CHAPTER 9

WOMEN, VIOLENCE AND THE LEGAL SYSTEM

Patriarchal attitudes pervade the legal system. Whether the enquiry is into the personnel of the legal profession, or attitudes towards female victims of crime or defendants in the criminal process, the legal system reveals itself as still steeped in the patriarchal, exclusionary, tradition. Before considering the manner in which the law responds to female victims of violence, the personnel of the legal profession is considered. In the first extract, recent data on access to the legal profession is outlined. There follows an extract from Albie Sachs and Joan Hoff Wilson's seminal work on sexism and the law, which traces the early attempts by women to enter the legal profession, and details the resistances which were then faced. These resistances, whilst ostensibly now eliminated, continue to have depressing relevance to the opportunities for women in the legal profession – a matter which, whilst difficult to quantify in precise terms, has an inevitable and direct bearing on the manner in which the law continues to treat the victims of violence and rape and those women who, having suffered violence for protracted periods of time, respond with violence against their partners.

THE PERSONNEL OF LAW[1]

Access to Legal Education and the Profession

1. Access to legal education

Factors of gender, race and ethnicity and social class raise common concerns both in relation to access to legal education and in relation to access to the legal profession. The following data provide an outline summary of relevant changes over time in respect of these factors.

(a) Gender

In Australia in 1960 women comprised to 11.4% of the law student cohort: by 1984 the proportion had increased to 41%,[2] although in 1986 only 17.2% of all lawyers engaged in practice were women.[3] In Ontario,[4] in 1978, women comprised 31% of all law undergraduates; in 1987 this proportion had increased to 42.5%. Nationally by 1989 this figure was 48%, and women engaged in legal

1 Extracted from Hilaire Barnett, 'The Province of Jurisprudence Determined – Again!' [1995] *Legal Studies* p 88.

2 D Weisbrot, 'Access to Legal Education in Australia', in R Dhavan, N Kibble, W Twining (eds), *Access to Legal Education and the Legal Profession* (Butterworths, 1989), p 85.

3 Australian Bureau of Statistics National Census cited in D Weisbrot, *Australian Lawyers* (Longman, 1990).

4 National figures unavailable for that time.

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practice amounted to only 22%.[5] In the United Kingdom in 1990 52.1% of admissions to universities for law were women.[6]

(b) Race and ethnicity

In Australia special preparatory courses for Aboriginal students are offered at Monash, Queensland and the University of New South Wales.[7] In 1987 the Pearce Committee, in its nationwide review of legal education at the tertiary level,[8] reported that in 1986 just six Aboriginal lawyers had been admitted to practice. In Canada, by contrast, a 'Programme of Legal Studies for Native People' was established in 1973 at the University of Saskatchewan Native Law Centre in an attempt to increase the disproportionately low number of native Canadian lawyers. Between 1973 and 1985 202 of the 302 students registered on this course were recommended for admission to law school.[9] Four-fifths of all native Canadian law school applicants go through the Saskatchewan programme: each year 200 to 250 apply for admission to law school; of this number between 40 and 50 actually register – a five-fold increase within a decade.[10] Canadian universities adopt discretionary admissions policies and may specifically use the successful completion of the Programme of Legal Studies as a criterion for entry to law school.[11] In England, by way of comparison, the Law Society's 1994 survey of student characteristics concludes that 'some ethnic minority groups are very well represented among students doing law degrees'.[12] Students of Indian, Pakistani and African-black origins are well represented; Bangladeshis and Afro-Caribbeans are not. The same report reveals that ethnic minority students are most likely to study law at the 'new' universities (where they represent 26% of students reading law). In older universities the corresponding proportion figure is 20% of the total and at Oxbridge 12%.[13]

(c) Socio-economic Background

Research in Australia shows that the majority of law students come from a high socio-economic background.[14] Professor D Weisbrot states that 'the social background of young lawyers is, if anything, more elite than in previous

5 DAA Stager and HW Arthurs, *Lawyers in Canada* (University of Toronto Press, 1990).

6 45% at 'old', 55% at 'new' universities. Admissions for the CPE course were 50%. See D Halpern, 'Entry into the Legal Professions' *The Law Society Research and Policy Planning Unit Study No 15* (1994).

7 In 1986 the Aboriginal and Torres Strait Islands population amounted to 1.43% of the total national population: D Weisbrot *op cit*, n 6.

8 *Australian Law Schools, A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Canberra, 1987).

9 BM Mazer, 'Access to Legal Education and the Profession in Canada', in *Access to Legal Education and the Legal Profession*, *op cit*, n 6.

10 *op cit*, n 9.

11 See eg the *University of Toronto Faculty of Law Calendar 1993–94*, p 60.

12 D Halpern *op cit*, n 10; but *cf* N Kibble, 'Access to Legal Education and the Legal Professions in England', in *Access to Legal Education and the Profession*, *op cit*, n 6.

13 *Ibid*, p 19.

14 Pearce, Appendix 4.

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generations'.[15] Moreover, with the increasing numbers of women being admitted to legal education – the majority of whom come from the same social class as the majority of men – coupled with the decreasing availability of alternative qualifying routes into the profession, there are correspondingly fewer opportunities for those from lower socio-economic backgrounds to gain entry to legal education. In Canada socio-economic data relating to law students has until recently been unavailable. Professor Brian Mazer has commented that '[the] dearth of demographic information is of concern, if one is of the opinion that the legal profession may not be representative, in any significant way, of the Canadian population'. It is nevertheless recognised that the Programme for Native People and the increasing admission of mature students have extended the range of backgrounds from which law students are drawn.[16] Professors Stager and Arthurs have observed that in Canada there has been a slight increase in the proportion of lawyers from minority ethnic groups.[17]

In England and Wales in the late 1970s it is reported that 50% of 20–24 year olds in full-time education had professional or managerial fathers (compared with approximately 20% of the general population, but that among law students 54% had professional or managerial fathers and only 16% working class fathers.[18] David Halpern's survey for the Law Society in 1993 reveals that even today only 23% of law students are drawn from working class backgrounds and that the figures vary widely according to the type of institution attended. Working class parentage accounts for 25% of law students at new universities, 16% at 'old' universities and 9% at Oxbridge.[19] Moreover, it seems that the Common Professional Examination course, in attracting candidates from disproportionately higher socio-economic backgrounds, has not achieved its intended goal of broadening the social background of entrants to the legal profession but has restricted further the socio-economic base of future lawyers.[20]

The broad picture of the legal profession in each jurisdiction is one of a primarily male, white, middle class institution. In England, constructive – if belated – attempts are being made to redress the imbalance in gender and race. The Policy Studies Institute undertook research in 1995 on behalf of the Law Society's research and policy planning unit. The latest research confirms that sexual and racial discrimination remains rife. In 1995, of 63,628 practising solicitors in England and Wales, a mere 18,417 were women, and only 70 practising solicitors were from ethnic minorities. When figures for partnerships are examined, the Young Women Lawyers group have found that only 25% of new partners in 1995 were women; a drop from 1985 when 44% of new

15 *op cit*, n 6.

16 *op cit*, p 129 at n 13.

17 *op cit*, n 9.

18 *Royal Commission on Legal Services 1979* (Cmnd 7648), cited in D Halpern *op cit*, n 10 at para 5.1.

19 'Entry Into the Legal Profession', *op cit* n 10, p 22.

20 *op cit*, p 23, n 10.

partnerships were granted to women. At the bar, the Bar Council has endorsed a new 'equality code' which is aimed at tackling discrimination within the profession.[21]

The absence of a profession which is balanced on gender and racial lines has inevitable consequences for women who find themselves dealing with law. The continued dominance of the profession by middle-class, middle-aged white males – the majority of whom it may reasonably be assumed are conservative in outlook (even if not political party) ensures a continuance of the traditional stereotypical attitudes to women. With this background in mind, attention can now be turned to the manner in which the legal system is imbued with patriarchal attitudes.

In the following extract from Albie Sachs and Joan Hoff Wilson's now seminal work on gender-based discrimination in the law, the authors explain the obstacles which women have faced when attempting to enter the legal profession.

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SEXISM AND THE LAW[22]

Albie Sachs and Joan Hoff Wilson

Britain: Barristers and Gentlemen

A major reason for the obdurate resistance by judges and lawyers to the entry of women into the professions was simply their determination to exclude competitors seeking to participate in a lucrative monopoly activity. The feminists themselves had no doubt that this was a prime consideration, though only two of the many judgments referred to earlier alluded directly to this point. In one case a Scottish judge relatively sympathetic to Sophia Jex-Blake's claim went out of his way to emphasise that the exclusion of women from medical practice was not, as alleged, due to economic jealousy, but a leading South African judge openly stated that the choice was between denying women the right to economic independence and increasing the ranks of an already overcrowded profession.

In general, however, the exclusion of females was justified on the basis of maintaining professional standards. Maleness was converted into one of the attributes of professionalism (just as the capacity to be professional, that is, intellectually detached and emotionally uninvolved, became one of the attributes of the middle-class male). The professions, like clubs and elite schools, were not simply institutions from which women happened to be absent. Their maleness became part of their character, so that the admission of women was seen as not merely adding to their number or introducing some novelty, but as threatening the very identity of the institutions themselves.

Whereas the medical profession expressly set out to take healing away from women – many female folk-healers being condemned on the testimony of professional male doctors as witches – the legal profession established a monopoly of litigation and conveyancing that only incidentally excluded females. The procedures designed to protect the income and status of the professional lawyers from the competition of unregistered scribes and other unqualified persons were not specifically anti-female, but their consequences

21 *The Times*, 14 November, 1995.

22 (Martin Robertson, 1978) Chapter 5.

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were such as to make it impossible for women to practise law. Once this exclusion of women had been established, however, maleness became part of the ethos of the profession, and male-exclusiveness was elevated to the level of a principle. A legal profession centralised around the courts in London, as opposed to community lawyers dispersed through the population, favoured the exclusion of women. The monopoly established by the profession over litigation and later over transfers of land, defined the function and the style of the profession from the first, and tied it in firmly with landed and commercial interests, creating what to this day has become the model of lawyers' work. In the neighbourhoods there were of course wise women as well as wise men who were consulted and asked to arbitrate informally on local disputes, but since they did not work for a fee in association with the courts they were not regarded as lawyers.

Incidentally, it is interesting to note that the professions were almost invariably described as 'overcrowded'. It is in the nature of professions dependent on fees from private clients to be permanently 'overcrowded', just as it is in the nature of publicly funded professions to be perpetually 'short-staffed'. It would seem that public funding through such agencies as the National Health Service and the Legal Aid Fund has played a major role in weakening the opposition of males to the entry into the professions of females. Public funding, however, makes specialisation and progress through a career structure the crucial determinants of income and status, and it is suggested that males have shifted their control away from the point of entry towards the routes of advancement. To say this is not to suggest that men conspire as a secret brotherhood to exclude women – though male condescension may well be nearly universal and male hostility fairly common – or even that individual male bigotry is the dominant bar to female advancement. Institutions tend to have machinery for their self-perpetuation, and all professions are structurally organised so as to maintain male domination and female subordination. This is most noticeable in areas such as health, education, and the social services, where men are in a small minority as far as all occupations are concerned, but grossly over-represented in the highest echelons. The social services have been built up by women and are largely staffed by women, but nine out of ten top posts are held by men.[23] And anyone who doubts the special role of professionalism in maintaining male privilege need merely to look at what professionalism has meant in relation to the kitchen. Women do the cooking in almost every home – men are at pains to perpetuate their inferiority here – but women are almost entirely excluded from the well-paid and prestigious activity of professional chef.

Women have been struggling for at least a century to find a place in the legal profession. just over a 100 years ago 92 women signed a petition requesting permission to attend lectures in Lincoln's Inn, a preliminary step to being called to the Bar. The Benchers (leaders) of the Inn regretted that this was 'not expedient'.[24]

Although there appear to have been examples in the distant past of women acting as attorneys in England, the first application in modern times for a woman to be enrolled as a solicitor seems to have been made in 1876, which was seven years after Arabella Mansfield had become the first woman to be admitted to legal practice in the United States. The English application was rejected by the

23 *House of Lords Select Committee Report on Anti-Discrimination Bill* (HL 104), House of Lords 1972–73, Vol VIII.

24 Helena Kennedy, in Robert Hazel (ed), *The Bar on Trial* (Quarter Books, 1978), p 148.

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Law Society and when six years later a male solicitor proposed to offer employment to female clerks, the *Solicitors' Journal* treated the suggestion as a huge joke.[25] In fact it was the typewriter rather than the law degree that opened the way for women to enter legal offices. Initially, all important documents were handwritten by male clerks, and typing was regarded as a form of copying appropriate for inferior materials only, fit to be done by women at low rates of pay. The subordinate status of women typists continued even after they became responsible for the preparation of important documents. Lawyers in fact long resisted the entry of both typewriters and women into their offices, but eventually gave way to economic pressures that favoured the replacing of male clerks by machines and by women.

In his study of the black-coated worker, David Lockwood points out that in the century 1851 to 1951 clerical workers increased from one in 100 of the general labour force to one in ten, and that the proportion of women clerks during this period rose from less than one in 1000 to nearly two out of three.[26] Clerical work thus became largely feminised, which acted to the advantage rather than the disadvantage of male clerks in that they tended to be the ones who offered themselves or were preferred for promotion. The characteristic office situation was thus of the supervisor or manager being an older man and his assistants being younger women, the men exercising discipline through personal contact, 'whether the ensuing relationship [was] paternalistic, petty tyrannical or sexually exploitive'. The lawyers' office, it should be mentioned, tended to take on a three-tiered structure, with men occupying virtually all of the top or professional sector, as well as most of the middle or managing layer, while women filled almost all of the bottom or clerical zone.

There were, however some women who from the 1880s onwards practised neither as clerks nor as qualified lawyers, but as legal workers dealing directly with the 'public' or else giving assistance to solicitors and barristers. The admission of women to the universities in the last quarter of the century led to a number of women receiving law degrees, a state of affairs which was not objected to by the profession as long as it led nowhere. But, as has been seen, when in 1903 Bertha Cave brought a test application on behalf of herself and other recent graduates, including Christabel Pankhurst, seeking admission to the Bar, both the Bar and the judges insisted that the profession be confined to men only. It is interesting to speculate what the result on the suffrage movement would have been had women been admitted to legal practice at that time. If many leading rebels and revolutionaries have been lawyers, few leading lawyers have been rebels, and it is highly likely that even the spirited Christabel Pankhurst would have been totally contained by the Bar. As it was, 'the hot strife at the Bar', which allegedly was too much for women, appealed to her temperament, and in her capacity as a defendant she manifested such forensic brilliance that it was the male witnesses, magistrates and lawyers who found the combat too intense, not her. The courtroom became an arena in which she was far more effective as a feminist law-breaker than she would have been as a female barrister, and the occasion when she humiliated Lloyd George in the witness box – a government minister, solicitor and orator of note – stands, out as one of the notable pieces of cross-examination of her era.

25 Abel-Smith and Stevens, *Lawyers and the Courts*, p 193, give a brief history of attempts by women to enter the profession.

26 Lockewood's study, *The Black-Coated Worker* (London, 1958) was unusual for its period in that it focused on gender relationships at work.

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Not all the women rejected by the Bar followed her example of embarking on full-time political activity. Ivy Williams, who 18 years later was to be the first woman to be called to the Bar in England, declared in 1903 that women holding University law degrees could set up practice outside of the profession without being trammelled by the lawyers' trade union rules. The *Law Journal* countered what it called 'these threats which have been added to the weapons with which women are assailing the legal fortress', by reporting the comforting news that women had not been triumphant rivals in countries where the profession had been opened to them, quoting as evidence a letter from a member of the American Bar.[27]

The Bar and the Law Society were not merely unhelpful to women, they resolutely set their organisations against women, fighting tenaciously both inside and out of Parliament to maintain their male-exclusive character. To the extent that they bothered to argue the matter at all, male lawyers insisted on evaluating possible female lawyers against the stereotype woman rather than the stereotype lawyer – either they suborned male judges and juries with feminine wiles, or else they became 'un-sexed'.[28] Even after women won the vote at the end of the First World War, the professions hoped to uphold a legal barrier to women entering practice, but once women had the franchise, Members of Parliament were not willing to risk their seats in order to support a male monopoly in which they no longer participated. The Sex Disqualification Removal Act 1919 expressly authorised what the profession had expressly resisted, namely the right of women to set up as barristers and solicitors.

By 1921 there were 20 women barristers listed, and by 1929 the number had grown to 77.[29] By 1955 the total had actually declined to 64 (3.2%) and ten years later it had grown only to 99 (4.6%). By 1970 the increase had been rather more rapid and the total stood at 147 (5.7%) while by 1976 it had reached 313 (8.1%). In that year only four out of 370 practising Queen's Counsel (senior barristers) were female. As one female barrister recently put it:

> The successful jealously guard their right to remain overworked, and junior tenants who have only just got on to the bottom rung of the ladder are frequently the least sympathetic to the plight of those waiting below … Females become a luxury the profession cannot afford.[30, 31]

VIOLENCE AGAINST WOMEN

Violence, in general, of course takes many varied forms. Physical violence specifically directed against women includes domestic violence, rape committed against a stranger, acquaintance or family member – including wives and daughters. Violence may also be more broadly defined to include harassment – sexual or other – whether private or public. Violence may also be defined to include violence against women's images, represented in the form of

27 (1904) 39 *Law Journa*l.

28 *Cf* Holdord Knight (1913) *Times*, 4 July.

29 Figures from Vera Brittain, *Women's Work in Modern England* (London, 1928); Ruth Miller in (1973) *Times*, 1 January; *Legal Action Group Bulletin* (December 1975); H Kennedy, *op cit*, p 153.

30 Helena Kennedy, *op cit*, p 153.

31 *Sexism and the Law*, pp 170–74.

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pornography. Because pornography raises a number of specific and difficult issues for feminist jurisprudence, it is considered separately in Chapter 10.

It is important to recognise the seemingly intractable problem of eradicating violence against women. As was seen in Chapter 2, historically there is a broad, ill-defined, movement from nature to culture, and from culture to law. Implicitly and explicitly, this movement incorporates at each stage of societal development the 'distinctive', 'special', 'separate', domain of women – with women being confined, as a result of her physical vulnerability in times of childbearing and child-rearing, to the private domain under the suzerainty of her patriarchal kin. Not only is woman relegated to the private domain, but she is kept there – excluded from the public, civic world of politics, government and power. The 'patriarchal society', however, is not merely protective and benevolent, it also includes *control of women*. This control is, from the point of view of the patriarch, essential to the maintenance of several features of his society. Firstly, it is a feature of all societies that there are taboos against incest within family groups – whether defined by consanguinity or affinity. This taboo is explainable on two bases. In the first place there exist eugenic justifications against incestuous relationships. It is scientifically established that there are risks involved in sexual relationships between closely related family members. Children born of closely related family members may result in mental and/or physical sub-normality. As important for the patriarchal society is the continuation of the legitimate line of succession of power and property. It is for this reason that under English law from the sixteenth century, at least, there have been punitive laws penalising the woman who bore a child outside wedlock, and the woman who committed adultery. The patriarchal society has a vested proprietorial interest in legitimacy. For this reason, the patriarch insisted on the right of *physical control* over women. This control – this dominium – is both physical and non-physical. It is from the claimed right of physical control over women that, it is submitted, the seeds for violence are sown. Woman is relatively physically weak and at times physically vulnerable. Her 'special' position as the bearer of legitimate – and only legitimate – children with the right to succeed to the property of the male, requires her protection against weakness, whether emotional, psychological or sexual in order that the line of legitimate succession be ensured. Thus, a right to correction was implied in the relationship between the patriarch and women. This right of 'protection' – which in fact means 'correction' becomes recognised in law, in the progression from nature to culture to law, as demonstrated in the selected extracts.

Other forces are also at work. Whilst immunity from the law of rape for husbands – on which see further below – had long been 'justified' under English law under the doctrine of 'one flesh' – similar arguments cannot prevail in relation to rape between unmarried persons, whether strangers or acquaintances.

RAPE WITHIN MARRIAGE

Prior to 1991, under English law, a husband had immunity from rape within marriage. The governing doctrine was that of implied consent to sexual intercourse by virtue of entering marriage. Accordingly, unless husband and

wife were living apart under an order of the court,[32] no wife could complain that forced sexual intercourse amounted to rape. In addition, where a couple had agreed to live apart, or were in fact living apart, the court might hold that consent to intercourse was thereby revoked. The immunity from rape within marriage stems from the opinion of Sir Matthew Hale, expressed in *History of the Pleas of the Crown* (1736) in the following manner:

> But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract.[33]

This immunity from prosecution for rape, deriving from the fictitious 'deemed consent' of a wife[34] had long been abolished in other common law jurisdictions – for example Canada, New Zealand, Victoria, New South Wales, Western Australia, Queensland, Tasmania, the Republic of Ireland,[35] and Israel had all abandoned the doctrine. Reform of the law of England was to be brought about only in 1991 with the case of *R v R*.[36]

In *Woman and the Law* (1984), Susan Atkins and Brenda Hoggett considered the question of marital rape, and the traditional – masculine – objections raised to criminalising rape within marriage.

WOMEN AND THE LAW[37]

Susan Atkins and Brenda Hoggett

> Far and away the most important remaining aspect of a wife's legal subjection to her husband is that he cannot be prosecuted for raping her. He may be prosecuted for any accompanying assault, even if this was no more than necessary to achieve his object,[38] but unless he causes her actual bodily harm apart from the intercourse itself and its effects,[39] she would have to bring a private prosecution for the minor offence of common assault. The statutory definition of rape refers only to 'unlawful' (that is, extramarital) intercourse, but it is assumed that earlier cases hold good. These remove the husband's

32 Orders of Judicial Separation, non-molestation, personal protection or ouster orders made in relation to domestic violence, all of which are deemed to revoke the wife's consent to sexual intercourse.

33 *History of the Pleas of the Crown* (1736), Vol 1, Chapter 58, p 629.

34 See *R v Clarence* [1888] 22 QBD 12, [1886–90] All ER 113. See also *R v Clarke* [1949] 2 All ER 448; *R v Miller* [1954] 2 All ER 529; *R v Reid* [1972] 2 All ER 1350; *R v O'Brien* [1974] 3 All ER 663; *R v Steele* [1976] 65 Cr App Rep 22; *R v Roberts* [1986] Crim LR 188.

35 Where doubt existed as to whether the supposed immunity had survived the adoption of the Constitution of 1937.

36 [1991] 2 WLR 1065 (Court of Appeal); [1991] 3 WLR (House of Lords). Subsequently, an application was lodged under the European Convention on Human Rights alleging that the United Kingdom had infringed the provisions against retrospectivity (Article 7). The Court of Human Rights ruled unanimously that there had been no violation: see *CR v United Kingdom* (48/1994/495/577), judgment 22 November 1995.

37 Basil Blackwell, 1984.

38 *R v Miller* [1954] 2 QB 282.

39 See *R v Clarence* (1888) 22 QBD 23, in which the husband infected the wife with the venereal disease from which he knew that he was suffering.

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protection once there has been a decree of judicial separation,[40] decree nisi of divorce[41] or anti-molestation injunction[42] or agreement. The same would probably apply to a magistrates' order excluding the husband from the home but not to a personal protection order which prohibits only violence or the threat of violence. But there is no protection for the wife who is living apart from her husband under some other form of order or without any order at all, still less for the wife who is still living with him.

The arguments which are advanced against a change in the law are curiously weak.[43] Two of them are inconsistent. On the one hand it is said that marital rape will be difficult to prove, while on the other it is said that the threat of unjustified proceedings may be used by a wife to blackmail her husband into a favourable settlement at the ending of their marriage. The difficulties of proving rape are indeed formidable, particularly where the woman knows her assailant well; and if they are likely to deter her from prosecuting, they are equally likely to deter her from threatening it improperly or her husband from succumbing to such threats. There is no reason why the difficulties of proving antisocial behaviour should make us any less ready to acknowledge it as a crime. Two other objections assert that the criminal law should not intervene in marital relationships and that the wife will be adequately protected by her matrimonial remedies. The second cannot be right for, as the Criminal Law Revision Committee (CLRC) itself points out,[44] matrimonial remedies no longer depend upon considerations of conduct alone, even if all courts could be relied upon to regard a single act of marital rape in the same serious light. Even if they could, the damage would already have been done (as the CLRC again realised, this was an insuperable objection to its proposed replacement of criminal with civil sanctions against intercourse with severely mentally handicapped people).[45] The belief that the criminal law has no place in family relationships could equally be applied to familial violence. At bottom, it is a plea to the wife to put her responsibility to preserve the family unit above her wish to preserve the integrity of her person:

> Spouses have responsibilities towards one another and to any children there may be as well as having rights against each other. If a wife could invoke the law of rape in all circumstances in which the husband forced her to have sexual intercourse without her consent, the consequences for any children could be grave, and for the wife too.[46]

The fact that the victim may suffer as much as, if not more than, the aggressor does not normally inhibit the criminal law from condemning antisocial behaviour, and it will certainly be another factor deterring her from the hasty action which is so much feared. But although hasty action is deplored, so also is the risk that the victim may change her mind, which again has been much favoured as a reason for failing to respond to violence against women in their homes. the evidence on this is debatable, but in any event the fact that some may

40 *R v Clarke* [1949] 2 All ER 448.

41 *R v O'Brien* [1974] 3 All ER 663.

42 *R v Steel* (1976) 65 Cr App R 22.

43 See MDA Freeman, 'But if You Can't Rape Your Wife, Whom Can You Rape?: the Marital Rape Exemption Re-examined' (1981) 15 *Family Law Quarterly* pp 1–29.

44 *Sexual Offences* (1984), para 2.79.

45 *Ibid*, para 9.3.

46 *Sexual Offences* (1980), para 33.

withdraw is no reason to deny the law's protection to those who continue to want it or to the much greater number whose husbands may be deterred by the knowledge that raping their wives would be a crime.

The real reason for opposing a change in the law is the difficulty which many seem to find in believing that it is indeed so dreadful for a husband to rape his wife that he should be called a criminal for doing it.[47] After all, she did once wish to have intercourse with him and may do so again. If they are still living together and sharing a bed, can he not be allowed to use a little persuasion upon her for the sake of their marriage? In the nullity case of *G v G*,[48] Lord Dunedin permitted himself to wish that the husband had used some 'gentle violence' instead of acquiescing in his wife's refusals. In *Baxter v Baxter*[49] the Court of Appeal actually refused a decree because the husband had not insisted, although the House of Lords disagreed.[50]

This argument appears to have caused the CLRC to change its mind between working paper and report. In 1980 a majority thought that wives should no longer be so subject to their husbands or in a position less favourable than that of unmarried cohabitants. Nevertheless, they believed that the consent of the Director of Public Prosecutions (DPP) should be required as check upon prosecutions which were 'not desirable in the public interest'.[51] What they meant by this was not explained. By 1984 all were agreed that the husband's exemption should go once the couple were no longer living together; but as they could not find an acceptable definition of this, they were divided as to whether the law should stay as it is or whether the exemption should be abandoned altogether. A narrow majority favoured leaving it as it is, and even most of those who wished it to go would have required the consent of the DPP to prosecution.

The majority view is clearly based on the perceived need to preserve the unique character of the 'true rape'. Although the Committee will happily contemplate an offence of indecent assault ranging from a small stroke to violent oral intercourse, it finds it hard to contemplate an offence of rape which includes intercourse between husband and wife. Yet if, as the Committee elsewhere asserts, the unique gravity of rape lies in the risk of pregnancy and childbirth, the most serious objection to the marital rape exemption ought to have been apparent. Before the advent of reliable contraception, it could effectively force a wife to bear her husband's children. Even today, unless she is a suitable candidate for oral contraceptives or an intra-uterine device, it allows him to proceed without waiting for her to take the precautions which are safest for women but which he may dislike. This objection may carry little weight with people who see a woman's prime vocation as bearing children, and particularly her husband's children. From the women's point of view, she may indeed have the same ambitions, but she might prefer it if the law left to her the decision as to whether and when. As with the decision to prosecute, however, the law remains curiously reluctant to allow women to take responsibility for their own lives.[52]

47 See Criminal Law Revision Committee, *Sexual Offences* (1980), para 42.

48 [1924] AC 349.

49 [1948] AC 274.

50 See also N Morris and AL Turner, 'Two Problems in the Law of Rape', *University of Queensland Law Journal*, vol 1, 1952–55, pp 247–63, quoted with apparent approval in JC Smith and B Hogan *Criminal Law* (Butterworths, 1978, 4th edn), pp 40–43.

51 *Sexual Offences* (1980), para 42.

52 *Women and the Law*, pp 71–73.

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