THE REGULATION OF MARRIAGE BY THE CRIMINAL LAW: A FEMINIST ANALYSIS

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ABSTRACT

Feminist analyses have drawn attention to the patriarchal structure of society that has in many ways served to subjugate women. Issues such as pornography, prostitution and wife abuse have thus been the focus of a great deal of feminist research. The status of the married woman, however, has not been singularly addressed. While marriage is regulated by many legal sanctions, the Canadian Criminal Code encompasses many provisions that specifically pertain to married persons, giving spouses a unique standing within the criminal law. These provisions encompass matrimonial offences, parties to an offence, testimony in criminal proceedings as well as crimes of a fundamental criminal nature and in substance and application treat married persons differently from their non-married counterparts.

This thesis examines crimes of a fundamental criminal nature to assess and facilitate understanding and awareness of how the criminal law has historically regulated marriage in Canada. Sexual assault (previously rape), the duty to provide necessaries and theft are the focus of this analysis. These specific provisions are examined by means of Canadian case law, beginning with the inception of the Canadian Criminal Code in 1892. Judicial interpretation of statutory provisions identifies the meanings, aims and application of these provisions.

The findings of this thesis affirm that married women are subjugated by these particular provisions of the Criminal Code. Case law indicates that a woman is regarded as the property of her husband and therefore to be dominated by him. This patriarchal application of the criminal law achieves the maintenance of the traditional Christian marriage where the woman is accorded the role of child-bearing and rearing and the husband is the head of the household and breadwinner. It is also shown that the state has a vested interest in the maintenance of this traditional union since it provides independent economic units that are not dependent upon the state for support. This analysis supports the contention that Canadian criminal law, as written and enforced by the courts, has enabled and supported patriarchal laws that have subordinated women in an effort to maintain the traditional marriage structure which is in keeping with state interests.

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DEDICATION

Dedicated to the memory of my father - for his love,
encouragement, support and friendship

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CHAPTER I

INTRODUCTION

Feminist theories and analyses focus on power, domination and subjugation. A number of feminist research enterprises examine the family, and the power relations which occur within this unit.[1] Within this feminist perspective, the marital relationship in North American society is of great importance to feminist theorists, for this monogamous unit is the site of primary patriarchal relations.[2] While much of the feminist legal literature assesses spousal assault,[3] a more general analysis of the types of legal controls specifically assigned to the marital relationship is necessary to illustrate how such a central institution of our culture has historically maintained strong patriarchal tenets. This is not to say that this is a new field of enquiry, but at this time, much of the literature only examines one area of subjugation by a male-oriented criminal law, for example, spousal assault, pornography or prostitution. Thus, this thesis provides a comparative analysis of several forms of legal controls that regulate marriage in various respects, with one underlying theme, that of control and domination. Before such an analysis can take place, however, feminist theory and its usefulness as a theoretical tool must be examined in order to pinpoint its major theoretical tenets as well as the value of utilizing a feminist approach in assessing the regulation of marriage by criminal sanction.

Feminist Theory

Feminist theory provides a unique level of analysis that was previously neglected by the more 'malestream'[4] modes of enquiry which failed to examine specific types of power struggles and domination that are endemic to society. According to Marshall (1988): "Feminism has an important role to play in reinterpreting norms, creating new meanings, and linking transformation to consciousness with institutional reform."[5] Feminism is also distinct from other theoretical bases in that, not only does it provide theoretical guidelines, but also its strength began as a socio-political movement: the women's movement beginning in the nineteenth century.[6] As well, feminism can be divided into varying theoretical strains. Much of the literature of feminist theory does however limit the focus to three broad forms: liberal feminism, radical feminism, and socialist feminism.[7] While it is not the purpose here to conform to one label of feminist theory, but rather to approach the research under a unified theme of feminist analysis, the focus and themes of these three major feminist theories will be briefly examined.

Liberal feminism has as its primary focus the desire for legal and social equality. Concentration is therefore directed at legislative reforms, which promote equality between men and women within the existing societal structure. Liberal feminism has as its roots the Enlightenment, with its conception of equality and natural rights, as espoused in the work of Rousseau

and Locke. While the notions of inherent rights and equality provisions are laudable, these aims are in fact self-defeating and diluted when implemented in a society that is patriarchal in nature, since in such a structure, true equality can never be achieved. Thus, successfully lobbying for equality provisions in an unequal society that favors male interests does not rectify the subordinate's status, but may in fact further increase repression.[8] Structural changes must occur before the legal and social subjugation of women is abolished. Due to this inherent problem with liberal feminist theory, the primary focus of most feminist analysis is now employing radical and socialist themes.

Radical feminism is to some degree a response to the gap created by what was seen as 'ineffectual lobbying', as the desired equality provisions did not result in equality in practice, and simply left the patriarchal structure of society in place. The main focus of radical strains of feminist theory is on patriarchy, or male domination.[9] Much of the radical feminist research and literature examines the family and the oppression resulting from the woman's reproductive role. Child-bearing and rearing are thus of central focus, providing insight into the oppression of women in the private sphere.

Marxist feminists focus on the key issues of class and the economy. A patriarchal level of analysis is also the main focus, as with radical feminism, but it is done in terms of the materialistic control of society and the state. The Marxist analysis of the relations of production is extended and

broadened under this model to the concept of relations of reproduction. Many socialist feminists thus devote a great deal of analysis to the linkage between capitalism and patriarchy.[10]

These, briefly, are the major issues raised by the three major strains of feminist theory. It is not necessary in this instance, to limit the analytical focus to simply one of these approaches, for the tenets raised by all models or strains of feminist theory will provide a good theoretical tool for examining the legal regulation of marriage. Specifically, liberal feminism lends focus on the need for equality and the natural rights accorded to everyone to be equal members of society. As noted by Eisenstein (1981), liberal feminism "shares the belief in the supremacy of the individual and the correlate concerns with individual freedom and choice. This belief underlies the demand for women's independence. All feminists, no matter what their particular persuasion is, root their feminism in this (liberal) conception of self."[11] The radical and socialist strains of feminism then can be employed to understand the patriarchal structure of society, and specifically with socialist feminism, within an economic model. Radical and socialist approaches facilitate an analysis that recognizes the control and, in turn, the repression that a woman's reproductive role creates. In so doing, the function of the state in securing the family as an economic and sexual institution can be assessed. Combining all of these themes and approaches secures a more comprehensive approach to the problems and issues concerning the regulation of marriage by the criminal law. Each

of these strains of feminist theory are not mutually exclusive. As Eisenstein notes: "The unity between these three orientations derives from the concern to understand and dismantle patriarchy."[12]

Accordingly, the concept of patriarchy is central to feminist analysis. This term has been widely used in the literature to the extent that its usage has produced several divergent meanings.[13] Kate Millett was perhaps the first to conceptualize patriarchy as a base for feminist critique, defining it as: "...power-structured relationships, arrangements whereby one group of persons is controlled by another."[14]

In a Marxist analysis of patriarchy, the stress is placed on the relationship between capitalism and patriarchy, linking the oppression of women to other forms of oppression. Hartmann (1979) defines patriarchy in a hierarchial sense, emphasizing that there are two levels of male domination – one existing within the home, and the other existing as a function of the state. Under a Marxist critique, then: "Patriarchy, by establishing and legitimating hierarchy among men (by allowing men of all groups to control at least some women), reinforces capitalist control, and capitalist values shape the definition of patriarchal good."[15]

Patriarchy has also been intrinsically linked with law. The law is the site where domination is reified and substantiated, for the laws are created by men: "Law in state and non-state

contexts is based on male authority and patriarchal social order."[16]

While these definitions may vary, it can be seen that the unifying themes within feminist discussions of patriarchy are power and domination, frequently entrenched in legal norms. Often this domination takes the form of men having what are essentially proprietary rights over women. Property rights have not remained solely concerned with inanimate objects, but have also served to justify a dominating 'ownership' between human beings. To understand how this has been done, the issue of property and the power and privileges attached to it must be briefly examined.

The concept of private property has been said to have developed with the economic system of capitalism, and its idea of ownership. As Hirshon (1984) contends:

> Broadly speaking, our attitudes to property are associated with the development of capitalism and with the notion of the commodity. Property for us is based on the idea of 'private ownership' which confers on the individual the right to use and to disposal. Property is thus seen as valued goods/objects which can be transferred between legally-constructed individuals.[17]

The ability to acquire property, and the issue of what constitutes something that can be appropriated or acquired by an individual is less clear than the origination of the concept of property. Durkheim (1957), for example, discounts the argument that property is acquired solely by labour, holding that exchange, donations and inheritance provide non-labour means of acquiring possession over something.[18] Negating, then, the

contention that property rights arise as the fruits of one's labours, Durkheim contends that: "We might say that in law, the vital method of acquiring property is: the material taking possession, the holding of it and the close contact with it."[19] As the law is said by Durkheim to regulate how property can be acquired, he further contends that the law also defines what is to constitute property: "...the range of objects liable to appropriation is not necessarily settled by their natural composition but by the law of any nation. It is public opinion in every society that makes some objects regarded as liable to appropriation and others not: it is not their physical nature as a natural science might define it, but the form their image takes in the public mind."[20]

Certain laws, as a reflection of patriarchal society, have defined women as the property of men; first the father has proprietary rights over his daughter, and then upon marriage, these property rights are exchanged from father to husband. Caputo et al. (1989) reinforce this contention: "The laws concerned with the regulation and control of sex have always reflected male values and treated women as the property of men."[21] Property rights in persons do not, however, hold the same powers as property rights might over some inanimate objects. It has long been held that there are three potential powers over property: the *jus utendi* (the right to make use of the property in question); the *jus fruendi* (the right to make use of the yield of the property in question); and the *jus abutendi* (which gives the owner the power to destroy the

property in question).[22] Male property rights over women do not permit them to destroy such property, in the true sense of the word, however the integrity of the individual can be destroyed or diminished; such rights also do not permit making use of the monetary gain of selling such property. The male proprietary rights over women therefore involve the basic property rights, for "...the power of usage...which within certain limits, is found wherever there is a right of property."[23]

Property rights, then, are not solely confined to inanimate objects but have been extended to rights over individuals. As Cohen (1983) notes, this is the meaning of 'property': "as a legal term 'property' denotes not material things but certain rights."[24] When examining the legal regulation of marriage, then, the property rights instilled in husbands over their wives by the patriarchal society must also be of crucial focus. These rights, as will be seen, have served to justify and perpetuate male domination within marriage.

Feminist theory in its assessment of, and focus on, patriarchy, property rights and the need for equality is therefore a most useful theoretical tool. This is the most appropriate level of analysis to utilize when assessing power structures, domination and inequality, for as Acker (1987) notes: "Feminist theoretical frameworks address, above all, the question of women's subordination to men: how this arose, how and why it is perpetuated, how it might be changed and (sometimes) what life would be like without it."[25] Feminist

theory as a whole is therefore the most applicable theoretical tool to investigate and uncover male domination and female subjugation. One of the primary sites of this subjection is within the family and the marriage unit itself.

Feminist Views on Law and Marriage

Of primary interest to feminists is the regulation of marriage by criminal sanction, for this exemplifies a dual patriarchal system: the state and the male head of the household. In analyzing the state intrusion, it is clear that the state has a vested interest in securing the *status quo*, which constitutes the traditional family existing within a male dominated society. The role of the state is seen by McIntosh (1978) as having two primary functions:

> On the one hand, for the reproduction of labour power the state sustains a family household system in which a number of people are dependent for financial support on the wages of a few adult members, primarily of a male breadwinner, and in which they are all dependent for cleaning, food preparation and so forth on the unpaid work done chiefly by a woman.... On the other hand, for the reproduction of relations of production (specifically the nature of labour power as a commodity), the state has played an important part in establishing married women as a latent reserve army of labour, again by sustaining the family household system and particularly by assuring the financial dependence of unemployed wives on their husbands so that married women are not fully proletarianized even during a period when they are increasingly drawn into wage labour.[26]

The family unit, so structured by these relations of reproduction and subsequent gender roles, is legally secured by the state in order to maintain the vested state interest of independent economic units. John Stuart Mill (1869), a noted

early liberal feminist, also underscores this ideology when he quotes a doctrine prevalent in his time:. "It is necessary to society that women should marry and produce children. They will not do so unless they are compelled. Therefore it is necessary to compel them."[27] Western society promotes and attempts to secure and maintain the Christian concept of a monogamous marriage. Engels (1972) maintained that the monogamous marriage promotes economic gain for men: "The Greeks themselves put the matter quite frankly: the sole exclusive aims of monogamous marriage were to make the man supreme in the family, and to propagate, as the future heirs to his wealth, children indisputably his own."[28] The state then has a patriarchal interest in reproducing "the material and ideological conditions under which these relations may survive."[29]

There are many types of laws that regulate marriage and the family, but of particular interest is the involvement of the criminal law, a public instrument, into this obstensibly private domain, in a manner that attempts to uphold the sanctity of the marriage rather than the sanctity of the individual. While the criminal law should not intervene in matters of strictly private concern,[30] this is not to say that alleged criminal behaviour on the part of one spouse against the other should be condoned, but rather that marriage should not be deemed so sacred an institution as to permit offences to occur within this relationship in the guise of protecting the union. The proper line must be drawn between what is public and what is private, but this division must be made based on the sanctity and welfare

of each individual.

Feminist analysis has focused on three main issues of contention regarding the use and application of the criminal law, as held by Boyle et al. (1985): "A critical analysis of criminal law from a feminist perspective reveals problems in three areas: morality [moral order based on male consensus], legitimacy [i.e., includes acts which cannot be seen as 'criminal'] and equality."[31] The morality and legitimacy of the criminal law, or certain specific provisions, may be questioned as they are resultant of a male based society. As Boyle et al. further note: "A true feminist analysis must therefore identify the male concerns and interests that have governed the definition of offences and the determination of sentences."[32] Feminist analysis of law has concluded that behavior should only be criminalized when it is harmful to others and the values of the community, but that such criminalization must not violate or harm the integrity and fundamental rights of each individual.[33] Criminalization should pose a solution to a problem, not exacerbate it. Of primary concern to feminists, then, is that the integrity of each individual be upheld and supported by legal sanctions, and that such protection be based on equality. Equality, however, is not easily achieved. Absolute gender neutrality is problematic for it does not take into consideration biological, social, psychological and economic differences. Boyle et al. (1985) advocate that equality should be achieved by virtue of the 'subordinate principle'; that is, "to be equal is to be non-subordinated."[34] Section 15 of the

Canadian Charter of Rights and Freedoms holds that: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discriminatin based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." In interpreting and implementing s. 15, however, caution and care must be taken for,

> ...an insistence that s. 15 requires that women and men be identical in the eyes of the law ignores existing biological, social and economic inequality. To put it simply, mandating formal equality (i.e., that men and women be treated identically) in a world of real inequality, is to maintain inequality, not eradicate it.[35]

Attention must therefore be directed to the aims and purposes of the criminal law in assuring that members of society are not subordinated by certain provisions. It must be assessed whose interests are being protected and why.

In examining the regulation of marriage by criminal sanction, one must question not only how and why these certain specific laws are enforced, but also why marriage is a sacred relationship, which, above all others, is to be protected by the criminal law. In fact, the family as a whole, with respect to the children, is not as well protected. Also, the only type of unit to be protected is the heterosexual married couple. Boyle (1985) comments: "It is...seriously questionable whether heterosexual marriage should be given any special protection by the criminal law. To the extent that any such provisions are retained it is not justifiable to draw distinctions between heterosexual marriage and other ongoing relationships."[36] The

morality, legitimacy, and equality of the regulation of marriage by criminal sanction can thus be questioned. Clearly, some interests are being supported by such legislation, but they are by no means universal interests.

There are many questions to be raised in terms of the regulation of marriage by the criminal law. Feminist legal scholarship has drawn a great deal of attention to these discrepancies and concerns, but further analysis is needed to facilitate understanding and awareness of how marriage has been defined and regulated by the criminal law. Before such an enquiry can begin, however, the concept of marriage within western culture needs to be further examined.

Marriage

While there are many types of marriages condoned in different societies, the western marriage ideal is that of monogamy: one man and one woman excluding all others. This Christian ideal holds that such a monogamous relationship is the 'natural law' of man. In defining natural law, St. Thomas Aquinas holds that it is "a knowledge naturally belonging to man, by which he is guided to the right performance of the actions proper to him." [37] Cole (1939) states that:

> ...'natural law' is not the result of correlated observation, but of meditation upon morals, and derives from the views of morals held by those who have so meditated, which result they then declare to be applied to the world at large, including those who appear in general to agree with their view and those who do not.[38]

The purposes underlying marriage, as extolled under this Christian ideology are: 1) the procreation of children; 2) to remedy against sin (i.e., to avoid fornication); and 3) to benefit society by having someone in times of prosperity and adversity which idealistically secures harmonious independent economic units (and in fact the marriage vows reflect this latter point). The impact of marriage has been noted and illustrated in terms of the status it contracts: "Marriage is a contract, but it is also much more than a contract, for it confers a status upon the parties and upon their children; that is to say, it gives rise to rights and duties which are not, as in a contract, created by the parties themselves, but are conferred or imposed upon them by the community."[39] This statement illustrates the power and authority that the institution has over the individual, although this power is not equally distributed over both parties: men and women are not placed on an equal footing in this regard.

While one could contend that marriage is a private relationship which is governed by these goals of the Christian community, it is in fact essentially a public institution, and historically, a religious one at that.[40] Originally, marriage was simply contracted by a consensual agreement, but the Council of Trent in 1563 imposed "a public formality as an essential condition of the validity of marriage."[41] In 1753, the English Parliament imposed this requirement as a component necessary for a valid marriage, henceforth requiring: "For the valid celebration of a marriage in England it is required that the

ceremony should take place in the presence of two or more credible witnesses besides the officiating clergyman or authorized person in whose presence the marriage is celebrated or the civil registrar or marriage officer by or in whose presence it is celebrated."[42] Further, the marriage "must be celebrated with open doors" and "registered in duplicate".[43] While it can be argued that common law marriages, consensual agreements, are still legally and publicly recognized to this day, these marriages do not hold the moral status and credibility of the traditional mode, and are held in disdain by some. Common law marriages are also not included, by definition, in the enforcement of certain criminal law provisions that pertain specifically to married persons. As Atkins and Hoggett (1984) contend:

> Marriage is clearly the relationship preferred by the law, for although overt sanctions against fornication have been abandoned, extramarital intercourse is still termed 'unlawful', contracts designed to promote it are 'illegal'; and its offspring are 'illegitimate' and thereby disadvantaged.[44]

The social policies reflecting the Christian ideology of a monogamous marriage continue to stigmatize those who do not adhere to these values. Monogamy has in practice served to facilitate the repression of women. In the Bible, upon marriage, the couple is deemed as one.[45] This unification has been translated into law. As Zuker and Callwood (1976) indicate, however, this 'one' is the man. A marriage ceremony creates man and *wife*: "the inference is that the man is unchanged by the ceremony but the woman has become something other than she was."[46] They add:

> Throughout a good deal of history, society believed that a husband had title to his wife, exactly as he did to a slave he had purchased. If he wanted to, he could kill her. Until the middle of the nineteenth century, there was a category in law – bluntly defined as "women, children and lunatics" – which had no status. Marriage laws reflected this and the wedding ceremony was the straight transfer of child-bearing machinery from one owner, the father who guaranteed the intact hymen, to the new owner, the husband.[47]

The Christian ideology of marriage is therefore based very much on a patriarchal model. While the law no longer accords the married man the right to kill his wife, laws within the criminal sphere regulating marriage have continued to repress the married woman in other ways and have been justified as a means of protecting this socially heralded institution.

The Legal Regulation of Marriage

Plato, in his book of Laws, asserted that: "In a well ordered state, the principal laws will be those governing marriage."[48] It has long been felt that the family or married unit is of such public importance "as to require special protection from the law."[49] Since the marital relationship constitutes a public and economic institution, it has been deemed to be in the best interests of the state and the public at large to shape and maintain the desired *status quo* of marriage through law.[50] In terms of 'policing', or regulating state interests, Johann von Justi (1768) noted:

> The purpose of policing is to ensure the good fortune of the state through the wisdom of its regulations, and to augment its forces and its power to the limits of its capability. The science of policing consists, therefore, in regulating everything that reflects to the present

> condition of society in strengthening and improving it, in seeing that all things contribute to the welfare of the members that compose it. The aim of policing is to make everything that composes the state serve to strengthen and increase its power, and likewise to serve the public welfare.[51]

The regulation of marriage by criminal sanction has served to 'police' and reinforce the state interests of the patriarchal nature of this union. Marriage has been viewed as an institution that needs the guiding force of legislation to keep it within the desired bounds of Christian dogma.

Originally, marriage was regulated by ecclesiastical law, given that this union was a religious one.[52] Ecclesiastical law was not, however, simply concerned with religious offences, but also dealt with 'ordinary' offences, some of which arose "out of the relation between the sexes."[53] Marriage therefore fit within both of these aspects of ecclesiastical law. Court records complied by Archdeacon Hale from the Court of the Commissary for London, Essex and Hertfordshire indicate that the ordinary offences relating to the sexes comprised approximately half of the cases presented in ecclesiastical courts.[54] The jurisdiction of these tribunals was not strictly defined, and thus permitted a great deal of intrusion into individuals' lives: in terms of behavior liable to official scrutiny, the wide bounds of evidence gathering, and the severity of punishment for offences committed. While the ecclesiastical courts may have appeared to have been the ideal or proper bodies to regulate marriage, their powers and functions soon met with disillusion and eventual dissolution. As Sir James Stephen (1883) notes:

> The function of the ordinary ecclesiastical courts was to punish offences against religion and morals, in a word to punish sin as such. This function they discharged with little interruption till the year 1640, and during the latter part of the period they united with it the function, half political, half theological, of enforcing ecclesiastical conformity and suppressing writings and words opposed to the system established by law. The resistance provoked by these efforts and the intense unpopularity of their method of procedure brought the whole system to the ground. It was revived to a very limited extent in 1660, and still retains a shadowy existence as against the laity, though it has fallen into complete desuetude in regard to them, except in the single case of incest.[55]

With the decline and eventual disbandment of the ecclesiastical courts, many of the offences regulated under ecclesiastical law were made an offence by statute, under the criminal law. The regulation of marriage thus eventually fell within the bounds of the criminal law.

The criminal law became one of the key regulatory mechanisms by which the institution of marriage is secured within the proscribed Christian parameters. Many legal commentators support such a pervasiveness in the criminal law which spans beyond intrinsically 'criminal' behaviors to an emphasis on morality and the perceived need to protect certain values. As Sir John Barry of the Supreme Court of Victoria (Australia) has contended:

> It is...true beyond question that in the reality of the social process an important end of the criminal law is to reinforce and uphold the moral sentiments of the community that favor the promotion of virtue and discourage the pursuit of evildoing, and in practical affairs this is done by gratifying the desire for retaliation which a crime arouses, and by way of deterrent example.[56]

Feminists have, however, argued against the moral nature of the criminal law.[57] Legislating morality is problematic, for it discriminates against those who do not abide by the morals of the powerful. Within marriage, then, the codification of morals protecting the interests of males serves to further repress the married woman's status and perpetuates patriarchy. As noted by Smart (1984):

> The law therefore can be understood as a mode of reproduction of existing patriarchal order, minimizing social change but avoiding the problems of overt conflict...legislation does not create patriarchal relations but it does in a complex and often contradictory fashion reproduce the material and ideological conditions under which these relations may survive.[58]

The regulation of marriage by the criminal law therefore needs to be further examined with these concerns in mind.

The Research Question

It has been noted that feminist scholarship has focused primarily on the family, and specifically on the regulation of marriage by criminal sanction, but at this time, a comprehensive analysis of those provisions of the Criminal Code of Canada that specifically pertain to married persons has not been made. As Boyle et al. (1985) note, a legal analysis of the substantive offences that have differential application to married persons has yet to be addressed.[59] A broader scope will further the assessment of the patriarchal nature of the criminal law and of the structure of marriage in Canada. In so doing, the following question posed by Boyle et al. (1985) will be addressed and

assessed: "Does such recognition contribute to the subordination of women by supporting the status of heterosexual marriage, the idea that the home is sacrosanct and the perpetuation of the notion that husband and wife are one person in law?"[60]

The criminal laws which affect marriage can be broken down into four categories, according to the aims of the particular provisions:

1. those of a more fundamental criminal nature – sexual assault, theft and the legal duty to provide necessaries;
2. those dealing with explicit matrimonial offences – bigamy, polygamy and solemnization;
3. those imposing liability on parties to an offence, through compulsion or as an accessory; and
4. the rules governing spousal testimony.[61]

Each of these categories benefits from analysis within a feminist critique.

This thesis will focus on the provisions of the Canadian Criminal Code that are of a more fundamental criminal nature: sexual assault, the duty to provide necessaries, failure of which constitutes an offence, and theft. The major purpose of this thesis is to assess and facilitate understanding and awareness of how the criminal law has historically regulated marriage in Canada. While previous feminist analysis has addressed the patriarchal nature and application of many Criminal Code provisions, this thesis will expand this theme, assessing how the criminal law has historically been utilized as

a means of maintaining the *status quo* of the traditional marriage and of family unity. Under this traditional model, the husband is the breadwinner and authority figure while the wife is responsible for child bearing and rearing and is under the control of, and subservient to, her husband. The perpetuation of this patriarchal hegemony will be assessed in terms of its being founded upon a vested state interest, in both an economic and social context. The dominant theme, then, is to provide awareness of specific patriarchal bases of the criminal law, which are in turn protecting and upholding certain male and state interests.

Focusing specifically on the sexual assault, duty to provide necessaries and theft provisions, as they apply to married persons, will illustrate the traditional subordinate status of the married woman. This repression, it will be shown, has over time been legitimized by the biblical and legal conception of the 'unity principle', in conjunction with the perceived proprietary rights a man has been held to gain over a woman upon marriage.

Marriage is, and has been, regarded as a sacred institution that is fundamental to the well being of society as a whole. While the purpose of this thesis is not to discredit this institution, there must be an awareness of the tenets of this union as they apply to and govern the status of the wife and the husband. Acceptance of the legitimacy of any institution must be based on reasoned assessment, and justification of, the

principles and foundations contained therein. Since marriage has been regarded as a sacred institution which affects most individuals in society in some way, there must be a general awareness of the manner in which this union is regulated and externally defined.

Of integral concern to this thesis, then, is the regulation of marriage by specific patriarchal criminal law provisions which have defined the married woman's status as that of subordinate to her husband. There is a need to understand the operation of these provisions and in turn to assess how this repression can be eradicated. In so doing, this thesis will also assert that the nature of change is also problematic, for when one is encountered with a need for structural change in order to resolve inequality, the necessary first step is not always clear. While it is clear that married women should no longer be socially or legally defined as subordinate to their husbands, there is a fallacy, that of liberal feminism, that legal change and advancement, perhaps in the form of equality provisions, will effect the necessary social change. That social change must precede legal change is too simplistic a conclusion to make, for something must drive the impetus for that social change. This thesis will therefore lay the groundwork for further awareness of the structure and regulation of marriage by the criminal law, in an effort to provide that impetus for reasoned change.

This analysis will begin with those provisions of the Criminal Code of Canada which relate to what was formerly termed

rape and is now categorized as sexual assault. Since much of the feminist legal literature has focused on this area and facilitated awareness of the proprietary nature of this law, specifically in terms of the historic immunity that regarded a husband as incapable of raping his wife, an examination of this offence first will further understanding of the patriarchal nature of specific Criminal Code offences and lend comparative value for discussions to follow. As the former offence of rape has been amended in accordance with aims of upholding equality and the integrity of the individual, Chapter III will then assess another provision which has been modified into a so-called equality provision, the duty to provide necessaries provisions, as they relate to marriage. This offence has recently been amended to reflect the push for equality. The duty has been made a bilateral one owed by both spouses. It will be assessed whether or not such amendments actually facilitate equality in practice, not just in theory.

Chapter IV will examine the theft provisions as they apply to married persons. These theft provisions have received very little legislative attention and thus remained virtually unchanged since the codification of Canadian law in 1892. While all of these offences will be shown to be patriarchal in nature and application, they also individually illustrate three key concerns and problematic uses of the criminal law. The rape/ sexual assault provisions are indicative of violence towards women, specifically in this instance towards married women. The duty to provide necessaries provisions have historically upheld

the ideology that women, married women, are in need of support, being incapable or undeserving of autonomy, and require a male authority figure for guidance and care. The theft provisions most clearly illustrate the property nature of criminal law and further have supported a married woman's inability to maintain proprietary independence. The issues of violence, support and property will thus be of overriding concern to the proceeding analyses. The critical analysis of these three offences will support the thesis that Canadian criminal law, as written and enforced by the courts, has enabled and supported patriarchal laws that have subordinated women in an effort to maintain the traditional marriage structure which is in keeping with state and male interests.

Methodology

This examination of specific marital offences, or the enactments that permit married persons to be above the law in certain areas, will be an historical, macro-sociological analysis of these laws, within a feminist critique. Such a comprehensive analysis, delving into the past, present, and making recommendations for the future, is vital for understanding the law, its problems and desirable future. As Sir James Stephen has noted:

> A complete account of any branch of the law ought to consist of three parts, corresponding to its past, present, and future condition —
> 1. Its history
> 2. A statement of it as an existing system
> 3. A critical discussion of its component parts with an

idea to its improvement.[62]

Canadian case law, dealing with rape/sexual assault, the duty to provide necessaries and theft between spouses will be the main data base from which these sections will be assessed. Primarily, this analysis will begin with the year 1892, with the inception of the Canadian Criminal Code; however, in order to get a sense of how and when these laws developed, some earlier case law will also be examined. As stated previously, this analysis will focus on Canadian case law, but as our laws have been largely derived from the English common law system, it will be necessary to analyze certain leading English cases. It would be inadequate simply to assess the provisions as they have stood and have been developed over time, it must be examined how these provisions have been interpreted by the courts for this is where the true meaning is given to legislative provisions. It is imperative to assess the prevalent ideologies: "...the concept of ideology – a concept derived from social theory rather than legal theory – is helpful because it facilitates in-depth analysis of legal ideas, principles and doctrine, without lapsing into the position that courts are engaged only in a neutral process of elaboration."[63]

While it is clear that case law will facilitate a fruitful analysis of how these laws were and are applied, it must be cautioned that the case law available and utilized in this analysis covers only reported cases. Thus, the conclusions to be drawn will only be relevant to those Canadian cases that have been appealed or been so distinguished as to have been reported. Reported cases, are, however, leading decisions, reported due to

their legal significance regarding some particular aspect of the law. These decisions then become legal precedents which will be followed by many of the unreported case decisions. Cases which have been reported are thus illustrative of the status and application of the law and provide the information necessary for assessing the law as it stands in Canada. In many instances, however, the provisions to be assessed here have not often reached the courts. There are therefore, some gaps in the data which can lead to problems of interpreting the focus and application of certain laws. Where that is the case, leading English decisions and Canadian case law dealing with similar terminology have been utilized to draw conclusions regarding relatively untried law.

Utilizing the perspective of feminist theory in these analyses will help to define and guide the level of discussion. Since this topic involves male/female relationships, feminist theory should help to uncover and explain the operation of these provisions and the problems therein. Only then can conclusions, assessments and recommendations be drawn.

Feminist theory, while useful to this analysis, may, and has, been criticized to the extent that it does not encompass a 'full fledged' theory.[64] Feminism does however facilitate consciousness raising with regards to challenging the *status quo* and the hegemony of patriarchy, an endeavor integral to this analysis. As Marshall notes: "Feminism has an important role to play in reinterpreting norms, creating new meanings, and linking

transformation to consciousness with institutional reform."[65] Prior to the emergence of feminist theory, female concerns, and concerns of power and subordination were not adequately addressed.[66] Feminism is therefore the requisite theory to guide this research.[67]

Relying on these sources of data will facilitate a comprehensive and comparative feminist critique of provisions of the Canadian Criminal Code that have over time regulated marriage in a patriarchal manner. This research will add to the growing wealth of feminist research and will serve to fill the gap left by previous analyses, which hopefully will ultimately contribute to redressing the fundamental inequality existent in Canadian society.

NOTES

1. For example, see T. Brettel Dawson (1985), "Legal Structures: A Feminist Critique of Sexual Assault Reform"; Linda Gordon (1986), "Family Violence, Feminism, and Social Control"; Carol Smart (1984), The Ties That Bind: Law, Marriage and the Reproduction of Patriarchal Relations; Barrie Thorne and Marilyn Yalom (eds.) (1982) Rethinking the Family: Some Feminist Questions.

2. 'Primary' patriarchal relations refers to domination within the private sphere of social existence, as opposed to the patriarchal relations imposed by the State and other institutions in the public sphere. See Brown (1981) for further differentiation between public and private patriarchy: "...private patriarchy includes the individual relations between men and women found in the traditional family, in which the individual husband has control over the individual wife, her daily reproductive labour and the product of that labour, the children. But patriarchy is not just a *family system*. It is a *social system* which includes and defines the family relation. It is in the social system that we find the public aspects of patriarchy: the control of society – of the economy, polity, religion, etc. – by men collectively, who use that control to uphold the rights and privileges of the collective male sex as well as individual men." (quoted in Currie, 1989: 285).

3. For research on spousal assault, see for example: T. Brettel Dawson (1985), "Legal Structures: A Feminist Critique of Sexual Assault Reform"; Linda Gordon (1986), "Family Violence, Feminism, and Social Control".

4. 'Malestream' is a term ultized by Sandra Harding (1986), "The Instability of the Analytical Categories of Feminist Theory" to distinguish the feminist approach from the male dominated mainstream theories that omit to consider the crucial aspects of domination and subjugation.

5. Marshall, 1988: 223.

6. For a discussion of the evolution of the women's movement, see Olive Banks (1981), Faces of Feminism: A Study of Feminism As A Social Movement, and John Charvet (1982), Feminism. Banks, for example, traces the reasons for the development and rise of the women's movement (individualist ideology, liberal Protestantism, industrialization) and distinguishes four main periods of the women's movement: The Early Years (1840-1870); The Golden Years (1870-1920); The Intermission (1920-1960); and The Modern Movement (1960-present).

7. While these three broad categories are much discussed (e.g., Banks (1981), Burton (1985), Grosz (1987)), Boyd and Sheehy (1986) refer to liberal feminism, integrative feminism, radical feminism and socialist feminism, and in 1989 added result equality feminism.

8. For further discussion on the inherent problems of achieving equality within the given system, see Richard W. Krouse, "Patriarchal Liberalism and Beyond: From John Stuart Mill to Harriet Taylor", (Elshtain (ed.), 1982: 146, 151), Eisenstein (Sargent (ed.), 1981: 350). Also Rifkin: "Litigation, and other forms of legal relief, however, cannot lead to social changes, because in upholding and relying on the paradigm of law, the paradigm of patriarchy is upheld and reinforced." (Rifkin, 1980: 88).

9. See Banks (1981): "Ideologically, radical feminism has no single doctrine and no simple set of goals or aims...On the whole, however, the movement is united in its opposition to what it sees as patriarchy or women's oppression by men – a concept that, in its implications, is far wider and more radical than the equal rights concept of feminism. Much of the energy of the feminists, and especially of the feminist intellectuals, has therefore gone not simply into actions, or even propaganda, but into a search for the *source* of man's power over women; one of the main lines of division is to be found in the alternative answers that individuals and groups have provided to this crucial question". (Banks,1981: 227).

10. For further discussion on the relationship between capitalism and patriarchy, see Hartmann, "The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union", in Sargent (ed.) (1979).

11. Eisenstein in Sargent, 1981: 343.

12. Ibid, 341.

13. For a more detailed analysis of the varying definitions attached by feminists to patriarchy, see Beechy (1979).

14. Millett, 1970: 23.

15. Hartmann, 1979: 27-28.

16. Rifkin, 1980: 92. See Janet Rifkin's article "Toward a Theory of Law and Patriarchy" (1980) for further evaluation of law and patriarchy.

17. Hirshon, 1984: 2.

18. See Durkheim, 1957: 123.

19. Durkheim, 1957: 169.

20. Ibid, 138.

21. Caputo et al. (eds.), 1989: 253.

22. See Durkheim, 1957: 138-139.

23. Durkheim, 1957: 145.

24. Cohen in MacPherson, 1983: 158. MacPherson in commenting on Cohen notes: "He then shows that while property is in the first instance a relation of rights between persons in reference to things it is also a relation of power between persons..." (MacPherson, 1983: 153).

25. Acker, 1987: 421.

26. McIntosh, in Kuhn, et al., 1978: 264.

27. Mill, 1869: 50.

28. Engels, 1972: 67.

29. Smart, 1984: 21-22.

30. See Lahey, for example: "...criminal law should apply to "public" conduct, and not to "private" matters..." (Lahey, 1984: 49).

31. Boyle et al, 1985: 3.

32. Ibid, 2.

33. Ibid, 4.

34. Ibid, 15.

35. Ibid, 16.

36. Ibid, 10.

37. quoted in Cole, 1939: 36.

38. Cole, 1939: 36.

39. Crispin (ed.) Stephen's Commentaries on the Laws of England, 21st ed. 1950 Vol. II: 479.

40. While this viewpoint may often times shift from this religious direction, Robilliard notes that: "The English law on marriage grew out of Christian definitions and ideals and

it was not until 1836 that it was possible to contract a civil marriage at all." (Robbilliard, 1984: 190).

41. Law Reform Commission of Canada, 1985: 7.

42. Turner, 1964 Vol. I: 745.

43. Ibid.

44. Atkins and Hoggett, 1984: 147.

45. For example, see Williams' (1947) discussion on the biblical conception: "The notion of conjugal unity has a biblical origin. Genesis, ii, 24, is explicit that husband and wife 'shall be one flesh' and this is repeated in the New Testament. There can be no doubt that it was this theological metaphor that produced the legal maxim." (Williams,1947: 16). Also, case law supports the ideology of married persons being one person in law- see Maule, J. in Wenman v. Ash 138 ER 1432 at p. 1435 and Estey, J. in R. v. Kowbel [1954] SCR 498: "Hawkins states the basis upon which the law is founded to be that a husband and wife 'are esteemed but one person in law, and are presumed to have but one will'." (R.v. Kowbel [1954] SCR 498: 505).

46. Zuker and Callwood, 1976: 15. Also see Blackstone, Commentaries on the Laws of England, Vol. I: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law-French a *fem-covert*, *foemina viro co-operta*, is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called *coverture*." (Blackstone, 1803 Vol. I: 442). Also see Pollock and Maitland, The History of English Law (1895: 366, 403-404) and Dawn Currie in Law and Society: A Critical Perspective (1989: 273).

47. Zuker and Callwood, 1976: 16. See also Mill's discussion on the history of marriage (1869) in The Subjection of Women p. 53-54 as further illustrative of this repressive ideology.

48. Quoted in Law Reform Commission of Canada, 1985: 3.

49. Crispin (ed.) Stephen's Commentaries on the Laws of England 21st ed., 1950 Vol. IV: 156.

50. See Dranoff (1977): "Marriage is not only a personal relationship; it is also a legal and economic institution through which the community imposes a certain order on

society." (Dranoff, 1977: 23).

51. quoted in Donzelot, 1979: 7.

52. For example, Holdsworth held in A History of English Law Vol. I: "The ecclesiastical courts had, certainly from the twelfth century, undisputed jurisdiction in matrimonial causes. Questions as to the celebration of marriage, as to the capacity of the parties to marry, as to the legitimacy of the issue, as to the dissolution of marriage, were decided by the ecclesiastical courts, administering the canon law." (Holdsworth, 1966 Vol. I: 621).

53. Stephen, 1883 Vol. II: 404.

54. From Sir James Stephen, A History of the Criminal Law of England Vol. II: "Archdeacon Hale says that out of 1,854 cited [cases] before the Court on the Commissary for London and a small part of Essex and Hertfordshire "one half were charged with the crimes of adultery and others of like nature." (Stephen, 1883 Vol. II: 411).

55. Stephen, 1883 Vol. II: 436.

56. quoted in Smith and Hogan, 1973: 5-6. Also see Lord Devlin (1965) who argues: "that there is a public morality which is an essential part of the bondage which keeps society together; and that society may use the criminal law to preserve morality in the same way that it uses it to preserve anything else that is essential to its existence." (quoted in Smith and Hogan, 1973: 19).

57. See Boyle et al: "...the moral order that criminal laws seek to preserve was established through male consensus. With the rare exception of protests against sexist legislation, women have had no say in defining what is criminal and what is not. The exclusion of women from criminal law debates has enabled legislators to give priority to such values as private property and the security of the State and its officials at the expense of other issues, such as sexual equality, children's rights and the responsibilities of fathers toward their children. In a moral order established by men and women on an equal basis, priority will be given to different values or, in any case, values will be ranked differently." (Boyle et al, 1985: 3).

58. Smart, 1984: 21-22. Also see Scutt, 1981: "Criminal laws have been drafted to perpetuate the dependency of women." (Scutt, 1981: 1).

59. See Boyle et al., 1985: 10.

60. Boyle et al., 1985: 10.

61. The rules governing spousal testimony in court are procedural in nature whereas the marital, 'real', and party to offence provisions encompass substantive law.

62. Stephen, 1883 Vol. 1: 1.

63. Gavigan, 1988: 284. Gavigan then goes on to say: "The first is a question of identifying the ideological nature of legal doctrine and principles.... The second, equally important, inquiry involves identifying the extent to which the judiciary itself employs 'ideological' thought (which is formally external to the law) but which is then incorporated into legal doctrine and becomes virtually unassailable." (Gavigan, 1988: 292).

64. See for example Bernard Cohen's work, Developing Sociological Knowledge: Theory and Method (1980) in which he assesses the necessary components of a theory: i) it must be explicit and precise; ii) it must have explicit definitions; iii) it must 'provide a clear exhibition of the structure of the argument'; iv) it must indicate guidelines on the domain of applicability; v) it should be empirically testable; and vi) it 'should formulate an abstract problem'. (Cohen, 1980: 191). Arguably, feminist theory has not yet reached this level of sophistication and may more appropriately be labelled an orienting strategy (see Wagner, The Growth of Sociological Theories (1984) Chapter 2, for a discussion of orienting strategies).

65. Marshall, 1988: 223.

66. See Farganis, 1986: 175.

67. See Sugarman (1981) in Law, State and Society for a discussion on the need to theoretically guide research.

CHAPTER II

FROM HUSBAND'S IMMUNITY FROM CRIMINAL LIABILITY FOR RAPE, TO THE NEW ACCOUNTABILITY FOR SEXUAL ASSAULT

Within the context of the patriarchal structure of criminal laws, which have long promoted the continued existence of the traditional family, forced sexual intercourse within a marriage was historically not regarded as a crime, but rather was a condoned and acceptable activity. A distinction was clearly drawn between raping an unmarried woman as opposed to a married woman. Indeed, the rape of a wife by her husband was, by definition, a legal impossibility. The basis for this differentiation rested on the questionable perception of the married woman as being the property of her husband. As will be seen with the marital theft and duty to provide necessaries provisions, the married woman's role was clearly defined as subordinate to her husband.

Currently there is no agreement on exactly what constitutes forced intercourse and the gravity and severity of such an action, nevertheless, there have been numerous studies that confirm that a sexual violation has a severe impact upon the victim.[1] The suffering incurred is not related so much to the victim's relationship to the offender as it is to the sexual violation itself. Mitra (1979) challenged the distinction that has been historically drawn between the married and unmarried victim:

> Rape is an act of violence which subjects the victim to physical and emotional humiliation besides pain, fear and not infrequently serious injury. It is recognized by the law as a crime, one of the most serious known. This same act however, if perpetuated within the marriage, is no offence and carries no sanction; it is merely the exercise of the husband's right in pursuance of the marriage contract. By thus exempting the husband from prosecution for rape on his wife, the law has granted him an immunity which is based solely on status.[2]

This discrimination against the married woman was eliminated with amendments to the Canadian Criminal Code in 1983 which abolished the marital immunity from rape and criminalizes what is now termed sexual assault, even within marriage. This legislative change is not in itself indicative of an undermining of patriarchal ideologies. Such a positive result must be demonstrated and upheld by the courts. It must be assessed whether the historic subversion and repression of married women has been effectively eliminated. The historic immunity of a husband from charges of spousal rape will therefore first be examined in terms of the property rights and patriarchal domination which identified the marriage ceremony with a woman's life-long consent to her husband's sexual gratification. Also, the rationales proposed to justify the maintenance of this immunity will be assessed. From this background, the legislative amendments will be discussed in order to determine whether or not married women have truly gained autonomy over their bodies, and true equality. Legislative advancements do not always achieve the objective that what is laid out in print will be what is carried out in practice, and therefore a scrutiny of the courts' application of this amendment is necessary.

The Original Immunity

Historically, rape has been recognized as a serious offence, and offenders were harshly dealt with.[3] Canadian law reflected English law in this area as the laws prevalent in England in 1792 became the criminal law in Upper Canada in 1800.[4] The original Canadian statutory provisions regarding rape were quite vague, simply supplying the offence, as well as the punishment. Section 49 of the 1867-68 Statutes of Canada held: "Whosoever commits the crime of rape is guilty of felony and shall suffer death as a felon".[5] Such legislation did not expressly exclude a husband's forced intercourse upon his wife from liability. Even so, by the power of one legal authority, it was felt, and held, that a husband could commit no such crime. Sir Matthew Hale in Pleas of the Crown extended the marriage vows to include eternal consent to sexual advances, holding, "for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."[6] This viewpoint was hesitantly contained within Burbridge's Digest of the Criminal Law of Canada,[7] the precursor of the Criminal Code, and was made law in the first Criminal Code of 1892,[8] and remained so until the recent sexual assault amendments transformed the law regarding rape.

Hale's comments, which were subsequently transformed into a legal reality, have met with both judicial opposition and confirmation. Prior to the legislative confirmation of Hale's contentions, the House of Lords in England had an opportunity to

assess the validity of marital immunity from rape in the case of R. v. Clarence (1889).[9] Of the six judges speaking on the issue, three emphatically supported Hale's contention. Hawkins, J. held:

> By the marriage contract a wife no doubt confers upon her husband an irrevocable privilege to have sexual intercourse with her during such time as the ordinary relations created by such contract subsist between them. For this reason it is that a husband cannot be convicted of a rape committed by him upon the person of his wife.[10]

Two other judges agreed that the marriage vows imply consent, which cannot be revoked or refused, and further support Hawkins' contention that marital intercourse is "an obligation imposed upon her by law."[11] Willis, J., however, took an opposing stance:

> If intercourse under the circumstances now in question constitute an assault on the part of the man, it must constitute rape, unless, indeed, as between married persons rape is impossible, a proposition to which I certainly am not prepared to assent, and for which there seems to me to be no sufficient authority.... I cannot understand why, as a general rule, if intercourse be an assault, it should not be rape. To separate the act into two portions, as was suggested in one of the Irish cases, and to say that there was consent to so much of it as did not consist in the administration of an animal poison, seems to me a subtlety of an extreme kind. There is, under the circumstances, just as much and just as little consent to one part of the transaction as to the rest of it.[12]

Field, J., questioned whether the word of only one legal authority should be accepted without further support, and left the door open to such situations that may merit conviction for marital rape. While Stephen, J., had initially included Hale's contention in his Digest of the Criminal Law, in this instance he only indicated that his latest edition of this text no longer contained that marital restriction.

Thus, while the support of Hale's contention in Clarence was not unanimous, his assessment of a husband's immunity became a legal reality. Developing and implementing laws based upon a single authority is undesirable, particularly when that law reflects the moral (and indeed patriarchal) judgement of that individual. Further, as stated by Willis, J., in Clarence, the application of the law in this area is contradictory; holding temporal consent irrelevant in cases of forced marital intercourse and yet assessing consent in cases of wife assault does not permit either a uniform assessment or a uniform application of the law and the meaning of the marriage vows. The courts have, however, historically found that there was a distinction to be made in cases of forced marital intercourse as opposed to cases involving detainment by force, legal cruelty, abduction, and assault. A brief assessment of these applicable cases will illustrate this selective requirement of consent.

The Selective Requirement of Consent

Hale's assessment precluded a marital rape charge, by virtue of a perceived implicit consent inherent to the marriage vows. His rationale did not however include consent to other forms of potentially criminal behavior. Under this reasoning, Hale contended that while a husband could not rape his wife, he could as a result of forced intercourse be found guilty of assault or indecent assault.[13] Hale further asserted that a husband could be held accountable for assisting the rape of his wife, and in

fact guilty of rape if this act followed a forced marriage.[14] In essence, then, Hale's views reflected a patriarchal ideology, embodying only the interests of the husband in holding that a wife's consent to sexual intercourse was presumed rather than required. While intercourse was perceived as a *duty* of the wife and a *right* of a husband, this inherent right encompassed by the marriage vows was not seen to extend to other lesser forms of criminal behavior.

Commonwealth countries, particularly England, have embodied this contradictory application of consent to meet the perceived need of unifying husband and wife, insofar as sexual behavior was concerned. The English decision of R. v. Jackson [1891] (C.A.), for example, held: "Where a wife refuses to live with her husband, he is not entitled to keep her in confinement in order to enforce restitution of conjugal rights."[15] The courts sidestepped the issue of forced intercourse, in preference of labelling the action with a less egregious offence. In the civil case of Foster v. Foster [1921] (C.A.) the rape was redefined as legal cruelty, due to the circumstances of the case. This, however, was acknowledged by the court to be a broader reasoning than was previously held: "A successful attempt by a husband, who knows that he is suffering from venereal disease, to have connection, against her will, with his wife, who also knows that he is so suffering, may, in some circumstances, be legal cruelty, although in fact the disease is not communicated."[16] While a charge of rape was not legally possible, the decision rendered took on the components of a rape trial and in fact

required a new trial in order to ascertain the degree of force utilized by the husband, as well as the degree to which the wife resisted.

In a more recent case, R. v. Reid (1972), the English Court of Appeal reaffirmed this selective requirement of consent, holding that while the marriage vows imply a perpetual consent to intercourse, this was not to extend to kidnapping, or carrying away against the will of the wife:

> The notion that a husband can, without incurring punishment, treat his wife, whether she be a separated wife or otherwise, with any kind of hostile force is obsolete, and if that force results in carrying her away from the place where she wishes to remain, then this Court is quite satisfied that the offence of kidnapping is committed.[17]

While the decision rendered identifies the need to extend the protection of the criminal law to a wife, it is not clear why this protection should not extend to forced sexual intercourse. This contradictory application of consent is nonsensical; it simply reaffirms the patriarchal nature of the criminal law.

The Australian courts have also adopted this distorted reasoning, holding in R. v. Caldwell [1976] (S.C. of Western Australia) that forced intercourse within a marriage may only result in a charge of assault:

> In the terms of s. 325 of the Criminal Code it is not rape if a man has carnal knowledge of his wife without her consent but if he uses force on her without consent in order to have sexual intercourse with her he may be convicted of unlawfully and indecently assaulting her....[18]

The physical injury can therefore generate accountability but this is not acknowledging the true nature of the offence. A rape

is not only potentially physically injurious, but it is mentally injurious and this secondary component was not being recognized by the courts when the victim was the offender's wife. It was not rational to include forced sexual intercourse as part of the consent provided by marriage, and yet hold a husband liable to other acts of violence, even murder.[19] As Scutt (1977) has contended:

> ...although public policy allows a man to be charged with simple assault committed upon his spouse so that crimes committed against the person within marriage are not totally without redress, it remains difficult to comprehend a public policy which would allow prosecution within a marriage for theft and for assault, but not for an act of penetration arising from the very assault which can be the subject of criminal prosecution.[20]

This contradiction was not only irrational, but as Boyle (1984) notes, "the withholding of that label [rape] carried an important message with respect to a husband's rights over his wife's body and, when combined with reluctance to enforce the law of assault in this context, constituted a serious embarrassment for Canadian criminal law."[21]

Even though this differential application rested upon perpetuating patriarchal relations in the form of the traditional marital roles, and not upon rational thinking, the Canadian and English courts did make Hale's contention a legal reality. Marriage vows were translated into eternal consent which could only be revoked when the marriage ended. While commentary on this issue defined that the consent was only revoked upon absolute and final divorce, the English courts have

taken a broader stance and included judicial and separation orders.

The English case of R. v. Clarke [1949] (Assizes), for example, held that:

> ...as a general proposition of law a husband cannot be guilty of a rape on his wife, but where justices had made an order containing a provision that a wife be no longer bound to cohabit with her husband and the consent to marital intercourse impliedly given by the wife at the time of the marriage was revoked thereby and the husband was not entitled to have intercourse with her without her consent, with the result that he could be guilty of a rape.[22]

A later English decision, R. v. Miller [1954] (C.A.), qualified that this consent can only be judicially revoked, and thus a petition filed for divorce, not yet heard, did not constitute a retraction of the original marital consent.[23] While clearly the wife in this case wanted the marriage ended, the husband's subsequent forced intercourse upon her was not deemed to be rape. The judicial rationale in Miller was that the petition might be rejected, thereby confirming the marital vows and the implied consent therein. This case emphasizes that a wife was to be given no independent control over her own body, this authority was only given to the courts which were composed of male judges who favored and promoted male interests and thereby perpetuated patriarchal hegemony. As LeGrand (1973) has noted:

> ...rape laws are not designed, nor do they function, to protect a woman's interest in physical integrity. Indeed, rather than protecting women, the rape laws might actually be a disability for them, since they reinforce traditional attitudes about social and sexual roles.[24]

When the courts have deemed a marriage incompatible, and

terminated this union, the English case of R. v. O'Brien [1974] (C.C.) has confirmed that this successfuly revokes the marital consent:

> A decree nisi effectively terminated a marriage and thereupon the consent to marital intercourse impliedly given by a wife at the time of the marriage was revoked. It followed that the accused had committed the offence of rape if he had had sexual intercourse with his 'wife' after she was granted a decree nisi.[25]

Commentary assessing when consent is revoked has been more rigid than the courts, and held that this consent can only be retracted upon divorce. Emphasis is placed on the sanctity of the marriage, not the autonomy of the wife:

> If reconciliation between married persons is to be encouraged, it would appear best to allow a husband to be prosecuted for rape only after absolute and final divorce. Although wives need some form of protection by the criminal law from the injurious consequences of forcible intercourse with their husbands, rape is a category ill-suited to marriage.[26]

One does not have to question too deeply which party of the marriage this would be 'best' for. This viewpoint does not recognize the gravity of the offence, particularly so in marriage, where ideally a wife should be able to trust her husband not to harm her in such a manner. If this trust is infringed and a woman is raped by her husband, this might realistically result in divorce proceedings, but under this perception of the law, the offence would never be properly categorized for the crime would have had to take place after the divorce in order to be prosecuted as rape. A rape is much more than an assault and the charges should reflect the gravity of the actual offence.

The marital immunity from rape was therefore in opposition to a wife's better interests in that it accorded protection to the husband, not the wife. The criminal law should uniformly and equally protect everyone from harm or injury, but traditionally this integrity has been lost in favor of male interests. The marital immunity provides support for the theory that patriarchal ideology is pervasive in western society, as well as the view that wives have been perceived as the property of their husbands. The realization that rape laws have entrenched and enforced male property rights is not a new idea,[27] but is a compelling one that must be further scrutinized in terms of the historic marital immunity from rape.

Perceived Property Rights

The traditional view of marriage has helped the law to legitimize wives' inequality and subjugation, and the perception that a wife is to be deemed as the property of her husband. This phenomenon is clearly illustrated in the historic marital immunity from rape. A legal analysis conducted by the United States Department of Justice reinforces this point: "The concept of marriage entitled the ownership of the wife by the husband. A husband could not rape his wife for the same reason that he could not burglarize his own house; one cannot steal what one already owns."[28] As will be seen with the application of the marital theft provisions, upon marriage there was a total transference of property, including not only the goods the wife

brought into the marriage, but the wife as well.[29] The legal promotion of male interests has been most effectively secured by virtue of instilling proprietary rights in men over women, husband over wives. Clark and Lewis have held that: "Ownership is simply the most efficient form of control."[30] Rape laws, and specifically the marital immunity, have reinforced a husband's control over his wife by defining the wife as the property of her husband, which he could use as he desired.

In assessing the possible rationales for defining rape as a crime, Brooks (1975) proposed four potential justifications:

1. for the protection of women;
2. for the protection of male property rights;
3. to prevent unwanted pregnancies or transfer of communicable social diseases; or
4. "...[as] a method by which men exercise continued power over women. Rape is seen as a political device used to support the male class by ensuring that women do not forget their vulnerability and objective subordination of men."[31]

The preceding discussions emphasize that little or no concern has been directed toward the welfare of women in defining and applying rape laws, thereby making the first and third rationales inapplicable. The rape provisions and historic marital immunity stem from male property rights over women and their wives. Commentary on the U.S. provisions has indicated that:

> The impossibility of convicting a husband for raping his wife is the natural outgrowth of traditional notions of married women and the purposes behind rape laws. Rape

> laws developed at a time when a woman was considered the property of either her father or her husband. The purpose behind these laws was largely to ensure her value as a sexual object for her husband or future mate. Thus viewed, a husband forcing sex on his wife was merely making use of his own property.[32]

The ideologies underlying rape provisions deal with property issues; thus, forced sexual intercourse of a woman not 'belonging' to the perpetrator is to be deemed a crime. A husband is however naturally seen to have property rights over his wife, and in such an analysis, he is able to treat/use his property as he likes. Rape provisions therefore become akin to theft provisions, as Mitra holds: "Once the law had accepted theft as the *sine qua non* of rape it was only logical to hold that a husband is no more capable of raping his wife than an owner is of stealing his own property."[33] Clark and Lewis note:

> Rape laws were simply one of the devices designed to secure to men the ownership and control of those forms of property, and to provide a conceptual framework which would justify punishing men who violated the property rights of other men in this respect.[34]

Clearly there was no concern for the female victim, the emphasis was placed on perceived male rights. Hale's perception of the implied consent stemming from the marriage vows was simply a means, perhaps more socially acceptable than an outright declaration, of identifying and reinforcing a husband's proprietary control over his wife.

The subjugation inherent to this ideology of one human being the property of another must, however, be vested with legitimacy. As MacPherson notes in his analysis of property:

> ...any institution of property requires a justifying theory. The legal right must be grounded in a public

> belief that it is morally right. Property has always to be justified by something more basic; if it is not so justified, it does not remain property.[35]

Until very recently, this legitimacy was achieved by means of the patriarchal hegemony which affirms male property rights and persuades women to believe that these rights are justified. Females are often socialized into positions of inferiority with the underlying theme that they are weaker, and need to be controlled, protected, and dominated by men. The marriage ceremony and ideology reflected this by the unification of two persons into the persona and domination of the man. Not only does socialization play a part in achieving this legitimacy, but the resulting structure of our system, both legal and political, is dominated by males and thereby gives males a greater opportunity to secure their own interests. As Kasinsky contends: "Rape laws and practices protect male interests. The law itself is the creation of male lawyers and judges and the administration of this law for the most part is also in the hands of men."[36]

The patriarchal nature of Canadian society has therefore shaped the role of marriage and the property relationship contained therein. Marriage is a unique relationship in our society, which has historically been heralded since this union has been a means to not only secure male interests but state interests as well. The concept of marriage is integral in understanding the legitimation of the rape immunity for husbands. Before the recent provision abolishing this immunity can be assessed, it first must be examined how this union bore

the distinction for so many years. The arguments and rationales that justified this marital discrimination must be understood before the present situation is discussed, for these ideologies are crucial to assessing whether or not we have indeed progressed in terms of the married woman's rights. It must be determined what the rationales were and whether or not they have changed.

Marriage – Did This Institution Merit Distinction?

Marriage is a relationship like no other, for it facilitates the perpetuation of inequality within the private sphere of a woman's life and beyond. Although the marriage ideology promotes a union between a man and a woman, this union under the tenets of Christianity and subsequent legal provisions, is based on subjugating the woman's independence to be under the control of her dominant husband. These roles are not internally defined but are imposed from external sources. The marriage contract is therefore generally made with a great deal of ignorance on the part of the consenting parties, for they are not aware of the specific rules that will guide their future relationship. As Mitra (1979) notes, the marriage contract is unique:

> As has been pointed out, 'its provisions are unwritten, its penalties unspecified, and the terms of the contract are typically unknown to the "contracting" parties. Prospective spouses are neither informed of the terms of the contract nor are they allowed any option about these terms.' It seems to be totally unreasonable to infer from such vague promises that a wife intends to make her body accessible to him at all times.[37]

Although both parties may enter the state of matrimony uninformed, the patriarchal structure of society has historically ensured that the husband's interests will be protected and promoted. The wife's independence is concomitantly subjugated and her role is governed by male interests inside and outside the marriage. Marriage is not simply a concept developed to unite two parties for their future well-being, but rather is also in many aspects a union based on moral and economic considerations that benefit the state and certain male segments of society. The moral emphasis promotes the curtailment of sexual activity, which is said to be beneficial to society at large:

> All societies seek to control and direct sexual energy in order to maintain their group structure and function. Unchanneled, the sex drive threatens to disrupt patterns of social and family organization. Properly controlled, on the other hand, sexual energy moves people into relationships and activities which sustain the group. The channeling of sexuality into marriage is crucial to all societies and espoused as a desirable goal by virtually all component sub-groups.[38]

This moral emphasis is clearly articulated in the traditional Christian marriage service, that in part describes the purpose of marriage: "...it was ordained for a remedy against sin and to avoid fornication that such persons as have not the gift of continency might marry and keep themselves undefiled members of Christ's body...."[39] This moral stance, which creates a union where sexual energy is to be channeled and promoted and to led to procreation lead to the economic structure and role of marriage. Two gender roles were therefore created where the wife is entrusted with the function of child-bearing and rearing and

is to be supported by her husband the breadwinner. Marriage is both a sexual and economic institution, but within this utilitarian model, the married woman's interests and independence are not accounted for or promoted. The Bible and the state have construed the purposes of marriage within a male model, leaving the wife in a coercive and subversive relationship. Her well-being, sexual and otherwise, was not historically of concern to this patriarchal institution.

In understanding the roles created and defined by the institution of marriage, it is clear that: "The married relationship, rather than negating the possibility of coercive sex, represents opportunities for types of pressure other than those asserted by rapists other than husbands."[40] Not only has intercourse been defined to be a basic marital right, but society has vested a domineering control in the husband which has permitted sexual coercion like no other relationship. Boyle (1981) in fact has likened the married relationship to other 'total institutions' which create an atmosphere of both economic and psychological dependency in their regulatory control of those socially seen as incapable of doing so for themselves.[41] While this may be the historic reality of the married relationship, the arguments that have justified this union and the criminal law turning a blind eye to sexual coercion and permitted forced intercourse is flawed and based on a patriarchal model that should be universally recognized as archaic. As Boyle has argued:

> I assume that since it is accepted that non-consensual intercourse can legitimately be defined as criminal, the distinction between wives and other rape victims is invidious and a denial of the full humanity of a wife in a sexual context. Such a distinction is based on the view of a wife as the property of her husband, a view that I hope no one would now openly defend, on the equally untenable view that a sexual relationship in the past has some probative value in relation to the sexual activity in question, on the continuing doubt as to the veracity of the rape victim, and on a misguided emphasis on the value of marriage *per se*. [42]

Scutt (1977) further adds:

> To imply that lack of provision for protection of married women against rape where the perpetrator is the husband supports the marital relationship is to state that the aim of the law is to preserve relationships *not* where there is "equal agreement" by the parties, but where there is domination by one, subjugation on the part of the other, and where one partner's sexual appetite is assuaged without regard to sexual appetite, good health and well-being of the other.[43]

These rationales which support the proprietary rights of men over their wives, and justified the lack of legal intrusion as necessary to sustain the married relationship are not supportable. Property rights of one human being over another is a concept that should have no justification whatsoever.

While this realization has been a long time in coming in terms of modifying legislation in accordance with these tenets, the idea of abolishing spousal immunity did not meet with universal acceptance. Many commentators were in fact quite dogmatic in their support of immunity provisions. Morris and Turner (1952-55), Dworkin (1966), and Jonas (1979) have argued wholeheartedly in favor of maintaining a husband's immunity for forced intercourse within marriage. While many of the rationales cited do not bear grave scrutiny due to single-minded and

chauvinistic attitudes, there were possible evidentiary problems raised which should be briefly discussed in order to later assess whether these were valid arguments. It must be kept in mind that the issue is not strictly black and white, for simply abolishing the spousal immunity for rape, does not necessarily rectify all ills. If a majority of people still view forced intercourse within marriage as acceptable, then certainly jury trials will reflect this bias. Also, the judiciary may continue to impart rulings reflective of previous patriarchal ideologies. Legal amendments must be able to reflect in practice what is desired in theory. As Boyle (1981) notes, there are enough ineffective, non-enforceable laws[44] and this should not be the resting place for the abolition of the immunity for forced intercourse within marriage.

The most prevalent hindrances to the legal enforcement of forced marital intercourse, or other forms of marital sexual assault involve the issue of consent, as well as the traditional view of the family and marriage. In order to resolve these potential problems, the traditional views of sexual violation and victimization must be transformed in order to be conversant with reality and non-subordination.

The issue of consent is crucial in what was previously a rape trial, now a trial charging sexual assault, for it is what transforms an intimate interpersonal act into a crime. The standard of consent has been legislatively limited to include only certain specific criteria defined by law-makers, and

interpreted by judges. As Boyle (1981) clarifies: "In other words, the law maintains tight control over what factors vitiate "consent" to intercourse in this context."[45] Historically, the criminal law has virtually equated consent with submission and this lack of clear definitional standards is compounded when applied to the married situation. The potentially coercive qualities of marriage present a much different situation than would forced intercourse between strangers.[46] The courts must recognize the power and control that has been vested in the husband's role, and also realize that this type of control should not be permitted. While in the past, the courts have viewed intercourse against the will of the wife as permissible,[47] this clearly does not and should not come within the confines of consent. If the traditional husband's role is seen by the courts for what it is: "Husbands who insist on being the head of the household might well be in trouble here, if judged according to their view of reality. It may be easier for them to be found guilty of sexual assault than a stranger."[48] The patriarchal nature of society may, however, continue to hinder successful marital rape prosecutions due to a husband's contention that he believed his wife was consenting and the jury adopting his perception of implied consent, or mistake of fact. As Marshall has noted:

> When it is his word against hers as to whether there was consent, the man in the case is often seen as more credible because he is in the superior position, deriving authority and status from his age, employment or other factors [marriage]. Research on "genderlectics" tells us that "male" speech patterns guarantee greater credibility."[49]

The potential difficulties of proving consent, or of establishing that consent was absent, are not justification to exclude husbands from the criminal provisions prohibiting forced intercourse. The issue of consent represents a legal obstacle to any rape/sexual assault prosecution:

> Lack of consent is the most difficult element to prove in any rape prosecution. Even though the status of marriage complicated the task, by creating in the minds of jurors an inference that the wife consented, a jury at least ought to be allowed to consider a rape charge when the accused and victim are married.[50]

McFadyen (1978) takes an optimistic outlook in this regard: "Difficulties of proof have never deterred the legislature or the courts from enacting or implementing laws which address the preferred shared values in our society."[51] The potential problem does not really lie with the issue of consent, but rather with the courts' interpretation of it, and the juries' ability to determine that consent is not always present in marital intercourse. Forced intercourse must be assessed within the context it is being perpetrated; while in the past domination was upheld and legitimized, the lack of consent must be seen in any relationship for what it is, i.e., a criminal act.

The other argument that was raised against the abolition of a husband's accountability was that such immunity contravenes the traditional role and view of marriage and the need to protect this sacred union. This viewpoint simply reifies patriarchal hegemony. It was, and perhaps by some still is, felt that to permit marital rape/sexual assault prosecutions is to aggravate marital strife. It is difficult to understand how

proponents of this argument see the prosecution as the disruptive factor and not the initial rape itself. As commentary contends:

> [The] argument made in support of the husband's immunity is that intramarital rape prosecutions would prevent reconciliation and foster marital discord. This assumes that in a situation in which a wife is prompted to bring a rape charge against her husband there is a state of matrimonial harmony left to be disturbed. The assumption that the wife will be soothed by denying her the protection of the criminal laws is ludicrous on its face.[52]

This enlightened viewpoint was also reached in the U.S. case of People v. Liberta (1984), which marked the first time that the State of New York convicted a husband for raping his wife. In commenting on this case Estrich (1987) explained: "The court...[concluded]...that there may be little room for reconciliation in marriages which have reached the point of violent rape."[53] It must be universally realized that a married relationship should not rise above any other relationship, and accountability must become the norm. A prosecution for forced sexual intercourse does not destroy marital harmony, but rather the offence itself and the thinking that permitted such an intrusion upon the wife's person will permanently destroy the relationship. As McFadyen notes: "...it is difficult to see that the availability of a sexual assault charge to spouses would disrupt constructive family relationships, as a healthy family will not be the situs for sexual assault."[54] To say otherwise is to simply perpetuate an ideology that favors male interests, at the expense of female integrity, independence and equality.

What must be recognized is that a wife-victim is no less harmed than her non-married counterpart. In fact, the repercussions experienced by the woman who has been sexually violated by her husband may be more severe. Russell (1982), in studying "Rape in Marriage" concluded:

> Rape in marriage, then, is no less traumatic than rape outside of marriage. Indeed, I believe that wife rape is potentially more traumatic than stranger rape, usually perceived as the most dreadful form of rape.... In addition, it often evokes a powerful sense of betrayal, deep disillusionment, and total isolation. Women often receive very poor treatment by friends, relatives, and professional services when they are raped by strangers. This isolation can be even more extreme for victims of wife rape. And just as they are more likely to be blamed, they are more likely to blame themselves.[55]

Russell adds that the plight of the wife-victim is compounded, for while other rape victims may seek comfort and sanctuary in the home, one who has been sexually violated by her own husband cannot do so. She has two choices, to stay or to leave: leaving involves economic, social and psychological hindrances, while staying may give her husband the message that such action is permissible. The impact on the wife-victim must be recognized for what it is: very real and traumatic. This needs to be the pervading rationale, which should be able to counterbalance any evidentiary difficulties. As LeGrand contends:

> There are, of course, conceptual difficulties involved in making rape a crime between husband and wife. But if a woman suffers no less pain, humiliation, or fear from forced sexual penetration by her husband than by a relative, a boyfriend, or a stranger, the difference is not great enough to warrant the total insulation of the former but not the latter from legal sanction.[56]

The Law Reform Commission of Canada also asserted in 1978 that: "The integrity of the human person should not be violated.

Consequently, no individual should be forced to submit to a sexual act to which he or she has not consented.[57] It has been a long time in coming, but it is now legislatively recognized that spouses should not be excluded from the crime of rape; within the patriarchal context of society, however, has this legislative breakthrough been able to overcome these traditional ideologies that have historically assumed that rape and marriage are mutually exclusive?

The Abolition of Spousal Immunity - Has a Change Really Been Made?

Although male property rights over spouses should have been made obsolete in the nineteenth century with the Married Women's Property Act (1882) which permitted a wife to have her own property and legal identity,[58] it was not until 1982 that the Bill proposing the abolition of spousal immunity received royal assent. This was not a speedy process, for the debates and proposals began in 1978.[59] The proposed change met with some opposition until it was finally passed. Not only does the process merit discussion, but it must also be assessed whether the abolition of the immunity has come to mean in practice what was desired so long in theory.

While feminists preceded politicians in recognizing the archaic and discriminatory nature of the marital exclusion from the crime of rape, legislators began the process of effecting legal change in 1978. The Law Reform Commission of Canada

published its working paper in 1978 advocating that s. 143 of the Criminal Code, [as it then was] be abolished, thus establishing a husband's accountability for forced intercourse upon his wife. In May of the same year, Ronald Basford [then Liberal Minister of Justice] introduced Bill C-52, which: "...utilized indecent assault terminology, left the relevant offences in the section dealing with sexual morals rather than classifying them as assault, and limited marital rape to non-cohabiting spouses."[60] Bill C-52 was not passed. The basic provisions of the Bill were, however, later supported by the Progressive Conservative (PC) Minister Jacques Flynn along with the addition of an amendment which would eliminate the spousal exclusion from rape: but, "With the defeat of the PC Government in Feburary 18, 1980, this proposal was never introduced in the House of Commons."[61] In commenting on this proposal, Cohen and Backhouse (1980) supported the 'inclusion of marital rape' but felt that on the whole the changes were only cosmetic in nature, and were "riddled with discrepancies and irrational assumptions".[62]

In January of 1981, under the direction of Liberal Justice Minister, Jean Chrétien, Bill C-52 was replaced by Bill C-53, which proposed to abolish spousal immunity from rape. In the debate of July 7, 1981, one M.P., Mr. Irwin, made an insightful account of the previous contradictions in the legislation and discounted the evidentiary problems that were misidentified with such a legislative change:

> ...proving lack of consent will remain a key factor in all cases where the parties have had prior sexual relationship, married or not. It is strange in this day and age that a person involved in a common law relationship, such as common law wife, has the right to charge her common law husband with rape. Yet a married person who is separated and awaiting a decree nisi in a divorce action does not have the same right. The immunity from being prosecuted for rape persists. It should be noted that under the present law forced intercourse or assault within marriage can constitute grounds for divorce. There is no evidence in the Divorce Act that this involves an abuse of the law in its process. Consequently, by abolishing spousal immunity the government would eliminate this discrimination against legally married women. Equal protection under the law would be granted to all persons. Married women would be given greater protection of their personal integrity than the law now provides.[63]

This is a reasoned argument that had in fact been made by feminists for years. M.P. Svend Robinson concurred and held that: "In this day and age we must recognize that marriage should not mean forced sexual submission...."[64] Bill C-53 became Bill C-127, still retaining the elimination of a husband's immunity. In speaking to this Bill and the abolition clause, Chrétien held: "Women are not the chattels of their husbands, and sex without the consent of both parties is as unacceptable within marriage as it is outside of marriage."[65] Contrary to the traditional position, Chase (1983) notes, "The 'sanctity of the family' appears to be essentially modified under the guidelines of Bill C-127...."[66] Bill C-127 was passed, including the addition of s. 246.8 to the Criminal Code: "A husband or wife may be charged with an offence under section 246.1, 246.2 or 246.3 in respect of his or her spouse whether or not the spouses were living together at the time the activity that forms the subject matter of the charge occurred." The abolition of the

spousal immunity is now to be found in section 278 of the Criminal Code (1989) and the offence is no longer defined as 'rape' but rather is seen as what it is, an assault upon a person of a sexual nature. Advocates of this new terminology desired that the violence of the act supersede the sexual qualities. Forced intercourse encompasses domination, violence and the like, much more so than being a sexual act. While legislatures have come to terms with the nature and quality of the act, and the fact that such provisions should be applied uniformly, no matter how personal the preceding relationship, this is not necessarily to say that the courts will follow suit and uphold this approach.

Legislative changes will be ineffectual unless the enforcers of those laws and society at large are in agreement with the provisions. In order to institute successful marital sexual assault prosecutions, there must be consensus that such a crime is not only possible, but that it is wrong. As Boyle notes:

> Otherwise abolition is in danger of being a superficial sop to feminist concern, the thought always being possible that a husband could rarely be convicted of rape anyway.... Change in the law after all is only a *minimum* requirement of real social change in those areas where it has any impact at all. Concern about the impact of the law is particularly acute in this context since there is an apparent tension between the "public" nature of criminal law and the supposedly "private" nature of the family.[67]

Marriage has historically been viewed by the law as a sensitive area, best left beyond the bounds of the criminal law, but this ideology must change. As noted previously, women can be harmed just as much, if not more, inside a marriage as outside. Forced

sexual intercourse within a marriage is not a rarity. Studies indicate that, although not often reported to the authorities, sexual violation within marriage may "be one of the most common forms of rape in our society."[68] A study conducted by Frieze (1983) indicates that forced sexual intercourse within marriage "is a problem experienced by up to 10 percent of all married women",[69] and research by Russell (1982) "suggests that at least one woman out of every seven who has ever been married has been raped by a husband at least once, and sometimes many times over many years".[70] Russell's study thus raises the incidence of this type of crime to 14 percent. This is clearly a problem that needs to be addressed.

While the concept of marriage as a 'sacred institution' must be modified, then, so too must the thought that past sexual relations vitiates prosecution. Historically, the victim's previous sexual history was a key factor in the outcome of the trial.[71] Ironically, the victim was put on trial and her testimony concerning her previous relations with the accused could be contradicted. Willes, J., held in the old English case of R. v. Cockcroft (1870) (Assizes): "...you may...examine her with respect to particular acts of connection with the prisoner, and if she denies them you may call witnesses to contradict her."[72] If this type of assessment continues, sexual assault charges within a marriage would be futile. Boyle (1985) notes that due to the lack of restrictions placed on inquiry into past sexual activity with the accused, "what goes out by the substantive front door may come back in by the evidentiary back

door."[73] Male law enforcers, and for the most part male judges, can perpetuate patriarchal relations, making equality provisions null and void. It is therefore necessary to examine how the courts are interpreting and applying this new legislation.

As with other marital offences (such as theft), marital sexual assault cases are either not reaching the courts in great numnbers, or not attaining the distinction of being reported. Only one such case was found to be reported, although it contains references to some non-reported decisions. The case of R. v. Gleason (1986) (Y.T.C.) deals with sentencing a husband who was convicted of sexually assaulting his estranged wife. While the conviction indicates that this law is enforceable, the sentence imposed, one year in prison and two years probation, implies that intramarital offences are not to be accorded the gravity of other similar offences. Stuart, T.C.J., began with an enlightened approach to such a crime, holding that a sexual assault on someone closely related to the accused should not be treated less seriously than sexual assault between strangers. He in fact recognized the special qualities of such an offence:

> Whereas each case must turn on special facts, the aggravating circumstances of the sexual assault against a person sharing the same home would generally, as it does in this case, involve a breach of trust and is given ready access to the privacy and protection of the victim's home. In this case, the offender abused his special status and breached the trust and confidence arising from his cohabitation and relationship with the victim.[74]

Even though the psychological trauma of the victim was clearly set out, emphasis was placed in this case, and cases referred to, on the physical injury that the victim sustained. The three

unreported decisions referred to imposed very minimal sentences due to lack of, or minor, physical injury. The case of R. v. Anderson (Man. C.A.) imposed a sentence of two years, because, "The offence involved no lasting physical damage to the victim."[75] Lasting psychological damage was not considered. In R. v. McCann (B.C.S.C., 1984), the sentence imposed was two and one half years, for the victim had been out with the accused that night, and she suffered no physical harm. The offender was seen as law-abiding and in no need of rehabilitation, even though he sexually assaulted his 'friend'. In R. v. Knelson (B.C.C.A., 1982), the accused was sentenced to two years less a day, for he did not inflict any visible physical injury upon the friend he sexually assaulted.

From this backdrop, Stuart, T.C.J., sentenced Gleason to one year of imprisonment and two years probation, holding that: "The offender will carry the spectre of this crime for the rest of his life."[76] No concern was given to the life-long impact that this crime may have on the wife. Instead, the court reached back to previous ideologies supporting unity of the family, asserting that the husband's future relationship with his children should not be harmed. Presumably it would be much graver to deprive children of their criminal father than to see justice done in the eyes of the victim.

While there were no other reported decisions involving the sexual assault of one's wife, the Canadian "Sentencing Digest" reported the sentences of several such cases. These cases

illustrate that the Gleason case is not unique: the sentences imposed are in no way indicative of the gravity of the offence and the ideologies expressed are reminiscent of the not too distant past. This conclusion is not resultant from a comparative analysis, either historically or of all contemporary sexual assault sentences, but rather constitutes an intuitive assessment of these particular sentencing rulings only. While a comparative analysis in a socio-historical context would be one way to assess the application and enforcement of these provisions, one can also reach the conclusion that the sentence imposed in Gleason and the following sentences to be discussed are not, at face value, reflective of the gravity of the offence.

In the case of R. v. D.F.M. (B.C. Co. Ct., 1986) the convicted accused was sentenced to only six months of imprisonment for sexually assaulting his estranged wife. The court held in this case that the accused's relationships with friends and coworkers had already suffered, and he might lose his job if a longer prison term was imposed. In his sentencing ruling, Cooper Co. Ct. J. contended that specific deterrence was not necessary, although general deterrence was. It is difficult to see how six months imprisonment, for what should be regarded as a serious crime, provides general deterrence. The case of R. c. N.A. (Que. Prov. Ct., 1986) resulted in a sentence of two and one half years for the sexual assault of the accused's estranged wife, but it still must be questioned whether this punishment fits the crime.

In the case of R. v. R.W.G. (Y.T.C.A., 1987) the convicted husband had sexually assaulted his wife after a violent physical assault. Since he had already served two and one half months, the court sentenced him to time already served and two years probation. Again, factors strictly endemic to the accused were taken into consideration, as the judge agreed that the accused's hypoglycemia made him more prone to violence. While the Gleason case indicated that physical violence is an aggravating factor, the ruling in R.W.G. does not reflect this. Further, the case of R. v. K.L. (Ont. Dist. Ct., 1988) which involved a sexual assault upon the wife of a violent nature, did not look to the violence of the offence so much as to the characteristics of the accused. It was felt that since the accused was new to Canada and spoke little English, a long jail term would be difficult for him. Having had a history of physically abusing his wife, one could argue that these difficulties that he might experience are really not of concern. The accused in this case was sentenced to twenty months imprisonment.

In the case of R. v. K.N. (N.B. C.A., 1988), the court retained the ideology of promoting the sanctity and harmony of the marriage over meting out appropriate sanction for a crime. The accused had threatened to kill his separated wife unless she had intercourse with him; nevertheless, he was sentenced only to time served and two years probation. It must be noted that the wife was not cooperative in the prosecution, yet a crime should be punished on the weight of the offence, for it is possible her reticence was due to fear of future retaliation. The case of R.

v. H.L.C. (B.C. Co. Ct., 1988) indicates that the courts are not only upholding the sanctity of marriage but are also, to some extent, condoning male control and domination within marriage. The accused was married to his wife for nineteen years prior to the sexual assault, and upon sentencing blamed the victim and had a 'high-handed' attitude towards her. Although these sentiments were clearly expressed in his testimony and he showed no remorse, he was only sentenced to nine months imprisonment. These sentences are really not indicative of the crime perpetrated.

These cases illustrate that the courts continue to step back in time, rather than push for necessary changes that promote equality and the sanctity and integrity of every individual, male or female. The legislative change abolishing spousal immunity will simply be a legislative placebo, with no beneficial effects, if these are the types of decisions that apply that law. Boyle (1984) notes that: "The removal of that embarrassment is no doubt to be applauded, but attention will now focus on enforcement practices. Only time will tell whether the law has been changed in practice as well as theory."[77] The Gleason case, in conjunction with these sentencing briefs, illustrate that this is not yet a reality. Theory and practice have yet to converge. Society must change before legislative changes can be effective. As noted by Dawson (1987): "Fundamental justice cannot be achieved under conditions of inequality."[78]

Conclusion

Rape or sexual assault, no matter the label, is a serious crime, within or outside marriage. It is time that there is uniform agreement on this basic principle, rather than on the concept of basic marital rights. Legislation itself cannot effect this change, the courts can easily render such provisions ineffective. The patriarchal nature of society must be changed to one that recognizes the quality, independence and integrity of each and every individual. This will be the overriding theme for marital theft provisions, and the duty to provide necessaries, and has shown here, is certainly true for the sexual assault legislation. These changes must be made before the legislation can be seen to be realistic and effective. Of course, it would be preferable to render sexual assaults obsolete, but we must begin this process of not subordinating women by legally respecting those who are married.

NOTES

1. Studies conducted by Klemmack and Klemmack (1976) and Kanin et al. (1987) indicate that the public perception of forced sexual activity varies in terms of severity and culpability; studies assessing the impact of forced sexual activity on the victim confirm the severity of such a crime. Frieze (1983), for example, found that "...most women who have experienced the violation of rape will suffer effects that are often severe, such as physical injury, anger, depression, fear, and loss of interest in sex." (Frieze, 1983: 538). Marshall (1988) also emphasizes the heinousness of such an offence: "The French word for rape "viol", shares a common Latin root with the English terms "violence" and "violation". Internationally-renowned police psychologist Morton Bard names rape "a trampling of the mind, body and soul," "the ultimate violation" and locates it just before homicide – at the end of the violation continuum." (Marshall, 1988: 221).

2. Mitra, 1979: 558. Also see Russell (1982): "It is illogical, inconsistent, absurd, and unjust that rape outside of marriage be recognized as a very serious crime, deserving of penalties of years of incarceration to death (depending on the state), while inside of marriage it is seen as acceptable male behavior against which a wife has no recourse. This truly is a state of legalized sexual slavery." (Russell, 1982: 359).

3. See for example, Radzinowicz (1948): "At first rape was a felony punishable by death [1576 - 18 Eliz. s. 7]; later it was reduced to a great misdemeanor and the offender was punished with the loss of eyes and castration. Subsequently, by Stat. of West. 1, c. 13, it was further reduced to a trespass, punishable by imprisonment of up to two years and a fine at the King's will. It was then felt that this lenient penalty encouraged the commission of the crime and by Stat. of West. 2, c. 34, it was again declared to be a felony." (Radzinowicz, 1948 Vol. I: 631 footnote #2).

4. See Boyle, 1984: 11.

5. 1867-68 Statutes of Canada, Chap. 20, s. 49. Also see: 1886 The Revised Statutes of Canada: Chap. 162, s. 37: "Every one who commits the crime of rape is guilty of felony, and liable to suffer death as a felon, or to imprisonment for life, or for any term not less than seven years."

6. quoted in Backhouse, 1983: 234.

7. Article 323 holds in part: "A husband (it is said) cannot commit rape upon his wife by carnally knowing her himself,

but he may do so if he aids another person to have carnal knowledge of her."

8. Criminal Code, 1892, s. 29 s. 266: "Rape is the act of a man having carnal knowledge of a woman *who is not his wife* without her consent which has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representations as to the nature and quality of the act." (emphasis added).

9. R. v. Clarence (1889) 22 Q.B.D. 23 (House of Lords).

10. Ibid, 51.

11. Ibid, 54.

12. Ibid, 34.

13. See for example Boyle (1985): "A husband could in fact, but not in law, rape his wife; he had to be charged, if at all, with assault or indecent assault." (Boyle, 1985: 96).

14. See English (1976): "He [Hale in Pleas of the Crown] made it clear [however] that a husband who forced his wife to submit to intercourse with another could be convicted of assisting in the other's rape. He also suggested that a man who forced a woman to marry him and then had forcible intercourse with her ought to be liable for punishment for rape." (English, 1976: 1223). Also see R. v. Cogan and Leak (1975) 61 Cr. App. R. 217 (C.A.).

15. R. v. Jackson [1891] 1 Q.B.D. 671 (C.A.): headnote, 671.

16. Foster v. Foster [1921] P. 438 (C.A.): headnote, 438. This case overruled the 1853 decision of Ciocci v. Ciocci which held that there was no cruelty unless the disease was actually communicated.

17. R. v. Reid (1972) 56 C. App. R. 703 (C.A.).

18. R. v. Caldwell [1976] W.A.R. 204 (S.C.W.A.): headnote, 204.

19. However, as pointed out in "Comment: Rape and Battery Between Husband and Wife", the felony-murder doctrine would absolve accountability when the death resulted from forced intercourse and 'rape' may in some circumstances provide a defense to other offences. (see "Comment", 1954: 720, and footnote #3).

20. Scutt, 1977: 271.

21. Boyle, 1984: 47-48. See Loh (1980): "The rape label carried far more social stigma than assault. Indeed, to brand

someone as a rapist is a kind of "status degradation". More accurate identification of rapists *qua* rapists teaches others that society deems this form of conduct to be criminal." (Loh (1980) quoted in Chappell, 1984: 74).

22. R. v. Clarke [1949] 2 All E.R. 448 (Leeds Assizes): headnote, 448.

23. R. v. Miller [1954] 2 Q.B.D. 282 (C.C.A.).

24. Legrand, 1973: 919. Also see Boyle (1984): "It is also crystal clear that the protection of the woman's right to sexual self-determination was not a significant factor, indeed it was not a factor at all, since the rule bluntly denied that she had any such right." (Boyle, 1984: 8).

25. R. v. O'Brien [1974] 3 All E.R. 663 (C.C.): headnote, 663.

26. "Comment: Rape and Battery Between Husband and Wife", 1954: 725.

27. See for example, Mitra, "For She Has No Right or Power to Refuse Her Consent", (1979) Crim L.R. 4. Sigmund Freud, quoted in "Comment": "The demand that the girl shall bring with her into marriage with one man no memory of sexual relations with another is after all nothing but a logical consequence of the exclusive right of possession over a woman which is the essence of monogamy...." (Freud quoted in "Comment", 1952: 72 footnote #118). Camille E. LeGrand (1973), Neil Brooks (1975), Clark and Lewis (1977), Reneè Goldsmith Kasinsky (1978), and Constance Backhouse (1983).

28. National Institute of Law Enforcement and Criminal Justice Law Enforcement Assistance, Administration United States Department of Justice, 1978: 14. Also see Klemmack and Klemmack: "Rape can be viewed as the logical extension of a cultural perspective that defines men as possessors of women." (Klemmack and Klemmack, in Walker and Brodsky (eds.), 1976: 136).

29. Also see Schwendinger and Schwendinger on this point: 1983: 113.

30. Clark and Lewis, 1977: 114.

31. Brooks, 1975: 3.

32. "Note: The Marital Rape Exemption", 1977: 309.

33. Mitra, 1979: 559-560.

34. Clark and Lewis, 1977: 117-118.

35. MacPherson, 1983: 11-12.

36. Kasinsky, 1978: 62.

37. Mitra, 1979: 561.

38. "Comment: Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard", 1952: 70.

39. quoted in Morris and Turner, 1952-55: 259.

40. Boyle, 1981: 206.

41. See Boyle, 1981: 210

42. Ibid, 197.

43. Scutt, 1977: 272.

44. Boyle, 1981.

45. Ibid, 201.

46. See Boyle: "...rules which define coercive sexual intercourse between strangers *may* not be useful where there exists a close relationship between the victim and rapist."(Boyle, 1981: 203).

47. See Scutt, 1976.

48. Boyle, 1984: 70.

49. Marshall, 1988: 219.

50. "Note: The Marital Rape Exemption", 1977: 313-314. Also see Scutt: "Although it is understandable that difficulties in proof are acknowledged in the case of rape between partners in a marriage, it is difficult to understand that such should be seen as greater than problems of proof arising where parties are acquainted with each other, or where they have been social partners, or have been living together for some time." (Scutt, 1977: 276).

51. McFadyen, 1978: 196.

52. "Note: The Marital Rape Exemption", 1977: 315.

53. Estrich, 1987: 77-78.

54. McFadyen, 1978: 195.

55. Russell, 1982: 198. Also see Frieze: "Overall, the results of this interview study confirm that marital rape is indeed

a serious crime and that women who have experienced this type of rape need better sources of help. Victims undergo a variety of emotional and behavioral reactions, some of them quite severe."(Frieze, 1983: 552).

56. Legrand, 1973: 926.

57. Law Reform Commission of Canada, 1978: 7.

58. "Note: The Marital Rape Exemption", 1977: 310.

59. This is not to discount previous feminist and other arguments which strongly advocated the abolition of spousal immunity from rape.

60. Boyle, 1984: 28.

61. Cohen and Backhouse, 1980: 101.

62. Ibid, 103.

63. Debates, 1981: 11300-11301.

64. Ibid, 11347.

65. Ibid, 20039.

66. Chase, 1983: 54.

67. Boyle, 1981: 198.

68. Frieze, 1983: 542-543.

69. Ibid, 542-543.

70. Russell, 1982: 2.

71. See: R. v. Martin and Martin (1834) 172 E.R. 1364; R. v. Cockcroft (1870) 11 Cox C.C. 410; R. v. Riley (1887) 16 Cox C.C. 191 (C.C.R.)

72. R. v. Cockcroft (1870) 11 Cox C.C. 410 (Liverpool Assizes): 411. Also see R. v. Riley: "Upon an indictment which charges a prisoner with an attempt to commit a rape, the prosecutrix may be cross-examined as to the fact of her having had connection with the prisoner previously to the commission of the alleged offence; and should she deny the fact of such connection having taken place, evidence may be given in order to contradict such denial." (R. v. Riley (1887) 16 Cox C.C. 191 (C.C.R.: headnote, 191-192).

73. Boyle 1985: 97, footnote, #19.

74. R. v. Gleason (1986) 1 Y.R. 106 (Y.T.C.): 110.

75. Ibid, 110.

76. Ibid, 110-111.

77. Boyle, 1984: 47-48.

78. Dawson, 1987-88: 332.

CHAPTER III

THE LEGAL DUTY TO PROVIDE NECESSARIES

Married women have historically been under the control of and dominated by their husbands, as illustrated in the previous chapter discussing the proprietary rights a husband gained upon marriage to the extent that he could have sexual intercourse with her even if she was unwilling. In conjunction with this physical power that was previously regarded as inherent to marriage, married women were also viewed as 'delicate' and in need of their husband's control and support. Husbands therefore have been obligated to protect their 'frail' wives, and this requirement has been legally recognized. English, and subsequently, Canadian criminal law thus created a legal duty to provide necessaries; an omission to provide for the safety and welfare of one's wife became a criminal offence.

While the provisions setting out this offence have been changed and modified over time, the rationale has persisted that women are dependent, and unable to secure their own economic needs. It has only recently been legislatively recognized that married women are as capable of providing necessaries as men. Before the legislative provisions were made bilateral in 1975, however, a woman's role was clearly defined and she in turn had to adhere to this role in order to be worthy of her husband's support. It was recognized that a married woman needed to be cared for but she had to continue to subvert her independence in

favor of her husband's wishes in order to be guaranteed his maintenance.

Case law dealing with the legal duty to provide necessaries required a married woman to be living properly with her husband, and disqualified the adulterous wife from being worthy of support. These cases, and the judicial interpretation of the elements of the offence, must therefore be analyzed and assessed, in terms of their role in subjugating women. Also, the effects of the 1975 legislative change, making both spouses liable to support, needs to be examined as to whether or not this is truly a provision which will secure equality. As seen with the sexual assault amendments, the courts do not necessarily uphold the desired aims of legislative changes, nor does equality in theory necessarily mean equality in actual practice.

History of Maintenance Provisions and the Avenues of Resort

Historically, various laws have enforced the requirement that a husband care for his wife. Presently, the Canadian Criminal Code (s. 215) maintains that both husband and wife must provide necessaries for one another. This is a departure from the common law provisions and the ensuing legislative policies that codified the requirement that only the husband was responsible for his wife. Also, it should be briefly acknowledged that the criminal law is not the only legal recourse available to a neglected wife.

At common law it was not a criminal offence for a husband not to supply necessaries to his wife;[1] the common law did, however, require the husband to maintain his wife. Smyth, D.C.J. in R. v. Brown (1941) (Sask. D.C.) quoted from Halsbury: "At common law...'It is the duty of a husband to maintain his wife according to his estate or condition in life, or according to his means of supporting her'."[2] The basic maintenance requirement was soon felt to be in need of extension due to the perceived nature and dependency of the female. The Imperial Legislature in England declared in 1851 that, "...it is expedient 'to make provision for the better protection of persons who are under the care and control of others as apprentices or servants...'."[3] This view soon extended to the married woman who was seen as less capable than her husband's employees. Harrison, C.J., gives a good account of the introduction of this legislation in R. v. Nasmith (1877) (Assizes):

> When this last Act was passed [regarding protection of apprentices and servants], there were persons in England who thought that some similar measure of protection ought to be extended to wives, lunatics, and idiots, as therein extended to apprentices and servants. Prominent among these was Mr. Greaves, Q.C., who prepared the English bill.... The argument in favour of the extension of the law as he proposed was, that while apprentices and servants are generally quite able to remonstrate against ill-treatment, and remove themselves from its influence, married women, children, lunatics, and idiots are either not so free to do so or so capable of doing so.[4]

Married women clearly were not accorded an equal status with their husbands, and were included in legislators' thoughts with those deemed incapable of functioning on their own. It was

concluded again that married women were not independent and autonomous.

These patriarchal laws, developed in England, were then made law in Canada. The Offences Against the Person Act of 1867-1868, for example, also likened the married woman's status to that of a child, lunatic or idiot.[5] With the inception of the Criminal Code in 1892, section 210(2) required a husband to provide necessaries to his wife.[6] Over time, the Criminal Code more clearly refined and redefined the parameters of this offence and the requirements of proof and level of punishment, but it has maintained that a husband is to be criminally responsible for inadequately providing for his wife when he is legally required to do so.[7]

The offence of failing to provide necessaries is not the only means of making a neglectful husband accountable for his omissions. There are three avenues for a wife whose misfortune is due to her husband's neglect. Action can be taken civilly, under the aforementioned common law provisions for support and maintenance which require a husband to "provide for and maintain his wife according to his status and his means...."[8] Proceedings can also be initiated under the provincial laws of maintenance, which make restitution to the deserted wife.[9] The third means available involves utilization of the criminal law, and thus further imposes punishment for wrongdoing. In the past, the vagrancy provisions complemented the legal duty to provide necessaries provision; however, as noted in the case of R. v.

Aikens [1948] (Ont. H.C.): "the essential facts to be proved are different according to the terms of the various statutory provisions."[10] The vagrancy provisions required, as an essential element of the offence, a willful refusal to maintain, whereas the omission to provide necessaries when required by law centers on negligence and the absence of a 'lawful excuse'.[11] While the vagrancy provisions are no longer in existence,[12] a prosecution can still be initiated under the criminal law based on the duty to provide necessaries provisions. Some cases do caution that the Criminal Code provisions should not be abused and should only be used as a last resort. The case of R. v. Wilson [1933] (Alta. S.C.) emphasized that the Criminal Code provisions are not to be used to enforce a civil debt; if civil proceedings are ineffectual in securing payment, the criminal law should not be invoked to attempt to ensure restitution, or revenge.[13] R. v. Wolfe (1908) (H.C.C.C.) reaffirms that the marriage should be preserved, and thus usage of the criminal law may be too drastic a measure: "In conclusion, it is not out of place to say as it is always very difficult to effect a reconciliation between husband and wife after a wife invokes the application of this section of the Code, the section should only be invoked as a last resort and when all other means have been exhausted."[14] When the criminal law is invoked, the case of R. v. Brown (1941) (Sask. D.C.) highlighted that such an omission is an offence against the Crown, rather than against the wife personally, and thereby can be prosecuted as such.[15]

While the criminal law is not the only means available to a neglected wife, the legal duty to provide necessaries provisions contained within the Criminal Code will be the focus of this chapter. The criminal law has much more stigma and power than the civil law or provincial maintenance provisions, and also the purpose here is to elucidate how the criminal law has over time legitimized patriarchal relations, inequality and subjugation. Before these provisions are assessed in terms of their discriminatory application and interpretation, the basic elements of the offence must first be examined in order to gain an understanding of the parameters of such an offence.

The Elements of the Offence

As with any piece of legislation, the true meaning of its terms has been supplied by the courts. The case law has set out the essential elements of the offence that must be proved before a conviction can stand. The early Canadian case of R. v. Bowman (1898) (N.S.S.C.), for example, has shown that the charge of failing to provide necessaries to one's wife is to be determined as "purely a question of fact",[16] but other relevant decisions must be examined in order to clarify what is meant by 'necessaries' and the extent of injury or ill health necessary to constitute the offence.

While the case of R. v. Wilson [1933] (Alta. S.C.) contended that a husband was not required to supply necessaries to his wife, unless he was under a legal duty to do so, amendments to

the Criminal Code in 1953-54 rectified this discretionary application and maintained that as a husband, he did in fact have this legal duty to his wife. The 1927 Criminal Code s. 242(2) which held, "Everyone who is under a legal duty to provide necessaries for his wife...", was re-enacted in 1953-54 to s. 186(1)(b): "Everyone is under a legal duty as a husband to provide necessaries of life for his wife". Case law has therefore emphasized that one element to be proved is that the couple are married.[17] Although the marriage must be proved, this requirement is not as stringent as it is for the offence of bigamy, which requires strict proof of marriage.[18] The level of proof rests upon cohabitation, as set out in the Criminal Code Amendment Act, 1913, C. 13.[19]

A second element to be proved, as set out in the original section 209 of the Criminal Code (1892), and continuing on to the present time, is that the "life is endangered, or...health has been or is likely to be permanently injured".[20] In the case of R. v. McIntyre (1897) (N.S.S.C.), the court held that this is a subjective test in which inferences can be drawn.[21] Case law has contended that this injury must be physical and not mental:

> The injury to the wife's health which is essential to constitute the offence of failing to provide necessaries to a wife under Cr. Code sec 242, must be due to deprivation of food, clothing, shelter or medical attendance, and an attack of nervous frustration suffered by the wife through mental worry because her husband deserts her and allows her relatives to support her is not sufficient.[22]

This is more stringent than the provincial laws of maintenance which provide support in cases of desertion due to cruelty.[23]

The case of R. v. Wood (1911) (Ont. C.A.) did, however, view upcoming surgery, and the state of well-being prior to the surgery, as harmful and in need of support:

> Where the deserted wife had been compelled to work continuously at menial labour to support herself and child and required rest and surgical treatment for organic disease to stop the breaking down of her health, but was unable to obtain such surgical treatment and rest without being dependent on charity such facts will support a special finding by the jury that the wife's health is likely to be permanently injured from the husband's neglect to provide necessaries for her which neglect in such an event is an indictable offence under Cr. Code (1906), sec. 242.[24]

The Criminal Code Amendment Act of 1913 extended this concept of harm in adding the summary conviction offence of putting one's wife in 'destitute or necessitous circumstances'.[25] The civil case of Algiers v. Tracey (1916) (Que. K.B.) provided the definition that: "To be in necessitous circumstances simply means to be in need."[26] The later case of R. v. Harenslak [1937] (Alta. S.C.) broadened the interpretation of 'necessaries' in assessing necessitous circumstances:

> The duty of a husband to support his wife is not limited to providing such "necessaries" as food and clothing but includes the duty to provide shelter; and a wife living in the family home, even if it is owned by her, may, notwithstanding, be in necessitous circumstances within the meaning of subsection 3 of s. 242 of the Criminal Code. The fact that changing circumstances of a family may require that the home be given up and the house and furniture sold to provide other necessities of life does not alter a situation such as exists in the case before us.[27]

The third major aspect to be proven is that there was a failure to provide the necessaries.[28] Necessaries are to include any measure required to preserve life, including medical attention, and are to be determined on a case by case basis.[29]

In assessing these necessaries, there must have been an omission to supply them; this omission can, however, be justified by a 'lawful excuse'. A recent Canadian decision, Regina v. Degg (1981) (Ont. P.C.) notes that failing to provide necessaries is a *mens rea* offence. In other words, it is not an offence of strict liability. A further element to be proved is, therefore, whether the act was one of recklessness, or whether the culpability of the omission is negated by a lawful excuse for not providing such necessaries.[30]

Early Canadian case law has determined that: "The question of lawful excuse is to be determined upon all the facts and circumstances, the onus being upon the Crown."[31] Further, the words 'without lawful excuse' must be contained within the complaint, for: "Those words are part of the offence, not merely an exception, proviso, excuse or qualification accompanying the description of the offence."[32] Thus, while a husband has been accorded a duty to protect and care for his wife who is deemed in need of such care, he could in certain instances be found accountable for omitting to uphold this duty. The parameters of this defence must therefore be assessed.

The acceptable excuses that have been put to the courts are varied, but they all involved a departure from the traditional marriage: i.e., a unity between a man and a woman with the woman being dependent upon her husband the breadwinner. R. v. Robinson (1897) (Ont. H.C.), for example, opened the door to the excuse of marital agreements, making the spouses financially

independent until such time as the husband was able to support his wife:

> Upon a prosecution under the Criminal Code, 1892, sec. 210(2) for omitting without lawful excuse to provide necessaries for a wife, evidence is admissible, as tending to shew a lawful excuse, of an agreement between husband and wife at time of marriage that she should be supported as before the marriage and not by him until he could earn sufficient means for the maintenance of both.[33]

This ruling is unique, especially during this early time period, but it is not conclusive, it just provided the potential for such an excuse. A later Halifax decision in 1908 reinforced that the wife must abide by her husband's wishes if she was to be provided for. This case held that if a wife refused to return to her husband, his non-support was excusable:

> The refusal of a deserted wife to again live with her husband unless he puts up security in money not to again desert her, is a "lawful excuse" for his omission to support her subsequently to his offer to return and while such refusal continues, unless it is shewn that her return would be dangerous to her health.[34]

This case, therefore, limited the wife's ability to refuse reconciliation, and still be provided for, to those instances where physical harm would be the result of her return, and closed the door on such a refusal that was due to mental stress over economic insecurity.

When a husband did not fulfill his role as the breadwinner of the union, this could provide him with a lawful excuse. The Ontario Supreme Court held in R. v. Bunting (1926): "A man cannot be convicted of an offence under s, 242 A of the Cr. Code, for failing to support his wife and family during a period when he was unable to obtain work and consequently earned

nothing."[35] When one delves into the facts of the case, however, the husband had been previously employed with Bell Telephone Co. and quit his job when he ran off with a young woman. When the Bell Telephone Co. subsequently offered work to him, he refused to do so.[36] A wife therefore could not refuse her husband's wishes, but the husband was not to be found liable if he made choices that made him unable to secure his legal duty to his wife. This is clear evidence of the patriarchal application of these laws. The case of R. v. Harenslak [1937] (Alta. S.C.) affirmed this lawful excuse of unemployment.[37]

In contrast to Bunting and Harenslak, other decisions have held that unemployment is not a lawful excuse when a husband refused to accept available employment and the state had to bear the burden of undertaking his neglected duty. In R. ex rel Connell v. Klein [1937] (Sask. P.C.), the accused husband refused work which would involve separation from his family, but Tingley, P.M. held:

> I do not consider it "monstrous" that our representatives in administering our affairs should say to a man able to work that he must do so to bear the burden of his family's care rather than shift it to the state, to the people who carry the burden of their own families' care and are called upon by his default to carry his burden also.[38]

This case reaffirms McIntosh's (1978) comments on the state's need to maintain the traditional marriage in order to secure financial obligation within each respective unit and the contention of this thesis that the state has such a vested interest. McIntosh contends that the state has two primary functions, the first of which is expressed in the Klein ruling

and involves the need to sustain household units where the wife is responsible for household duties and the husband is to financially support his family. Within this traditional model, the state is alleviated from bearing any financial responsibility to individual family members.[39] Klein illustrates how this state interest can be legally secured.

The proposed 'lawful excuses' that have been unsuccessful in the courts, involve cases where there had been an attempt to dissolve the marriage and the obligatory duties contained therein. The Canadian viewpoint, although not unanimous, places a high regard on the sanctity of marriage and therefore impedes the disruption of this union. In keeping with this philosophy, case law has held that a divorce in a foreign country does not absolve a husband living in Canada from his legal duty to provide necessaries, if residence in that foreign country was strictly to effect the divorce, before returning to Canada.[40] Further, the case of R. v. Scott (1925) (Ont. S.C.) held that: "A foreign divorce in the country of a man's domicile on grounds not sufficient for divorce in Canada, will not avail as a defence to a charge of non-support."[41] Scott also confirmed that a husband who is absent from his family must provide for their needs during his absence.[42] While divorce may vitiate the husband's legal duty, the case of R. v. Vallieres (1954) (Que. C.S.) has held that a separation order did not. The Québec Court of Sessions of the Peace held that while the Civil Code "deprive[s] the wife of the advantages of the marriage such as the benefits of the community property regime but do[es] not

extinguish the husband's obligation to support her when she has no means of subsistence. The husband's duty to support his wife in such circumstances is expressly provided for by art. 213 and continues throughout the currency of the marriage."[43] Marriage has been deemed of such primary importance that the *status quo* of this union is to be maintained by the courts in order to secure the state's interest in obligatory support within the family. Attempts to break this union and the duties that follow have, therefore, been dismissed by the courts as not meeting the standards of a 'lawful excuse'.

These then are the elements that must be proven, which can then be nullified by virtue of a lawful excuse. While it has been noted that a lawful excuse can be constituted by a husband's inability to support his wife due to unemployment, the courts have also historically limited a wife's claim for support if her behavior is somehow deemed unworthy of this support. The legal duty placed upon a husband was contingent upon her living 'properly' with him, and being faithful to him. This legislation then reinforced a man's control over his wife, and facilitated subjugation. Case law illustrating these points highlights the issues of living together, adultery and separate support, and perpetuates discrimination, and thus the thesis tenet that these laws are patriarchal in nature and application.

The legal duty provisions have been interpreted by the courts in a manner that in essence first placed a duty upon a wife to conform to her traditional role before her husband was required to provide for her. A wife must subjugate herself to the wishes of her husband, as the traditional model of marriage holds, in order to be eligible for support. The courts indicated that if she did not uphold her end of this bargain, her husband was not obligated to perform his supportive role. The legislative provisions therefore have been applied in such a fashion that ensured that the traditional roles and duties were met, in keeping with the vested state interest to maintain the traditional family unit.

A married woman has been deemed the property of her husband, as illustrated in the previous chapter discussing the historic husband's immunity from a charge of rape, and if his control over this piece of property is lost, he was no longer legally required to care for it under the duty to provide necessaries provisions. Case law has held that in order for the husband to have a legal duty to supply necessaries to his wife, she must not only be living with him, she must be living *properly* with him. Of course, his behavior in this regard was not often scrutinized by the courts. In Flannagan v. The Overseers of Bishopwearmouth (1857) (Q.B.), for example, the court did not take the husband's actions into consideration when rendering the

decision that the wife must live with her husband in order to secure support:

> Let it be taken that he had ill-used his wife very much, and that she had reasonably apprehended that he would do so again. Let it also be taken that he had promised to make her a weekly allowance, and that he has not done so. The question is, whether there is any evidence of his having wilfully refused or neglected to maintain her. It seems to me that clearly there is no such evidence. It appears further that there has been an offer made to her to live with her husband, and that she has refused that offer. The justices have thought that there was a wilfull refusal or neglect to maintain her. I think that they are wrong, and that the conviction cannot be supported.[44]

The case of R. v. Yuman (1910) (Ont. C.A.) further held that the wife should not only be living with her husband but should be "as helpful to him as she could be...."[45] The behavior of the wife was on trial and legally circumscribed, more so than the actions or inactions of her husband. When it pleased the courts, a married woman was granted a free will, which again could absolve the husband from his responsibililty:

> Where a woman who has the exercise of free will and is in possession of an ample supply of suitable clothing chooses, to the knowledge of her husband, to leave the house provided for her by him and goes out into the cold and is frozen to death the husband is not liable under s. 242 of the Criminal Code, for failing to provide her with necessaries on the ground that he did not go after her and bring her back.[46]

The courts were sending mixed messages in this regard. On the one hand, married women were seen in need of care and protection, unable to secure their needs by themselves. On the other hand, she was granted independence to the extent that her husband was guiltless in not preventing her death.

Customarily, the courts have not accorded the married woman with being capable of this free will, or if capable of it, not permitted to use it. Case law has therefore required that she be absent only when she has her husband's consent. The case of R. v. Bullard (1924) (Alta. S.C.) in fact transferred the husband's qualification of a 'lawful excuse' to the wife:

> A summary conviction under sec. 242 A of the Cr. Code, for failing to maintain his wife is not justified where the wife of the accused is absent from his home without lawful excuse.[47]

R. v. Wilson [1933] (Alta. S.C.) confirmed that the legal duty only extended insofar as the wife did not leave the homestead without his consent.[48] Applying this case, the court in R. v. Stevenson [1936] (Alta. D.C.) held that the sentence should be reduced, even when all the elements of the offence had been proved, since the husband and wife were not cohabiting.[49]

This patriarchal application is not, however, unique to the criminal law. The common law and provincial maintenance provisions have also in practice reflected patriarchal ideologies where a married woman's role and duties were clearly defined:

> At common law a husband must provide for and maintain his wife according to his status and his means, while the wife on her part must cohabit with her husband at his place of abode. If he does not provide and maintain she does not have to cohabit and may live separate and apart; while on the other hand if she refused to live with him without just reason he is no longer bound to provide and maintain.[50]

The English case of Holburn v. Holburn [1947] (C.A.) held that even when there had been a history of unusual sexual demands placed upon a wife, if her husband promises to 'be good', she

must return to him in order to be supported.[51] The courts were clearly upholding male interests in these cases, as well as perpetuating the traditional male/female roles.

The courts have indicated that there may be circumstances under which the wife was permitted to leave and should be supported separately by her husband,[52] but Flannagan illustrates that these circumstances were narrowly defined. While these circumstances remained somewhat elusive, the civil case of Buteau v. Hamel (1915) (Que. C.S.) reassured a legally separated wife that she did not have to return to her husband's abode in order to initiate criminal proceedings against her husband's neglect.[53] For the most part, however, a wife was seen to have an implied duty to her husband; she was to be "proper and good" and reside with him and his reciprocal duty did not have to be met if she deviated from her role.

Even more important than the wife living with her husband was her faithfulness as property of her husband. If a married woman committed adultery, the husband was provided with the best lawful excuse known to the courts. Adultery exonerated a husband from his legal duty to care and provide for his wife.[54] This 'unlawful connection' must however be substantiated in some way in order for the husband to be absolved from his duty.[55] Halsbury is quoted in R. v. Brown (1941) (Sask. D.C.): "'...a refusal to maintain her is not wilful for this purpose if it is caused by a *bona fide* belief that she has been guilty of adultery'. Of course the *bona fide* belief must be founded on

something real and there must be substantial reasons for the belief."[56] Hall, J., emphasized the underlying rationale most succinctly in Anonymous Case (H. v. H.) (1902) (Que. K.B.): "Persons who choose to live such lives as those exposed to us in this trial [the wife was alleged to be the mistress of a separated man] should not resort to the criminal law for assistance. Its provisions were not intended for their protection."[57] The criminal law took and takes a firm stance on moral impropriety, and thus further required that the 'proper' roles are adhered to.

Alongside the issue of adultery was the argument that a husband should not be required to support his wife when she was obtaining support from others. The cases of Nasmith and Wilson emphasized that adultery eliminated a husband's duty since presumably the wife was then living with and supported by her lover.[58] Adulterous relations were not the only means of support questioned by the courts. The issue of separate support was also raised in cases where the married woman was supported by friends or family. Over time the courts attempted to come to terms with whether or not separate support could absolve the husband's responsibility. Canadian case law affirmed early on that if a wife was provided for by others, a charge could not succeed against her husband when he was not providing that support. It was held in R. v. Wilkes (1906) (Ont. C.A.):

> ...the fact that she is maintained by the charity of others or gains her livelihood by her own means or exertions forms no ground for a prosecution under the Code, which was not intended as a means of enforcing the husband's civil responsibility for the wife's

> necessaries either at her own instance or that of those who supply them.[59]

This viewpoint was confirmed in R. v. Wolfe (1908). The 1933 case of R. v. Wilson was not as emphatic in this regard. It was held that separate support was not necessarily a defence, but rather the facts of the case must be assessed to determine whether the wife was in destitute or necessitous circumstances. Later case law placed primary concern on this latter point, holding that the circumstances that the wife was placed in will decide the case. R. v. McDonald [1942] (Ont. C.A.) held that since the wife was being maintained comfortably by her father, no criminal prosecutions could succeed against her husband.[60] The Québec Court of Sessions of the Peace in R. v. Flaman (1952) again looked to the conditions in which the wife was placed, as well as whether or not these external sources were really capable of providing that support. This was in response to the earlier civil decision in Algiers v. Tracey (1916) (Que. K.B.) which distinguished parental support as no longer legally required, and the fact that in this case "they are little able to provide that support."[61] While the courts have not been concerned with where the support was coming from, as long as family and friends were alleviating potential destitute or necessitous circumstances, quite a different view was taken when the neglected wife became a state responsibility. The case of R. ex rel Connell v. Klein [1937] clearly emphasized that the husband's duty should not become a burden to the state. These provisions are meant to secure that families take care of themselves and provide an independent economic institution,

which is not to become a burden to the state.[62] Since 1953, however, with additional amendments to these duty provisions, "the fact that a wife or child is receiving or has received necessaries of life from another person who is not under a legal duty to provide them is not a defence."[63] This then secured a husband's obligation and can be construed as confirming the property and control aspects of marriage in Canadian society.

Case law interpreting the legal duty provisions therefore emphasized the reciprocal duty that society has placed on husbands and wives. These duties, however, are very patriarchal in nature and are indicative of the thesis contention that the laws specifically pertaining to marriage are patriarchal in nature and application: first, it was presumed that married women were not capable of caring for themselves, which may be due to the limited economic avenues available in a society dominated by men and their interests; and second, a married woman must conform to her submissive role in order to be deemed worthy of support. As discussed in the Introduction, and the previous chapter, married women were treated as the property of their husbands, and must in turn meet their possessor's wishes. Property rights do not just encompass inanimate objects, as previously noted, but define relations between persons. MacPherson's (1983) work on Property indicates:

> ...to have a property is to have a right in the sense of an enforceable claim to some use or benefit of something, whether it is a right to share in some common resource or an individual right in some particular things. What distinguishes property from mere monetary possession is that property is a claim that will be enforced by society or the state, by custom or

convention or law.[64]

The legal duty to provide necessaries secured this property right of a husband over his wife, as did the historic immunity from a rape charge, and did so by subjugating her independent status. This legislatively enforced inequality is intrinsic to laws, for as Bentham notes: "The laws are constantly establishing inequalities, since they cannot give rights without imposing obligations upon another.[65] A married woman has thus been obligated to her husband by virtue of his rights over her.

These principles enshrined in the criminal law met with opposition from The Royal Commission on the Status of Women in 1975, and resulted in a change in the legal duty to provide necessaries provisions. Nonetheless, it must be assessed whether or not equality in legislation means equality in practice. As noted by Boyle et al. (1985), true equality is difficult to achieve in a society based on inequities.

Legislative Amendments - the Bilateral Duty to Provide Necessaries

In 1975, The Royal Commission on the Status of Women successfully challenged the one-sided duty of a husband to care for his wife, advocating instead a bilateral duty placed upon both spouses. The Commission recommended that women be recognized as equal partners in a marriage, and thus share the responsibilities within that marriage. The previous one-sided legislation perpetuated dependency and disregarded a woman's

economic contribution to the marriage, be it direct or indirect. It was felt that legislators had ignored women's changing status in the economy, and this was reflected in archaic laws. The basic principle underlying The Royal Commission on the Status of Women's aims was that "...there should be equality of opportunity to share the responsibilities to society as well as its privileges and prerogatives."[66] The Commission was clearly voicing the aims of liberal feminism. In commenting on this legislative amendment, one M.P. contended: "It is time, finally, to get rid of the idea that one sex must be compliant, supportive and inferior, while the other sex must be agressive, ambitious, and strong. Parliament spends a lot of time on subjects of much less importance."[67] This amendment thus sought to abolish the discriminatory practices that heretofore had characterized the duty to provide necessaries provisions.

Even though the legislative amendments promote equality, The Royal Commission on the Status of Women cautioned that "we must be concerned that such legislation does not become merely a palliative to the problems surrounding women's status - legislation must be considered in the broader context of providing part of a viable base for true equality within our society."[68] This is a real problem with legislative change, for mere words do not secure equality when the society itself remains unchanged.[69] Shrofel (1985), for example, is critical of similar Canadian bilateral changes to Deserted Wives' and Child Maintenance Acts, for they did not take into consideration the differential economic and social plight of women:

> The committee ignored the fact that a wife may have unique reasons for "deserting" a husband – reasons such as physical or mental abuse of herself or of the children. To hold a wife liable for her husband's maintenance in such a case would be ludicrous. Even if the reviewers had built an exception for abused spouses into the recommended change, such an exception would not rescue the amendment from criticism, for the proposed amendment also reflects the false premise that women are presently the factual financial equals of men. Placing women under the same financial obligation as men does not take into consideration the fact that women generally have much lower earning capacities than men. As Lindsay Niemann has pointed out, 'Since the time that statistics have been reliably collected, they have shown that women, on the average, earn only two-thirds as much as men do'."[70]

This is a problem with the aims of liberal feminism for equality cannot be simply secured by legislation. Until the wider context is restructured, women will remain on unequal footing, perhaps even worse off, as unrealistic economic demands may be placed upon them. As Miles (1985) notes: "...legislation which attempts to ensure equality of treatment by banning or avoiding differential treatment regardless of substantive differences can further disadvantage women by treating unequals equally."[71] There has historically been a very patriarchal quality to these specific marital provisions, but the simple redrafting of laws along gender-neutral lines will not ensure true equality until society in general is receptive to and founded on that ideal. As stated in the Introduction, however, it is difficult to determine which of these changes precedes the other. If social change must come first in order for legislative change to be successful, then such equality provisions will be ineffective. If, on the other hand, legislative change can spark the impetus for social change then such legal inroads must continue to be

advanced. As noted by Boyle et al (1985), however, at the present time, when there are distinct biological, social, psychological and economic differences between males and females, the legislative aims should not be towards absolute gender neutrality but should take account of the 'subordination principle' whereby "to be equal is to be non-subordinated",[72] and aim to eradicate such subordination.

Further to the problem of achieving statutory equality is the fact that most often male judges give interpretation and meaning to these provisions. Legislative provisions that promote equality on the books can therefore be defined in a manner that continues to secure male interests, even when the aim of the legislation is clearly otherwise.[73] Lahey (1987) argues on this point:

> And even when women have successfully pursued equality claims on the substance, judges have applied a purely neutral and "empty" concept of equality which defines discrimination as any form of classification. Each and every victory of women on this basis makes it even easier for men to win equality claims than it is for women.[74]

Historically the courts have interpreted the duty to provide necessaries provisions in a very patriarchal manner, and this will not necessarily change just because the strict wording of legislation has. The sexual assault amendments which now make a husband liable for nonconsensual sexual activity with his wife clearly makes this point. While the legislative changes were desired as equality provisions which in substance no longer regarded a wife as the property of her husband, the courts, as seen in Gleason and sentencing briefs are not upholding these

principles but rather, continue to render patriarchal decisions. Equality in theory has yet to be made equality in practice. Unfortunately, there is no recent reported case law assessing these new bilateral provisions,[75] so it presently remains open to question and speculation on how these changes will be interpreted and enforced by the courts. Using the sexual assault amendment as an example, however, indicates that the courts have yet to assess and uphold the 'subordinate principle'.

Conclusion

The provisions that required husbands to care for and protect their wives were originally based upon a very patronizing view of the married woman, as she was deemed incapable of taking care of herself. The criminal courts then applied this legislation in a patriarchal manner, upholding distinct male/female roles as a necessary prerequisite for a successful prosecution. A wife was to be dutiful and obey her husband in order to be worthy of his support.

Opposition to this subjugation of the married woman resulted in the 1975 amendments to the Criminal Code, which instituted a bilateral duty to provide necesaries. While this reciprocal duty may appear to be an equality provision, its impact is limited by continued societal patriarchy. The legislation recognizes that males and females are equal, whereas economic opportunities continue to favor males. Placing the same supportive duty upon a wife as upon a husband is, in fact, furthering her inequality.

Before the legislation can recognize equality between the sexes, society in general must first do so. The source of inequality must be attended to before the desired goals of equality can be secured. These issues highlight the appeal of the 'subordinate principle'.

NOTES

1. See: McGillivray, J.A. in R. v. Wilson [1933] 60 C.C.C. 309 (Alta. S.C.): 317. McGillivray, J.A. in R. v. Harenslak [1937] 67 C.C.C. 277 (Alta. S.C.): 285.

2. R. v. Brown (1941) 75 C.C.C. 285 (Sask. D.C.): 290. Also see Rex v. Harenslak [1937] 67 C.C.C. 277 (Alta. S.C.): 285.

3. R. v. Nasmith (1877) 42 U.C.R. 242 (Assizes): 247 (discussing 24 & 25 Vic. Ch. 10, s. 26).

4. Ibid, 247. This is not the first time that women have been coupled with those of diminished intellectual capacities as is noted by Zuker and Callwood: "Until the middle of the nineteenth century, there was a category in law – bluntly defined as "women, children and lunatics" – which had no status." (Zuker and Callwood, 1976: 16).

5. 1867-68 Statutes of Canada, Chap. 20 "Offences Against the Person": s. 25 "Whosoever, being legally liable, either as a husband, parent, guardian or committee, master or mistress, nurse or otherwise, to provide for any person as wife, child, ward, lunatic or idiot, apprentice or servant, infant or otherwise, necessary food, clothing or lodging, wilfully and without lawful excuse, refuses or neglects to provide the same, or unlawfully or mailiciously does, or cause to be done, any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant is endangered, or the health of such apprentice or servant has been, or is likely to be, permanently injured, is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour."

6. Criminal Code, 1892, c. 29. s. 210(2) "Every one who is under a legal duty to provide necessaries for his wife, is criminally responsible for omitting, without lawful excuse so to do, if the death of his wife is caused, or if her life is endangered, or her health is or is likely to be permanently injured by such omission."

7. This point is clearly made in R. v. Wilson [1933] by McGillivray, J.A.: "I think it important to point out now that the Criminal Code, s. 242(3), does not create a legal duty on the part of the husband to supply necessaries to his wife; it merely provides that a husband *who is under a legal duty* to provide necessaries for his wife is criminally responsible for failure to do so without lawful excuse, if his wife be in destitute or necessitous circumstances." (R.

v. Wilson [1933] 60 C.C.C. 309 (Alta. S.C.): 316-317). (Emphasis in original).

8. R. v. Brown (1941) 75 C.C.C. 285 (Sask. D.C.). Also see R v. Wilson [1933] 60 C.C.C. 309 (Alta. S.C.): 317.

9. The case of R. v. Brown (1941) provides the example of the Deserted Wives' Maintenance Act of Saskatchewan: "Again if he abuses her or treats her cruelly she does not have to put up with it, but may live apart, and his obligation to support and maintain remains as before. Such conduct constitutes desertion on his part at common law and under our Deserted Wives' Maintenance Act, she is still legally entitled to support and maintenance." (Smyth, D.C.J., in R. v. Brown (1941) 75 C.C.C. 285 (Sask. D.C.): 291-292).

10. "Practice Note: "Maintenance Cases", R. v. Aikens [1948] 5 C.R. 454 (Ont. H.C.): 455).

11. For further discussion of proceedings initiated under the vagrancy provisions see R. v. Aikens [1948] 5 c.R. 454 (Ont. H.C.); R. v. Leclair (1898) 7 Que. Q.B. 287 (Q.B.); R. v. Mariott (1924) 41 C.C.C. 333 (N.S.S.C.); and R. v. Kelly (1933) 60 C.C.C. 116 (N.S.S.C.). The elements of the offence of failing to provide necessaries will be further discussed in following sections.

12. Repealed, 1972, c. 13, s. 12 (1). Section 238(b) of the Canadian Criminal Code (1936) had held: "Every one is a loose, idle or disorderly person or vagrant who being able to work and thereby or by other means to maintain himself or family, wilfully refuses or neglects to do so."

13. R. v. Wilson [1933] 60 C.C.C. 309 (Alta. S.C.): 320-321. Leniency can be accorded in this area; see Algiers v. Tracey (1916) where Archibald, Acting Chief Justice held: "It is true that the Criminal Law is not to be used, as a general rule, for the enforcing of civil obligation; yet in the present case, it must necessarily have that effect." (Algiers v. Tracey (1916) 26 C.C.C. 178 (Que. K.B.): 180).

14. Wallace, Co. C.J. in R. v. Wolfe (1908) 13 C.C.C. 246 (H.C.C.C.): 248-249.

15. The headnote in R. v. Brown (1941) contends: "His Majesty the King is always aggrieved by a failure of justice and has the right under Cr. Code, S. 749 to appeal from the dismissal of an information laid by a wife charging her husband with unlawfully neglecting to provide her the necessaries of life contrary to Cr. Code, s. 242(3)." (R. v. Brown (1941) 75 C.C.C. 285 (Sask. D.C.): 285).

16. R. v. Bowman (1898) 3 C.C.C. 410 (N.S.S.C.): headnote, 410.

17. See for example, R. v. McIntyre (1897) 3 C.C.C. 413 (N.S.S.C.): 418 and "Note: Non-support of Wife – Injury to Health – Cr. Code secs. 210, 215" (1907) 11 C.C.C. 230.

18. Johnston, J. in R. v. McIntyre (1897) 3. C.C.C. 413 (N.S.S.C.): 415.

19. Criminal Code Amendment Act, 1913, c. 13 s. 242 B "Upon any prosecution under section 242 or 242A, evidence that a man has cohabited with a woman or has in any way recognized her as being his wife shall be *prima facie* evidence that they are lawfully married, and evidence that a man has in any way recognized children as being his children shall be *prima facie* evidence that they are his legitimate children." The Statute Law (Status of Women Amendment Act, 1974, 1974-75-76, c. 66 extends this presumption to both spouse in s. 197(4)(a): "evidence that a person has cohabited with a person of the opposite sex or has in any way recognized that person as being his spouse is, in the absence of any evidence to the contrary, proof that they are lawfully married." This is the status of the legislation today – R.S.C., 1985, c. C-46, s. 215(4)(a).

20. Also see relevant case law: R. v. McIntyre (1897) 3 C.C.C. 413 (N.S.S.C.): 418; R. v. Wolfe (1908) 11 C.C.C. 246 (H.C.C.C.): 247; R. v. Wilkes (1906) 13 C.C.C. 226 (Ont. C.A.): "Note: Non-support of Wife – Injury to Health – Cr. Code secs. 210, 215" (1907) 11 C.C.C. 230: 231.

21. R. v. McIntyre (1897) 3 C.C.C. 413 (N.S.S.C.): 418.

22. R. v. Wolfe (1908) 13 C.C.C. 246 (H.C.C.C.): headnote, 246.

23. See R. v. Brown (1941) 75 C.c.C. 285 (Sask. D.C.): 291-292.

24. R. v. Wood (1911) 19 C.C.C. 15 (Ont. C.A.): headnote, 15.

25. Criminal Code Amendment Act, 1913, c. 13 s. 242 A.

26. Archibald, Acting Chief Justice in Algiers v. Tracey (1916) 26 C.C.C. 178 (Que. K.B.): 181.

27. Ford, J.A. in R. v. Harenslak [1937] 67 C.C.C. 277 (Alta. S.C.): 278.

28. See R. v. McIntyre (1897) 3 C.C.C. 413 (N.S.S.C.) R. v. Wolfe (1908) 13 C.C.C. 246 (H.C.C.C.) "Note: Non-support of Wife – Injury to Health – Cr. Code secs. 210, 215" (1907) 11 C.C.C. 230.

29. See the Supreme Court of B.C. decision in R. v. Brooks (1902) 5 C.C.C. 372 (B.C.S.C.) which involved failure to

provide necessaries to a child. This ruling has been held to include the provisions extending to wives, see: "Note: Non-support of Wife – Injury to Health – Cr. Code secs. 210, 215" (1907) 11 C.C.C. 230: 230.

30. See for example R. v. Wolfe (1908) 13 C.C.C. 246 (H.C.C.C.).

31. Moss, C.J.O., in R. v. Yuman (1910) 17 C.C.C. 474 (Ont. C.A.): 478. This has been upheld in the R. v. Joudrey [1935] decision dealing with failure to provide to a child: "On a charge of failure to provide necessaries without lawful excuse the phrase "without lawful excuse" is an essential element the onus of proving which is upon the Crown, and the Crown has not proved that the negligence was without lawful excuse the conviction would be set aside." (R. v. Joudrey [1935] 3 D.L.R. 754 (N.S.S.C.): headnote, 754).

32. R. v. Uridge [1937] 3 W.W.R. 467 (Alta. D.C.): headnote, 468.

33. R. v. Robinson (1897) 1 C.C.C. 28 (Ont. H.C.): headnote, 28.

34. R. v. Wolfe (1908) 13 C.C.C. 246 (H.C.C.C.): headnote, 246.

35. R. v. Bunting (1926) 45 C.C.C. 135 (Ont. S.C.): headnote, 135.

36. Ibid, 136.

37. R. v. Harenslak [1937] 67 C.C.C. 277 (Alta. S.C.): 286.

38. R. ex rel Connell v. Klein [1937] 1 W.W.R. 734 (Sask. P.C.): 738-9.

39. See page 9 of Chapter I, Introduction, for McIntosh's comments in this regard.

40. R. v. Wood (1911) 19 C.C.C. 15 (Ont. C.A.).

41. R. v. Scott (1925) 44 C.C.C. 117 (Ont. S.C.): headnote, 117.

42. Ibid, 117. This is in response to the 1919 legislative amendment to the Criminal Code which added s. 242 C: "Upon any prosecution under section two hundred and forty two A, evidence that a man has, without lawful cause or excuse, left his wife without making provision for her maintenance for a period of at least one month from the date of his so leaving, or for the maintenance for the same period for any child of his under the age of sixteen years, shall be *prima facie* evidence of neglect to provide necessaries under this section." This is basically the presumption as it stands today, R.S.C., 1985 c. C-46, s. 215(4)(c) except that it is now bilateral (as of 1975) and provides that it is proof

when no evidence to the contrary has been supplied.

43. R. v. Vallieres (1954) 109 C.C.C. 327 (Que. C.S.): headnote, 327. Roy, J. Sess, further held: "Marriage under our law is indisolvable, and if the husband obtains a separation from his wife, he does not have the right to leave his wife in misery; she has the right to his support as long as the marriage has not been annulled by a competent tribunal."(R. v. Vallieres (1954) 109 C.C.C. 327 (Que. C.S.): 331).

44. Coleridge, J., in Flannagan v. The Overseers of Bishopwearmouth (1857) 3 Jurist (New Series) 1103 (Q.B.: 1104.

45. Meredith, J.A., in R. v. Yuman (1910) 17 C.C.C. 474 (Ont. C.A.): 479.

46. R. v. Sidney (1912) 2 W.W.R. 761 (Sask. S.C.): headnote, 761.

47. R. v. Bullard (1924) 41 C.C.C. 397 (Alta. S.C.): headnote, 397.

48. R. v. Wilson [1933] 60 C.C.C. 309 (Alta. S.C.): 317.

49. R. v. Stevenson [1936] 2 W.W.R. 111 (Alta. D.C.)

50. R. v. Brown (1941) 75 C.C.C. 285 (Sask. P.C.): 291-292.

51. Holburn v. Holburn [1947] All ER 32 (C.A.).

52. R. v. Nasmith (1877) 42 U.C.R. 242 (Assizes): 246.

53. Buteau v. Hamel (1915) 24 C.C.C. 53 (Que. C.S.): 54. Of course how the criminal proceedings were carried out is not known, but perhaps this more liberal-minded approach was not secured in the criminal courts.

54. See: R. v. Nasmith (1877) 41 U.C.R. 242 (Assizes): 246; R. v. McIntyre (1897) 3 C.C.C. 413 (N.S.S.C.): 416; R. v. Wilson [1933] 60 C.C.C. 309 (Alta. S.C.): 317.

55. See R. v. McIntyre (1897) 3 C.C.C. 413 (N.S.S.C.): 416.

56. R. v. Brown (1941) 75 C.C.C. 285 (Sask. D.C.): 293.

57. Anonymous Case (H. v. H.) (1902) 6 C.C.C. 163 (Que. K.B.): 166.

58. R. v. Nasmith (1877) 42 U.C.R. 242 (Assizes): 246. R. v. Wilson [1933] 60 C.C.C. 309 (Alta. S.C.): 317.

59. R. v. Wilkes (1906) 11 C.C.C. 226 (Ont. C.A.).

60. R. v. McDonald [1942] 78 C.C.C. 330 (Ont. C.A.)

61. Algiers v. Tracey (1916) 26 C.C.C. 178 (Que. K.B.): headnote, 178.

62. R. ex rel Connell v. Klein [1937] 1 W.W.R. 734 (Sask. P.C.): 738-9. Also see Weitzman (1974): "A third state interest is that of securing the continued welfare of its citizens by making them legally responsible for one another. This interest is served by making the husband legally responsible for their children." (Weitzman, 1974: 1244).

63. Criminal Code, 1953-54, c. 51 s. 186(4)(d). This provision stands today, R.S.C., 1985 c. C-46, s. 215(4)(d) but is bilateral

64. MacPherson, 1983: 3.

65. Bentham, "Security and Equality of Property" in Property, 1983: 43.

66. Debates, 1975: 6240.

67. Ibid, 6268.

68. Ibid, 6241-6242.

69. See for example Boyd and Sheehy (1989): "One important component of a result equality approach is careful scrutiny of legal rules for their actual effects on men and women." (Boyd and Sheehy, 1989: 257-258).

70. Shrofel, 1985: 113.

71. Miles, 1985: 65.

72. Boyle et al, 1985: 15.

73. A good case in point are the sexual assault provisions. See Dawson, T. Brettel, "Legal Structures: A Feminist Critique of Sexual Assault Reform." Resources for Feminist Research. Vol. 14, 1985: 40-43, for a discussion of this.

74. Lahey, 1987: 82.

75. This was confirmed by a computer search.

CHAPTER IV

THEFT AND MARRIAGE

As discussed in the previous chapters, the traditional view of marriage has led to legal proscriptions that perpetuate what were felt to be the appropriate gender roles within this union. The criminal law has also been utilized to maintain the sanctity and harmony of the marriage. In a patriarchal society, however, the 'sanctity and harmony' of the marriage has taken on a different meaning from the logical definition one might otherwise derive from these terms. For example, a husband's immunity from a rape charge was viewed by the courts as necessary to maintain the appearance of harmony and sanctity within the marriage. The rape itself was not seen as necessarily destructive to the union, whereas the criminal prosecution would be. The legal duty provisions established the sanctity of marriage by virtue of instilling a reciprocal duty in a wife to be good and faithful to her husband. These prior analyses have illustrated the patriarchal nature and application of particular Criminal Code provisions, and how married persons have been treated differentally by the criminal law in order to maintain the state's interests in the traditional marriage union. This differential application of the criminal law has established both intrusive and non-intrusive ideologies, depending upon how state and male interests could be met. With the rape provisions, the law did not invade what was felt to be private matters, in order to maintain the union. The legal duty provisions were

intrusive in order to secure the state's interest in independent economic unions.

The non-intrusive ideology also estabished that spouses could not be charged with stealing from one another. At common law, theft was defined "as an intent to deprive the owner permanently of the stolen goods,"[1] "permanently, wrongfully, and without claim of right."[2] It was felt that the courts should not scrutinize such actions within a marriage, and that such a crime was impossible between spouses. This rationale is in keeping with the traditional view of marriage and the roles to be adhered to therein, which, as seen, has been legally secured. While the exclusion of married persons from the theft provisions may be seen to formally promote the unity of a man and woman, it will be shown, as with the other provisions discussed, that the reality of such an exclusion stems from the patriarchal structure of the traditional marriage and the subordination of the married woman.

In order to accurately assess the theft provisions as they relate to marriage and the patriarchal nature and application of these laws, the status of the married woman must be historically examined. It will be shown that the married woman's initial inability to own property logically justified the conclusion that a husband could not steal his wife's property, for she had none. The so called "unity concept" further established that a wife could not steal her husband's property for they were to be deemed one person in law, and that person was to be the husband,

and he could not steal from himself. This patriarchal characterization of the law was modified by the English Married Women's Property Act of 1882, and codified into the 1892 Canadian Criminal Code, nevertheless, it must be assessed to what degree this legislative provision redefined the status of the married woman, and the laws of theft as they apply to marriage. This analysis will thus focus on the historic progression of the marital theft provisions until the present day. Unlike the sexual assault amendments and recent amendment to the legal duty provisions, making this duty bilateral, the theft provisions have remained virtually unchanged since 1892. While the theft provisions will be shown to subordinate the married woman in the same manner as the rape/sexual assault and duty to provide necessaries provisions, these particular sections of the Code have received negligible critical scrutiny. The patriarchal nature of these laws thus needs to be illustrated and assessed.

Historical Perspectives: Property Rights and the Unity Principle

Historically, both early Roman law and English common law deemed spouses as incapable of stealing from one another. These laws stemmed from the general premise that married women could not own separate property, as well as the male biased unity principle. As noted in Russell on Crime:

> At common law the goods and chattels of a married woman belonged to, or were treated as in the possession of, her husband, so he could not be guilty of stealing them from her. And at common law a wife could not be guilty

> of larceny of her husband's goods while they were living together. The fact that the property taken by the wife belonged to the husband and others jointly made no difference.[3]

The married woman's inability to own property defined the exclusion of spouses from the theft provisions, and, in a much broader sense, defined her status in society as subordinate to men. Further to these divisions based on sexual inequality, married women also experienced discrimination amongst themselves, based on class, as married women of higher socio-economic standing clearly would be allocated higher standing and power as compared to a married woman of lesser means. Due to these class discrepancies, it was, as Holdsworth (1966) states, the married woman of wealthier means who had more opportunity to rectify this sexual/economic discrimination:

> ...during the sixteenth and early seventeenth centuries we can see the gradual growth of a feeling that these rigid rules [on the status of the married woman at common law] ought to be modified. The total incapacity of the married woman to own personal property, and to deal with her real property, naturally appeared more and more unsatisfactory to the women of wealthier classes and their relations – in 1590 George, Earl of Shrewsbury, made a legacy to his daughter conditional on her surviving her husband. Hence we find attempts to modify her proprietary incapacity; and the partial success of these attempts naturally introduced modifications of her other disabilities which had followed from this proprietary incapacity.[4]

The rigid application of a married woman's proprietary incapacity thus began to be challenged, not only by women of standing, but also by the more liberal thinkers of the time. Progress was, however, often thwarted by clauses and provisions that preserved the husband's power to intervene and nullify his wife's proprietary independence. In the latter half of the

seventeenth century, for example, the separateness of the married woman's property was only permitted upon the consent and approval of her husband.[5] Also, the conception of the separate estate of the married woman in 1877 was circumscribed by Lord Thurlow's introduction "of a clause in a settlement by which the woman could be effectively restrained from anticipating her separate estate."[6] A husband could also apply to a Court of Equity to make a settlement in regards to his wife's property, or facilitate the lack thereof. De Montmorency (1897) comments on the married woman's predicament:

> Up till 1870, then, all that a married woman could possess was settled, and other separate property (including her pin-money) and property acquired under her equity to a settlement. With regard to her interests in such property, she was for all practical purposes free from her husband and a single woman. But this rule of equity, of course, in practice merely applied to the well-to-do and until 1870 no married woman in this country could earn, acquire, or possess, apart from the rule of equity, a single sixpence. So recently has the law altered that we cannot yet fully appreciate the monstrous inequity of such a thing, especially among the poorer classes, where the men, not unnaturally, as an old law-writer has quaintly remarked, '*were always fond of the old common law*'.[7]

Holdsworth's comments express the contradiction of the reality for the married woman: "The wife was under the control of the husband; but she possessed proprietary capacity."[8] It is difficult to ascertain any degree of independence, monetary or otherwise, when the married woman was seen to be under the control of her husband.

This patriarchal, male dominant regard to property rights inevitably led to the inability of married persons to steal from one another, due not only to the husband's sole control over all

money and property, but over his wife as well. The marital exclusion from the theft provisions was further justified by the unity principle integral to the Christian monogamous marriage, another means of legitimizing the subjugation of the married woman.

This unity which subsumes the married woman into the person of her husband[9] made the crime of theft impossible within this union, for it not only justified the married woman's proprietary incapacity, but it also meant that a married woman could not steal her husband's property for she was part of his being. As McCaughan (1977) notes:

> Dicey was of the view that the property rights of the married woman under the common law were the natural result of the unity principle so that, in general, 'marriage was an assignment of a woman's property rights to her husband, at any rate during coverture.' It has also been said that the common law of matrimonial property rested on the principle of the dependency of married women – a consequence of the extinction of her legal personality and the vesting of her property in her husband.[10]

In order to constitute the crime of theft, there has to have "been an actual physical change of possession...without the consent of the person entitled to the goods."[11] Since this change of possession is essential to the crime of theft, and the unity principle makes such a transference impossible, the law has by virtue of this religious and patriarchal tenet, excluded spouses from the crime of theft. Early case law illustrates how the courts have adopted and reaffirmed this unity principle.

The English case of R. v. Tolfree (1829) (C.A.), for example, clearly confirms this marital exclusion from the crime

of theft, and does so with reliance on the writings of Hawkins:

> It is certain that a feme covert may be guilty thereof by stealing the goods of a stranger, but not by stealing her husband's because a husband and wife are considered but as one person in law; and the husband by endowing his wife at the marriage, with all his worldly goods, gives her a kind of interest in them; for which cause even a stranger cannot commit larceny in taking the goods of the husband by the delivery of his wife, as he may by taking away the wife by force and against her will together with the goods of the husband.[12]

Several years later, at the trial of R. v. The Lord Mayor of London (1866), Hawkins' principle was again set out by the English courts, in *obiter dicta*.[13] The Supreme Court of Canada, in 1954, has more recently made reference to this principle, in an attempt to determine whether spouses can be found guilty of conspiracy, noting that, "...the fiction that they are but one person in law is the underlying principle at the root of the law which says that during cohabitation, one cannot be convicted of stealing the property of the other."[14]

As with the proprietary discrimination against the married woman, the unity principle has met with some resistance and criticism. Even after the usage of this principle was lessened with the Married Women's Property Act, Williams (1961) questioned the rationality of such an ideology:

> The rule [of notional unity of possession] works badly, particularly in that it prevents even the receiver of property *de facto* stolen by one spouse from another from being prosecuted. It has been modifed by statute...[but] since the rule was not abrogated entirely, Parliament must have regarded it as supportable on grounds of policy, apart from the doctrine of unity. It may be questioned, however, whether there is a satisfactory policy behind it.[15]

The subordination of the married woman, through both her

inability to own property and her transformation upon marriage into the controlling persona of her husband, obviously transcended the issue of whether or not theft was possible within a marriage, but these provisions illustrate the subservient position that married women held in a patriarchal society. The sections of the Criminal Code dealing with the offence of theft as it applies to marriage is therefore one site of subordination of the married women, as are the sexual assault and duty to provide necessaries provisions, which have over time been recognized by a minority in a push for change.

With the rise and growth of the women's movement, from 1840 to 1870, characterized by Banks (1981) as the Early Years, women began to examine their status in marriage, and the property rights contained therein, in hopes of facilitating reform.[16] In response to the outcry made by these feminist reformers, married women were eventually granted the ability to own separate property, by virtue of the English Married Women's Property Act (1882) and similar provincial statutes in Canada.[17] As indicated in the following section, this statutory change affected the marital provisions in regards to the offence of theft, although, not drastically. It has been shown in previous chapters that legislative change is not the whole answer for eradicating subordination. The changes made to the theft provisions must therefore be assessed in terms of their true impact on the status of the married woman.

The Married Women's Property Act

The English Married Women's Property Act of 1882 and ensuing provincial Married Women's Property Acts in Canada were a step forward in terms of the married woman's property rights. The English Act maintained that "a married woman shall be capable of acquiring, holding and disposing by her will or otherwise of any real or personal property, in the same manner as if she were a feme sole."[18] Similarly, the B.C. Married Women's Property Act (1887) held: "A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding and disposing by will or otherwise, or any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee."[19] While the provisions previously discussed had to some degree enabled the married woman to own separate property, her wishes to do so were often thwarted by clauses or provisions which permitted her husband to override any proprietary independence that she might gain. With the Married Women's Property Acts, both in England and in Canada, the married woman's ability to own separate property was now legally secured, without providing overriding provisions to her husband. Due to this statutory change, the provisions in regards to spousal theft also required amendment. As McCaughan observes, however, "public opinion was not yet prepared to abandon the old rule completely".[20] Thus, the theft provisions were only slightly modified, maintaining for the most part that spouses could not steal from one another. The English

Married Women's Property Act set out that theft was only possible while the spouses were living apart, or upon leaving or deserting the other.[21] These minor concessions to the spousal immunity from theft were not contained within Canada's provincial Acts but were later translated into the original Canadian Criminal Code of 1892. Section 313 held:

> No husband shall be convicted of stealing, during cohabitation, the property of his wife, and no wife shall be convicted of stealing, during cohabitation, the property of her husband; but while they are living apart from each other either shall be guilty of theft if he or she fraudulently takes or converts anything which is, by law, the property of the other in a manner which, in any other person, would amount to theft.[22]

The Criminal Code Amendment Act of 1913, in keeping with the provisions of the Married Women's Property Act, added to these provisions and enacted s. 354 which held:

> During cohabitation no husband or wife shall be convicted of stealing the property of the other, but a husband or wife shall be guilty of theft who, intending to desert or on deserting the other or while living apart from the other, fraudulently takes or converts anything which is by law the property of the other in a manner which in any other person would amount to theft.[23]

While marriage is the only type of 'partnership' with a unique standing in terms of the application of the crime of theft,[24] it is unclear, by virtue of the legislation itself, just how broad this immunity extends, and thus, it must be assessed when in fact a husband or wife can be deemed to be 'living apart' from, or 'deserting' the other. Case law must be examined, then, in order to determine how these terms are to be defined and applied and whether the partriarchal basis of these laws was eroded to any degree.

Early English case law is vague in defining the terms 'living apart' and 'deserting' and thus, the actual parameters of the application of the crime of theft to married persons, but the case of R. v. James and Johnson [1902] (C.A.) makes it clear that proof of living together constitutes a good defence to spousal theft, the onus of proof being on the accused:

> We think it is clear that in the case of an indictment against the wife for stealing the goods of her husband, upon proof that the husband and wife were living together at the time when the criminal proceedings were taken, a good defence would be established; and so, if the act relied upon as constituting larceny proved to have been done by the wife while the husband and wife were living together, there could be no larceny unless it could be proved that the property had been wrongfully taken by the wife when leaving or deserting, or about to leave or desert, her husband.[25]

When the courts assessed the issue of 'living apart' or 'deserting', the civil case of Lemon v. Simmons (1888) at trial construed these concepts in a strict and narrow sense. In this case, the wife alleged that her husband's violence brought on her insanity and he then had her removed from the house to a workhouse in order to facilitate the theft of money that she had brought into the marriage. The trial judge concluded that such action on the part of the husband did not constitute desertion or living apart for the purposes of section 12 of the Married Women's Property Act, thereby reinforcing that a husband had rights over his wife's property, and nullifying the purposes of this Act. The later case of King (1914) (C.A.), held that the issue of desertion is to be assessed on a case by case basis, according to the particular circumstances of each case, and is not to be guided by a uniform 'test'. The lack of reported case

law indicates, however, that the courts have not had much opportunity to assess these qualifications as they relate to the crime of theft within marriage. The limited right accorded to spouses who have had their possessions stolen by their mate appears to be more symbolic in nature rather than indicative of a real means of redress to offended spouses. These provisions therefore constitute a paradox of protection for the legislative provisions would lead a wronged spouse to believe that the criminal law would uphold their proprietary rights and yet, by virtue of limited case law, these cases are not reaching the courts perhaps due to interventions that aim to promote marital harmony rather than accountability. It is, therefore, difficult to determine exactly how these provisions would be interpreted and applied if such cases reached the courts in a more significant number.

In order to determine how broadly or narrowly one spouse's possessions are to be protected from the other, case law not dealing with theft, but with these particular exclusionary terms, must be examined. Much of this type of case law deals with maintenance, child custody, divorce petitions and military desertion, and on the whole is much more liberal than the few theft decisions.

The determination of when a married couple is in fact living apart is difficult to make, but has been held not to include temporary absences, unless the returning wife was, under the Married Women Act (1886), denied re-entry into the marital home

by her husband.[26] The Canadian case of Re. Leahy [1938] (N.S.S.C.) clearly established that living apart does not involve living under the same roof, in separate bedrooms. In the later Canadian decision of R. ex rel. McAuley v. Andrews [1944] (Sask. P.C.), Branion, J. contended that: "...the words "living apart" have no technical import and mean simply not living together."[27] It is not clear, however, whether or not the courts may require a mandatory period of absence before the couple can be deemed to be not living together.[28]

The courts have been able to more succinctly narrow down the concept of 'desertion'. In the Canadian case of R. v. Graves (1918) (N.S.S.C.), dealing with military desertion, Mr. Justice Drysdale held: "Desertion means absence without the intention of returning."[29] In terms of divorce proceedings, desertion also entails a cessation in cohabitation due to cruelty, or other behavior which causes either spouse to leave.[30] This is a much broader definition than was applied in the Lemon v. Simmons case that actually dealt with section 12 of the Married Women's Property Act. Desertion, again in regards to divorce petitions, also centers upon the issue of intention and consent. For example, in Walsh v. Walsh [1925] (Sask. K.B.) Mr. Justice Bigelow quoted from Dixon's Divorce Law: "To constitute desertion by the husband it must be shown that he has *wilfully* absented himself from the society of his wife and in spite of her wish, *she not being a consenting party*."[31] It has also been held that desertion can involve resulting separation due to one parties' unreasonableness on where to locate the family home.[32]

While this brief analysis illustrates that the terms 'desertion' and 'living apart' have been more liberally interpreted in cases of maintenance, child custody, divorce and military desertion, it is not clear whether such issues are deemed by the courts to merit a broader definition than in cases of spousal theft, or whether the greater number of cases in these areas has over time permitted a more exhaustive assessment of the definitions and scope to be applied. In either case, the definitions of 'desertion' and 'living apart', when assessed in terms of spousal theft, are quite narrow in focus and therefore, as seen in the Lemon v. Simmons decision, subordinate married women and maintain patriarchal hegemony.

It is thus clear that legislative advancement, on its own, has not been able to secure a married woman's proprietary independence from her husband. The ineffectiveness of legislative advancement has also been assessed in terms of the sexual assault and duty to provide necessaries provisions. Not only must the courts interpret such legislation in the fashion that it was intended, but society must also be receptive to this change in thinking. Striving for equality in a society based upon fundamental inequities, it has been noted, is necessarily problematic; but as discussed in terms of the legal duty to provide necessaries provisions, the "chicken and the egg" quandary is analogous to the problem here of determining whether legislative change should precede societal change, or whether societal change spurs legislative reform so as to achieve

equality, or at least non-subordination. Brown (1971) has also taken note of the married woman's proprietary dilemma:

> By providing that both her pre-marital and post marital property was to remain the wife's separate property, the statutes put her on an equal footing with her husband. This trend towards equality of husband and wife was only one aspect of the more general movement towards social and political equality of the sexes that began to spread throughout the western world in the 19th century, a movement fostered of course by the growth of industry and the urban way of life. It was under the twin banners of "emancipation of women" and "equality of the sexes" that the Victorian reformers introduced separation of property as the new norm to oust the traditional hegemony of the husband at common law. But with the science of sociology in its infancy, little thought was given to how the principle of equality, with its emphasis on husband and wife as individuals, was to be reconciled with the essential unity of the family. For all its crudity, the common law did at least uphold this unity by vesting the funds of the family solely in the husband.[33]

The Married Women's Property Act, both in England and Canada, made it possible for women to acquire and maintain their own property. It must be considered, however, whether she really had the capacity to do so. Beyond the potential for acquisition, she must also be accorded the means of earning in the public sphere. The employment opportunities, or other means of acquiring monetary value, also need to be available to all married women, not just a select few based on other discriminatory standards. Patriarchy needs to be eradicated not only inside the home but also in the public sphere, in order to ensure that women are not subordinated or repressed in any aspect of their lives. As Currie (1989) asserts:

> Overall, problems in this area illustrate that although the Married Women's Property Acts represent an objective improvement in the legal status of women, as such they benefited only a minority of women. Most married women

> enter into marriage without property and are prevented from acquiring property during marriage due to the division of domestic and child-bearing labour.[34]

There is, therefore, a need for change beyond such legislative advancement as The Married Women's Property Act. As seen with the sexual assault and duty to provide necessaries provisions, structural changes must occur before the purpose of such laws can be upheld in practice. Otherwise, husbands will be charged with sexual assault but not duly punished as such a crime merits; married women will be legally required to support husbands when they do not have the economic resources to do so; and married women will not be effectively recognized to have proprietary independence, nor even the ability to gain such independence.

While originally the married woman had no proprietary independence, for legally she could own no separate property, The Married Women's Property Act did very little to change her status or her monetary standing. In conjunction with these limits to a married woman's proprietary capacity, married women were also further subverted by the pervading ideology that women were in fact the property of their husbands. The practice of regarding married women as the property of their husbands governed the laws of rape and duty to provide necessaries and can also be illustrated by further theft provisions that intrinsically relate to marriage: that is, instances where one spouse's apparent paramour assists or receives in the taking of objects of the other spouse. In such cases, again the husband's property is seen to extend not only to inanimate articles, but

also is to include his wife. While cases of spousal theft are rare, since for the most part this is a crime which cannot be committed within a marriage, the courts have historically had ample opportunity to assess cases of theft that was aided by a spouse's apparent lover. All the cases reported, concern the wife's paramour, rather than the husband's, and as will be seen, of crucial concern to the courts is whether or not adultery has taken place – thereby not only depriving the husband of his possession (his wife), but damaging it as well. The lack of reported case law, concerning a husband's theft with aid by a paramour, may be indicative of the still pervasive dual standard in society. Adultery, or any non-marital sexual activity on the part of males is largely accepted and even applauded by some, whereas females are to remain pure and innocent and 'save themselves' for their husband only. A theft committed by a husband and his lover would, therefore presumably, not draw the legal attention that such a wife's transgression from her husband's control and domination would.

Receivers and the Issue of Adultery

While Holdsworth has defined theft as "the fraudulent dealing with another man's property with the intent of stealing it against the will of its owner",[35] the courts' interpretation of cases involving adulterous receivers have effectively extended the definition of 'another man's property' to include the wronged man's wife. Case law has, therefore, looked more to

the issue of adultery on the part of the wife when goods have been jointly stolen with the aid of her paramour, than they have to the actual theft. In such cases, the wife, as property of the husband of which he was to have sole use and not to be deprived thereof, was the central issue. An analysis of this case law will illustrate and clarify this point. The cases to be discussed are, however, English decisions. There were no reported Canadian cases relevant to this particular analysis.[36]

Early English case law has taken a firm stance regarding a wife stealing her husband's belongings with the aid of a male partner. The most important issue to be assessed in much of this case law is not whether or not the wife in fact stole the possessions, or whether she was aided in such an endeavor, but rather whether "adulterous Intercourse, was engaged jointly with her in taking the Goods."[37] The wife was treated as the property of her husband, as she was neither permitted to take his goods, nor abscond with another man without her husband's permission. In R. v. Tolfree (1829) (C.A.), the English Court of Appeal relied on the following passage from Russell: "But it should be observed that if the wife steals the goods of the husband and delivers them to B, who, knowing it, carried them away, B being the adulterer of the wife, this according to a very good opinion would be felony in B, for in such case no consent of the husband can be presumed."[38] Russell on Crimes was also quoted and confirmed in R. v. Featherstone (1854) (C.A.): "A stranger cannot commit larceny of the husband's goods by the delivery of the wife; but a distinction is pointed out where he is her

adulterer...."[39] Clearly, theft of money or household possessions was not the offence being tried here.

Since the issue of adultery was held to be the crucial aspect in determining either to convict or acquit, judges' charges to the jury focused on this point as illustrated in R. v. Berry (1859) (C.A.):

> The prisoner was tried for stealing the goods, and on the trial the wife was examined on his behalf, and swore that they had not gone away for the purpose of carrying on an adulterous intercourse, and never had committed adultery together. The jury was directed, that if they were satisfied that the prisoner and the prosecutor's wife, when they so took the property, went together for the purpose of having adulterous intercourse, and had afterwards effected that criminal purpose, they ought to find the prisoner guilty; but if they believed the wife, that they did not go away with any such criminal purpose, and had never committed adultery together at all, the prisoner would be entitled to his acquittal.[40]

Much of the case law during the nineteenth century focused decisively on the issue of adultery; where there was no adultery, there was no crime.[41] This was not a rational assessment of theft but rather delved into the moral propriety of a married woman and underscored the view of a wife as the property of her husband, not to be taken away and damaged by another. In the case of R. v. Harrison (1870) (Assizes) it was held:

> So long as a wife is living *properly* with her husband, if she gives away his property, or sells it under ordinary circumstances, it would not be larceny, but if a wife goes away with a man for the purpose of committing adultery, and takes with her her husband's property, and the adulterer either sells it or uses it as his own, he will be guilty of larceny.[42]

Such an interpretation of the common law merely sustains the patriarchal view of a married woman and her place in the home,

with a limited concern as to the crime of theft. The issue of adultery has historically been of crucial concern to the criminal laws specific to marriage. Adultery was seen to exonerate a husband from his legal duty to care and provide for his wife, while it in turn inculpated a wife's assister or receiver for the theft of her husband's goods. This type of assessment and application illustrates the discriminatory interpretation of the criminal law.

The case of R. v. Taylor (1874) (Assizes) qualified this single-minded assessment, and required that the adulterer must have taken some role in the theft, be it active, or living upon the stolen goods.[43]

While much of this case law takes a firm stance on adultery, if not the actual theft, there are two English decisions from this time period that are less rigid.[44] Mr. Justice Cockburn in R. v. Avery and Another (1859) (C.A.) was not inclined to rule definitively on whether or not adultery was a necessary element in order to sustain a conviction, but he did hold that assistance from a mere stranger was not a crime.[45] The case of R. v. Fitch (1857) (C.A.) held that regardless of an adulterous liaison, the joint taking of the wife's clothing from the husband's possession was not to be deemed as larceny, even though such clothing was in fact the property of the husband, for she could own no property of her own. From this case, it can be seen that the transgression was far greater when both the husband's money and his wife were taken. Fitch is however an

anomaly. For the most part, adultery was deemed more heinous and of more concern than the actual property taken and the value thereof. Not only were married women's property rights circumscribed by these provisions and rulings, but her status was further subordinated to be in keeping with the traditional view and roles of marriage in conjunction with the perception of her as the property of her husband.

With the advent of the Married Women's Property Act, the law in regards to spousal theft and receivers and assisters needed further clarification, for now the wife could be tried alongside her lover if she committed the theft whilst leaving or deserting her husband. Due to the wording of the Larcency Act (1861), applied in conjunction with s. 12 of the Married Women's Property Act, there was initially a problem of ascertaining a receiver's liability, if indeed there was such liability. The case of R. v. Payne (1906) (C.A.) in fact held that a receiver could not be charged under these provisions, for his offence was not regarded as a felony: "The receiving of such property is not a felony within the meaning of s. 91 of the [Larceny] Act of 1861; and as there is no other statute making such receipt a felony, it is a misdemeanor only."[46] Previous case law had held, in the decision of R. v. Prince (1868) (C.A.), that a charge of a misdemeanor in the case of receivers does not warrant a conviction, and therefore a receiver could not be so prosecuted. The later case of R. v. Creamer [1919] (C.A.) set out that before the receiver can be convicted, the qualifications of the Married Women's Property Act must be proven; that is, the

offence must have been committed by the wife while living apart from her husband, or upon deserting him.

Subsequent case law involved charges of jointly stealing the husband's property, but these cases continued to maintain that adultery was of crucial concern. The Lord Chief Justice of England held in R. v. Bloom (1910) (C.A.), that: "The general rule of law is that a wife cannot be convicted of stealing her husband's goods, but this rule is qualified when she is eloping with an adulterer. An adulterer cannot be allowed to set up his elopement as a defence when he knows goods were taken without the consent of her husband."[47]. Adultery was to become the definition of desertion, but this qualification had existed in the reasoning of the courts long before the Married Women's Property Act extended this proviso. In R. v. Totterdell (1910) (C.A.), upon appeal, the defence contended that the excessive sentence imposed upon the adulterer was in fact a punishment for adultery, rather than for the theft itself. The Lord Chief Justice either did not agree with this assertion or felt that the sentence was warranted and the punishment remained unchanged. It was not succinctly stated which crime was in fact to be punished, but other case law supports the argument that the emphasis is placed on a wife maintaining a dutiful and monogamous role, rather than on the theft itself. Such rulings emphasize the proprietary nature of our laws.

While all these cases are old English decisions, Burbridge's "Digest of the Criminal Law of Canada", the precursor to the

Criminal Code, incorporated these rulings and patriarchal hegemony in Article 375.[48] With the inception of the Criminal Code in 1892, section 313(2) established the criminality of receivers and assisters, but no specific mention was made of adultery being a necessary component to the crime. Section 313(2) held:

> Every one commits theft who, while a husband and wife are living together, knowingly – (a) assists either of them in dealing with anything which is the property of the other in a manner which would amount to theft if they were not married; or (b) receives from either of them anything, the property of the other, obtained from that other by such dealing as aforesaid.[49]

The Imperial Commissioner's Report on s. 313 was critical of adducing guilt on the part of a receiver on the basis of adultery.[50] Historically, then, legislation did not specify the requisite need for adultery in order for the components of the crime to be met. Recent commentators on this law discuss the need to prove, as a necessary component of the offence, the third party's knowledge of the offence, rather than the sexual relationship between the two parties:

> If a third party assists one of the spouses in taking property belonging, in law, to the other, he or she will be guilty of theft [s. 289(3), now s. 329(3)]. Also, if the third party receives property from one of the spouses and the property was stolen by the spouse, the third party will also be committing theft. In such situations the third party must know the spouse is removing property which belongs to the other before the offence of theft can be made out.[51]

Since Canadian case law dealing with spousal theft is rare, and there were no reported cases dealing with receivers found, it is difficult to determine whether or not the absence of an adultery qualification has undermined male proprietary rights over their

wives. As noted previously, however, the lack of reported case law is not in itself indicative of few crimes of this nature. Rather, this suggests that the legislation is performing a symbolic rather than real function. That these cases are not being brought to the courts again emphasizes that the criminal law has been seen as an inappropriate and perhaps destructive intervention into marriage. As seen with a husband's historic immunity from rape, crime within marriage has been ignored in order to maintain the sanctity and harmony of this union. Such a maintenance of this union is, however, achieved through subordinating the married woman under the control and authority of her husband. This too, is not an appropriate use, or non-use, of the criminal law. Again the morality, legitimacy, and equality of the criminal law and its application can be questioned. As discussed in previous chapters, legislative provisions on their own do not mean that they will be either utilized, or if utilized, applied in a fashion that is non-subordinating. When such cases have reached the courts, however, these English decisions confirm that patriarchal interests have served to extend the evaluation of the husband's property.

Based on these rulings and relevant provisions, it is clear that the theft provisions have perpetuated inequality: first, by reinforcing that a married woman could not own property of her own, then by treating her as the property of her husband. As Clark and Lewis (1977) note: "The specific form that this inequality took made women the objects rather than the subjects

of property rights: women were among the forms of private property owned and controlled by individual men."[52] Such legislation maintained patriarchal hegemony. As Hay (1982) proposes, this is a specific function of the criminal law: "The criminal law was critically important in maintaining bonds of obedience and deference, in legitimizing the *status quo*, in constantly recreating the structure of authority which arose from property and in turn protected its interest."[53] This structure of authority is based on male rights and the subsequent power that is accorded to reinforce those rights. As Rifkin contends: "Law, in mythology, in culture and in philosophy, is the ultimate symbol of masculine authority and patriarchal society."[54] The basic legislative provisions concerning theft and property have for the most part ensured the married woman's subordinate status, and when these provisions were scrutinized by the courts, the married woman's role was further repressed into a property figure, of which her husband was to have sole usage. The same can be said for the rape/sexual assault and duty to provide necessaries provisions. All these legislative enactments have treated married women as the property of their husbands and have ensured that the traditional model of marriage was maintained.

Historically, then, the theft provisions have served to maintain the traditional view of marriage, and the roles to be contained therein. The status of the married woman was subverted by the surrounding patriarchal society, and even legislative advancement did little to rectify her repressed role. While over

one hundred years have passed since the advent of the Married Women's Property Act, it soon becomes evident that the criminal laws governing property rights within a marriage have yet to secure true equality.

The Present and Future Direction of the Law in Relation to Theft and Marriage

Canadian criminal law has not changed much from the marital theft requirements contained within Married Women's Property Act. This is in contrast to the recent legislative amendments changing the crime of rape to one of sexual assault and making the duty to provide necessaries a bilateral duty. Canadian criminal law maintains that theft can only occur between married persons when intending to desert or deserting the other, or while living apart from the other. Section 329(2) of the Criminal Code thus holds:

> A husband commits theft who, intending to desert or on deserting the other or while living apart from the other, fraudulently takes or converts anything that is by law the property of the other in a manner that, if done by another person, would be theft.[55]

Once these qualifications have been met, as with the Married Women's Property Act, the offended spouse is both a competent and compellable witness for the prosecution.[56] As the law now virtually mirrors the provisions of the past, prosecutorial difficulties still exist in terms of defining whether or not the theft conforms to the proscribed requirements. While the reported case law in this area is negligible, the case of R. v.

Bryze (1981) (Ont. P.C.) has addressed a further requirement: that is, once the accused spouse has been found to be living apart from or deserting the offended spouse, it must be proved that the property stolen was *by law* the property of the other. The case of Bryze, then, illustrates the problems of proving individual ownership within a marriage.

In the Bryze case, the wife was accused of breaking into the matrimonial home and committing a theft. In first assessing the charge of break and enter, the Provincial Court Judge relied on the provisions of the provincial Family Law Reform Act (1978) and held that without a separation agreement, either spouse had access to the matrimonial home and the possessions contained therein. The accused therefore could not be convicted upon the break and enter charge since there was not such a formal agreement. In terms of the charge of theft, the spouses were living apart at the time of the offence, thus satisfying this necessary requirement under s. 289(2) [now s. 329(2)]. The charges were, however, eventually dismissed due to the difficulties in assessing sole ownership. As the court held:

> It is put, therefore, that the parties being *de facto* joint owners of the assets in question, and no order being in existence determining which party was to have which asset, the wife was, at the relevant time, equally entitled to possession of the assets with the husband, just as much as he was entitled to equal possession with the wife. It is put, then that until a court order was made, and despite the provisions of the Family Law Reform Act, 1978, both parties were equally entitled to possession of in part or the whole of the *jointly owned assets*, assets which had been purchased jointly and received jointly by the parties during their marriage.[57]

This case illustrates that a charge of theft is difficult to

establish within a marriage. It is undesirable for married persons to have to negotiate complex contractual and ownership agreements and also objectionable to permit what would otherwise be deemed as criminal behavior where such legal contracts have not been made. Following the Bryze decision, spouses often would not be accorded the protection of the criminal law but instead would have to resort to civil litigation, which is a costly and time-consuming endeavor. This case also opens the door to further invasion on the independence of an individual in ruling that spouses are to have access to the matrimonial home unless there is a separation agreement which prohibits such entry. The law in this area is exceedingly complex, for offended spouses must have previously negotiated legal contracts before the offence has taken place, in order to satisfy the requirements of the theft provisions. This is not in keeping with the average theft prosecution which is much more straightforward in terms of the elements to be proved for such previous legal distinctions are for the most part not required.

The problems with the marital theft provisions extend far beyond the legislation itself, and satisfying each particular requirement, but encompass the traditional view of marriage and the society that support the maintenance of this *status quo*. Under this traditional view, as historically supported, the couple is deemed to have no independence (certainly on the part of the wife), monetarily or otherwise. The theft provisions are therefore to varying degrees continually supporting this tenet. The traditional role of a wife receives no monetary compensation

for the jobs of child-bearing and rearing and instead must rely on the support of the breadwinning husband. Within this type of domestic situation, it would in fact be detrimental to the married woman to extend the regular theft provisions to married persons. The present theft provisions can be seen to support the maintenance of this type of family unit insofar as they tend to exclude the married relationship from culpability. If the legislation were instead to recognize the liberal feminists' desire for equality, this also would, at the present time, further subordinate the married women. As with the duty to provide necessaries amendment, equality provisions enacted in a society still maintaining patriarchal tenets does not ensure equality, but rather will inevitably lead to further repression. Before legislative change can effectively support the independence and equality of the married woman, societal changes must also be made. As it stands at the present time, there is an inherent quandary to determining what would be the best means of assessing married persons under the criminal law.

The Law Reform Commission of Canada has assessed the theft provisions in its report on "Theft and Fraud" (1977), but in its recommendation, the reality of the dilemma was not examined. Within the theft provisions that specifically relate to married persons, the Law Reform Commission drew attention to what was felt to be a problem of redundancy. In effect, the Law Reform Commission recommends that the legislative qualifications of this crime be reduced to only specifying that theft cannot occur with marriage when the couple is living together. In assessing

the present provisions the Commission held:

> S. 289(1) [now 329(1)] preserves the earlier rule that husbands and wives can't in law steal from each other while living together. S. 289(2) lays down that they can do so if living apart or on desertion. S. 289(3) makes it theft to assist, or to receive property from, a husband or wife committing what would, but for s. 289(1), be theft. It is arguable that s. 289(2) is clearly covered by the general offence of theft, that cases falling under s. 289(1) could be decided on the facts, by considering whether such taking is fraudulent, and that this removes the necessity for s. 289(3). It is arguable, however, that the marriage relationship is such that theft law shouldn't apply where husband and wife are living together. In these circumstances s. 289 can't be deemed simply redundant or unnecessary.[58]

The provisions in S. 289(2), now s. 329(2), only recognize theft where one spouse is leaving or deserting the other and historically have been interpreted very narrowly. Implementation of the Law Reform Commission's suggestion that s. 289(2) [329(2)] be discarded may dissolve this strict curtailment. If the courts' interpretation of s. 329(1) carried over this leaving or deserting clause, however, no progress will have been made. If it is left to the courts to determine upon the circumstances of each case, patriarchal hegemony can simply be perpetuated. This assessment and recommendation by the Law Reform Commission is not, however, really delving into the societal inequities that are in essence inhibiting a truly rational determination of theft within marriage.

A truly rational assessment of theft within marriage is, however, very difficult in the context of the present societal structure. Legislative amendments should take into consideration all possible problem areas before they are enacted. Some provisions are easier to rectify than others. For example, the

abolition of a husband's immunity for rape was a straightforward proposal for the new sexual assault provisions. While it is clear, then, that a husband should not be permitted to have sexual intercourse with his wife without her consent, it is less clear how to absolve the subordination of the married woman in the legal duty to provide necessaries and theft provisions. As Boyle et al. (1985) note, absolute gender neutrality is not the answer, nor is 'gender neutrality with exceptions based on real, as opposed to imagined, differences between the sexes', for: "In essence both a gender neutrality and a recognition of difference approach can be used against women. Gender neutrality may be a vehicle to deny women's reality, while recognition of difference may simply invite double standards."[59] The best approach, then, is the 'subordinate' principle; married women, as illustrated here, have been subordinated both by the substance and application of these legislative provisions. The theft provisions and their interpretation and implementation should in the future work to ensure that this is no longer to be the case. Exactly what these provisions would entail needs a great deal of further assessment. Both the integrity of the married woman working outside the home and the married woman working at child-bearing and rearing roles in the home must be accounted for. Also, the differential economic opportunities for women must be addressed in the implementation of such legislation.

It is only possible at this time to recognize the problem and identify the parameters of it. The liberal feminist stance of legislative change to rectify inequalities is ineffective

within the structure of a male based society. In order to remedy women's, particularly married women's, discriminatory property rights, the focus must presently be on working towards non-subordination. Only when society changes to the degree that women are placed on an equal footing with men can we strive to true equality.

Conclusion

The application of the theft provisions to married persons has historically presented many problems and continues to in the present day. While initially the extreme repression of the married woman seemed to easily justify the complete exclusion of spouses from the law of theft, only limited progress has been made in establishing the married woman's capacity for proprietary independence, providing only a limited realm of culpability for theft. The issue extends beyond the theft provisions and their application to married persons but involves the broader issue of married women's subordination and inequality in our society. The theft provisions are, however, in both substance and application illustrative of how the criminal law has subordinated the married woman and maintained the traditional marriage roles. This type of subordination is not justifiable and should not be legitimized. The laws pertaining to marital theft should in the future work towards eradicating this subordination.

NOTES

1. Stephen, 1883: 31.

2. Ibid, 33.

3. Turner, 1964 Vol. II: 1026. Also see R. v. Willes (1883) 1 Mood 375 (C.A.): "Stealing by a wife of a member of a friendly society, money of the society deposited in a box in the husband's custody, kept locked by the stewards, is not larceny."(R. v. Willes (1883) 1 Mood 375 (C.A.): 375).

4. Holdsworth, 1966 Vol. V: 310.

5. Ibid, Vol VI: 644.

6. De Montmorency, 1897: 194.

7. Ibid, 194-195 (emphasis in original)

8. Holdsworth, 1966 Vol. II: 89.

9. See for example De Montmorency (1897), "The Changing Status of a Married Woman": "Until recent times (the middle of this century, indeed) the doctrine obtained that the husband and wife were but one person possessing but one will, and that will resided in the mind of the husband as the person 'fittest and ablest to provide and govern the family.' It was a doctrine of elegant simplicity and one capable of remarkable results. It was a doctrine that removed, in theory, the burdens or responsibility and the sanctions of morality from any woman that entered the holy state of matrimony. Logically considered, all her crimes and all her sin emanated from the duplicated brain of her husband and lord. Not only did she convey to him her person and her worldly goods, but she added the entire responsibility of her personality to the weight of his own. The Creator took from Adam a rib and made it Eve; the common law of England endeavoured to reverse the process, to replace the rib and to re-merge the personalities." (De Montmorency, 1897: 192).

10. McCaughan, 1977: 5.

11. Holdsworth, 1966 Vol. III: 361.

12. quoted by defense counsel in R. v. Thomas Tolfree (1829) 1 Mood 243 (C.A.): 244-245. Also see R. v. Featherstone (1854) 6 Cox CC 376 (C.A.) where Lord Campbell, C.J., held: "The general rule of law is, that the wife cannot be found guilty of larceny for stealing the goods of her husband; but that is so, because the husband and wife are regarded by the law as one person, and therefore the taking by the wife is not

sufficient to constitute the offence....' R. v. Featherstone (1854) 6 Cox CC 376 (C.A.): 376).

13. Also, an English civil case, Phillips v. Barnet (1876) 1 QBD 436 (Court of Divorce and Matrimonial Causes), dealilng with a wife attempting to sue her husband for beating her, confirmed that the same unity exemption from this civil case can be found in the criminal law in regards to theft between spouses. (see Blackburn, J., p. 439 and Lush, J., at p. 440).

14. Taschereau, J., R. v. Kowbel [1954] SCR 498: 500.

15. Williams, Criminal Law 2nd Ed., 1961: 799 (emphasis in original).

16. See Banks (1981) Faces of Feminism: A Study of Feminism as a Social Movement.

17. For example the Married Women's Property Act of B.C. (1887).

18. quoted in De Montmorency, 1897: 195-196.

19. Married Women's Property Act of B.C.. 1887, c. 20, s. 2 *part*: section 4.

20. McCaughan, 1977: 31-32.

21. See section 12 of the Married Women's Property Act of 1882: "Every woman, whether married before or after the Act, shall have on her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject as regards her husband, to proviso herinafter contained), the same remedies and redress by way of criminal proceedings for the protection and security of her own separate property, as if she were a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under the section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband, while they are living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting or about to leave or desert his wife." (quoted in Turner, 1964 Vol II: 1029).

22. Criminal Code, 1892,c. 29, s. 313.

23. The Criminal Code Amendment Act, 1913, c. 13, s. 354. This is basically the law in Canada as it stands today under s. 329 of the Criminal Code, R.S.C. 1985, c. C-46.

24. For example, the 1867-68 statutes of Canada held in s. 38: "Whosoever, being a member of any co-partnership owning any money or other property, or being one of two or more beneficial owners of any money or other property, steals, embezzles, or unlawfully converts the same or any part thereof to his own use, or that of any person other than the owner, shall be liable to be dealt with, tried, convicted and punished as if he had not been or were not a member of such co-partnership, or one of such beneficial owners." Section 328(b) of the Criminal Code, R.S.C. 1985, c. C-46 similarly makes a partner liable to be convicted of theft. The English case of R. v. Smith (1870) L.R/C.C. 266 gives the history and rationale for this legislation: "At the time that Act (24 & 25 Vict. c. 96) was passed theft by a partner of the goods of the firm did not fall within the criminal law, either common or statute. This defect was supplied by 31 & 32 Vict. c. 116, which, after reciting that 'it is expedient to provide for the better security of the property of co-partnerships and other joint beneficial owners against offences by part owners thereof, and further to amend the law as to embezzlement', provides to enact, by the first section, that if a partner, or one of two or more beneficial owners, shall steal, &c., any property of such co-partnership, or one of such beneficial owners." (Bovill, C.J., in R. v. Smith (1870) L.R./C.C. 266 (C.A.):269) Obviously the same necessity was not felt and thereby extended to married 'partners'.

25. Lord Alverstone, C.J., R. v. James and Johnson [1902] 1 K.B. 540 (C.A.): 542-543.

26. Chudley v. Chudley (1893) 17 Cox CC 697 (C.A.). Referring to the Married Women (Maintenance in case of Desertion) Act, 1886 (49 & 50 Vict. c.52), s.1, sub-sec.1.

27. R. ex rel. McAuley v. Andrews [1944] 82 CCC 320 (Sask. P.C.): 322.

28. For example, in the case of desertion, Fullerton, J.A., quotes Browne and Watts on Divorce in Newton v. Newton [1924] 3 DLR 887 in establishing that desertion must be "for 'two years and upwards.'" (Newton v. Newton [1924] 3 DLR 887 (Man. C.A.): 890).

29. R. v. Graves (1918) 43 DLR 696 (N.S.S.C.).

30. See Newton v. Newton [1924] 2 DLR 732 (Man. K.B.) (i.e.,

Galt, J., p. 749). Newton v. Newton [1924] 3 DLR 887 (Man. C.A.) (Dennistown, J.A. p. 894) Schwab v. Schwab [1929] 3 WWR 188 (Sask. D.C.). McPherson v. McPherson [1944] 1 DLR 592 (Ont. C.A.).

31. Walsh v. Walsh [1925] 2 DLR 794 (Sask. K.B.):795. Also see McPherson v. McPherson [1944] where Judge Robertson quotes from the Williams v. Williams [1939] case: "The act of desertion requires two elements on the side of the deserting spouse – namely the factum of separation and the animus deserendi; and on the side of the deserted spouse one element, namely, the absent of consent." (McPherson v. McPherson [1944] 1 DLR 592 (Ont. C.A.): 593).

32. Dunn v. Dunn [1948] 2 All E.R. 822 (C.A.) (see Denning, L.J. at pp. 823-824).

33. Brown, 1971: 332.

34. Currie, 1989: 277.

35. Holdsworth, 1966 Vol. II: 360.

36. However, as Canadian law is derived from the English common law system, valid interpretations can be made as applicable to the Canadian domain. Also, as will be discussed later, Burbridge adopted these general principles in the issue of adultery, and included them in his "Digest of the Criminal Law of Canada" – Article 375. It also must be noted that the case law to be discussed here revolves around charges against the receiver or assister, not against the wife. Although her behavior was not dealt with by the courts prior to the Married Women's Property Act, it can be surmised that in cases involving adultery, and the ideology prevalent at that time, that the wife was dealt with by the husband at home.

37. R. v. Thompson (1850) 14 Jur. 488 (C.A.): headnote, 488.

38. R. v. Tolfree (1829) 1 Mood 243 (C.A.): 244.

39. quoted in R. v. Featherstone (1854) 6 Cox CC 376 (C.A.): 376 - 377.

40. R. v. Berry (1859) 5 Jur. N.S. 228 (C.A.): headnote, 228.

41. See: Erle, C.J., in R. v. Mutters (1865): "Upon these facts, the taking of the box *animo adulterii* was evidence of larceny. The prisoner took his master's property, knowing it to he his master's property, and with it his master's wife with the intention of committing adultery. The conviction must therefore be affirmed." (R. v. Mutters (1865) 10 Cox CC 50 (C.A.): 53). Kelly, C.B., in R. v. Kenny (1877): "There

is a class of cases in which the question of adultery is very material. Where the adulterer, acting in concert with his wife, takes the husband's goods, the fact of adultery, if established, by revoking the wife's authority to dispose of her husband's goods, may make that larceny on the part of the adulterer which otherwise would not have been so." R. v. Kenny (1877) 2 QBD 307 (C.A.): 310-311). Also see R. v. Flatman (1880) 14 Cox 396 (C.A.)

42. Lush, J., in R. v. Harrison (1870) 12 Cox CC 19 (Assizes): 20.

43. See R. v. Taylor (1874) 12 Cox 627 (Assizes).

44. Also see R. v. Prince, (1868) 11 Cox Cr. C. 193 (C.A.), which further qualified Taylor (1874) in holding that not only must the adulterer take an active part, he can only be convicted of a felony, not a misdemeanor. Thus a distinction was made between a charge of larceny and a charge of false pretences; the latter being a misdemeanor and held no liability to the second party.

45. See Cockburn, C.J.: "We take, however, this to be clear, that a wife cannot be guilty of larceny in taking the goods of her husband, and if a stranger do no more than merely assist her in the taking, inasmuch as the wife as principle cannot be guilty of larceny, so neither can the stranger as accessory be guilty."in R. v. Avery and Another (1859) 8 Cox CC 184 (C.A.): 186).

46. R. v. Payne (1906) 1 K.B. 97 (C.A.): headnote, 97. Also see R. v. Streeter [1900] 2 Q.B. 601 (C.A.): 604.

47. R. v. Bloom (1910) 4 Cr. App. R. 30 (C.A.): 34.

48. Article 375: "A married woman cannot commit theft upon things belonging to her husband.

    If any other person assists a married woman in dealing with things belonging to her husband in a manner which would amount to theft in the case of other persons, such dealing is not theft unless the person so assisting commits or intends to commit adultery with the woman in which case he, but not she, commits theft. But this exception does not apply to the case of an adulterer or person intending to commit adultery, who assists a married woman to carry away her own wearing apparel only from her husband.

    It is doubtful whether the mere presence and consent of a married woman on an occasion when some person deals with her husband's goods in a way in which would otherwise amount to theft excuses such person if he acts as a principal in the matter, and not as her assistant."

49. Criminal Code, 1892, c. 29, s. 313(2).

50. In terms of s. 313 of the 1892 Criminal Code, the Imperial Commissioner's Report held: "By the present law a husband or wife cannot steal from his wife or her husband even if they are living apart, although by recent legislation the wife is capable of possessing separate property. So long as cohabitation continues this seems reasonable, but when married persons are separated, and have separate property, it seems to us to follow that the wrongful taking of it should be theft. This section is also framed so as to put an end to an unmeaning distinction, by which it is a criminal offence in an adulterer to receive from his paramour the goods of her husband, but no offence in any one else to receive such goods from the wife." (Tascheraue, H.E. The Criminal Code 3rd ed., 1893: section 313, 57-58). The same applies to the present provisions in s. 329.(2) of the Criminal Code R.s.C. 1985, C. C-46, which basically mirrors s. 313(2).

51. Clarke, Barnhurst and Barnhurst, 1977: 226-227.

52. Clark and Lewis, 1977: 112. Also see John Stuart Mill in MacPherson (1983): "The laws of property have never yet conformed to the principles on which the justification of private property rests. They have made property of things which never ought to be property, and absolute property where only a qualified property ought to exist. They have not held the balance fairly between human beings, but have heaped impediments upon some, to give advantages to others; they have purposely fostered inequalities, and prevented all from starting fair in the race." (Mill, "Of Property" in Property: Mainstream and Critical Positions, 1983: 83).

53. Hay, 1982: 107-108.

54. Rifkin, 1982: 299.

55. Criminal Code, R.S.C. 1985, c. C-46, s. 329(2).

56. While the old Scottish case, Muirhead v. McIntosh (1886) 23 Sc. L.R. (C.A.), had determined prior to the MWPA that the offended spouse was an incompetent witness, the English case of R. v. Moore [1954] 2 All E.R. 189 (Assizes), confirmed that by virtue of the MWPA the wronged spouse was a competent witness, providing that the actual theft fell within the proviso qualifications and insofar as the couple were not living together at the time of prosecution. The recent Canadian case, R. v. Pillbeam (1983) 32 Sask. R. 228 (Sask. Q.B.), has confirmed that the spouse is both a competent and compellable witness.

57. R. v. Bryze (1981) 63 CCC (2d) 21 (Ont. P.C.): 25.

58. Law Reform Commission of Canada, 1977: 58.

59. Boyle et al., 1985: 17.

CHAPTER V

CONCLUSION

Feminist theory provides a level of analysis that was previously neglected by the 'malestream' theoretical approaches. In so doing, feminism helps to uncover and elucidate patriarchal and male property relations that have traditionally governed many facets of women's lives. Of particular concern here, and in other feminist analyses, is the role and regulation of marriage in a predominantly patriarchal society. Within marriage, which is governed by the Christian values of monogamy the woman's role has been externally defined in such a manner as to promote and perpetuate male interests. The marriage union which is said to join two persons into one single identity, has with the demise of ecclesiastical governance, been regulated and enforced in part by the criminal law. This regulation has distinguished married persons from their single counterparts in terms of accountability under certain provisions of the Canadian Criminal Code. Thus, as discussed in the preceding three chapters, by virtue of the marriage vows, spouses have traditionally maintained a unique standing in terms of the offences of rape, duty to provide necessaries and theft. The rationales that historically have served to justify this marital differentiation were based upon patriarchal interests of placing a perceived weak and inferior married woman under the guidance and control of her husband.

The repressive ideologies that were codified in the original Criminal Code in 1892 were legitimized through the idea that husbands had property rights over their wives. These property rights were believed to vest the husband with the ability to use his wife as he wished, without falling under many of the sanctions provided by the criminal law. The husband's property rights over his wife were seen legitimately and necessarily to extend to conjugal rights, whether his wife was willing or not. A husband was in turn required to care and provide for his wife, but this qualification only existed insofar as his wife behaved 'properly' and conformed to the traditional role of the married woman as child-bearer and rearer. A husband, then, gained property rights over any possessions his wife might bring into the marriage, and property rights over her as well. All of these patriarchal assertions became part of the law in Canada, with the inception of the Criminal Code in 1892, under the rape, duty to provide necessaries and theft provisions.

The recent sexual assault provisions which have abolished the marital immunity illustrate the patriarchal substance and application of the criminal law. The legislative amendment has been unsuccessful in completely discarding the adherence to Hale's concept of an eternal consent based on the marriage vows. Historically, this consent was seen to only extend to conjugal rights and not other forms of force instituted within the marriage and thus served to protect a husband from the stigmitized label of rapist. This interpretation of the law was based on perceived male proprietary rights over their wives. The

rationales justifying such an exclusion from the law were not valid, being simply based on patriarchal, discriminatory and subversive practices which served to perpetuate and legitimate the ideology that marriage is a sexual and economic institution where women's interests and independence are not accounted for. The contention that marital exclusion from the crime of rape upholds the sanctity and harmony of the marriage does not in any way recognize the harm done to the wife-victim who has had her being and trust violated by the one person who should ideally respect her, and her wishes.

With the 1982/83 changes to the Criminal Code this discriminatory practice was recognized and abolished; this means that the effectiveness of this legislative change is now up to the courts. A conviction for marital rape is, however, only partially indicative of societal condemnation of such a crime. The punishment must also convey that such an offence is not condoned, even within a marriage. As seen with the Gleason (1986) case and sentencing briefs on other recent cases, the courts are not sufficiently punishing marital sexual assault, due to archaic thinking whereby traditional roles and values are tacitly condoned so as to legitimate men's property rights over their wives. In order for legislative change to be effective and establish in practice what was desired in theory, societal structural changes must be made. Until these changes are successfully made, however, we should strive for reeducation and non-subordination. There must be recognition of these discriminatory practices in an effort to end them.

This need for societal change and non-subordination also holds true in terms of the legal duty to provide necessaries provisions. Originally this duty only extended to husbands, and was enforced by the courts in a discriminatory fashion. Cases such as Flannagan v. The Overseers of Bishopwearmouth (1857) (Q.B.), R. v. Yuman (1910) (Ont. C.A.), R. v. Bullard (1924) (Alta. S.C.) and R. v. Wilson [1933] (Alta. S.C.) cast the married woman as the property of her husband, and ruled that when the husband loses control over this proprietary right, he is no longer legally liable to care for her. R. v. Brown (1941) (Sask. D.C.) and H. v. H. (1902) (Que. K.B.) further required that the married woman must be faithful to her husband in order to be worthy of his support. These decisions illustrate a very patriarchal interpretation of the law which perceives the married woman as incapable of supporting and caring for herself (which may to some degree be the case due to limited economic opportunities for females), but she is only deemed worthy of support if she conforms to her traditionally submissive role. The case of R. v. Klein (1937) (Sask. P.C.) is indicative of the state interest in these provisions which require that each family unit be self-sufficient and not dependent on the state for support.

As a result of this patriarchal structure and interpretation of the duty to provide necessaries provisions, The Royal Commission on the Status of Women successfully lobbied for equality provisions that require both spouses to be responsible for providing for each other. There are, however, problems with

promoting equality in a society based on inequities. As discussed by Shrofel (1985), Miles (1985) and Lahey (1987), equality provisions in a society that is not assuring sexual equality can place a further burden on women. As the fallacy of liberal feminism has been recognized, legislative changes are ineffective when they are enacted and interpreted in a structure that remains male based. At the present time, the non-subordination of the married woman should be addressed, for at this time, true equality cannot be achieved.

The marital theft provisions have also been shown to be discriminatory and subversive to the married woman. At common law, spouses were excluded from the crime of theft for it was held under the unity principle and the fact that a married woman could own no separate property that such a crime was not possible. The Married Women's Property Act changed this rigid exclusion to the extent that marital theft could be committed but only upon one spouse committing the act of theft while leaving or deserting the other. While this proviso negated total spousal immunity from theft, the limited case law assessing the meanings to be attached to 'living apart' from or 'deserting' indicate that these terms were to be interpreted very narrowly. The civil trial of Lemon v. Simmons (1888) illustrates that the theft provisions have historically encompassed a much stricter meaning than litigation concerning child custody, divorce and military desertion which also employ those terms. English case law dealing with third party involvement with spousal theft, for example Tolfree (1829) (C.A.), Featherstone (1854) (C.A.) and

Harrison (1870) (Assizes), indicate that of crucial concern was whether or not the relationship between the wife and receiver or assister was adulterous, thereby confirming that the marital relationship was one of control and domination where the wife was regarded as the property of her husband, not to be taken by another. While the Canadian Criminal Code does not intrinsically establish the necessity of proving adultery, it is not clear, by virtue of the lack of reported Canadian marital theft prosecutions, whether or not these property rights have been maintained by the courts. The Criminal Code does, however, maintain that marital theft can only be committed upon leaving or deserting the offended spouse. Marital theft prosecutions are therefore only possible in Canada when these qualifications have been met; and upon such time, the offended spouse is deemed a competent witness to testify.

The marital relationship presents prosecutorial difficulties, as illustrated in R. v. Bryze (1981) (Ont. P.C.), in terms of establishing which property was by law the property of the offended spouse. This difficulty should not necessarily be the rationale for absolving criminal responsibility. The true quandary rests with the structure of society which traditionally has defined the married woman's role as one that provides no independent economic gain, but is to be dependent upon the breadwinning husband for support. Even while married women are moving out of the 'private sphere' of the home to the 'public sphere' which economically rewards labor, the patriarchal society does not provide equal economic opportunities to males

and females. Realistically, in order to require marital accountability for theft, structural changes must be made in accord with legislative changes. Married women should no longer be discriminated against in either the public or private sphere, but as with sexual assault and the duty to provide necessaries provisions, the first step is to strive for non-subordination.

The provisions regarding forced marital intercourse (first rape then sexual assault), duty to provide necessaries and marital theft have all been based on and supported by perceived male property rights over married women. These provisions were historically introduced by male authorities which then were in turn supported and upheld by primarily male courts. It should be clear, however, that such property rights are unfounded in valid reasoning, and as Mill (1893) notes, human beings should not be the subjects of property:

> Besides property in the produce of labour, and property in land, there are other things which are or have been subjects of property, in which no property rights ought to exist at all. But as the civilized world has in general made up its mind on most of these, there is no necessity for dwelling on them in this place. At the head of them, is property in human beings. It is almost superfluous to observe, that this institution can have no place in any society even pretending to be founded in justice, or on fellowship between human creatures. But, inequitous as it is, yet when the state has expressly legalized it, and human beings, for generations, have been brought, sold, and inherited under sanction of law, it is another wrong, in abolishing the property, not to make full compensation.[1]

The property rights vested in husbands over their wives have been given legitimation and religious sanction by virtue of the unity principle inherent to marriage, which in reality has

subverted the status of the wife under the role and wishes of her husband. This perceived unification of two individuals into the mind of one is discriminatory in practice and as De Montmorency notes, in fact confounds the purposes of the criminal law:

> The error of the common law of England seems to have been that it thought that it could enforce that absolute blending of body, soul, and spirit, which perfect love imports into the perfect marriage: an error more than obvious when we recall the trite fact that the purpose of law is to measure, not human love, but human sin, it is clearly less strong and could not perfect the imperfect marriage, and make the two parties one. Laws of regulation *inter se* could not effect for good or for evil the perfect union; it could only affect the imperfect union, and in doing so it succeeded for generations in degrading an entire sex and in restraining its physical, mental, and moral advance.[2]

There should not be a perceived unity between two persons when one has partaken in criminal action against the other. Husbands and wives are in fact two individuals and can be independently harmed and victimized by each other as can any other two individuals. Therefore, provisions regarding sexual assault and theft should not exclude spouses, but should recognize that anyone and 'everyone' should be held accountable for their actions. Laidlaw, J.A. commented in Kowbel [1954] (S.C.C.): "I am not willing to give life to a dead principle which could make an absurdity of part of our criminal law as it exists today...the antiquated, obsolete fiction of ancient times [the unity principle]...ought to be left in its grave."[3]

If, however, certain relationships are in fact to be deemed of such a special nature that they are to be protected by the criminal law, this thinking then should be uniform in thought

and practice and not simply to protect the Christian monogamous marriage. This should not be done through perceived property rights, nor an archaic unity principle, but if society cherishes unions based on love this should not be confined solely to the heterosexual monogamous union. Nor realistically should such a standard be confined to the married couple and not the family unit as a whole. This is not to say that every relationship should be protected, but argues against the contradictions presently in place that confine protection only to the traditional marriage and do so in a subversive manner. Certain segments of society have legally secured their own morality and imposed these moral standards on the rest of society, with the contention that these are the 'proper' and 'correct' values. There are not only potential class problems with this model, but also differing standards within each socio-economic stratum of society. Donzelot arguing on the issue of class holds:

> But what might be the reasons for the low classes having adhered to bourgeois morality, for their having complied with the familialist injunctions of those who ruled them? Can it be maintained that family life became a universal value solely by the attractive force of its bourgeois model? And what entitles us to affirm that the sense of the family that exists in the lower classes is of the same nature as that existing in other social strata, that it obeys the same constitutive logic, that it embraces the same values, the same expectations, that it has the same effects?[4]

Beyond imposing class biases, the Christian monogamous union which has been vested with legal support is not seen as the ideal relationship by all members of society. As Weitzman (1974) notes: "...it is clear that the traditional assumption of monogamy, and the importance of monogamy in marriage, is being

subjected to a growing number of theoretical and empirical challenges in our society."[5] Further to this, "Certainly current divorce statistics would lead one to question its effectiveness, and current norms might lead one to challenge its desirability."[6] One can therefore question the legal protection of a union that has been proven to be less than harmonious.

The state does, however, have a vested interest in protecting this union and the traditional model of it. This interest revolves around economic and moral reasoning and has been divided by Weitzman (1974) into four basic purposes: "promoting public morality, ensuring family stability, assuring support obligations, and assigning responsibility for the care of children."[7] The case law assessing the theft and duty to provide necessaries provisions illustrates that the state is through legislation and through the courts promoting the perpetuation of the traditional and 'proper' marital roles, where the wife is responsible to her husband and children and is to be economically supported by her breadwinning husband. While this traditional model is more inclined to sustain unions which are independent and do not require even child care assistance from the state, since this is seen to be the role and duty of the wife/mother, such unions are in practice discriminatory and repressive to the married woman. Weitzman notes: "It has been argued that the state's interest in family stability is also served by the maintenance of the sexual division of labor to ensure responsibility for economic and social tasks within the family...[which is] inappropriate, ineffective and

disciminatory."[8] Rich (1980) further clarifies, "that heterosexuality, like motherhood, needs to be recognized and studied as a *political institution*."[9] Before change can occur, then, the interests protected and secured, and who and what these interests benefit must be assessed and acknowledged.

There is therefore a need for change, but as seen with the equality provisions instituted in terms of marital sexual assault and the legal duty to provide necessaries, legislative change by itself is ineffective in the context of a patriarchal society. Equality provisions on their own can in fact further inequality. Boyle recognizes that: "...an insistence that s. 15 [of the Charter requires that women and men be identical in the eyes of the law ignores existing biological and social and economic inequality. To put it simply mandating formal equality (i.e., that men and women be treated identically) in a world of real inequalilty, is to maintain inequality, not eradicate it."[10] Rather than striving for equality, as Boyle et al. (1985) assert, the 'subordinate principle' should first be addressed. Legislation in both substance and application should not subordinate the married woman. There have admittedly been many changes instituted over time, as seen in this analysis covering the time period of 1892 to the present, but there remains a long road ahead before real equality and non-subordination is recognized and secured. Atkins and Hoggett (1984) note:

> Since 1979 we have seen radical changes in the laws affecting the separate spheres of men and women. In this modern period family laws have ceased to discriminate on grounds of sex, so that they are theoretically capable of reflecting role reversal, role sharing and other

> diverse forms of intimate relationship. Employment laws have sought to prevent discrimination on grounds of sex, marital status or pregnancy. Even welfare laws and taxation are coming to abandon their presumption that men and single women occupy one sphere, while married and cohabiting women occupy the other. But the process is far from complete. Nor do we find that the values underlying modern legislation are inevitably translated into action by the courts and other agencies.[11]

The present legal regulation of marriage can thus be seen to be problematic; but it is also problematic to simply rely on legislative changes to rectify these ills. Legislative change are subsequently interpreted by the courts and until these patriarchal ideologies are erased, it can be presumed that they will continue to be perpetuated in some form. Equality provisions in an unequal society provide room for further discrimination; thus, structural changes and attention to non-subordination should be the focus. The marriage union should be based on respect between two individuals of equal standing, and until this is socially and in turn legally recognized, judical rulings such as those analyzed here will be the norm.

NOTES

1. Mill, "Of Property", in Property, 1983: 98-99.

2. De Montmorency, 1897: 198.

3. quoted in "Case and Comment", 1955: 83-84.

4. Donzelot, 1979: 6.

5. Weitzman, 1974: 1235.

6. Ibid, 1243. Also see McGregor (1981): Since the end of the last war, the number of divorce petitions has more than quadrupled and, by 1979, some 11 per cent of all families with dependent children were one-parent families. The absolute numbers are formidable." (McGregor, 1981: 44-45).

7. Weitzman, 1974: 1243.

8. Ibid, 1244.

9. Rich, 1980: 637.

10. Boyle et al., 1985: 16.

11. Atkins and Hoggett, 1984: 4.

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