November 1833, rather than 1832.
\textsuperscript{133} Queen v. Card, 2 June 1840, Macaulay Benchbooks, RG 22-390-1-5-2.
\textsuperscript{134} For example, Queen v. McPhee, 24 October 1848, Robinson Benchbooks, RG 22-390-2-27-5 (Harriett Brooke); Queen v. Gillen, 26 April 1847, Robinson Benchbooks, RG 22-390-2-27-2 (Jane Newson).
are punished than about why so many women are disbelieved.” Strange found that in York County, the shifting rate of convictions stemmed from the ways that race, class and gender affected the justice system, as well as “the changing climate of moral reform”:

“Each of these elements coloured jurors’ assessments of the character and credibility of alleged victims and offenders – the overwhelming preoccupation in rape trials.” A man’s reputation was also on trial, and complainants as well as witnesses on their behalf felt they had the right to call attention to their assailants’ reputation. Rachel Elizabeth Lincoln of Yarmouth told the court that she had “heard a bad character” of Walter Rykenson, a neighbour whom she had known “from childhood,” before he dragged her into the woods and “tried to get up my clothes” one afternoon in September 1849. Lincoln asserted that her “own character,” by contrast, “is good,” and the two “had not kept company.” As Strange concluded, “rape trials are ultimately tests of male character as well. … For men, habitual drunkenness, prolonged unemployment, poor relations with creditors, or the shirking of family responsibilities could all be read as evidence of low character.” Some of these criteria were also in effect in assessing men accused of rape in Upper Canada, although to this list should be added sexual licentiousness. Particularly deserving of examination, however, is the role of alcohol.

Alcohol was linked to assessments of character within the courtroom. Both complainants’ and defendants’ alcohol use was often a subject of questioning. Maria

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137 R. v. Walter Rykenson, 19 September 1849, London District Assizes, Draper Benchbooks, AO, RG 22-390-6-47-1. Rykenson was found guilty of assault “negating the intent.”
138 Strange, “The Criminal Prosecution of Rape in York County,” pp. 210-211.
Clue was raped on militia training day in June 1839; according to witnesses in the trial of brothers Daniel and Reuben Way for the crime, most of the men in Sophiasburgh had been drinking that night. It was alleged that Reuben Way was “high,” but Daniel, whom Clue had more confidently identified as one of her attackers, was described as “sober.”\footnote{Testimony of Peter Stickles, Queen v. Way and Way, 19 September 1839, Macaulay Benchbooks, RG 22-390-1-4-5.} In any case, as one witness attested, Daniel bore “a good reputation,” and was “light spoken when he drinks.”\footnote{Testimony of James C. Peterson, Queen v. Way and Way, 19 September 1839, Macaulay Benchbooks, RG 22-390-1-4-5.}

Alcohol and reputation also played a role in the trial of Solomon King for the attempted rape of Sarah Scott. Scott alleged that King and another man surprised her on the plank road near the Don River one night in June 1849; they took a pint of brandy from her basket and attempted to rape her, but left when her screams drew the attention of a neighbour.\footnote{Testimony of Sarah Scott and Norah McGan, Queen v. Solomon King, 19 October 1849, Home District Assizes, Sullivan Benchbooks, AO, RG 22-390-5-43-4.} Although deliberate mention was made of the fact that Scott’s husband was “a coloured man,” and one defence witness alleged that both “she & her husband have had bad characters,” the attack on Scott’s credibility was less about sexual activity than veracity. The defence called witnesses who questioned whether Scott should be believed on oath; one opined that “from her actions and mulling to herself I have thought her not right in her mind.”\footnote{Testimony of Richard Playter, Queen v. King, 19 October 1849, Sullivan Benchbooks, RG 22-390-5-43-4, also Thomas Smith.} William Courtney suggested that Scott had admitted to him

\footnote{On the Don River Valley as “lawless” space, see Jennifer Bonnell, “Imagined Futures and Unintended Consequences: An Environmental History of Toronto’s Don River Valley” (Ph.D. Dissertation, Graduate Department of Theory and Policy Studies in Education, Ontario Institute for Studies in Education, University of Toronto, 2010), chapter 4.}
and his wife over a glass of whiskey that she did not know King, but had identified him to placate a jealous or violent husband: “you know what Scott is, he would kill me if I didn’t.”\footnote{Testimony of William Courtney, Queen v. King, 19 October 1849, Sullivan Benchbooks, RG 22-390-5-43-4.} The defence was unable to present Solomon King as a man of upstanding character, however. Richard Playter claimed King was “of good character,” but admitted that he had “seen in him in liquor sometimes,” and that “he is a little given to lurking.”\footnote{Testimony of Richard Playter, Queen v. King, 19 October 1849, Sullivan Benchbooks, RG 22-390-5-43-4.} Similarly, John Eastwood had “heard that [King] is given to drink and to lurk a little.”\footnote{Testimony of John Eastwood, Queen v. King, 19 October 1849, Sullivan Benchbooks, RG 22-390-5-43-4.} King’s predilection for alcohol and “lurking” convinced the jury to convict on the first count, of assault with intent to commit a rape, rather than reducing the charge to common assault.\footnote{Queen v. King, 19 October 1849, Sullivan Benchbooks, RG 22-390-5-43-4.}

Alcohol also functioned as a way to make contact. A number of women stated that their assailants first approached them with an invitation to have a drink.\footnote{For example, Queen v. Patrick Monaghan, 1 November 1842, Home District Assizes, Robinson Benchbooks, AO, RG 22-390-2-24-7.} Bridget Stokes told the court that she met three soldiers as she walked home just outside London in February 1846, one of whom “asked her to go” to a nearby tavern “& get some Beer.” When she “declined,” the man, subsequently identified as Hugh O’Hara, first followed her, then chased her. Stokes “tripped,” fell, and screamed for help as O’Hara stood over her. He “endeavoured to keep [her] down,” but it was “not more than 5 minutes till help came.” Stokes, although “frightened,” described her assailant as “not very violent”; while she could not say whether or not he was sober, she “thôt he was drunk by his
manner of walking – did not seem steady.” The three men who responded to Stokes’s screams for help, including her brother-in-law, George Wyatt, declined to speculate on O’Hara’s level of intoxication, but all believed that they had averted an imminent rape.

Sergeant Hodges of the 81st Regiment, who took custody of O’Hara when he was brought in by the “3 Civilians,” described him as “very drunk – too drunk for any duty.”

Intoxication was seen as no excuse in this case, however, and O’Hara was found guilty.

Drunkenness could potentially excuse a man’s behaviour. In addition to impairing his judgement, overconsumption of alcohol might prevent him from sustaining an erection or, more importantly, ejaculating. Although, as Connor points out, Upper Canadian courts placed limited emphasis on proof of emission in rape trials, the suggestion that a man was too drunk to have “effected his purpose” could be used to create reasonable doubt. In addition, an assailant’s intoxication was thought to provide some opportunity for a woman to escape an assault. On 18 September 1837, John Lindsay witnessed Thomas Turnbull “struggling with a woman.” Turnbull “forced her to go up a street with him,” then “threw her down.” Lindsay, certain that Turnbull was

151 Connor, “‘The Law Should Be Her Protector’,” p. 106; see also Backhouse, “Nineteenth-Century Canadian Rape Law,” pp. 204-205. For two exceptions to this tendency, see King v. Shavalier, 17 September 1831, Macaulay Benchbooks, RG 22-390-1-1-10, and Queen v. Elliott, 6 May 1846, Macaulay Benchbooks, RG 22-390-1-8-4. In both of these cases, Macaulay instructed the jury that proof of emission was necessary to sustain a verdict of rape.
152 This strategy was employed unsuccessfully in Queen v. Dour, 22 October 1850, Sullivan Benchbooks, RG 22-390-5-44-3.
about to commit rape, “as a Constable felt it proper to interfere.” An angry Turnbull struck Lindsay, landing him in court on a charge of assaulting a constable in the execution of his duty. Turnbull’s defence, attempting to downplay the situation, evidently asked Lindsay whether Turnbull might have been drunk. Lindsay responded that although Turnbull “might have been drinking,” he “was not drunk,” and that the woman he attacked “did all she cd. to get away from him” before Lindsay intervened.

Mary Bann also told the court that James McKee had first approached her with the offer of a drink. Unlike Bridget Stokes, however, Bann was already in a tavern, and her behaviour there coloured the interpretation of her charge that McKee raped her. Roberts argues that Upper Canadian “[t]averns were legitimate female space. … colonial women had no reason to identify the taverns as sites of specific danger.” As she points out, taverns, “given their inherent publicness,” may have provided women with greater safety. Far more women were assaulted in their own homes, on roadways, or in open space than in taverns. Although taverns did not pose an inherent danger to women, nor were they perceived to do so, consumption of alcohol did in some cases affect the perception of a complainant’s veracity. Anne Eliza Crysler was asked by James Dalton’s defence not only whether she thought Dalton had been drinking when he

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155 Queen v. McKee, 6 April 1832, Robinson Benchbooks, RG 22-390-2-21-2.
157 Roberts, In Mixed Company, p. 163. Roberts’s analysis draws on Connor, “‘The Law Should Be Her Protector’,” pp. 113-114 and 122 in particular, as well as private communication with him (In Mixed Company, p. 201, note 63).
raped her, but whether she drank spirits, and if she had done so that day.\textsuperscript{158} Sally Peters complained that John McDonald had tried to rape her as he drove her home after the two “dined … and drank together” at James Gordon’s tavern in Fergus in 1841.\textsuperscript{159} Witnesses for the prosecution and the defence remarked on Peters’s propensity to drink, however. Some described her as “a drunken woman,” or “an indiff. char.”; her husband, Robert, testified that when McDonald brought her home that night “she seemed insensible – can’t say whether wholly from liquor or not.”\textsuperscript{160} McDonald, the witnesses remarked, “himself was drunk” that night. He was reputed to be “rather simple – harmless.”\textsuperscript{161} Since Sally Peters had a reputation for drunkenness and could not be trusted on oath, McDonald was acquitted.

Women who willingly drank with their assailants did come under suspicion, not necessarily because the consumption of alcohol was considered inappropriate or to impair their judgement,\textsuperscript{162} but more likely because drinking together indicated a social

\textsuperscript{158} Queen v. Dalton, 13 September 1849, Robinson Benchbooks, RG 22-390-2-28-1.
\textsuperscript{159} Queen v. John McDonald, 12 May 1841, Wellington District Assizes, Robinson Benchbooks, AO, RG 22-390-2-24-3. See also Ramos, “‘A Most Detestable Crime’,” pp. 376-377, for discussion of King v. Louis Boutron dit Major (1811), a Montreal case in which alcohol and sociability played a similar role.
\textsuperscript{160} Queen v. McDonald, 12 May 1841, Robinson Benchbooks, RG 22-390-2-24-3, testimony of Wm. Christieson, James [unclear], Agnes Robertson, Elizabeth Munroe, and Robert Peters. The defence in Queen v. McMurchy (3 November 1842, Robinson Benchbooks, RG 22-390-2-24-7) made similarly effective use of complainant Ellen Mills’s fondness for rum. Such allegations were also made against Mary Bann in Queen v. McKee, 6 April 1832, Robinson Benchbooks, RG 22-390-2-21-2.
\textsuperscript{161} Testimony of William Allen, Queen v. McDonald, 12 May 1841, Robinson Benchbooks, RG 22-390-2-24-3.
\textsuperscript{162} Adherents to middle-class moral values and advocates of temperance, however, did hold such views. See, for example, William Bell journal, QUA, Vol. 8, August 1831, p. 19. Backhouse makes the argument that testimony about alcohol, as well as previous sexual experience, was used to discredit rape complainants throughout the nineteenth century (\textit{Petticoats & Prejudice}, p. 87, and a fuller discussion in “Nineteenth-Century
relationship, which, as we have seen, clouded the issue of consent for Upper Canadian judges and juries. Jane Jordan alleged that when he took her across Reed Lake to visit her relatives in 1843, William Jenkin had pulled the boat ashore and raped her. The jury found Jenkin not guilty, however, likely swayed by witness testimony that Jordan and Jenkin had been drinking together at a tavern before they left, spent the night out together, and seemed “quite friendly” on their return.\textsuperscript{163} Ann Pidd, however, made it clear in her testimony that she had held no intention of a convivial relationship with Archibald Bell and his brother when she met them on the road near Elden in September 1835. Pidd recounted that the Bells asked her “to drink some whiskey” with them, and that Archibald in particular had “insisted [she] drink some.” Rather than argue, Pidd “pretended to drink some & wished them good night,” only to find the men were following her.\textsuperscript{164} Archibald Bell “took indecent liberties with her” while his brother “was standing by,” but “did not accomplish his purpose.”\textsuperscript{165} Pidd, “much bloodied,” went promptly to the home of Ewan Cameron to report the attack. Cameron, who went with her to the magistrate to lay charges, described Pidd as “a married woman … a person of good steady character.”\textsuperscript{166} The jury agreed, and found Archibald Bell guilty of assault with the intent to commit rape.

\textsuperscript{163} Queen v. William Jenkin the Younger, 5 October 1843, Colborne District Assizes, Robinson Benchbooks, AO, RG 22-390-2-25-3.
\textsuperscript{164} Queen v. Bell, 1 November 1836, Robinson Benchbooks, RG 22-390-2-23-1.
\textsuperscript{165} Testimony of Ann Pidd, Queen v. Bell, 1 November 1836, Robinson Benchbooks, RG 22-390-2-23-1.
\textsuperscript{166} Testimony of Ewan Cameron, Queen v. Bell, 1 November 1836, Robinson Benchbooks, RG 22-390-2-23-1.
Drinking could also occur at home. Fourteen-year-old Catharine Mulligan of Cornwall charged Philip Lalonde, a married father, with rape in 1842. Mulligan “went to his house at dusk”; Lalonde “was in bed,” and Mulligan initially thought “he was asleep,” but his wife and small children were at home and awake. Mulligan “sat by his wife” and visited. “Abt. an hour after [she] got there,” Mulligan recounted, Lalonde “caught hold” of her and “pulled her on the bed and wd. not let [her] go … he had his trousers on, but pulled down his flaps.” Mulligan “holooed & struggled … got away,” and “then struck him on the back with a stick.” She noted, “his own wife & son struck him” as well.

Mulligan’s parents and her brother supported her, testifying that she had gone over to the Lalondes’ that evening and came back distressed, bloody and crying. Lalonde’s defence, however, tried to cast doubt on Mulligan’s assertion that she had been raped by emphasizing that the group had been drinking whiskey before the incident occurred. Mulligan admitted “there was some whiskey in the house,” and that she had drunk only “a glass,” but was unclear about whether it had been given to her by Philip Lalonde or his wife. Lalonde’s son Thomas, “a very young boy,” told the court that “Kitty Mulligan came in” on the night in question: “she got drunk then threw his mother

down – his father was in bed – never went near her.” However, Robinson noted disapprovingly, “the boy got drunk too.” The level of alcohol consumption in the Lalonde home became a pivotal factor in this case. Character witnesses for Philip Lalonde described him as “a hard working man,” with “nothing agt. him – except that he drinks.” They pointed instead to a “quarrel” between the two families over some timber; one witness, John McGuire, stated that Catharine’s mother was “badly spoken of – a spiteful person,” although he knew nothing of “her husband or Catharine.” Philip Lalonde’s drinking did not lead him to be regarded as a rapist, however, and he was found not guilty.

**Conclusion**

The “neighbourhood” was of critical importance in defining rape and sexual assault in Upper Canada. Coercion and consensual activity were not always easily distinguished by the colony’s men in particular, although complainants’ testimony clearly indicates that they expected the ability to refuse an unwanted sexual encounter. Although rape was taken seriously as a crime, attacks by strangers and acquaintances were more easily punished by the colony’s courts than those which could be placed in the context of a courtship or other social relationship. The issue of consent and ideal masculine behaviour was often vexed by discourses which collapsed consensual activity and force.

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172 Testimony of Thomas Lalonde, Queen v. Lalonde, Robinson Benchbooks, RG 22-390-2-24-5.
173 Testimony of Angus McGillis, Queen v. Lalonde, Robinson Benchbooks, RG 22-390-2-24-5; very similar statements were made by John McGuire.
Community knowledge also functioned to bring greater depth to the assessment of “character” and “reputation,” however, for female complainants and for the men they accused. Although the legal system cannot entirely be described as “sympathetic” to victims of sexual assault, neither did it insist on women’s chastity.
Chapter 7

Conclusion

Basil Hall strongly favoured Britain’s retention of the North American colonies. To this end, the Royal Navy captain offered a few suggestions for improving the economic prospects of Upper Canada. After visiting the Canadas in 1827 and 1828, he noted “the absence of a hearty political union between the upper and lower provinces”: “The effect of this want of concert is, that their joint resources are not, and cannot, I fear, be directed to … objects, which, if the colonies were thoroughly joined, would eminently advance the interests of the united body.” One such object was Upper Canada’s lack of a seaport, which could be rectified by annexing Montreal to Upper Canada. Without a seaport, Upper Canada would not only be denied a relationship with her “mother country,” but would also be “estranged from her sister colonies in that continent, and also from those of the West Indies, with all of which she is unquestionably entitled to hold as open relations, as are enjoyed by any of the rest of his Majesty’s possessions.” Hall was convinced that only the annexation of Montreal could place Upper Canada “on equal terms with her neighbours,” a position to which the colony was entitled “by political birthright, as well as her steady loyalty to Great Britain.” His argument in favour of constructing a further series of fortifications along the American border rested on the

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2 Hall, *Travels in North America*, p. 121; on canals, see pp. 117-124.
notion that “Canadians” were in fact “loyal Englishmen,” in spirit no further from the metropole than the outer reaches of the British Isles.³

Hall clearly saw settler colonies, and particularly the Canadas, as an essential component of a strong and vibrant British empire:

If, then, a due degree of hearty and mutual confidence be established between the Canadas and England – for to be worth a straw it must be mutual – and, here and there, we put forward conspicuously, such indisputable symptoms of our sincerity … these colonies will be as secure from foreign conquest, and, by judicious management on their part and ours, be made, permanently, as substantially British, as the Isle of Wight.⁴

This vision of settler colonies as a fundamental component of the British empire, and of Upper Canada as a little England, is reminiscent of John Graves Simcoe’s self-conscious desire to create the colony as a transplanted British society. Dissenting voices were equally common, however; moreover, many of those who expressed reservations about the value of colonies based their arguments on not only economic grounds, but revulsion at the immorality of settler colonists.

Heterosexuality and marriage in Upper Canada were contested throughout the period under study. They played a significant role in the building of colonial identity through connections to loyalty, order, and societal organization. Marriage was a critical aspect of organizing society; as the debates over its legal solemnization illustrate, marriage could be wielded as a tool of the fledgling state in an effort to shape society in certain directions, but also constituted a practice over which people themselves felt a sense of entitlement and ownership. As Sarah Carter has argued, to understand the social

³ Hall, Travels in North America, p. 132.
⁴ Hall, Travels in North America, pp. 132-133.
significance of marriage, we must expand our definition to include a broader set of practices through which societies regulated sexual intimacy, including variable understandings of “marriage.” While these notions included and frequently centered around marriage rituals which were sanctioned by church and state, and which settled on a monogamous, male-dominated heterosexual couple, this “Christian conjugality” was not the only way to regulate sexual behaviour. Nor, in Upper Canada, was it the only accepted form. Like other contemporary societies, Upper Canada was home to a broader range of heterosexual relationships and paramarital practices than scholars have previously acknowledged. Contests over “correct” forms of sexuality in Upper Canada, while specific to local conditions, were also part of an ongoing conversation about appropriate and inappropriate intimacies during this period.

This study has also highlighted the role of community and neighbourhood in shaping definitions of appropriate and inappropriate social and sexual behaviour, invoking the “intimacies of empire” in yet another sense. Relationships were of vital importance not only to the interactions between individual men and women in Upper Canada, but also to their understandings of the world in which they lived. Sex before marriage was not necessarily regarded as “scandalous,” especially when it occurred within the bounds of a socially recognized relationship and the possibility of marriage at least theoretically remained open. The expanded range of marital traditions practised into the 1840s in many ways precluded strict definitions of chastity and marriage. Although

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some men attempted to mobilize discourses about female purity in order to evade a promise of marriage they no longer wanted to keep, the “double standard” lacked practical power among many sectors of Upper Canadian society. Outside the colony’s elites, many women who became pregnant outside of conjugal relationships were able to rely on the support of their family and friends. Suits for seduction and breach of promise, as well as the less frequent suits for support of estranged wives and/or children, demonstrate a strong tradition of community involvement in brokering settlements. As with separations, these cases likely represent a greater number which went unrecorded; mutual agreements may not have left documentary evidence. The definition of rape and sexual assault also rested on community knowledge and social relationships. Women who were attacked by strangers could narrate their experiences in ways that resonated with Upper Canadian men’s understandings of consent. In instances where the assailant was a friend, an employer or employee, a member of the household, or a lover, coerced sex was less easy for Upper Canadians to define.

I have also suggested throughout this study that the overtly patriarchal system which functioned in the colony had the unanticipated effect of allowing women in particular a wider range of possibilities for sexual activity. The increasing ascendancy of middle-class norms which emphasized chastity and assigned responsibility for maintaining sexual boundaries to women contributed to the rise in invocations of shame among women who had been sexually assaulted. It also contributed to a decline in toleration of extramarital sexuality by removing some of the space in which women, as well as men, could engage in plural courtships which involved some level of sexual intimacy without facing considerable societal censure. While in many respects this was a
mutation of ideas about female sexuality, rather than a revolution, men as well as women clearly struggled with inconsistencies in conceptualizing appropriate behaviour. The changes in discourse which ultimately eliminated some of these backhanded “freedoms” were concurrent with the increasing project of codification by the state into the 1830s and 1840s. In some ways, changes to the legislation surrounding marriage and seduction, while it granted certain privileges, also made alternate forms more difficult to sustain. The greater consistency in application no doubt benefitted many of the colony’s residents. Community regulation was not necessarily benign, as the records of charivaris demonstrate.

In foregrounding the significance of Upper Canada’s colonial status to its contests around sex and marriage, this study emphasizes the importance of time and place. The shifts which took place during the colonial period contribute to a better understanding of the differences between “Protestant Ontario” and Upper Canada. More importantly, though, discourse about marriage in Upper Canada must be placed in the context of making colonial identity. Efforts to define a “native” status for settlers were yoked to marriage, both through the push toward legal regulation of marriage forms and proposals which imagined strength in “hybridity,” at least among European settlers. They are also visible in discourse which downplayed the colony’s “motley” population, and in Simcoe’s efforts to shift power away from the mixed families of the southwestern region, such as the Johnsons. These discussions also take on resonance when considered in light
of the Durham report, and its articulation of “race” in the British North American colonies.6

Race, marriage, and hybridity in Upper Canada were entangled in ways which should prompt questions about how they functioned in this specific colonial context.7 As Durba Ghosh points out in her study of mixed families in colonial India during the same period,

Historical narratives of colonial contact in various colonies have produced distinct legacies for national identities in the colonial and post-colonial eras. These narratives and the questions they raise about hybridity – broadly defined by race, ethnicity, and lineage – amplify the multiple complications in locating racially diverse, multicultural communities within post-colonial national identities.8

Although they were clearly present, elements within the colony and its subsequent scholars have tended to downplay the significance of social diversity in the colony, and its connections to concerns about sexuality. The history of hybridity in Upper Canada, largely obscured by biologically- or colour-driven interpretations of race, is in a sense hidden in plain sight. This study has concentrated on articulations of identity among settlers primarily as they relate to whiteness, but further research should explore the meanings of marriage to Upper Canadian identity from a wider perspective.9

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9 Steps down this path include Cecilia Morgan, “Creating Interracial Intimacies: British North America, Canada, and the Transatlantic World, 1830-1914.” *Journal of the*
Bibliography

Archival Sources

Library & Archives Canada

CO 47/141: Colonial Office Blue Books of Statistics, etc., Upper Canada
RG 5 A1, Upper Canada Sundries

Archives of Ontario

Court Records

RG 22-13, Johnstown District Court of General Quarter Sessions of the Peace rough minutes, 1808-1819
RG 22-14, Johnstown District Court of General Quarter Sessions of the Peace, 1801-1819
RG 22-31, District of Newcastle Court of General Quarter Sessions of the Peace case files, 1802-1846
RG 22-38, District of Newcastle Court of General Quarter Sessions of the Peace grand jury presentments, 1822-1841
RG 22-49, Eastern District Court of General Quarter Sessions of the Peace filings, 1794-1796
RG 22-134, Court of Queen’s Bench Assize Minute Books, 1792-1848
RG 22-138, Court of King’s Bench Criminal Case Filings, 1792-1819
RG 22-155, Court of Probate Estate Files

RG 22-390, judges’ benchbooks:

James Buchanan Macaulay, 1827-1856 (RG 22-390-1)
John Beverley Robinson, 1829-1862 (RG 22-390-2)
Christopher A. Hagerman, 1840-1846 (RG 22-390-3)
Jonas Jones, 1846 (RG 22-390-4)
Robert Baldwin Sullivan, 1848-1853 (RG 22-390-5)
William Henry Draper, 1849-1876 (RG 22-390-6)
Robert Easton Burns, 1838-1860 (RG 22-390-9)

Manuscript Collections

Birdsall Family, 1815-1892, F 478 MS 211
Andrew Norton Buell Family papers, 1808-1881, F 62 MU 309
Daniel Fowler Diary, 1810-1894, MS 199
Francis Goring, 1805, F 594 MS 432
William Johnson, 1832-1850, F 1248 MS 18
Macaulay Family, 1773-1874, F 32 MS 78
J. Sandfield MacDonald diary, 1837-1838, F 1 MU 1769
John Glass Malloch diaries, 1841-1845, F 771 MU 842,
Mrs. E.G. [Mary Gapper] O’Brien journals, 1828-1838, MS 199
Ely Playter diary, 1801-1853, F 556 MS 87
Rogers Family papers, 1765-1902, F 533, MS 522
Francis Shanly fonds, 1830-1899, F 647 MU 2719
Samuel Smith fonds, 1820-1864, F 565, MS 953
Joel Stone Family fonds, 1774-1921, F 536 MS 519
John Strachan fonds, 1794-1891, 1911, F 983
Isaac Wilson papers, 1811-1841, MS 199

Baldwin Room, Metropolitan Toronto Reference Library

William Warren Baldwin Papers, B103

Queen’s University Archives

William Bell journals, Vol. 1-17, 1780-1857

Newspapers

*British Colonist*
*British Whig*
*Cobourg Star*
*Colonial Advocate*
*Gore Gazette*
*Kingston Chronicle; Kingston Chronicle and Gazette*
*Niagara Gleaner*
*Upper Canada Herald*
*York Gazette*
*York Weekly Register*

Published Material


Dictionary of Canadian Biography.


-------. *Sketches of Upper Canada, Domestic, Local, and Characteristic: To Which Are Added, Practical Details for the Information of Emigrants of Every Class; and Some recollections of the United States of America.* Edinburgh: Oliver & Boyd, 1821.

*Journals of the Legislative Council of Upper Canada.*

*Journals of the House of Assembly of Upper Canada.*


MacTaggart, John. *Three years in Canada: an account of the actual state of the country in 1826-7-8, comprehending its resources, productions, improvements, and capabilities; and including sketches of the state of society, advice to emigrants, &c., by John Mactaggart, civil engineer in the service of the British government, in two volumes.* London: Henry Colburn, New Burlington Street, 1829.


Picken, Andrew. *The Canadas, as they at present commend themselves to the enterprize of emigrants, colonists, and capitalists: comprehending a variety of topographical
reports concerning the quality of the land, etc. in different districts and the fullest general information. Compiled and condensed from original documents furnished by John Galt, Esq., and other authentic sources by Andrew Picken. London: E. Wilson, 1832.

Pickering, Joseph. *Emigration or no emigration: being the narrative of the author, an English farmer, from the year 1824 to 1830: during which time he traversed the United States of America and the British province of Canada, with a view to settle as an emigrant; containing, observations on the manners and customs of the people ... and a comparative statement of the advantages and disadvantages offered in the United States and Canada, thus enabling persons to form a judgement on the propriety of emigrating*, by Joseph Pickering. London: Longman, Rees, Orme, Brown, and Green, 1830.

Queen’s Bench and Practice Court Reports [Old Series]. Published by J. Lukin Robinson, Esq. (From Manuscript Records in Judges’ Chambers.) From Michaelmas Term, 3 Will. IV., to Michaelmas Term, 5 Will. IV., Inclusive. Vol. III. Toronto: R. Carswell, 1878.


Queen’s Bench and Practice Court Reports [Old Series]. Published by J. Lukin Robinson, Esq. (From Manuscript Records in Judges’ Chambers.) Vol. V. Toronto: R. Carswell, 1877.

Queen’s Bench and Practice Court Reports [Old Series]. Published by Christopher Robinson, Esq. (From Manuscript Records in Judges’ Chambers.) Vol. VI. Toronto: Henry Rowsell, 1858.

Queen’s Bench and Practice Court Report. By John Hilyard Cameron, Esq., Barrister-at-Law, and Reporter to the Court. Vol. I. Containing the cases determined from Easter Term, 7 Victoria, to Easter Term, 8 Victoria, inclusive; and some cases of an earlier date: with a table of the names of cases argued, and digest of the principal matters. Second Edition. Toronto: Henry Rowsell, 1858.

Queen’s Bench and Practice Court Reports. By John Hilyard Cameron, Esq., Barrister-at-Law, and Reporter to the Court. Vol. II. Containing the cases determined from the sittings after Easter Term, 8 Vict., to Hilary Term, 9 Vict., with a table of the names of cases argued, and digest of the principal matters. Second Edition. Toronto: Bollo and Adam, 1861.

Report of Cases Decided in the Court of King’s Bench of Upper Canada. By William Henry Draper, Esq., Barrister at Law. Containing the Cases Determined from Michaelmas Term 10 Geo. IV., to Easter Term 1 Wm. IV.; with a table of the names of cases argued, and digest of the principal matters. Second Edition. Revised and corrected by the reporter, with the addition of notes of various cases bearing on the decisions reported. Toronto: Henry Rowsell, 1861.


Sleeper, John Sherburne. Tales of the Ocean and Essays from the Forecastle ... (Boston: A.N. Dickinson, 1842.


Strickland, Major C.M. [Samuel]. *Twenty-Seven Years in Canada West; or, The Experience of an Early Settler, by Major Strickland, C.M. Edited by Agnes Strickland* [1853]. Edmonton: M.G. Hurtig Ltd., 1970


Secondary Sources


“The Sin of the Settler: The 1835-36 Select Committee on Aborigines and Debates over Virtue and Conquest in the Early Nineteenth-Century British White


-------. White, Male and Middle Class: Explorations in Feminism and History. New York: Routledge, 1992.


322


-------. “‘Everything was new, yet familiar’: British Travellers, Halifax, and the Ambiguities of Empire.” *Acadiensis*, Vol. XXXVI (Spring 2007), pp. 28-54.


-------. “Turning Strangers into Sisters? Missionaries and Colonization in Upper Canada.” In Marlene Epp, Franca Iacovetta, and Frances Swyripa, eds., *Sisters or


Perry, Adele. “Islands of Intimacy: Community, Kinship, and Domesticity, Salt Spring Island, 1866.” In Tony Ballantyne and Antoinette Burton, eds., Moving Subjects:


Smith, Donald B. *Sacred Feathers: The Reverend Peter Jones (Kahkewaquonaby) and the Mississauga Indians*. Toronto: University of Toronto Press, 1983.


**Unpublished Theses and Dissertations**


Poutanen, Mary Anne. “‘To Indulge Their Carnal Appetites’: Prostitution in Early Nineteenth-Century Montreal, 1810-1842.” Ph.D. Dissertation, Department of History, Université de Montréal, 1996.
