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IS A POLITICS OF INSURGENCY POSSIBLE?
A CASE STUDY IN
THE REFORM OF CANADIAN RAPE LAWS

by
George J. Kiefl

Submitted to the Department of Criminology,
University of Ottawa,
in partial fulfillment of
the requirements for the degree of
Masters of Arts
1991



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INTRODUCTION

This is an exploratory study. It is a test of a Brickey and Comack's (1989) suggestion that a promising strategy for studying the role and limits of law as a vehicle of social change lies in Tigar and Levy's (1977) idea of a "jurisprudence of insurgency." Basically, Brickey and Comack suggest that individual cases of legal change should be analyzed in terms of the extent to which the legal change facilitates progressive social change through the development of a jurisprudence of insurgency.

We will take Brickey and Comack's suggestion to heart and apply it to a case of criminal law reform: Canada's rape law reforms of the early 1980s. This reform involved the elimination of rape from the criminal code and its replacement with the tripartite crime of sexual assault (the case selection will be defended in chapter two). As well, given that their idea is a suggestion, the utility of the methodology proposed is also being put to test.

In typical thesis fashion, we will begin our presentation with a review of the literature in chapter one, and a description of the research question and methodology in chapter two. In chapter one, we will briefly discuss the general field of law and social change, and we will develop the two major areas more specifically related to this project: the process and the limits of social change through law. In chapter two, besides identifying the research question and the methodology adopted for this study, we

will defend the case selection and discuss the relevance of the study to criminology.

The next three chapters will trace the case of rape law reform through the following stages: the origins and impetus of reform; the process of legal change; and, the implementation and effectiveness of the legal change. Chapter three will be devoted to an attempt to locate the origins and impetus of the reform movement. The aim is to show the role of the women's movement in the process of rape law reform and to describe the many problems of rape which led to the push to reform rape laws. Chapter four will focus on the process of legal change. We will briefly situate the process of reform and then turn to a description of the many and varied inputs in the formal legislative process of reforming Canada's rape laws. Chapter five will discuss the actual affect of the legal change and will look at the new law in terms of what mechanisms were either put in place or relied upon to translate the legal change into social change. Each of these research chapters will also involve a discussion from the point of view of a jurisprudence of insurgency. That is, we will address our main concern in a piecemeal fashion as each stage of the presentation permits.

In effect, by the end of chapter five, we will conclude the work by addressing the research question (see chapter two), and by going beyond the specific case in discussing methodology and future research.

CHAPTER ONE

LAW & SOCIAL CHANGE: A REVIEW OF THE LITERATURE

*** * ***

INTRODUCTION

This study falls under the umbrella topic of the sociology of law. A major interest in the sociology of law is the relationship between law and social change, and the role and limits of law as an engine of social change. As noted, the further exploration of the idea of a 'jurisprudence of insurgency' in the area of criminal law (which falls within the area of the limits of law as a vehicle of social change) is the reason for this study. As our concern is a specific one within the more general interest of law and social change, our review of the literature will address both general and specific levels.

Towards the goals of familiarity and clarity, we will begin with a few preliminaries in the field of law and social change. Following these preliminaries, and in keeping with the subject matter and organization of this project, the relevant law and social change literature will be summarized and organized around

our two major areas of interest: the process of legal change; and, the limits of social change through legal change.

PRELIMINARIES

The basic subject-matter of law and social change is lawmaking and its ability to bring about desired changes in the social system. Lawmaking is a "very prolific enterprise" which sees "literally thousands of laws enacted each year" (Chambliss, 1986: 27). The abundance and prominence of law, however, is relatively "newly-minted" (Freidman, 1973: 18). With the growth of nation states and the increasing centralization of power over time, the law has become "an increasingly prominent part of modern society as more and more aspects of our lives are regulated and controlled by laws" (Caputo et al., 1989: 1). Canada is no exception: the Law Reform Commission reported in 1986 that there are ninety thousand federal laws regulating Canadian life (cited in Caputo et al., 1989: 1). As the abundance and prominence of law has increased in modern times, so to has an interest in, and the importance of, a sociological study of law (Freidman, 1973: 18-19).

Law: A Sociological Conception

The subject-matter of a sociology of law is "how society affects law and how law influences society" (Brickey & Comack, 1986: 259). However, coming to grips with the term law, especially in terms of how law acts upon society, requires a different, non-traditional outlook. Essentially, as is developed below, a

sociological conception of law differs from the more traditional legalistic conception of law.

In one respect, law is a difficult concept because, as Cotterrell (1984: v) puts it, the law has "two faces." On one hand, the law is understood as a conglomeration, or plurality, of rules and principles. On the other hand, the law is, at one and the same time, a singular entity, or unity. That is, while the law is a plurality of written rules, it is nonetheless an entity in the sense that it exists as something in-itself, an overriding something called 'law.' However, the unity of law becomes real only through the creation, interpretation, and enforcement of specific legal rules. The law, then, is not strictly an independent unity; rather, the life and logic of the law emerges only as it is created, interpreted, and enforced by human actors (see also Smart, 1989).

In another respect, as Evan (1965: 286) explains, the law has two functions: it operates both actively and passively on the societal stage as both an independent and a dependent social variable. As a dependent variable, the law reactively codifies existing social customs and practices. As an independent variable, the law proactively modifies existing social values and patterns of behaviour. In our area of concern, the law's active function--like the face that shows the unity of law--gives the impression that the law is somehow autonomous in its social role (Watson, 1985: 69). Nevertheless, the law is only relatively autonomous: the law, to repeat, only gains its life and logic as it is created, interpreted

and enforced by social forces.

In effect, sociologically, "law is not...an actor in itself, but only an instrument of the human actors whose interests it represents" (Cotterrell, 1984: 70). The law, then, cannot be artificially cut-off from those forces--the human actors--that define and manipulate the form and content of law:

The empirical reality of law--apparently well understood in practice if not in theory--seems...to be that it is a set of resources for which people contend and with which they are better able to promote their own ideas and interests against others (Turk, 1976: 279-280).

Basically, then, a sociological conception of law differs from the more traditional legalistic conception. For the lawyer, "a course of action is properly to be followed because it is in accordance with law" (Watson, 1985: 115). The law, from a legalistic conception, is as a thing-in-itself, a good-in-itself, with a life and logic of its own. For the sociologist, however, the law is not a thing-in-itself, but a product of the human and social forces around which the law emerges and operates. It is never a thing-in-itself, a good-in-itself, but always a means to other ends. As a means to other ends, the law is a "system of action" (Dienes, 1970: 33), a "weapon" (Snider, 1988: 10).

It is a system of action in the sense that it is a location wherein human actors meet in a process of legal definition and interpretation with the goal of advancing and serving certain social interests. It is a weapon in the sense that it serves

certain interests at the expense of other interests and, once these interests are legally reflected, the law offers protections to these interests through the deployment of legal remedies and sanctions. As a system of action or weapon, then, the law is not static, not a thing-in-itself; rather, law is a social process subject to constant interpretation, revision, and change (Dror, 1958-59: 801; Brickey & Comack, 1986: 111; & Ericson, 1987: 29).

In effect, the law is not merely an instrument of the interests of certain human actors. The existing legal system at any one particular juncture may be seen to represent and serve certain interests at the expense of other interests. However, the existing legal system, through the process of legal change, is under constant interpretation and revision. The law, then, is not merely an instrument of power, it is also a social resource--a site or a location--for challenging and changing the interests served by the law. As such, the law is a site of conflict, a kind of social battle-field, wherein social groups are afforded the opportunity to express and attempt to advance their interests through the process of legal change (see Snider, 1979: 5-15; Brickey & Comack, 1989: 315-320).

Legal Change & Social Change

Briefly, as Freidman (1973: 21) points out, there are four logical types of legal change. On one hand, there are two possible points of origin for a legal change: inside or outside the legal system. On the other hand, there are two possible points of impact

for a legal change: inside or outside the legal system.

According to Freidman, then, given that a legal change may have an impact outside the legal system, it is at least a logical possibility that law is a means for bringing about social change. Basically, for this possibility to become actuality, legal change must reach beyond the legal system and have an impact on the social system, on people's lives. Nevertheless, it is also evident from Freidman's (1973: 21) choice of words that not all legal change that reaches out and has an affect on people's lives results in "true social change."

On another level, besides the logical possibility of social change through the law that Freidman discusses, social change through legal change is also common-sense knowledge (Cotterrell, 1984: 48). Being common-sense, it is basically an assumption that the law acts as an engine of social change. This assumption flows out of two characteristics of law: the increasing prominence of law in modern times, and the emergence and growing importance of legislation as a major legal institution.

First, as discussed above, the law has taken on an increasingly prominent role in society as more and more aspects of our lives are regulated and controlled by law. This increasing prominence reflects the simple fact that society is more and more willing to rely on law to regulate and control social behaviour; as a result, people view law as an independent variable capable of acting upon society (Cotterrell, 1984: 48; & Dror 1970: 553). Second, the increasing prominence of law coincides with the growing

importance of legislation as a legal institution. As Aubert (1969: 11) argues, the act of conscious, calculated lawmaking leads directly to the belief that law is "a vehicle of social engineering."

Social Change: A Working Definition

While there is reason for believing that the law is an available mechanism for achieving social change, the sociological literature has nevertheless spent considerable effort working out the meaning of social change. A basic distinction--not always adhered to, however--is drawn between adjustment-type changes and more deep-rooted changes. That is, as Freidman argued, while it is clear that at the most basic level legal change must affect people's lives, not all such changes are considered "true social change."

By way of example, in the economic sphere, changes in the interest rate would represent a mere adjustment to the social system and not real social change (Cotterrell, 1984: 51). Adjustments of this sort do not attempt to change the basic economic structure of society, they merely attempt to increase or decrease the level of economic activity within the existing structure. Alternatively, changes relating to the economic structure, such as the shift from feudalism to capitalism, would

represent social change (Tigar & Levy, 1977).¹

While it may be common-sense knowledge that the law acts upon and affects people's lives, social change has a much more specific meaning beyond adjustment-type changes. Changes in the basic patterns of social relations is what is meant by social change. Social change, in effect, refers to change that occurs in the existing social structures which bring about corresponding changes in the basic patterns of social relations (see Cotterrell, 1984: 51). So, in examining the assumption that the law affects social change, the sociological question is whether or not the law is available as a means for achieving changes that go beyond mere adjustments and affect the existing social structures.

Evaluating Social Change

In evaluating legal change from the perspective of social change, there are two basic options that arise out of the use of two different but related concepts: social change, and social reform. While change is a neutral term, the concept social reform carries with it the notion of progress. As such, it has been argued that while change can be observed and measured in a purely objective fashion, reform is a more subjective judgment (see Ericson, 1987; & Fattah, 1987). Working definitions of the more subjective social reform have nevertheless been advanced in the

¹ It is in this work, *Law and the Rise of Capitalism* (1977), that Tigar & Levy argue that radical social change through the law (a jurisprudence of insurgency) is not only possible but historically real.

literature:

reform...[is defined as]...an improvement in the situation or life chances of the less privileged and powerful vis a vis the more privileged and powerful (Snider, 1979: 2).

Working from such a definition, it is possible to view initiatives in such areas as health care and minimum wages as being reformatory in the sense that these kinds of changes have improved the life chances and life conditions of a great number of people (Snider, 1986: 188). The judgment that these initiatives constitute reform, however, derives from the values or positions adopted, and evaluation of the reformatory function of such changes would have to deal with the desired effects of legal change from the perspective of those seeking change.

THE PROCESS OF LEGISLATIVE CHANGE

Typically, the legislative process is taken to refer to the various stages of governmental activity in drafting, tabling, debating and finally passing bills through parliament (Canada, 1987). However, limiting the process of legislative change to the activities of members of parliament is inappropriate to a sociological study of law. To return to Freidman's scheme, legal change may originate either inside or outside the legal system. The process of legal change, then, must be taken from its point of origin which, in many cases, will lie outside of the formal institutional mechanisms of legal change. As well, beyond the

formal institutional procedures, since one of the aims of legal change is social impact, some sort of means will often be adopted or relied upon in order to help ensure the desired social effect is achieved. In effect, it is possible to see legal change as comprised of three sub-processes:

- 1) the origins of and impetus for reform;
- 2) the formal processes of legal change; and,
- 3) the translation of legal change into social change.

The Impetus for Legal Change

From the perspective of a sociology of law, there exists one simple prerequisite that must be fulfilled before any attempt to change the law takes place: a dissatisfaction with extant social conditions (Freidman, 1973: 28; Snider, 1979: 15; & Watson, 1985: 110-114). In other words, one needs a perceived social problem before legal change will be sought as a solution to the problem. In effect, while the point of origin of legal change may come from within or without the legal system, only through pressures--social actors seeking to influence the law--will legal change be undertaken.

Social problems, however, are not necessarily based in objective social conditions:

social problems are fundamentally products of a process of collective definition instead of existing independently as a set of objective social arrangements with an intrinsic makeup (Blumer, 1971: 298).

That is, social problems exist not because of objective reality but because they are successfully defined as such; social problems are "a kind of activity...claims-making activity" (Spector & Kitsuse, 1987: 73).

As an activity, a social problem is typically "a focal point...for divergent and conflicting interests, intentions, and objectives," which can be seen in terms of a "career" (Blumer, 1971: 301). The emergence of a social problem occurs as the issue is successfully orchestrated to gain public attention. The problem gains legitimation by transforming initial recognition into wider societal attention. With increasing social consciousness, the problem becomes an object of discussion and people who seek change will be mobilized into action, as will those with opposing interests. Negotiation regarding the appropriate solution to the problem may lead to an official remedy or plan of action. Then, the adopted plan of action will be implemented, though this does not necessarily mark the end of the life-cycle of a social problem.

With respect to the early stages of the career of a social problem, evaluating the success of claims-making activities has led to a distinction in the study of social problems. Best (1989: 245-249) differentiates between "strict constructionists" and "contextual constructionists." Strict constructionists argue that social problems should be viewed without any consideration of the objective conditions behind claims-making activities. Contextual constructionists, however, argue that knowledge about the objective social conditions behind claims-making activities may help explain

the success and/or failure of social problems.

Regarding the later stages of the career of a social problem, it is clear that part the life-cycle is the creation and implementation of a solution to the problem. Given the increasing prominence of law in modern times and the corresponding assumption that law is a viable mechanism of social change, it should not be surprising that claims-makers often seek solutions in the form of new laws (Best, 1989: 189). Not surprisingly, "statute law is now the main vehicle of fundamental legal change" (Watson, 1985: 28).

The impetus for legal change, then, lies in the successful identification and orchestration of a social problem. While interested groups may or may not employ objective conditions to defend their position that a serious social problem exists, they will often seek a legal 'solution' to the problem as part of their strategy for dealing with the problem. As such, given that the law is part of the social structure for resolving problems, the law is not merely an instrument of the ruling class but also a site of struggle where other social classes may bring forward social problems and attempt to resolve them in part through change in the legal system (see Snider, 1979: 5-15; Brickey & Comack, 1989: 315-320). As well, as noted, the major arena for dealing with social problems through the law is the legislature.

Formal Legislative Process

In Canada, the criminal code--the area in which our case of rape law reform falls--is a matter of federal jurisdiction. Change

to the substantive criminal code, as a result, must take the form of legislative change and must occur at the federal level. The formal process of federal legislative change is governed by a fairly rigid set of procedures (see Canada, 1987). The mechanism used to bring proposed changes to the attention of the legislature is the "bill," which is defined as "the draft of a proposed Act of Parliament submitted to parliament for consideration and adoption." To become law, all bills must pass through three readings in both the House of Commons and the Senate.²

The first reading is nothing more than the tabling of the bill, without formal consideration or debate, so that it may be printed and distributed. At second reading, the bill is debated in the House. After successful debate, ending in approval in principle, the bill is referred to committee for detailed review. The committee may accept briefs and/or hear witnesses in the process of review, and may make amendments to the bill as it sees fit. The committee will then report to the House of Commons with its findings and amendments. At this report stage, further amendments may be proposed by the Minister responsible for the bill or by any other member of the House. Such amendments may be debated and voted upon, and the bill will be agreed to either as reported by committee or as amended by the House. Third reading allows for a last consideration of the final version of the bill in the House

² A bill may be commenced in either the House of Commons or the Senate. In the case at hand, the reform of Canada's rape laws originated in the House of Commons, which is the more typical practice.

with debate, which, if successful, will result in the bill being passed. Once passed by the House, the bill is sent to the Senate where it undergoes the same three stages. After passing through the Senate, the bill is officially passed and becomes law either through Royal Assent or proclamation.³

That in a nut-shell, is the formal process of legislative change in Canada. Now, to reiterate, the legislature is not only a major legal institution but also one of the key mechanisms through which legal solutions to social problems are implemented. Towards this objective, as Dienes (1970: 36) argues, for legislation to provide effective solutions to complex social problems, the process of legislative change must be an informed and creative activity. Looking at the formal process--especially at second reading--shows that the procedures in place do allow for a number of inputs from a number of sources, including sources from inside and outside the legal system. These mechanisms allow parliament the opportunity to be informed in their task of legal change, and offers outsiders an opportunity to have a voice in the legal change process.

In terms of formal government-sponsored inputs, we find in Canada two primary sources of legislative advice in the area of criminal law reform: the Law Reform Commission of Canada, and the Criminal Law Review panel of the Department of Justice (see Caputo et al., 1989: 123). The Law Reform Commission of Canada was

³ In Canada, the Senate, or upper-house, is not an elected body of government. As a result, the Senate only rarely makes amendments to bills passed by the House of Commons.

established in 1971 with the mandate "to engage in both the technical task of systematizing and rationalizing the law and the broader sociopolitical task of reform" (Hastings & Saunders, 1987: 128). In terms of non-governmental inputs, any number of interest groups can be represented in the process of legislative change. For example, the women's movement--the interest group in our case study--represents an interest group that actively lobbies for legal change (see Boyd & Sheehy, 1989: 255).

Assuming that a social problem is successfully orchestrated and brought to the stage of legal change, the legislature may, through its formal procedures, hear from a number of sources in an attempt to come to an informed position--or at least give this impression--and to provide an informed and creative solution to the problem.

Effective Legal Change

There is a difference, however, between law-as-written and law-in-practice (Smart, 1986: 117). As a result, an effective legislature needs to understand how legal change operates, and what sort of mechanisms need to be supplied in order to ensure that the legal change has its desired effect.

Legal change operates on two levels. In Evan's (1965: 286) terms, law as an engine of social change operates on the institutionalization and internalization levels. Similarly, Snider (1988: 31) sees legal change as operating on the instrumental and symbolic levels. In essence, Evan and Snider put forward similar

arguments: the institutionalization or instrumentalization level refers to the implementation of new law with provision for its enforcement; the symbolic or internalization level refers to legal change acting upon not only the legal status but also the social or moral status of the behaviour in question.

The first level, instrumentalization/institutionalization, however, is problematic for the simple reason that words in-themselves do not change the legal system. Indeed, as suggested by King (1986: 203), legal change often "simply misleads us into believing the system is responsive" (see also Smart, 1986: 117). In other words, there is a difference between law-as-written and law-in-practice, the one does not guarantee the other. In order to translate the legal change into social change, the legal change must provide "remedies sufficiently attractive to motivate the victim of illegal practices to seek the aid of the legal system" (Cotterrell, 1984: 57). As well, "successful reforms have all been bureaucratized, and thus have vested interests...[in place]...to defend them" (Snider, 1986: 189). For the law-as-written to be translated into law-in-practice, then, the law must provide incentives for its invocation, and provide the concrete means--the human, economic, and physical resources--to respond to the demands of the victims and complainants who invoke the law as part of the solution to the problems they experience.

For the symbolic/internalization level to be effective, it must change not only the legal status but also the social or moral status of the behaviour in question. In effect, as Evan (1965: 287-

288) argues, if a law is enacted in the face of any "appreciable resistance," then the legal system needs to undertake to transform "forced compliance" into "voluntary compliance." In order to gain voluntary compliance--that is, internalization of the value(s) implicit in the law--the law must perform an educational function.

While the law operates on these two levels, it can bring about the desired effect either through direct or indirect means (Dror, 1958-59: 797). Law can bring about change by directly affecting basic social institutions. For example, the author argues that laws designed to prohibit polygamy aimed to change basic patterns of behaviour and have had a direct impact on society. Law, however, can also bring about change by acting indirectly with social institutions. Here, for example, the author argues that a law which legislates compulsory education is an indirect means of achieving social change through education.

THE LIMITS OF SOCIAL CHANGE THROUGH THE LAW

There is no clear consensus on the value of law in inducing true or structural-type social change. However, based on Tigar and Levy's (1977) study, there is reason to believe that radical social change through the law is a concept worthy of further investigation.

On the Limited Side

At one extreme, it would appear that the legal system is an extremely limited resource in bringing about social change.

Hastings and Saunders' (1987) study, mentioned above, argues that the Law Reform Commission of Canada has abandoned its task of social reform and has limited itself to the simpler task of technical revision of the law. The authors locate this lack of willingness in the legislature's refusal to act on the issue of social change:

the Canadian state is unlikely to want to tolerate much more from the LRCC than an exercise in technical reform. This contention is confirmed by the failure of the LRCC to get its proposals through parliament or to provide the substantive legal reforms it set out to accomplish. The problem is simply that the state is unwilling to risk real debate over issues fundamental to the social structure and class composition of society or to allocate resources to projects of social reconstruction which would redress structural inequality (Hastings & Saunders, 1987: 142).

Thus, on a practical level, it would seem that government limits itself to technical, or adjustment-type, change.

On a theoretical level, Chambliss (1986: 28-32) similarly argues that the state is a limited resource for seeking social change. According to Chambliss, every social system contains its own contradictions which give rise to conflicts. In the capitalist social system, for example, the basic contradiction is between the opposing interests of labour and capital. The conflicts that arise out of this basic contradiction, in turn, provide the state with a

basic dilemma: how to overcome the conflicts in the system. Notice, however, that it is the conflicts, and not the basic contradiction, that the state faces. The state, as a result, is often a limited social change resource: it is limited to minor social changes designed to repair superficial problems (i.e., symptoms) rather than root problems (i.e., the underlying source).

On the Social Change Side

At the other extreme, Snider (1986) has argued that social reform is a practical reality: changes in areas like health care and minimum wages have improved the life chances and life conditions of a great number of people. Thus, at least from the more subjective judgement of social reform, it is possible to view legal change as a mechanism--although Snider would argue a limited mechanism--for bringing about tangible, resulted oriented change in existing social conditions.

As well, Tigar and Levy (1977: 310-330) have expressly argued that the law can be used to bring about true, structural social change. In effect, in their study of the transformation from feudalism to capitalism, Tigar and Levy coined the phrase "jurisprudence of insurgency" to describe the role played by law in facilitating the emergence of capitalism at the expense of the feudal system.

In their book, Tigar and Levy set out "to trace the origins and development of our present legal system in terms of the struggle between a rising capitalist society and a declining feudal

structure" (Emerson, 1977: vii). The authors studied a period that begins in the eleventh century when the medieval bourgeois, or merchant, was regarded as a revolutionary in the eyes of the feudal lords, traces the struggle of the merchant class to gain concessions and laws favourable to trade and profit, and ends eight hundred years later with the rise to power of the bourgeoisie. The underlying theme of the book--the explanation for the bourgeois rise to power--is that interested parties can work through the law to change the legal system, alter existing social relationships, and transform the existing social structure.

Essentially, the term "jurisprudence of insurgency" refers to:

a certain kind of jurisprudential activity in which a group challenging the prevailing system of social relations no longer seeks to reform it but rather to overthrow it and replace it with another" (Tigar & Levy, 1977:285-286).

Thus, based on this definition and the fact that the transformation from feudalism to capitalism is partly explained by the jurisprudence of insurgency, radical social change through the law is not only possible, but historically real.

A Modern-Day Jurisprudence of Insurgency?

For Tigar and Levy (1977: 284-287), jurisprudence refers to a process in which legal ideology is created and elaborated. Legal ideology is understood as an overall statement about the rule of

law in a particular place and time. Legal ideology expresses the aspirations, goals, and values of a social group. The many and varied specific legal rules within a legal ideology lock into words the rights and duties of the social group. Laws, however, do not only express particular rights and duties, they also provide the means for resolving disputes and for enforcing and protecting the stated rights and duties. Accordingly, where there exists a variety of social groups with different aspirations, goals, and values, there will be a number of different and often conflicting legal ideologies. Nevertheless, the law at any particular juncture is the legal ideology of the ruling class, the group that possesses state power.

Legal change, in this view, is a product of conflict between social groups seeking to turn the institutions of social control to their own purposes and to maintain a specific system of social relations. The potential for a jurisprudence of insurgency, then, is always present by virtue of the fact that the law represents the goals, aspirations, and interests of the ruling class, which will not coincide with the goals, aspirations, and interests of all groups in society. In effect, contradictions in interests, because the ideology of the ruling class gets frozen in the law, are the ever-present opportunities that allow insurgent groups "to win partial and temporary victories within the parameters of existing law" (Tigar & Levy, 1977: 288).

The book, then, and the idea of a jurisprudence of insurgency, poses a question of relevance to the present-day issues

of social reform, and provides some insight regarding the means for employing a jurisprudence of insurgency:

How then can law be utilized within the existing system to effectuate social change? Tigar and Levy make clear that our system of law lends itself to this use. The rights asserted under the prevailing legal ideology...are stated in universal terms; they may be claimed by all elements of society. There are necessarily gaps and uncertainties in the system, which make for a certain flexibility. As the original factual basis for the law changes, the law gets out of joint and develops contradictions, which call for resolution by change....A rising group can take advantage of these features of the legal system and develop what Tigar and Levy call a 'jurisprudence of insurgency' (Emerson, 1977: viii).

Nevertheless, it must be noted that Tigar and Levy did not intend to suggest that one specific legal change initiative could, by itself, bring about a completely new legal ideology with new social relations and new social structure. Do not forget that the authors developed the idea of a jurisprudence of insurgency based on a study that spanned eight hundred years. Indeed, the authors suggest that the limits of the dominant ideology must be tested through legal change in order to discover the limits of elasticity in the dominant legal ideology. This limit testing would represent one stage, a necessary beginning, in the process of a jurisprudence of insurgency. Therefore, while a jurisprudence of insurgency is a

long process of legal change designed to bring about radical social change, specific legal changes may be analyzed in terms of their insurgent value--in their testing the limits of the dominant legal ideology, and in gaining partial and temporary victories within the extant legal system.

Basically, this is the strategy espoused by Brickey and Comack (1989: 323-325). The authors argue that the concept of a jurisprudence of insurgency represents a promising criterion for carrying out an evaluative study of specific legal change initiatives. Towards this goal, the authors attempt to provide a mechanism for identifying which kinds of reforms could be considered insurgent in terms of their orientation or consequences. They offer the following three insights.

First, one type of legal change aims at gaining equal application of the law across such variables as class, race, and gender. However, this kind of orientation is limited, at best, because it does not bring into question the very structural basis of unequal social relations. That is, the equal application of the laws that serve some interests at the expense of others fails to question what interests are being served and how those interests are protected by the law.

Second, another type of legal change aims at altering the content of law. For example, the authors argue that the criminal law could be reformed to reflect real dangers by making all harmful acts criminal, regardless of the class or status of the perpetrator. Such reforms would help develop a jurisprudence of

insurgency in that they aim to push the rule of law to its full limit by holding all people accountable to criminal sanction. That is, by addressing the content of law it is possible to bring into question the interests being served by those laws, and this is a step in the direction of insurgency by addressing the structural protections afforded those whose interests are served by law.

Third, the authors argue that a jurisprudence of insurgency must also be capable of addressing the manner in which legal issues are handled in the courts. In effect, they argue that the law addresses legal issues strictly in terms of individual problems, an approach which negates both the collective nature and the political aspects of the problem in question. A jurisprudence of insurgency would involve altering the manner in which the legal system defines the parameters of legal issues by pushing the system to deal with the underlying social problems that give rise to the individual problems which surface in legal disputes.

The concept of a jurisprudence of insurgency, then, refers to both the process of affecting legal change, and to an evaluative criterion for judging the effectiveness of legal change initiatives. In terms of process, conducting a jurisprudence of insurgency closely resembles the activities of a "moral entrepreneur" (see Cohen, 1980). However, the two concepts differ in a number of ways. First, as noted, the concept of a jurisprudence of insurgency is an evaluative tool. Second, while a moral entrepreneur may seek to change the moral status of an act through a variety of avenues, a jurisprudence of insurgency must

seek change through the legal system. Third, while a moral entrepreneur could aim at any kind of change, the concept of a jurisprudence of insurgency refers to changes geared towards a more humanistic and socialist society (see Emerson, 1977; & Tigar & Levy, 1977).

SUMMARY

In our preliminaries, we developed a working model that understands the law as a social resource. As a resource, the law offers social groups the opportunity to access the legal system and to attempt to change that system to their own interests through the process of addressing social problems. On both the common-sense level and the theoretical level, there is reason to believe that the law may be available as a mechanism of social change. On the common sense level, the increasingly prominent and increasingly legislatively oriented legal system lends itself directly to the belief that lawmaking is a means for conscious, calculated manipulation of the social system. On the theoretical level, it is at least possible for legal changes, when and if they move through and beyond the legal system, to have an affect upon people's lives and thereby impact social change.

From the viewpoint of a sociology of law, social change has a much more specific meaning than the simple theoretical requirement that the legal change must somehow have an effect on people's lives. That is, social change refers to structural changes that provide for change in the basic patterns of social relations.

However, the effectiveness of legal change initiatives may be examined from not only a purely objective, value-neutral perspective (i.e., working from the concept of social change) but also from the more subjective, perspective-driven viewpoint of those seeking the change (i.e., working from the concept of social reform).

In our discussion of the process of legal change, and in keeping with a sociological model of law, we identified three sub-processes: the origins and impetus for change; the formal process of institutional legal change; and, the implementation and operationalization of the means for translating the legal change into social change. The origin of legal change may arise from any number of sources, either inside or outside the legal system; nevertheless, the impetus for legal change lies in a dissatisfaction with the extant social conditions (i.e., a social problem). Social problems, when successfully constructed, are often addressed through the mechanism of legislative change. The formal, institutional legislative process allows for, and seeks inputs from, a number of sources--including both quasi-governmental and non-governmental sources. In the effort to effectively translating legislative change into social reality, legal change may act either directly (i.e., on a social institution) or indirectly (i.e., through a social institution), but must nevertheless provide incentives and resources for implementing the legal change.

Practically, there is some evidence to suggest that the state is unwilling to undertake social reform through legal change.

As well, theoretically, given that it is only symptoms of more deep-rooted social problems that manifest themselves, the state is limited to addressing only the symptoms of, and not the roots of, social problems. Nevertheless, Tigar and Levy have expressly argued--through the concept of a jurisprudence of insurgency--that the law can be, and historically actually has been, used to bring about changes to the very foundations of social structure.

The concept of a jurisprudence of insurgency is, at least theoretically, applicable in the present because contradictions between the existing legal system and specific legal rules afford the possibility for groups to test the limits of legal change and to win partial and temporary victories in attempting to bring about change. While the criteria for evaluating legal change from the perspective of a jurisprudence of insurgency are not clearly identified, legal changes that aim to alter the content of law or the manner of handling legal disputes are more promising than changes that aim at altering the application of the law.

CONCLUSION

Our review of the literature has by no means been exhaustive with respect to the many and varied sociological interests in law; rather, we have attempted to assemble a brief summary of the literature respecting the limits of social change through law.

It is clear, not only from the literature but also from the prominence of law, that the law plays an important role in today's society. With an increasing reliance on legislation, there is an

understandable willingness to see and treat the law as a mechanism for deliberately acting upon society. However, a review of the law and social change literature reveals a degree of ambivalence surrounding the availability of law as an engine of social change:

law both facilitates change and is an obstacle to change...There is an ambivalence about resorting to legal reform to promote change, yet any attempts to dismantle previously hard-won reforms are resisted strongly. Legal reform is both valued and undervalued as a means of achieving social change" (Smart, 1986: 117).

In sum, the literature gives the impression that the law does indeed act upon society (i.e., it does meet the basic criterion of having an effect on people's lives); however, the availability and limits of true social change through legal change is a matter of dispute.

Related to this debate, the present study takes Brickey and Comack's (1989) suggestion that a promising strategy for studying the limits of social change through law lies in the idea of a jurisprudence of insurgency, and undertakes to study one specific case of criminal law reform. The research question and methodology, as well as the basic scheme for analyzing the case will be discussed in the next chapter.

CHAPTER TWO

THE STUDY:

PROBLEM & METHODOLOGY

* * *

INTRODUCTION: IS THIS CRIMINOLOGY?

Traditionally, the subject-matter of criminology has been crime, criminals, and the criminal justice system. The concern with crime has focused on the causes of crime and the appropriate response required to reduce the rate of crime. Given that a large number of theories regarding the causes of crime have focused on the perpetrator, a major concern has been with the criminal's make-up and history, and with discovering and implementing the necessary remedy to his (traditionally not her) criminogenic problems. Similarly, the concern with the criminal justice system has been with improving the effectiveness and efficiency of the state's anti-crime apparatus as the chosen means for addressing the individual problems of criminals and the overall problem of reducing crime.

The issues being addressed in this study do not fall within the scope of traditional criminology. In essence, traditional criminology starts with an uncritical acceptance of crime as being

simply that behaviour prohibited by the criminal law, and undertakes to investigate the causes and remedies of criminal behaviour in an effort to reduce the level of crime. Over the last couple of decades, however, some criminologists have argued that the very concept of crime is problematic. No longer is crime simply taken to be prohibited actions; rather, the role of criminal law and the function of the criminal justice system have increasingly come under scrutiny. The criminal law and the criminal justice system have been and continue to be investigated not strictly in terms of their effectiveness in reducing crime, but also in terms of what interests they advance and serve (see e.g., Reiman, 1984: & Hopkins, 1986).

Criminologists working in a non-traditional approach have argued for a new orientation:

Criminological inquiry should focus on the agents of social control, on the processes by which laws come to be formulated and enforced....The proper role of the criminologist is to seek a comprehensive understanding of the larger political economy in order to promote a revolutionary transformation of society, one that would eliminate the structural causes of deprivation, greed, and misery (Ratner, 1987: 7).

In light of these changing interests, this study addresses some of the issues of the so-called "new criminologies" (see also Fleming, 1985). More specifically, to use Ratner's terminology, the study touches upon the processes by which laws come to be formulated as

well as the possibility of promoting a revolutionary transformation of society through the legal system. We will look at these areas by examining the process of criminal law reform, and by exploring the limits of social change through the concept of a jurisprudence of insurgency.

IN DEFENCE OF THE CASE STUDY

The means chosen for investigating these two areas of the sociology of law is a case study: more specifically, the focus will be on Canada's rape law reforms of the early 1980s. In terms of the process of legal change, we will look at, in effect, the how, when, and why of the move to reform the law. In terms of the limits of social change, we will explore and develop the applicability of the concept of a jurisprudence of insurgency to the reform of Canada's criminal laws surrounding rape.

One reason for choosing this case study is personal familiarity. I am somewhat familiar with the case because of the widespread attention it has received in academic journals, and because I have studied in the area of women's issues in criminal justice. Being familiar with the case and with the literature should prove advantageous because our purpose is to go beyond normal legal change evaluations and look at the case in terms of the concept of a jurisprudence of insurgency.

Another reason for adopting Canada's rape law reforms is that the nature of this case suits the orientation of the project. One aspect of the case is especially important: the reform of rape

laws is directly relevant to women, an identifiable interest group. Rape laws "were among the first targets of feminists" seeking to change laws in order to address the concerns and interests of women (Snider, 1988: 25). Indeed, "women have led the fight in recent times against oppression and for the establishment of a just and equitable society" (Caputo et al., 1989: 255). The nature of the case, then, because it involves an interest group seeking to influence the form and content of legislation, suits our purpose: we are interested in the ability of people outside the legal system to influence the form and content of law as a means of achieving social change.

A further reason for selecting the case deals with the nature and scope of this study. This study adopts the suggestion made by Brickey and Comack (1989) that the concept of a jurisprudence of insurgency be further investigated in terms of individual legal change cases. Thus, one specific case was chosen in order to help work out and develop the claim that individual cases may be evaluated in terms of their insurgent value. It should be noted, however, that Brickey and Comack are not alone in arguing that individual case studies will advance the literature with respect to the process and limits of legal change (see also Snider, 1979: 12).

Lastly, given that part of the interest behind the study is to look at the effectiveness of the legal change in terms of social change, it is necessary that there be a time lapse between the legal change and the point of study of the change. In the case at

hand, approximately eight full years have elapsed since the legal change.

THE RESEARCH QUESTION

The study focuses on two major areas:

- (1) the process of legislative change, specifically criminal law reform; and,
- (2) the limits of social change through law, specifically the development of a jurisprudence of insurgency.

In other words, the goal is to investigate the conditions under which the legislature will undertake the change demands of an interest group, and to look at the factors that foster and/or hinder the development of a jurisprudence of insurgency through the criminal law.

Essentially, this is an exploratory study that aims to further explore and test Brickey and Comack's (1989) suggestion. There is one over-riding research question:

"Is a Politics of Insurgency Possible through the Criminal Law?"

Brickey and Comack's question--Is A Jurisprudence of Insurgency Possible?--has been adapted slightly to reflect the specific nature of our study. The word 'politics' is chosen in place of the word 'jurisprudence' because the study looks specifically at a case of law reform that originated in the legislature (rather than through the judiciary), and the legislature is a political body with political interests. The word 'possible' is retained since, as developed in chapter one, we should not expect a single case alone

to bring about insurgent change. Rather, the case should be looked at in terms of its testing the limits of the dominant legal ideology and in terms of its gaining partial and temporary victories within the extant legal system. The word possible, then, reflects the fact that it is unreasonable to expect insurgency in any one case and that the more appropriate approach is to look at the case in terms of its promoting and developing a jurisprudence of insurgency. Lastly, we add the phrase 'in the criminal law' simply because the case is one of criminal law reform, which may prove to make a difference in seeking social change through the law and in developing a jurisprudence of insurgency.

METHODOLOGY

To begin, the methodology adopted herein flows from the basic suggestion made by Brickey and Comack (1989) that individual legal change studies should view such initiatives from the perspective of a jurisprudence of insurgency. It is only fair, however, to make it clear that Brickey and Comack did not fully spell out the appropriate methodology for such an undertaking. Rather, they argued that the concept provided a promising strategy for assessing the availability and limits of law in bringing about humanistic/socialist change through legal change. In part, then, the methodology herein adopted is being put to test and this will be discussed as we close out the study in chapter five.

There are two general strategies available for undertaking a study concerned with the role of legislation as an engine of

social reform. On the one hand, legislative change can be viewed in terms of a static conception of legal progression; on the other hand, legislative change can be viewed in terms of a dynamic understanding of the social process of law. In terms of the first strategy, legislative change can be understood simply as a movement from one static law to another static law. In this sense, it is possible to take a 'snapshot' of the law, compare this picture to a second picture of altered law, and view legal change strictly in terms of differences between the two. Alternatively, legislative change can be understood in terms of the social process of law reform. In this sense, it is possible to delve into the dynamics of social redefinition of law, and to analyze the new law in terms of the social actors and social influences that led to the specific form and content of the new law.

As suggested in the literature, from a sociological viewpoint, looking at legal change as a social process--a system of action--would be the more appropriate method. That is, legal change is a dynamic social process that involves much more than simple rewriting of law and should be looked at and studied as such. Nevertheless, the static legal progression is important: the origins and impetus for change will follow from a dissatisfaction with a specific law and will progress through to another altered, static picture of law. The static legal progression is important because these snapshots provide landmarks for both the original problem and the negotiated legal solution, around which the process of legal change can be situated and understood.

This study will combine these strategies. In effect, we adopt the traditional before-and-after evaluation method in order to be able to look at the impact of the legal change. In carrying out this pre-post strategy, however, we will be guided by our evaluative criteria: a jurisprudence of insurgency. We are not simply interested in the effects of the legal change, we are interested in the process of change from the point of view of conducting a jurisprudence of insurgency, and we are interested in the kind of effects generated by the legal change. That is, the static before-and-after look at the reform will be enhanced by a dynamic view of the process of change in order to get at both levels of interest in terms of a jurisprudence of insurgency.

Thus, the methodology behind this study is an evaluation of both the process and outcome of the reform guided by the concept of a jurisprudence of insurgency. The general plan is to take before-and-after snapshots of the law and, using these pictures, to reconstruct the processes of legal change. The purpose is twofold: to evaluate the process of legal change in terms of conducting a jurisprudence of insurgency; and, to evaluate the actual insurgent value of the case at hand.

In effect, as developed in chapter one, we will look at our case in terms of the three sub-processes of legislative change: the origins of and impetus for change; the actual process of legislative change; and, the mechanisms and effectiveness of translating the legal change into social change. Towards this goal, we will rely on the available literature and the official

documentation surrounding the reform of Canada's rape laws. As such the study represents a critical review of the literature aiming to further develop the concept of a jurisprudence of insurgency.

Data Sources

Chapter three, dealing with the origins of and impetus for change, will employ the available literature to locate and situate the origins and impetus for reform and to develop the general history of western-world rape laws. As well, Canadian statutes will be researched to briefly develop the history of Canada's rape laws, including our beginning snapshot of Canada's pre-reform laws of rape.

Chapter four, concerning the process of legislative change, will rely on official documentation--minutes, bills, submissions--to develop the process of, as well as the inputs into, the reform of rape laws.

Chapter five, dealing with the mechanisms for and effectiveness of translating the legal change into social change, will employ official documentation and the new law in order to identify the mechanisms that were created and/or relied upon to translate the law-as-written into law-in-practice. As well, we will use the available literature to come to terms with the actual effect of the legal change on the societal stage.

Lastly, by way of reminder, the entire reconstruction of Canada's rape law reform will be viewed, as each sub-process stage permits, from the perspective of a jurisprudence of insurgency. In

this fashion, by the time we arrive at the end of chapter five, we will be afforded the opportunity to address our research question.

THE SCHEME OF ANALYSIS

Basically, then, the methodology allows us to reconstruct an entire case of legal change. While we focus on process, our interest lies in the limits of social change through legal change. The limits will emerge out of our development of the process and will be discussed, as noted, in a piecemeal fashion as each stage of the process permits. There is really no way to discuss the limits of legal change--including the promotion and development of a jurisprudence of insurgency--without investigating the process of change in order to identify who sought what, what was implemented, and what was achieved.

The study will look at social change through legal change from the perspective of those women who organized around the issue of rape and who sought a legal resolution to the problem of rape. Since we are working from the perspective of those seeking change, we will take a social reform viewpoint rather than the more value-neutral social change perspective. It should be clear from our review of the literature that in attempting to judge any specific case of legal change in terms of a jurisprudence of insurgency, it is necessary that the reform be looked at from the perspective of an outside group seeking to change the law to serve their own interests. Hence, the method of investigation as well as the adopted method of evaluation are suitable to the aims of the

research.

More specifically, the scheme of evaluation will look at the case on two levels, from three areas of interest. The three areas of interest are:

- (1) the process of reform;
- (2) the legal change in-itself; and,
- (3) the translation of legal change into social change.

The two levels of analysis of the case are:

- (1) the formal/symbolic level; and,
- (2) the actual/instrumental level.

In effect, we aim to come to conclusions regarding the process of criminal law reform, the formal legal change in the criminal law of rape, and the actual effect of the change on the societal stage. All will be viewed from the perspective of a jurisprudence of insurgency.

The adopted methodology should allow for this kind of analysis of the case. The mechanical focus of the study is on the entire process of reform. As discussed above, there is really no way to discuss the limits of legal change, including the concept of a jurisprudence of insurgency, without investigating the process of change in order to identify who sought what, what was implemented, and what was achieved. By focusing on process, we should be able to look at the case in terms of the process of conducting a jurisprudence of insurgency and look at whether or not our interest group conducted such an activity and, if so, to what degree.

...continued

FIGURE ONE:

EVALUATION SCHEME: IS A POLITICS OF INSURGENCY POSSIBLE?

		LEVELS OF EFFECT (insurgency?)	
		Formal/Symbolic Level	Actual/Instrumental Level
C H A N G E L E V E L S	Process of Reform	?	?
	Legal Change	?	?
	Social Reform	?	?

FINAL REMARKS

Lastly, before we turn to the study, I would like to make a few remarks regarding implications and provide a brief disclaimer.

By way of a disclaimer, this study undertakes to further develop the non-traditional criminological research with respect to the role of law in social transformation. This study, then, does not set out to investigate traditional criminological concerns. We could have studied the reform of rape laws from a more traditional criminological perspective by looking at the reform of rape laws in terms of its effectiveness in such areas as: reducing the rate of rape; enhancing the arrest and/or conviction rates of rapists; changing the average length of sentence for rapists; or, reducing the rate of recidivism of rapists. While some of these objective outcomes may emerge in our evaluation of the effects of the legal change, these kinds of research interests will not be specifically addressed herein. The aim is not to evaluate the change in rape laws to enhance the efficiency and effectiveness of the criminal law and the criminal justice system to deal with the rapist; rather, the aim is to evaluate the potentiality and actuality--the value and limitations--of the criminal law to change in response to the interests and concerns of the real and potential victims of rape.

Regarding implications, the study hopes to contribute to the fields of criminology and the sociology of law. Both the sociology of law and the (non-traditional) criminological literature stand to

be enhanced through an investigation of the role and limits of social reform through change in the criminal law. Furthermore, at the academic level, this study will hopefully contribute to the development of an appropriate methodology for further studying the concept of a jurisprudence of insurgency. At a policy level, this study is also important to both public and private interests. Given the increasing prominence of law in modern times and the emergence of legislation as the major mechanism of legal change, the outcome of this study with respect to the value and limits of social reform through legal change should prove valuable to government policy makers and outside interest groups seeking to bring about social change. Along the same lines as the importance of the study at the policy level, the study should prove important at a practical level. Given that government and interest groups do undertake legislative changes, the study should help delineate insights into what to do or what not to do in order to attain the desired effect. Given that government and interest groups will continue to use the legislature to bring about legal changes, and given the fact that legal changes are meant to bring about social changes in response to social problems, this type of study will contribute at the academic, policy, and practical levels.

CHAPTER THREE

ORIGINS & IMPETUS:

THE PROBLEM WITH RAPE LAW

* * *

INTRODUCTION

The purpose of the present chapter is fourfold:

(1) to briefly develop the history of rape law in the western world, including a snapshot picture of Canada's pre-reform rape laws;

(2) to situate the origins of the move to reform Canada's rape laws in the wider women's movement;

(3) to locate the impetus for reform in the dissatisfaction with the then current laws of rape; and,

(4) to begin a discussion of a jurisprudence of insurgency.

Rape has received considerable attention as a social problem over at least the last couple of decades. Given that the attention to rape is relatively recent, it may appear as though rape is a new social problem. Unfortunately, this is not true: rape is "one of humanity's oldest problems, as ancient as war and conquest" (Gager & Schurr, 1976: 210). What is new, however, is the widespread

social attention paid to the problems surrounding rape and rape laws (Cann, et al., 1981: 1). Given that rape has a long history, it should not be surprising that the crime of rape has a correspondingly long legal history.

A BRIEF HISTORY OF RAPE LAW

While rape law in the western tradition has a long history, these laws, as will be developed below, have remained relatively unchanged from their early beginnings to their modern version.

Early Rape Law

The development of western rape law can be traced back to the law of Raptus in Roman society:

Raptus was a form of violent theft which could apply to both property and persons. Because it referred to abduction and not necessarily to rape, it was not a sexual crime by definition. If a woman was abducted violently and sexually assaulted, the crime was merely defined as theft of a woman without the consent of those who had legal power over her. Legally, the harm was committed against her father, guardian, or husband (Schwendinger & Schwendinger, 1982: 275).

Thus, in its early form, rape was a property crime: it portrayed women as male property and perceived the act as a crime against the male property owner, not as a crime against the female person.

The Substantive Law of Rape at Common-Law

At common-law, at least in name, rape came to be defined as a crime in-itself, as a crime against the female person (Schwendinger & Schwendinger, 1982: 280). Substantively, rape was defined as "illicit carnal knowledge of a woman by force against her will" (Richmond, 1980: 80). This definition makes it clear that rape was a crime committed by a man against a woman. As well, for the act to be "illicit," it was necessary to show that the man and woman involved were not married. "Carnal knowledge" was defined as sexual intercourse which meant that "the man's penis entered the female's vagina." In order that the act involve "force," it was necessary that the penetration be violent such that the female suffered "injury and outrage." Last, but not least, "against her will" meant that the act occurred "without the consent of the woman" (Richmond, 1980: 80-82). In effect, the law specified that only certain people were legitimate victims of rape--women, and then not all women as wives were not offered legal protection from their husbands.

Procedure & Evidence

Within this substantive definition of rape at common-law, juries were initially permitted to judge a rape case solely on the basis of the testimony of the victim and offender (Sullivan, 1974-75: 26). However, with the development of special evidentiary and procedural rules in rape cases, juries were no longer allowed to

judge cases solely on testimony. Basically, three special proof and procedural requirements emerged: the recent complaint rule; the admissibility of the victim's sexual history; and, the requirement of a cautionary instruction (Boyle, 1984: 14-15).

First, while the general rule at common-law was such that a crime victim's complaint was inadmissible, the courts decided that evidence of a rape victim's complaint was not only admissible but required evidence. Second, common-law courts allowed the accused to inquire into the victim's character by delving into her sexual history. Third, the common-law developed a special rule in rape cases that required the judge to warn the jury that it was dangerous to convict the accused on the uncorroborated testimony of the complainant (Boyle, 1984: 14-15). Corroboration is defined as "evidence from a source other than the complainant which tends to support or confirm her testimony" (Backhouse & Schoenroth, 1984: 200). As a result of these special evidentiary rules, rape convictions could no longer be sustained solely on the testimony of the victim (Sullivan, 1974-75: 26; & Caringella-MacDonald, 1988: 125).

North America: Codified Rape Law

The roots of rape law in both the United States and Canada are traceable to the English common-law tradition (Backhouse & Schoenroth, 1984: 173). In the United States, jurisdiction over criminal matters lies with the state and there are, therefore, some differences in rape law across states. Nevertheless, in essence, as

state legislatures began to codify criminal laws, the substantive common-law of rape was adopted and incorporated into state criminal codes (Richmond, 1980: 83), as were the evidentiary and procedural rules that surrounded common-law rape (Schwartz & Clear, 1980: 131).

Similarly, Canadian law adopted and mirrored the substantive and procedural laws surrounding rape. In 1892, when the then proposed English criminal code was adopted in this country, common-law rape became part of the first Canadian criminal code (Osborne, 1985: 49). At this time, rape fell under "Title V: Offences Against the Person and Reputation" and was substantively defined in the common-law tradition (C.C.¹, 1892: ss. 266):

Rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent, or with 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.

Obviously the main point of this definition lies in the first phrase: "rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent." By virtue of the definition, then, it is clear that, like the common-law, Canadian criminal law held that:

¹ C.C. refers to Canada's Criminal Code.

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- (1) only a man could commit rape;
 - (2) only a woman could be raped;
 - (3) a husband could not be found legally culpable for raping his wife; and,
 - (4) the act had to take place without the victim's consent.

As well, by virtue of other provisions in the code, as at common-law:

- (5) rape was limited to those acts where penile penetration of the vagina had occurred (C.C., 1892: ss. 266.3); and,
- (6) the procedural and evidentiary rules available at common-law remained in effect (C.C., 1892: ss. 7).

As one further investigates statutory developments in Canada, one finds that the definition of rape remained practically untouched until the recent reforms. For example, by the time of Parliament's complete revision of the criminal code in 1954, rape had been moved to "Part IV: Sexual Offences, Public Morals and Disorderly Conduct," but the substantive law itself was left virtually untouched (C.C., 1954: ss. 135):

A male person commits rape when he has sexual intercourse with a female who is not his wife,

- a) without her consent, or
- b) with her consent if the consent
 - i) is extorted by threats or fear of bodily harm,
 - ii) is obtained by personating her husband, or
 - iii) is obtained by false and fraudulent representations as to the nature and quality of the act.

As well, while all the procedural and evidentiary rules at common-law were still in effect (C.C., 1954: ss. 7), a 'special provision' for rape had, by this time, been specifically written into the code which required that the judge caution the jury on the dangers of convicting the accused in the absence of corroboration (C.C., 1954: ss. 134).

Pre-Reform Snapshot

At the time of the 1970 revision and consolidation of Canadian federal statutes (the last consolidation of Canadian laws before the reform of rape laws), the definition of rape came under the same "Part IV" of the code and was left untouched in any manner from the above listed 1954 revised version of rape (C.C., 1970: s. 143). As well, rape still required that there be penile penetration of the woman's vagina (C.C., 1970: ss. 3.6); the common-law remained in force except where overridden by the code (C.C., 1970: ss. 7.3); and, the "special provision" for a cautionary instruction was still in effect (C.C., 1970: ss. 142).²

Thus, in the year 1970 (which, as will become more apparent as we proceed, coincides fairly closely with women's rape law reform movement), a snapshot of Canada's rape laws produces a picture that has changed little from the common-law of rape (see also Stanley, 1985).

² For a more thorough summary of Canadian statutory developments with respect to rape law see Watt (1984).

THE ORIGINS OF RAPE LAW REFORM: THE WOMEN'S MOVEMENT

The beginnings of the efforts of women to make rape a social issue can be traced to the women's movement (Rose, 1977: 76). The women's movement is marked by the rise of a variety of loosely connected "women's health collectives" (Kasinsky, 1978a: 152),³ which sprung up across North America throughout the 1960s (see also Rose, 1977: 76; & Marsh et al., 1982: 1). Initially, these women's collectives gathered together in informal consciousness-raising groups to discuss a number of issues relevant to women's lives-- issues such as abortion, birth control, and rape.

For at least two reasons, however, rape quickly emerged as a central issue and a major concern to these women's groups. First, rape became a central issue because it became obvious that rape "proved to be far more common than anyone had imagined" (Kinnon, 1981: 62). Second, and perhaps most importantly, rape became a major concern as these women began to understand that rape epitomized women's vulnerability in a male dominated society:

the act of forcible sexual assault and the subsequent treatment of the victim by the criminal justice authorities have come to symbolize the most extreme example of the abuse of a woman's body and her integrity (Schram, 1978: 54; see also Rose, 1977: 75).

³ Strictly speaking this women's movement is "feminism's second wave" (Randall, 1987: 5). A women's movement is identifiable at least as far back as the late nineteenth century suffrage movement (see also Boyd & Sheehy, 1989).

The rape issue, then, took on primary importance to many of these women and, as Rose (1977: 75) explains, an "anti-rape movement" emerged.

The Anti-Rape Movement

The origins of the anti-rape movement are therefore traceable to the consciousness-raising groups of the emerging women's movement in North America in the 1960s. The original goal of these groups was to allow women "to investigate the solutions to their own problems, problems with which men showed little concern" (Kasinsky, 1978a: 152). As with any social problem a number of strategies were proposed to deal with the problem.

One of the earliest strategies--in keeping with the idea that women sought their own solutions to their own problems--was for women themselves to provide direct counselling to rape victims through rape crisis centres (Kinnon, 1981: 62).⁴ Initially, the centres opened in order to offer and provide support and assistance to the victims of rape, a need that was not being met by traditional service agencies nor by the criminal justice system (Clark & Lewis, 1977: 192; & Kinnon, 1981: 63). However, while direct service to rape victims was considered an essential aspect of addressing the rape problem, the role of rape crisis centres

⁴ The first rape crisis centre opened in Washington, D.C. in July 1972, and has served as a prototype for subsequent services throughout the United States and Canada (Rose, 1977: 76). The first Canadian rape crisis centre opened in Toronto in 1974 (Kinnon, 1981: 63).

expanded to go beyond the provision of direct support and counselling.

The centres quickly became equally concerned with the wider goals of short and long term social change (Kinnon, 1981: 63). On one level, rape crisis centre personnel undertook public education. As women began to realize the prevalence of rape and the extent of the misperception surrounding rape, they undertook to alter social understanding and social attitudes by educating the public. On another level, rape crisis personnel sought to bring about changes in rape law. As women began to realize that legal problems were part of the overall problem of rape, they sought to have laws changed to help overcome rape and the social and legal attitudes that foster rape (Kinnon, 1981: 68-70). Indeed, from the very beginning of the anti-rape movement women recognized that legal change was an important step in confronting rape and activities directed at gaining legislative reform of rape law soon became the "social change strategy of choice" (Marsh et al., 1982: 2).

THE IMPETUS FOR REFORM: WOMEN'S CRITIQUE OF RAPE LAWS

The impetus for reforming rape laws, then, comes out of the efforts of women to show the social meaning and social functioning of rape laws. Essentially, women argued that rape laws, throughout history, have offered little protection from, and little legal redress for, the crime of rape. As a result, women argued for the reform of rape laws as part of a solution to the many problems surrounding rape.

Early Rape: Women as Property

As noted above, early rape law depicted women as the property of men and saw the crime of rape in terms of theft of male property. In locating, explaining, and understanding the roots of rape law, women argued that the conception of women as male property flows out of one of the basic principles of western thought:

a fundamental cornerstone of western liberal democracy....is the assumption that men are naturally superior to women and that this inequality can be traced to natural differences between the sexes (Clark & Lewis, 1977: 112).

All forms of inequality between men and women are justifiable through this belief in the 'natural' differences between the sexes. The effect of this principle of gender inequality was to make women subordinate to, and the property of, men.

Clark & Lewis (1977: 112-114) argued that the conception of women as the property of some male owner--typically the father or husband--coincides with the rise of the institution of private property. The emergence of private property and individual ownership required that there be clear systems for the control and disposition of possessions. Property belonged to individual families, and fathers held the right to decide how to use and dispose of their assets. As fathers had the power to dispose of property, it became necessary to develop an inheritance system in

order to provide for the transfer or disposal of family property across generations. Thus, the system of private property also--although perhaps less obviously--required that the owners of private property have control over the means and the products of reproduction, not just production.

Control over the means and products of reproduction, from the viewpoint of individual male property owners, ensured that their rightful offspring could be identified and that property could thereby be transferred, through inheritance, to their rightful offspring. So, while access to women was important for reproduction, exclusivity of access to a specific woman was paramount. Exclusive access to child-bearing women not only kept family lineage intact, it also ensured that family property, through inheritance, would be kept intact.

It is clear that within this need to control reproduction, women were viewed as sexual and reproductive property. It is also clear that not all female property was of equal value or worth. Virginal women and/or chaste wives were the most valuable because they offered reproductive capacities that guaranteed the proper identification of a male's rightful heirs. The system of inheritance along with the differing 'value' of women depending on their virginity and chastity, then, provides a basis for the conception of women as property--a sexual and reproductive commodity--and for the early rape laws that defined the prohibited act as a crime against the male owner of such property and not against the female person subjected to the act of forced sexual

intercourse.

Rape laws, then, were not meant to protect women but to protect male sexual and reproductive property. The original factual basis of the law, then, is located in the need to provide for a system of inheritance. As a result, not all women were legitimate victims within the legal definition of rape. Only some women, depending on their virginity and/or chastity, were considered property worthy of protection. The conception of the legitimate victim, however, has not remained solely tied to the woman's virginity and chastity. While, modern rape laws have retained a conception of women as sexual property, the notion of the legitimate victim has turned more towards the victim's life-style and social standing rather than purely her sexual and reproductive value.

Common-Law Rape: A Property Crime by Another Name

It is clear that the substantive common-law definition of rape retained a view of women as sexual property. That is, rape laws were still cast from the male perspective and continued to treat women as the sexual and reproductive property of men even though, in name, it was a crime against the female person. Four aspects of the substantive common-law definition of rape give rise to this conclusion: the victim must be female; a husband could not rape his wife; only penile penetration of the vagina could constitute rape; and, the act had to occur in the absence of consent.

First, under the common-law substantive definition, the victim must be a female. Yet, there is no intrinsic reason for protecting females and not males from forced sexual acts: males were, and are, also victims of sexual violation (Kasinsky, 1978a: 153). The fact that only females, and not males, are specially protected from rape reveals a concern for maintaining the purity of the male's sexual and reproductive property (Clark & Lewis, 1977: 124). Thus, the criminal laws of rape continue to view women in terms of a special status because of their valuable reproductive capacities.

Second, the common-law tradition defines the act such that a husband can not be found legally culpable for raping his wife. Rape law, then, granted husbands unlimited access--on demand, and by force if necessary--to their wives' sexuality. In effect, the woman's freedom to choose sexual intercourse and to control her reproductive capacity is negated and transferred to her husband (Clark & Lewis, 1977: 121). Thus, women's sexuality, because the husband was granted unlimited access, belongs not to women but to the men who acquire it through marriage. Women are offered no legal redress for forced sexual acts that occur in marriage.

Third, by requiring that the only act that could constitute rape was penile penetration of the female's vagina, the law reflected an exaggerated male concern with women's reproductivity, especially their reproductive purity. By focusing exclusively on penile penetration, the law prioritizes virginity and/or chastity while minimizing other real and harmful sexual violations against

women, such as oral and/or anal sexual acts or the insertion of objects during the assault (see Clark & Lewis, 1977: 131; Kinnon, 1981: 39-40). By protecting women only from one avenue (vaginal) and one method (penile) of sexual violation, the law reveals a concern not with women's overall well-being but with the possible consequences of the act of forced penile penetration--the only protection offered by the law is protection against the one act that could result in unwanted pregnancy. Since rape is a violent attack against a woman, the law focused not on the offender's behaviour but on the possible undesirable consequences of the act. Rape laws, then, reflect the male perspective. They did not protect women themselves; rather, rape laws protected men from having their women defiled by other men (Los, 1990: 3).

So, while portraying rape as a crime against the person, it is clear that the common-law continued to be concerned with women's sexual and reproductive value from a male perspective (Griffen, 1975: 33; Gager & Schurr, 1976: 280; Clark & Lewis, 1977: 124 & 159; Kasinsky, 1978b: 62-63). Rape, then, protected and reflected male interests. It divided and separated woman's personal worth into segments and focused on their vaginas as a special aspect of womanhood (Clark & Lewis, 1977: 167; & Schwartz & Clear, 1980: 134). The law put priority on the sexual integrity of women by focusing on the 'value' of their vaginal, sexual, and reproductive purity. Reproductive purity, in essence, by virtue of the fact that husbands could not be found legally culpable of raping their wives, was protected only from other men, from outsiders. Thus,

rape laws primarily protected male sexual and reproductive property from abuse by other men, and did not protect women as women, as persons.

Fourth, women also took exception to the fact that a legal finding of rape requires, by virtue of the substantive definition, that the act take place without the victim's consent. The focus on the issue of whether or not the victim consented to the act is aimed at determining whether or not the accused has the requisite guilty mind (*mens rea*) to be convicted of a criminal offence. The substantive issue of consent was attacked by women because it shifts focus away from the offender's assaultive behaviour, and because it continues to portray and treat women as sexual and reproductive property (see Clark & Lewis, 1977: 162; Kinnon, 1981: 40; Caringella-MacDonald, 1988:128-129). The fact that attention is shifted away from the offender and towards the victim is not surprising in light of the perception of women in rape law. Given that the law retains a view of women as property, the court is primarily interested in the nature and status of the woman in question. In practice, then, it is the woman who is put on trial in a rape case (Gager & Schurr, 1976: 130; Clark & Lewis, 1977: 48).

Procedural Aspects: Putting The Woman on Trial

As one looks at the procedural and evidentiary requirements surrounding the crime of rape, it is clear that, like the substantive law, all three special rape-specific evidentiary rules reflect the male perspective and continue to work to the

disadvantage of women seeking redress through the criminal law.

First, the recent complaint rule emerged because the courts felt that women were suspect in making rape complaints (Boyle, 1984: 14). In effect, the law required that the victim of rape 'raise the hue and cry' immediately after the attack; otherwise, the woman would have had the opportunity to make up a story about the incident. Yet, as is argued throughout the literature, there is no evidence and no reason to believe that women make false rape accusations (MacKeller, 1975: 87; Kasinsky, 1978b: 64; Schwartz & Clear, 1980: 132; & Osborne, 1985: 51-52). The recent complaint rule, once again, shows that common-law rape was cast in the male perspective--the law requires a woman to immediately 'cry rape' in order to show evidence of the 'truthfulness' of the charge of rape. The focus, then, like with the substantive issue of consent, shifts away from the assaultive nature of the offender's behaviour and towards the truthfulness of the victim's charge.

Second, at common-law the accused was permitted to inquire into the past sexual history of the complainant, again largely because of the fear of false complaint (Boyle, 1984: 15). The sexual history of the rape complainant, beyond the recent complaint requirement, was used in order to further assess the woman's reliability and credibility at trial (Clark & Lewis, 1977: 48). The admissibility of the woman's sexual history also reveals a double-standard with respect to women: good (i.e., virginal, chaste, morally correct, socially proper) women are rapable, but bad (i.e., promiscuous, non-traditional life-styled, morally improper) women

aren't rapable (Clark & Lewis, 1977: 162). At the same time, the law includes a double-standard with respect to men and women: while the accused could delve into the victim's sexual history at trial, evidence regarding the offender's past sexual history--including any past convictions for sexual offences--was not admissible unless the accused himself brought up the issue (McTeer, 1978: 143; Los, 1990: 4). The law, in effect, requires that women retain their 'good' or 'pure' status in order to be eligible to attain legal redress for rape, while downplaying the male role in sexual aggression by denying that the male's history is relevant at trial.

Third, rape law requires that the judge caution the jury that it is dangerous to convict the accused solely on the uncorroborated testimony of the victim. Thus, not only is the victim effectively required to provide corroboration, the trial ends with the typically male judge explicitly warning the jury that the woman's testimony should be regarded with suspicion. The corroboration requirement, then, is clearly based on the belief that innocent men must be protected from false rape convictions brought about by malicious, lying women (Sullivan, 1974-75: 26 & 27; Brownmiller, 1975: 47; McTeer, 1978: 136). The cautionary instruction acts as a reverse onus that requires that the victim in rape to overcome the assumption that she was not really raped but merely crying rape for some underhanded, malicious reason.

As with the substantive issue of consent, then, the procedural and evidentiary rules surrounding rape shift attention away from the assaultive nature of the offender's behaviour and

towards the victim--i.e., is she the kind of woman who deserves protection? (Clark & Lewis, 1977: 48 & 161-162). The recent complaint rule makes it necessary that the victim react immediately; the sexual history rule makes the victim's character a central issue at trial; and, the cautionary instruction makes the victim's credibility crucial in obtaining a conviction. All of these special rules represent an aberration in the normal rules of evidence applicable in criminal law--they are applicable only in rape cases (MacKeller, 1975: 59; Clark & Lewis, 1977: 48; & Kinnon, 1981: 50).

These rules, then, from the perspective of women, have relegated the rape trial to the status of a "pornographic spectacle" (Smart, 1989: 40) in which the victim's sexual life is put on public display and in which the specifics of the sexual act in question are relived (see also Kasinsky, 1978b: 65). Such a reliving of the crime, in turn, amounts to a "double victimization" (Caringella-MacDonald, 1988: 125; see also Schram, 1978: 53; & Holmstrom & Burgess, 1978: vii & 261) of the female complainant--once at the hands of the individual male who assaulted her sexually, and once at the hands of the male-centred legal system that allows the victim of rape to undergo character assassination in the courtroom.

The purpose of such a focus, as Clark and Lewis (1977: 162) argue, is to provide ample opportunity for the courtroom actors to verify whether or not the woman in question is in fact "rapable." Only some women--those "who had not infringed judicial and societal

norms about what was appropriate behaviour and life-style"--were offered legal redress for the crime of rape (Boyle, 1984: 14; see also Clark & Lewis, 1977: 161-162; & Schram, 1978: 74). These rape-specific procedural rules, then, clearly reveal a male perspective in rape law--women cannot be trusted to properly care for the vaginal/sexual/reproductive property that they hold, by biological proxy, for their male owner. As such, rape laws have retained the male perspective and continue to value women as sexual property. However, under the common-law, as compared to early rape laws, the legitimate victim is not defined solely in terms of vaginal and sexual purity. While the sexual value of the woman in question is important in the rape trial, her social status--life-style, moral character, social class--also play a role in her ability to be seen as a legitimate rape victim. As such, the rape trial digresses into an examination of the sexual and social status of the victim rather than the offender's offensive behaviour. That is, the rape trial evaluates the value of the sexual property in question and the woman's character and worth by looking at her role in caring for her valued sexuality.

Canada's Rape Law: The Hangover Effect

It is clear, then, that from the early beginnings of rape law, to the development of the English common-law tradition, through the codification of rape into the first Canadian criminal code of 1892 and a number of statutory revisions up to 1970, rape laws have remained, for all practical purposes, virtually

unchanged.

As Marshall (1988: 5) puts it, rape laws suffer from "hangover effects"--Canadian law mirrors the tradition of rape laws that have, throughout their history, reflected the perspective of men and served to protect male and not female interests. The laws against which Canadian women sought legal change were essentially the age-old rape laws developed at common-law recast into Canada's statutory criminal code. These laws retain and reaffirm the age-old male perspective that does not value women as persons; rather, the laws reveal the male perspective that values women for their sexual status. In effect, rape laws do not operate to protect women, but to protect male sexual and reproductive property from unwanted abuse by other males. When abused by other men, only some women--those of acceptable life-style and social standing--are considered legitimate victims in the criminal courts.

What's more, Canadian women took exception to and were further motivated to seek legal change by a Supreme Court ruling with respect to the defence of consent (Atcheson et al., 1984: 39-40). Normally, in rape cases, the defendant has two main defences: an identification defence in which the defendant concedes that a rape took place but claims that he is the offender; or, a consent defence in which the defendant concedes that intercourse took place but that the victim had in fact consented (Richmond, 1980: 82). In the *Pappajohn* case, the Supreme Court ruled that "an honest [but] mistaken belief in consent (henceforth) constituted grounds for acquittal" (Snider, 1985: 339). With the ruling, consent in-itself

was no longer the main substantive issue; rather, the male's perception of consent, however mistaken that belief may have been, became central to a conclusion of guilt. So, the Supreme Court ruling further limited the likelihood of gaining legal redress for the crime of rape. The Supreme Court...

enshrined in the law what men often wanted to believe: that a woman's refusal to consent to sexual acts could be ignored and that their own aggression was socially acceptable (Atcheson et al., 1984: 39).

A Specific Impetus?

Women in the anti-rape movement, then, as the proponents for change in rape laws, played a role in the move to reform Canada's rape laws. Essentially, these proponents of change aimed to reconstruct society's understanding of rape laws by revealing the original factual basis of rape laws and by tracing the development of these laws through to modern times in order to show the meaning and functioning of rape laws from the female perspective. However, while it is therefore possible to locate the impetus for reform in the women's movement, these efforts did not occur in a vacuum. Other factors were at play.

As noted above, in our brief discussion of Hastings and Saunders' (1987) work, the federal government, in 1971, created the Law Reform Commission of Canada to undertake the task of technical revision and reform of Canada's laws, including the task of completely over-hauling the criminal code. As well, the federal

government appointed the "Royal Commission on the Status of Women" which, in 1970, issued a report that argued that a promising means of instituting much needed sexual equality was through the elimination of overt legislative discrimination on the basis of gender (Boyd & Sheehy, 1989: 256). Thus, the federal government--knowingly or unknowingly--sent a clear message to interests groups, including women, to prepare for and engage in the task of law reform. As well, these initiatives probably fed the belief that law reform would help alleviate social problems (see also Stanley, 1985).

One cannot truly locate the impetus for the reform of rape laws strictly in the efforts of women. However, women played a significant role in changing societal awareness regarding the many problems with rape law. If we see the women's effort as the impetus for reform, then, it is possible, in the Canadian context, to point out a major, early influence in this respect. As Boyle (1984: vii-viii) suggests, and as is evident in reviewing the literature, Clark and Lewis' (1977) work, *The Price of Coercive Sexuality*, played a significant role in directing the reform movement. As Clark and Lewis (1977: 13, 15, & 17) explain the situation at the time, "little research [on rape] had been done in Canada," and, consequently, their work was "the first Canadian book on the subject [of rape]." And, they argued that "change--in particular, legal and procedural change--is one of our major objectives." Accordingly, as the book was a ground breaking book on rape in Canada, their suggestions for law reform played a significant role

in bringing attention to the problem and, as will be argued later, set an agenda for legal change.

In effect, it seems that in the early stages of the anti-rape movement, women were in general agreement as to the nature of the problem of rape and the need for change. Clark and Lewis's book marks the formal presentation of a legal agenda for change in Canada and verifies the assertion that legal change emerged as the change strategy of choice. However, it would be unfair to say that, with respect to law reform, women spoke with one voice.

Some dissenters argued that the elimination of rape with a less strong term would not, as hoped, emphasize the seriousness of the offence, but would downplay the violent nature of the crime (see Chase, 1982: 54; & Smart, 1989: 44). Similarly, while the legal change strategy aimed to bring rape in line with existing assault laws, it was argued that rape is "qualitatively different from other forms of physical assault" (Cohen & Backhouse, 1980: 101). As well, there was disagreement surrounding the penalty structures for sexual assault. On one hand, while the reform movement generally proposed reduced sentences from those for rape, it was argued that reduced sentences would be counter-productive by reducing the perceived seriousness of the crime (Chase, 1982: 54). On the other hand, it was pointed out that reduced sentences could only have their desired effect if the penalty structure of the entire criminal code was changed (Cohen & Backhouse, 1980: 102).

A JURISPRUDENCE OF INSURGENCY

At a basic level, the present case does offer the possibility of promoting and developing a jurisprudence of insurgency for a number of reasons.

First, the women's activities are jurisprudential in the sense meant by Tigar and Levy (1977: 285-288): that is, at a very basic level, these women were in pursuit of social change by working through the law.

Second, these women employed the basic strategy implied in the jurisprudence of insurgency. They began by laying bare the original factual basis of the law they sought to change, and clearly showed that rape laws originally served the interests of male property owners. The social problem at the time of the rise of private property was the need to institute a system for transferring and disposing of property. There is no inherent reason why the transfer of property took the form of inheritance based on biological off-spring. Nevertheless, this system emerged, and with it came the need to ensure the proper identity of the male property owner's children. As such, rape laws helped serve this purpose by threatening punishment to those men who abused virginal and/or chaste women.

Third, as the jurisprudence of insurgency suggests, the original factual basis of the law must be refuted in order to use this refutation to work through the law. Implied throughout the women's efforts is the argument that the law is no longer needed:

it is no longer necessary for men to control women's reproductive capacity in order to ensure the proper identification of offspring. The original factual basis of the law, then, is no longer--if it ever was--a legitimate reason for rape laws that served to depict women as property and to protect not women themselves but men from having their women abused sexually.

It is therefore possible to see the efforts of these women in terms of a jurisprudence of insurgency. From this basic beginning, we will turn to a look at the actual process of legislative change in order to see what kind of changes were undertaken in response to these women's efforts to change existing law through the law.

CHAPTER FOUR

THE PROCESS OF CHANGE: FROM RAPE TO SEXUAL ASSAULT

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INTRODUCTION

The purpose of the present chapter, as noted, is to develop the process surrounding, and the outcome, of Canada's rape law reform. Towards this goal, we will by discussing some preliminaries: the wider context of rape law reform, and the social problems surrounding rape. Against this background, we will turn to the main concern of this chapter: the formal process of legislative change, including a post-reform snapshot of the new laws. And, lastly, we will renew our discussion of the case in terms of a jurisprudence of insurgency.

THE CONTEXT OF LEGAL CHANGE

In effect, since the Canadian reform of rape laws cannot be artificially separated from the reform of rape laws in the wider context of the western-world, we will begin by briefly developing the American experience in reforming rape laws. Next, as the

purpose of reform is to bring about change not only in law but also in the social arena, we will then turn to developing the many problems surrounding rape. In this fashion, it will be possible to look at the reform in terms of both its context and its aims in order to renew our development of the case from the perspective of a jurisprudence of insurgency.

The American Experience

In the U.S., the women's anti-rape movement had, by the mid-1970s, gained a good measure of social recognition and social support (Schwartz & Clear, 1980: 130). While such recognition and support does not guarantee success in pushing for legal change, these factors undoubtedly helped women to continue to push for and eventually gain legislative action with respect to rape laws (Rose, 1977: 79 & 82). These women's groups aimed at changing both the substantive rape law through the "adoption of new and wider definitions of rape," as well as the procedural and evidentiary rules surrounding rape through the "relaxation of the proof requirements for the crime" (Schram, 1978: 73).

The U.S. effort to reform rape laws met, at least in terms of process, with a good measure of success: virtually every state, to varying degrees, modified rape laws (Schram 1978: 73; & Caringella-MacDonald, 1988: 125). While, as noted, jurisdiction over criminal matters in the U.S. falls at the state level, and while rape law reform is therefore not identical across states, the general trend of these reforms was as follows: (1) in terms of the substantive

law, state legislatures abolished the substantive crime of rape and replaced it with "sex-neutral assault or battery" with different degrees of sexual assault; and, (2) in terms of procedural and evidentiary law, state legislatures eliminated or minimized the need for corroboration, abrogated or restricted the admissibility of the victim's sexual history, and/or denied or limited the need for corroboration (Schram, 1978: 74; & Richmond, 1980: 85).

The development of the Canadian anti-rape movement is similar to its American counterpart. The beginnings of the Canadian anti-rape movement are traceable to consciousness-raising groups of the early 1960s. These early beginnings were similarly translated into a more specific anti-rape movement as women's groups held public workshops, conferences, and speak-outs in the early 1970s. The movement took its specific public form as rape crisis centres emerged and spread across Canada throughout the mid 1970s. The rape crisis movement officially expanded its role to include the law reform objective as, in 1978, a National Health and Welfare grant was secured to pay for a 'National Assister' to the association of rape crisis centres with one of her goals being to coordinate a legislative lobbying campaign (Kasinsky, 1978a: 160-164). Lastly, as we shall see, the Canadian women's movement secured legal reforms that closely mirror the kinds of changes undertaken in the U.S. context.

However, while the Canadian anti-rape movement was only accorded governmental assistance to coordinate the legislative lobbying campaign in 1978, the federal government had in fact

already undertaken rape law reform. In 1975, Bill C-71¹ was tabled in Parliament with the intent to amend, among other unrelated things, the procedural and evidentiary rules surrounding rape law in two fashions: (1) to eliminate the cautionary instruction regarding corroboration; and, (2) to limit the admissibility of the victim's prior sexual history (McTeer, 1978: 141-145; Watt, 1984: 3-4; & Osborne, 1985: 50). These amendments were passed by parliament, and became law in early 1976 (Watt, 1984). The new law, however, left the door open for judges to return to old practices by giving them wide discretion to invoke traditional procedures. As a result, women pointed out that the effect of these amendments was negligible as judges used their discretion to bring back both rules (McTeer, 1978: 141-144; Cohen & Backhouse, 1980: 100; Kinnon, 1981: 42-43; & Osborne, 1985: 50-54).²

Given that the women's anti-rape movement in Canada was still in relative infancy at the time, and given the fact that national coordination of the movement was only formally undertaken with the assistance of federal monies in 1978, it is plausible that the federal government felt the pressure to reform rape laws in the mid 1970s based on the growing success of American women in this respect. As well, given that these 1976 evidentiary reforms had a very limited effect on age-old courtroom practices, the federal

¹ As cited in Sullivan (1974-75): Bill C-71, 1st Session, 13th Parliament, 23-24 Elizabeth II, 1974-75.

² This fact was also acknowledged by a number of Members of Parliament (see e.g. Canada, House of Commons, 1980-83: 11346).

government, by 1978, recognized the efforts of women to push for further reform by providing funding to support their efforts.

In the face of the failure of the piecemeal reform attempt of the mid 1970s, the women's movement went forward and aimed at a more comprehensive reform of rape law:

rape laws in Canada are outdated and no longer serve their original purpose....piecemeal attempts at reform [like the 1975 changes] will never result in a fair rape law. Only comprehensive legislation...will afford women any real protection from physical violation of their bodies (McTeer, 1978: 146-147).

This more comprehensive effort--like the reforms achieved in the U.S.--aimed to change both the substantive and the evidentiary laws surrounding rape in Canada. However, changing rape laws was an attempt to change not only the law but also a variety of problems associated with rape law.

Rape Law: Associated Problems

Essentially, as they did in discussing rape law, proponents of change sought to bring the many problems associated with rape to public attention. In effect, to borrow Gager and Schurr's (1976: 3) words, they aimed to change the "rape prone environment" in which women found themselves.

To begin, there was a realization that one of the problems surrounding rape law was the simple fact that the great majority of men who rape escape being brought to justice--as few as 1 in 10

rapes are reported to the police (Clark & Lewis, 1977: 60-61; see also Kinnon, 1981: 1). In essence, as women discovered that rape was far more prevalent than originally believed, they also learned that few rapes were ever officially recorded in crime statistics and that few rapists were ever arrested, prosecuted or convicted for their crimes (Brownmiller, 1975: 175; Clark & Lewis, 1977: 55-56 & 61-62; Kinnon, 1981: 1). Rape, however, like other crimes of personal violence, is not truly unique in this respect. While rape has a measure of uniqueness in the sense that it is a crime involving both violence and sexuality (usually against women but also against men), it is also something of a typical violent offence in that reporting and criminal justice processing problems are present in many violent crimes. Nevertheless, in essence, few rapes were being reported, and of those that were reported many were being funnelled out of the criminal justice system (Clark & Lewis, 1977: 57; Rose & Randall, 1978: 75-81).

A number of factors explain why many rapists are never brought to justice. On one hand, it became clear that few victims of rape actually reported the crime to police (Kasinsky 1978a: 154; Kinnon, 1981: 1; Clark & Lewis, 1977: 55-56; NAWL,³ 1981: 1; Osborne, 1985: 30). Clearly, as women argued, the treatment a victim receives in the criminal justice system, and especially in the courtroom, helps explain women's reluctance to report rape: the character assassination she will undergo through sexual history and

³ NAWL refers to National Association of Women and the Law.

reputation questioning reduces the likelihood that a woman would be willing to report the offence (Schultz, 1975: vii; Kasinsky, 1978a: 154; Osborne, 1985: 50).

Nevertheless, the blame for the lack of willingness on the part of victim's to report rape does not rest entirely with the justice system: attitudes regarding rape and rape victims also play a role in the low rates of reporting rape. In a society where men are encouraged to be sexually active and socially aggressive, rape is a reflection of social attitudes and conditions. Moreover, in a society where women are taught that their value in the sexual marketplace depends on their sexual purity and chastity, it should not be at all surprising that women would be reluctant to make a formal, public admittance that they have been raped: rape carries with it a stigma of sexual devaluation that many women would rather avoid (see Griffen, 1975; Brownmiller, 1975; Clark & Lewis, 1977; & Kasinsky, 1978b).

The problem of not reporting, however, goes further than the victim's reluctance to undergo a trial or her fear of stigma. It is also related to the lack of arrests, prosecutions and convictions in rape cases. In effect, some blame for the victim's reluctance to report rape falls on the criminal justice system's "management of rape" (Box-Grainger, 1986: 31), which has been adequately described as the best example of the "attrition-of-justice" phenomenon (Rose & Randall, 1978). The many actors involved in bringing a rape complaint to court have been found to screen-out a large percentage of the few cases that are reported (Clark & Lewis, 1977; Gunn &

Minch, 1985-86; & Neufeld & Bogaard, n.d.).

At the level of collecting evidence, medical personnel and police officers often simply don't believe complainants or find that the victim was somehow partly, if not wholly, to blame, and the complaint ends up as unfounded. Those charged with prosecuting rape cases, similarly, often simply did not believe that the woman's story was true or did not feel that the case would stand up to the rigours of the requirements of the crime, and the case would not be prosecuted. However, it would be unfair to suggest that it is only social attitudes towards women are at play in the dismissal of rape complaints. Medical practitioners, police officers, and prosecutors are all well aware that the costs to a victim in bringing a rape case to trial are high. Additionally, in court, because the law allowed character assassination of the victim, judges and/or juries, reflecting social attitudes, often shifted blame from the offender to the victim and brought in a finding of not guilty (Clark & Lewis, 1977: 57; see also Rose & Randall, 1978: 75-81; Schur, 1984: 151; Neufeld & Bogaard, n.d.: 21-24).

Thus, another problem surrounding rape, as is evidenced in this attrition-of-justice in rape cases, lies in the social attitudes that often shift blame from the offender to the victim. In effect, in a society that teaches male aggressiveness and values male sexual prowess, and that teaches females to be passive and to guard their sexual purity as a bargaining tool in the sexual marketplace, women who are raped are often ascribed a degree of blame for the incident. That is, social attitudes--she said no, but

really meant yes; she was asking for it; she's not a virgin, no harm was done--allow for an imputation of guilt and a shift in blame from the offender to the victim based on things like her mannerisms, behaviour, dress, and/or life-style (see Weis & Borges, 1975: 99 & 108; Clark & Lewis, 1977: 61 & 131; Kasinsky, 1978a: 155; Marsh, et. al., 1982: 3; Schur, 1984: 145).⁴

Which brings us to the problem, as developed briefly in chapter three, that rape laws only protect some women. Rape law "supports the middle-class notion that defines the 'good woman' as one who is 'chaste' and 'pious' and who, in good conscience, voluntarily subjects herself to her husband's will" (Kasinsky, 1978a: 154). On one level, the law ensures that wives are not protected from their husbands; and, through the procedural and evidentiary requirements, the law operates to protect only those women who are valued, or "rapable" (Clark & Lewis, 1977: 162). So, only the good, chaste woman who "had not infringed judicial and societal norms about what was appropriate behaviour and life-style" (Boyle, 1984: 14) were afforded legal redress, while a whole variety of women--e.g., prostitutes, students, strip-tease artists, hitch-hikers, single-mothers--were much less likely to be afforded legal redress for rape.

On one level, then, the concept of the legitimate rape victim is no longer tied strictly to the woman's sexual and

⁴ Interestingly, the victim-blaming phenomenon, referred to as victim-precipitated rape, has surfaced in the criminological literature (see e.g., Amir, 1967).

reproductive integrity. While it is clear that rape laws still retain a conception of women as sexual property, rape laws in the common-law tradition see the legitimate victim in terms of not only sexual purity but also social standing and life-style. The transference of blame from the offender to the victim for reasons of mannerisms, behaviour, life-style, and/or social standing signifies that only those women of sufficient moral and social standing--from a male point of view--are recognized as legitimate rape victims.

On another level, the overall practical result is that few victim's reported rape; few rapists were identified as such; the criminal justice system filtered out many rape complaints; and, overall, most women were denied effective legal redress for rape. The end result of this system-wide reluctance to report, arrest, prosecute, and convict offenders, was a virtual silence around the issue of rape (Clark & Lewis, 1977: 27). This silence, in turn, down-played the widespread nature of the problem and led to the belief that rape is not a serious social problem.

However, as women came to know, rape is a much more widespread problem than commonly believed. And, as they began to investigate how widespread the problem was, it became clear that a wide variety of men from all sectors of society commit rape: not just pathological, sex-starved weirdos, but also neighbours, friends, and acquaintances from all socio-economic backgrounds and not just in dark, hidden alley-ways, but in every kind of social situation (see e.g., Brownmiller, 1975: 176; MacKeller, 1975: 7;

Marshall, 1988: 14).

The fact that all kinds of men commit rape, in part, contributes to a widespread fear of rape amongst women. In effect, the fact that the rapist is potentially anyone, that the criminal justice system is lack-lustre in enforcing rape laws, and that social attitudes encourage male aggression and sexual prowess, all help produce the rape prone environment in which a great many women live in fear of rape. This effectively limits women's freedom and self-determination:

Rape operates as a social control mechanism to keep women in their place or to put them there. The fear of rape, common to most women, socially controls them as it limits their ability to move about freely. As such, it established and maintains the woman in a position of subordination (Weis & Borges, 1975: 120; see also Brownmiller, 1975: 309; Gager & Schurr, 1976: 4).

Against this wider background of the problems of rape, the women's anti-rape movement clearly sought changes in the wider social arena. As noted, the social change strategy of choice of these women was legal change. The legal change hopes, then, went beyond purely legal objectives, and included a number of tangible aims: increasing the reporting of rape; making it more likely that offenders would be identified and brought to justice; and, making the criminal justice system more responsive to rape victims (see NAWL, 1981: 1; & Snider, 1988: 27). However, they aimed at social change through legal change and their change objectives therefore

include change to the wide range of problems with rape law and the many associated problems in the social arena.

THE PROCESS OF LEGISLATIVE CHANGE

As noted, we will develop and discuss the process of legislative change beginning with Clark and Lewis' (1977) book. Their book, to repeat, was written when little research on rape in Canada was available. It represents the first Canadian book on the topic of rape, and it sets out an agenda for reforming rape laws in Canada which helped pave the way to the formal process of change.

An Agenda for Reform: Clark & Lewis' Influence

The essence of women's effort to re-educate the public lies in the idea that the perceived reality of rape is socially constructed:

rape is a social, not a natural fact. It is produced by a certain kind of society and not by an eternal, immutable human nature. The attempt to treat rape as natural fact, as an inevitable consequence of a fixed human nature, is simply a way to avoid doing anything about it (Clark & Lewis, 1977: 28; see also Los, 1990: 1).

The perception of rape, then, in order to bring it in line with the reality of rape for women, had to be changed. The strategy towards this goal was legal change.

...continued

FIGURE TWO:

LEGAL & ASSOCIATED PROBLEMS WITH RAPE

AREA	PROBLEMS
Offenders	- not enough rapists identified - too few arrested, prosecuted, convicted
Victim	- too few report - widespread fear of rape
Social Attitudes	- dis-incentive to reporting - victim blaming
Criminal Justice System	- reflects social attitudes - victim blaming: case attrition
Substantive Rape Law	- sexual discrimination: male offenders & female victims - spousal immunity: husbands exempt from legal culpability - only penile penetration of vagina
Procedural & Evidentiary Law	- recent complaint rule - admissibility of sexual history evidence - need to show corroboration - honest mistaken belief defence (i.e. Pappajohn)

* the idea for this kind of summary and organization of the environment surrounding rape comes from Young's (1987) "shape of crime" scheme.

Essentially, women argued that the many problems surrounding rape flow out of the perception that rape is a sexually motivated act. For women, rape is not a sexual act; rather, it is an act of violence (see MacKeller, 1975: 7; Brownmiller, 1975: 49; Griffen, 1975: 38; Schram, 1978: 53; Burgess & Holmstrom, 1980: 27; Groth & Birnbaum, 1980: 20-21; Morrison, 1980: 11; Neufeld & Bogaard, n.d.: 3-4). So, for women seeking to change the societal understanding of rape and to bring about rape law reform, the basic starting point was that:

rape laws should reflect the perspective of women--the victims of rape. For women, the presence of physical coercion defines the nature of the act. They experience rape as an assault, as an unprovoked attack on their physical person, and as a transgression of their assumed right to the exclusive ownership and control of their bodies (Clark & Lewis, 1977: 166).

In large part, then, the basic stage for rape law reform had been prepared. By arguing from the perspective of women, Clark and Lewis (1977: 166-167) set out to have rape reconceptualized as an act of violence, and set out to push the Canadian state to uphold their legal promise of protecting women from violence: rape is the "denial of physical autonomy....a violation of the central moral and legal rights which society has an obligation to protect."

In essence, then, the general agenda for addressing the many-faceted problem of rape was: change rape laws so that they reflect

women's perspective. The argument was that rape is a crime of violence, and the solution was to work through the law to push the state to uphold its obligation to protect people from violence and the fear of violence (see also NAWL, 1981: 1). The more specific agenda, then, would be to address the many problems with rape law in order to reconceptualize the crime and to thereby address the kinds of problems enunciated above: to increase reporting; to increase the numbers of offenders being brought to justice; to make the criminal justice system more amenable to processing rape complaints.

As such, at least in part, these change efforts were aimed at increasing the certainty of punishment for the crime of rape. This objective reflects the then increasing popularity of the "just deserts" model of criminal justice (see von Hirsch, 1990). However, as we shall see, while part of the aim to reform rape laws was to increase the certainty of punishment, the goal did not include a desire for severe punishments.

...continued

FIGURE THREE:

CHRONOLOGY OF EVENTS: THE FORMAL PROCESS OF RAPE LAW REFORM

DATE	EVENT
26 Apr 1976	- Bill C-71 passed into law: ineffective evidentiary changes to rape laws
1 May 1978	- Bill C-52 given first reading & dies before second reading
1978	- Law Reform Commission published Report dealing with sexual offences
12 Jan 1981	- Bill C-53 given first reading
7 Jul 1981 to 17 Dec 1981	- Bill C-53 given second reading & debated in the House of Commons & lastly referred to committee
17 Dec 1981 to 28 Jul 1982	- Bill C-53 reviewed by "Standing Committee on Justice & Legal Affairs"
4 Aug 1982	- Bill C-127, a cut-off version of C-53, given first reading, second reading, reported by committee to parliament, given third reading, passed by the House and referred to the Senate
27 Oct 1982	- Bill C-127 given "Royal Assent"
4 Jan 1983	- Bill C-127 proclaimed in force (S.C. Chapter-125)

Reform: The Early Stages

Bill C-52, tabled in early 1978, proposed to replace rape with the two offences of indecent assault and aggravated sexual assault. It aimed to change the law so that it was not sex specific as to the gender of the offender and victim, and to limit the questioning of the victim as to past sexual history. These amendments reflected some of the demands made by women; however, they fell short of the overall mark in a number of areas. While the bill died without debate, it is interesting to note that the government of the day was aware that the Law Reform Commission's report on sexual offences would soon be tabled in parliament, but they tabled the bill anyway (SCJLA,⁵ 1981, #31: 16). In effect, the claim of the government that it was taking an 'informed and creative' approach to solving the many problems surrounding rape is somewhat questionable. As well, if nothing else, according to one M.P., the tabling of the bill had the effect of bringing together and uniting the women's groups' effort around four central issues: changing the legal category of rape into some sort of assault; creating three tiers of sexual assault to parallel existing assault law; abolishing the spousal immunity in the law; and, limiting the admissibility of past sexual history (C.H.C.,⁶ 1980-83: 20041).

Soon after the tabling of Bill C-52, the Law Reform

⁵ SCJLA refers to "Standing Committee on Justice and Legal Affairs."

⁶ C.H.C. refers to Canada, House of Commons.

Commission entered the picture with their contribution. The LRCC put out two documents on the reform of rape laws: they first produced a working paper that made preliminary proposals and solicited public input; then, based on their consultations, they produced a report for parliament. In the working paper they proposed a "new formulation of sexual offences." The aim was to "simplify and organize sexual offences" and to "bring the law more in line with present values and attitudes towards sexual offences" (LRCC, 1978a: 1). The proposed provisions were formulated around three guiding principles: protecting the integrity of the person; protecting children and special groups; and safeguarding public decency (LRCC, 1978a: 5).

Clearly, then, given that the LRCC explicitly aimed to bring the law in line with present attitudes and values regarding sexual offences, and that one of the guiding principles was to safeguard the integrity of the person, the LRCC was espousing the basic agenda of the women's movement. As well, as the purpose of the paper was to elicit public response, the LRCC was inviting the public to partake in the process of reform. The report to parliament adopted the viewpoint of women:

Rape as presently defined in the Criminal Code is only one of several forms of criminal assault. Our consultations have confirmed that the predominant legal and behavioural characteristic of rape is not for the offender its sexual but rather its aggressive aspect, its violation of the physical integrity of the human person.

In the Commission's opinion the law should reflect this reality (LRCC, 1978b: 12). The report proposed that:

- (1) the word rape be eliminated and replaced by two degrees of sexual assault;
- (2) spousal immunity be abolished; and,
- (3) the intent of the 1976 provision to reduce the admissibility of sexual history evidence be strengthened.

In short, while clearly not addressing every legal problem enunciated by women, the LRCC proposed the kinds of changes desired in women's agenda for reform and did so based on the same basic principle that women sought to advance and enshrine.

The Immediate Process of Change

Bill C-53, which reflected and in large part adopted the LRCC's report, was tabled in parliament in early 1981. Second reading of the bill lasted, on an on-again off-again basis, for five months in the later half of the year, and the bill was then referred to the Standing Committee on Justice and Legal Affairs.

At second reading, the government enunciated its position with respect to the reform of rape laws (see also Canada, 1980). The government noted that women's groups from across the country had long criticized rape laws and claimed that the bill would address most, but not all of their concerns (C.H.C., 1980-83: 11299). In similar fashion to the LRCC report, the government claimed that the proposed legislation was guided by four basic principles, two of which are important to rape law reform: the

protection of the integrity of the person; and, the elimination of sexual discrimination in criminal law (C.H.C., 1980-83: 11299).

More specifically, in explaining the bill's provisions, the government set out to:

- (1) replace rape with two new offences--sexual assault and aggravated sexual assault;
- (2) move the provisions from the sexual and moral offences section of the code and place it under the section dealing with crimes against the person and reputation;
- (3) remove the requirement of penetration and allow the courts to decide what behaviours were to be deemed sexual in terms of assault;
- (4) eliminate spousal immunity;
- (5) make evidence of the victim's character and sexual history admissible only in exceptional circumstances--i.e., in a closed hearing, the judge would have to determine whether or not the accused had prior knowledge of the victim's sexual character;
- (6) remove the requirement of showing recent complaint; and,
- (7) remove the corroboration provision (C.H.C., 1980-83: 11299-11302).

There was only limited debate in the House of Commons at second reading. Essentially, both opposition parties responded to the government's introduction of the bill with one speaker. Their comments were largely limited to saying that the bill went a long way, but not all the way, in addressing the many problems with

Canada's laws of rape, and that the bill should be sent to committee as quickly as possible in order to ensure the passage of the bill.

While the efforts of women's groups was acknowledged in the House, their influence was not limited to the role of outside lobbying: at committee review, a number of women's organizations⁷ were represented as witnesses and presented their case regarding the proposed changes. While all of these women's groups expressed a good measure of satisfaction with the bill, they were still concerned primarily with three areas: they wanted more than two tiers of sexual assault; they aimed for further limitations on the admissibility of sexual history; and, they wanted the Pappajohn provision restricted.⁸

Concerning the offence, while the women's groups argued for different numbers of tiers of sexual assault (from the National Association of Women and the Law's three to the Quebec Women's Federation's five), they nevertheless generally agreed that three tiers was preferable to the proposed two tier system (the exception

⁷ specifically, in order of appearance:
National Association of Women and the Law (NAWL)
Canadian Nurses Association (CNA)
Canadian Advisory Council on the Status of Women (CACSW)
National Action Committee on the Status of Women (NACSW)
Quebec Women's Federation (QWF)
Saskatoon Rape Crisis Centre (SRCC)
National Council of Women of Canada (NCWC)

⁸ It should be noted that there was not complete agreement on the part of all the women's organizations; however, as Los (1990: 6) suggests, most groups accepted the proposals made by NAWL (see 1981).

being Canadian Nurses Association's agreement to two). Basically, the women's groups argued that the two tier system was too constrained and that the penalties accompanying the two tiers offered too little flexibility. The proposed sections of the offence would have made the first level of sexual assault punishable by a maximum of 10 years imprisonment, and the second level of aggravated assault would carry a maximum of life imprisonment.

Working from their belief that imprisonment accomplishes little in reducing rape (see e.g., Clark & Lewis, 1977: 57; Kinnon, 1981: 43; & Box-Grainger, 1986), these groups pointed out that severe penalties reduced the likelihood of prosecution and/or conviction, and argued that reduced penalties (including the provision of a third hybrid offence that would allow for summary conviction) would help reduce this potential problem. The high penalties (which they pointed out were unlikely to be used anyway) would only reduce the likelihood of bringing offenders to justice, especially in those minor yet serious cases of sexual touching. This which would have the effect of circumventing many of the benefits of the proposed law: it would once again make silent violence against women and perpetuate the conception of women as objects (see NAWL #78: 6-9; CNA #80: 5; National Action Committee on the Status of Women, #91: 14; QWF #93: 26; Saskatoon Rape Crisis Centre, #95: 5; National Council of Women of Canada, #97: 12).

Regarding the admissibility of sexual history evidence, the women's groups argued that the provisions did not go far enough. In

general, the women's groups argued that sexual history should never be admissible. However, in the face of reluctance on the part of government, they argued that, at minimum, the proposed provision should be amended to deny the possibility of questioning the victim about sexual history with persons other than the accused. In effect, they argued that if sexual questioning was permissible, there was no reason to allow any questioning beyond the circumstances of the relationship between the victim and the accused. There is no reason to allow 'other-than-the-accused' questioning. This only brings back outdated and degrading and dangerous notions such as only virgins are rapable, or once a woman consents to sex, she always consents (see NAWL #78: 20; Canadian Advisory Council on the Status of Women, #82: 44; QWF #93: 27 & 33; SRCC #95: 15).

As for the Pappajohn provision, most women's groups argued that the defence of honest mistaken belief should be eliminated and that it should be replaced with a higher standard of belief. In effect, the women argued that allowing an offender to walk out of court on honest belief without a measure of the reasonableness of that belief would greatly diminish the advances being made in the proposed legislation: it would bring back the age-old beliefs that a woman's refusal to sexual relationships could be ignored (see NAWL #78: 17; CNA #80: 6; SRCC #95: 6; NCWC #97: 13).

In mid-1982, the Minister of Justice brought forward a large number of amendments to the government's original bill. Apparently, the government was responding to the many representations made in

committee. For our purposes, the proposed amendments included:

- (1) to change the sexual offence category by making it a hybrid offence while also increasing the penalty to 14 years from 10 (but not expanding the structure to three offences);
- (2) to change the admissibility of sexual history by making it necessary that a judge decide in a closed meeting if the evidence is relevant (but not to exclude such with persons other than the accused); and,
- (3) to disallow the judge from commenting on the lack of recent complaint (SCJLA, 1982: #97: 29-59).

Clearly, however, even if the government was responding to the representation made in committee, these amendments still fell short of the kinds of change demands made by women's groups.

At Committee, as well as in the House, the opposition parties, especially the New Democratic Party, argued for the adoption of reforms more in line with the women's demands: a stricter requirement in the defence of consent, an expanded three tier system with a reduced penalty structure; and further limitation if not elimination of the admissibility of sexual history. (see e.g., SCJLA, 1982: #100-107; & C.H.C. 1980-83: 20045-20046). However, the proposed amendments went practically unheard, except, as we shall see, for the change in the number of offences.

New Law: Our Second Snapshot

On August 4, 1982, Bill C-127 was pushed through the House in one swift sitting that covered all stages of the formal process

of legal change: first reading, second reading, committee report, and third reading in order to pass the bill before summer recess. In effect, there was a fear that the government would call an end to the then three year long session of parliament so as to bring forward a new 'Throne Speech' when they returned from summer recess. Doing so would have meant the end of the bill as it would have 'died on the order paper.' As a result, Bill C-127, a cut-off version of the original omnibus Bill C-53, was sped through the House. However, while this may appear as an act of good faith on the part of parliament on behalf of the women of Canada, this conclusion is put in some doubt by the slow progress of the reform movement. That is, if we locate the reform initiative movement in the government's first reforms to rape laws, the process of comprehensive change--i.e., substantive and procedural change--spans nearly seven years.

Briefly, Bill C-127, as passed, made the following changes to rape law:

(1) the offence was moved from the section of the code dealing with sexual and morality offences to "Part VI: Offences against the Person and Reputation;"

(2) rape was repealed;

(3) three tiers of sexual assault--(simple) sexual assault, sexual assault with a weapon or threats, and aggravated sexual assault--were enacted to replace rape;

- (simple) sexual assault was a hybrid offence with the option of proceeding summarily or by indictment in which

case the maximum penalty was 10 years imprisonment;

- sexual assault with a weapon or threats carried a 14 years maximum;

- aggravated sexual assault carried a maximum of life imprisonment;

(4) spousal immunity was eliminated;

(5) there was no longer the requirement to prove penetration;

(6) the recent complaint rule is eliminated;

(7) the requirement of corroboration is eliminated;

(8) sexual reputation evidence aimed at challenging the credibility of the complainant was disallowed; but,

(9) sexual history evidence (with accused and/or others) was still allowed, but only after attaining the approval of the judge in a closed hearing showing that the defendant had prior knowledge thereof.

Clearly, then, the process of legislative change--a very long process--took action along the lines demanded by women. However, as is also clear, the process fell short of adopting all the women's recommendations for change.

...continued

FIGURE FOUR:

LEGAL PROBLEMS & LEGISLATIVE SOLUTIONS

PROBLEM	SOLUTION?
- rape defined as sexual crime	- offence moved to "Offences Against Person & Reputation"
- offence limited to penile - penetration of female's vagina	- rape taken out of code & replaced by tripartite offence of sexual assault
- sexual discrimination: male offender female victim	- sexual assault offences are in gender neutral
- penile penetration of vagina required	- no longer required
- spousal immunity	- eliminated
- recent complaint required	- eliminated
- corroboration required	- eliminated
- sexual history evidence	- restricted only by asking judge to approve questioning; but still allowed with both accused & others
- Pappajohn consent defence	- not eliminated

A JURISPRUDENCE OF INSURGENCY

At the end of chapter three we suggested that the case in hand, at least at the level of strategy, falls within the basic scheme of a jurisprudence of insurgency. That is, we found that the case did offer the possibility of promoting and developing a jurisprudence of insurgency based on three factors:

- (1) the women's anti-rape movement explicitly and consciously decided to work through the law--their social change strategy of choice--in order to address the many problems surrounding rape;
- (2) women exposed the original factual basis of the law as being the need to institute and protect a system of inheritance;
- (3) women exposed the fact that the law now served to perpetuate a conception of women as sexual objects and failed to offer most women any legal redress for the crime of rape.

A fourth stage--to work through higher legal principles in order to change specific legal rules--has now been developed. As stated, in the earliest available Canadian work that spells out an agenda for reform, Clark and Lewis (1977) explicitly argued that rape law effectively denied women the basic right to safety from violent interference and the right to self-determination. In the NAWL's (1981: 1) terms, as presented to the government, rape laws effectively deny women one of the basic principles of the rule of

law: "the inviolability of the human person."

Women, then, were working through this four stage process that falls within the framework of a jurisprudence of insurgency. However, the simple fact that these women's groups undertook the basic strategy of a jurisprudence of insurgency does not get to the problem of whether or not the kinds of changes sought could be considered insurgent. As defined in chapter one, the concept of a jurisprudence of insurgency refers to:

a certain kind of jurisprudential activity in which a group challenging the prevailing system of social relations no longer seeks to reform it but rather to overthrow it and replace it with another (Tigar & Levy, 1977: 283-286).

As well, working from Brickey and Comack's (1989) suggestion, such things as 'testing the limits of the dominant legal ideology' and 'gaining partial and temporary victories' could be seen to play a role in promoting and facilitating a jurisprudence of insurgency.

So, if we return to our definition, it can be argued that women did not adopt a complete jurisprudence of insurgency in their attempt to reform rape laws. In the area of substantive law, these women's groups sought to redefine the crime of rape as an offence against the person, and argued for corresponding changes in related issues (such as the need to prove penetration). In the area of procedural law, the women's demands focused on the treatment of women in the courtroom and argued that the special legal rules surrounding rape should be dissolved in order to bring the

procedural laws in line with the concept of, and existing rules surrounding, assault. In effect, given that the 'prevailing system of social relations' in our society is capitalism, these change demands clearly do not directly challenge the economic structure of our society.

However, in keeping with the idea that it is possible to view legal change in terms of promoting and facilitating a jurisprudence of insurgency, the present case moves in this direction. In effect, returning to our definition of a jurisprudence of insurgency, the beginning stages would be to 'seek to reform' the existing system of social relations as a prelude to the 'overthrow and replace' stage. So, the question becomes one of whether or not the women's legal change effort sought to bring about social change that would help in the development of a jurisprudence of insurgency. While, as noted, it is not truly correct to say that the women's change effort directly addressed the prevailing capitalist system of relations, they did address a central system of relations in our society: patriarchy.

Patriarchy can be defined as follows: "a systemic set of social relations through which men maintain power over women" (Kelly & Radford, 1987: 238). Sexual violence is clearly part of the patriarchal system of female subordination to male power and control. As such, rape laws that are ineffective in protecting women from rape clearly serve the patriarchal system of male domination and female subordination. The reform of rape laws, then, represents an attack on at least part of the social relations of

patriarchy. As such, the women's rape law reform efforts clearly offer the possibility of developing and promoting a jurisprudence of insurgency by 'testing the limits' and perhaps 'gaining partial and temporary victories' in the system of patriarchal domination.

CHAPTER FIVE

IMPLEMENTATION & EFFECTIVENESS: IS A POLITICS OF INSURGENCY POSSIBLE?

* * *

INTRODUCTION

The overall aim of the present chapter is to address the research question: *"Is a Politics of Insurgency Possible through the Criminal Law?"* Towards this goal, however, we will develop the third sub-process of change, the implementation stage. That is, we will look at what mechanisms were either implemented and/or relied upon to bring about the desired social results. In this way, we will be able to look at the effectiveness of the change. We will then be able to draw on the entire process to discuss the case from the perspective of a jurisprudence of insurgency.

CHANGE MECHANISMS

To begin, we must return to the basic position of women in the emergence of the anti-rape movement. In its origins, the anti-rape movement clearly espoused two methods of achieving change: education and law reform. Law reform, as noted, was the change

strategy of choice; however, the educational function, primarily through the efforts of rape crisis centres, was also undertaken in the hope of altering both public awareness of, and social attitudes towards, rape (see e.g., Clark & Lewis, 1977: 185). Clearly, then, the women's groups did not assume nor pretend that legal change alone would fully address the many problems surrounding rape. Not surprisingly, women argued that a number of supplementary mechanisms would be of continuing value in combating rape.

Rape crisis centres were created and designed to help women who otherwise found little or no assistance from traditional service agencies. They were praised as a viable, valuable, and necessary mechanism for addressing many of the problems surrounding rape. In essence, rape crisis centres carry-out three functions: they provide direct assistance and support to victims; they provide a para-legal service in explaining and assisting in the process of bringing a case to court; and, they undertake to educate and sensitize both the public and the criminal justice system about the realities of rape (Clark & Lewis, 1977: 191-193; Kinnon, 1981: 62-65). All of these functions are clearly important to not only the beginnings of the anti-rape movement but also to its continued success in combating rape. As such, the women's groups argued that rape crisis centres continue playing a part in addressing the problems of rape, and pointed out that funding problems are an on-going concern for these centres (see Kinnon, 1981: 63-65; Kasinsky, 1978a: 163; Vandervolt, 1985-86; & Marshall, 1988).

Rape crisis centres, then, with their focus on the needs and

welfare of the victim of rape, clearly fall within the victim's movement. The victim's movement represents, in part, an attempt to make the plight of the victim--not just the offender--a concern of the criminal justice system's management of crime. As such, rape crisis centres not only undertook legal mechanisms but also victim assistance mechanisms in addressing rape. These kind of victim assistance mechanisms were also a point of discussion--although only briefly--in the formal process of change as Bill C-127 was debated in the House. An opposition M.P. from the New Democratic Party (the same one who pushed for the further amendments sought by women's groups in committee) brought up the issue by arguing that while the new laws were an important step in the right direction, changing attitudes and opinions was equally important. Towards this goal, a number of suggestions were made, including the creation of a national organization to promote research and education, and support to sexual assault centres to continue their work (C.H.C., 1980-83: 20046-20051). Nevertheless, none of these kinds of victim assistance mechanisms were provided for in the new sexual assault legislation.

The Implementation of Sexual Assault Laws

As is clear from our discussion of the new law, there was little mention of extra-legal measures in the process of legislative change, and none of these kinds of mechanisms were adopted through the new law. The government, then, can be seen to have relied entirely on the existing mechanisms available in

relation to the criminal law: the criminal justice system. The desired effect, then, would have to occur either through the legal change itself, or through corresponding change in the criminal justice system and its agents.

In the government's own terms, the desired effects fall on two levels. On the 'rule-of-law' level, as noted, the purpose of the present legal change was to uphold and protect two guiding principles: the elimination of sexual discrimination in criminal law; and, the protection of the integrity of the person (C.H.C., 1980-83: 11299, see also Canada, 1980). On a more practical level, the reforms hoped to increase the reporting of the offence and to make it easier for police, prosecutors and courts to bring offenders to their rightful legal sanction (C.H.C., 1980-83: 11302).

Indeed, with respect to the government's reliance on the established criminal justice apparatus, the government went forward with penalties that were above and beyond the penalties argued for by women (see MacKeller, 1975; & Clark & Lewis, 1977). That is, in the process of accepting the women's groups demands for a hybrid offence, the government also adopted harsher penalties than those suggested. In effect, the women's groups hoped for a hybrid offence with a low 5 year maximum for the basic offence of sexual assault, and a maximum of 10 years for the second level offence. The government, however, attached a 10 year maximum to the hybrid offence and made the second level offence punishable by a maximum of 14 years.

EFFECTIVENESS: SOCIAL CHANGE & SOCIAL REFORM

As the legislature relied upon the criminal justice system to bring about the desired effects of the legislative change, it becomes important to come to grips with what was actually achieved through the government's response to the women's demands. Given that the government set out to address the women's groups' concerns, we will look at the results from the two different perspectives of social change and social reform.

Social Change

From the perspective of social change, the aim is to evaluate the effects of the legal change from an objective, value-neutral perspective. From this kind of viewpoint, as briefly developed below, there is little reason to believe that the reform of rape laws had any significant effect in the criminal justice system's management of rape.

In terms of the practical objectives in changing the criminal justice management of rape, we will first look briefly at the U.S. evidence. As discussed in chapters three and four, the roots and form of rape law reform are similar in Canada and the U.S. In both countries, the anti-rape movement aimed at a similar comprehensive reform in both substantive and evidentiary rape laws. In the U.S., as noted, the substantive changes took the form of sex-neutral assault or battery, and the procedural changes eliminated and/or limited the rules of corroboration, the requirement of recent

complaint, and the rules surrounding the admissibility of sexual history evidence. Clearly, then, the kinds of changes undertaken in Canada closely resemble those achieved in the U.S. The effectiveness of the American reforms, then, are relevant to an understanding of the actual effects of the kinds of change undertaken here in Canada.

Caringella-MacDonald (1988: 129-135) has reviewed the available U.S. studies with the following observations. First, the available evaluations provide mixed, but generally negative, results regarding change in police founding of complaints and rates of arrest, the rates of prosecution, and the rates of convictions under sexual assault laws as compared to rape laws. Second, regarding the question of the evidentiary changes in rape law, the objectives of the reforms have failed to materialize: corroboration requirements still operate; credibility and consent remain a main issue at trial; and, past sexual history evidence still arises. Moreover, she argues that the evidence suggests that there has been little improvement in criminal justice attitudes towards women or sexual assault.

Canadian studies similarly suggest that there has been little real change in the criminal justice system's response to sexual assault as compared to rape. Renner and Sahjpaul (1986), for example, studied the impact of the new sexual assault laws in their first year of operation. The authors found that there was a small but significant increase in the reporting levels of sexual assault; that there was no real effect on the rates of 'founding' at the

police level; and, that there was a small increase in clearance rates of sexual assault but this rate still fell well below that for assaults in general.

In a study of women who appeared at the Winnipeg crisis centre, Gunn and Minch (1985-86) looked at the filtering of sexual assault cases through the criminal justice system. They found that over 70% of sexual assault cases were filtered out of the criminal justice system in a continuing 'attrition-of-justice.' As well, in an informal study of judicial attitudes towards sexual assault complainants, Marshall (1988) suggests that judges continue to espouse traditional male attitudes that see women as sexual objects and down-play male aggression.

The government itself, through the Department of Justice, has also conducted a number of studies on the effectiveness of the sexual assault laws. On one level, in a review of legal cases of sexual assault, the research aimed to look at what kind of working definition the courts were applying to the term sexual assault. As the author of the study states, the interest in such a study flows out of (1) the lack of legislative direction as to the definition of sexual assault, and (2) the failure to clarify from which perspective (offender or victim) an assault is to be deemed sexual (Ruebsaat, 1985: 12-13). Based on a review of 71 cases over the first 28 months of the new law, Ruebsaat (1985: 13) argues that the lack of legislative directions in these areas may lead to a sexual emphasis in the courts (not the assaultive/violent behaviour of the offender), and may contribute to the continued harassment of the

victim in court (not the minimization of character assassination). Thus, there is reason to believe that the victim's treatment in the courtroom may not be greatly improved by the new law (see also Hinch, 1985).

On another level, objective outcomes of the sexual assault legislation have looked at reporting, founding, and conviction rates. Regarding the reporting of the offence, official statistics reveal an increase in the number of sexual assaults reported since the introduction of the new law. This increase has been attributed to the new law because the increased reporting began after and not before the passage of sexual assault laws, and because there has not been a corresponding increase in nonsexual assaults (Roberts, 1990a & 1990b; & Canada, 1990). Thus, while the victim's treatment in the courtroom may not be greatly improved with the new law, there is evidence that the sexual assault laws have influenced the reporting rates of victims in the desired direction.

However, while reporting has increased, it seems that the criminal justice system's response to these increased reports has not changed to any great degree. There has been little change in the police 'unfounding' rates of sexual assault as compared to rape (Roberts, 1990b; & Canada, 1990). While there has been an increase in police clearance rates of sexual assault as opposed to rape, it is unlikely that this increase is due to the implementation of the new law as a similar trend is observable in non-sexual assaults (Roberts, 1990b; & Canada, 1990). Lastly, even though clearance rates have for some reason increased, there has not been any

identifiable increase in conviction rates for sexual assault as opposed to those for rape (Canada, 1990). Thus, while victim's appear to be more willing to report the offence as a result of the new sexual assault laws, there is little evidence to suggest that these reports are more likely to be successfully processed through the criminal justice system.

Overall, then, it seems that the objectives relating to the criminal justice system's response to sexual assault complainants have not been achieved. In other words, the legal change has not achieved the desired objectives in terms of practical change in the criminal justice system's management of sexual assault (see also Hinch, 1985).

Social Reform

With respect to the question of social reform, the aim, as developed in our review of the literature, is to take the objectives of those seeking change and to look at the outcome from their perspective.

If we begin with the range of problems associated with rape law (see again Figure Three), it is clear that the women's rape law reform effort aimed at gaining both legal changes and wider changes that would be facilitated and advanced through the legal change. The change in the law was sought, in part, for the purposes of some tangible benefits on the social stage. These are, basically, the same objectives as those enumerated above under the government's objectives: increased reporting of the crime and increased

processing of offenders through the criminal justice system (see also Cohen & Backhouse, 1980; Caringella-MacDonald, 1988: & Snider, 1988). At this level, however, while it seems that more women are coming forward to report sexual assault, there is no real reason to believe that the criminal justice system is being more responsive to sexual assault complainants.

As such, it would seem that the women's movement only achieved desired results in changes to the law-as-written. On this level, it is clear that women have achieved many, but not all, of their aims (see again Figure Five). As well, with respect to the formulation of the desired legal change, the women's groups achieved a mixed result: the hybrid offence was achieved but at the price of higher penalties.

So, if we look at the effectiveness of the reform effort from the perspective of women, we are clearly left with mixed results. On the level of objective results, there is no convincing reason to believe that the actual functioning of the criminal justice system has changed in response to the new laws. On the legal change level, it is also clear that while there is reason to claim 'victory,' not all of the legal change goals were achieved. Lastly, with respect to the levels of offences and punishments, the result is again mixed: a hybrid offence was achieved but at the expense of higher penalties. In essence, the legal change from the perspective of women is a case of win-lose: it is neither a complete victory nor a total failure.

What was achieved was a number of changes in the substantive

law that can be seen as acceptable from the perspective of women. The victory in this area, however, cannot be considered absolute. While winning on the definitional nature of the offence (violent rather than sexual), the women's groups' arguments for lower penalties was not adopted in the new law. What was also achieved are a number of changes to the procedural law-as-written that help alleviate the victim's harassment at trial. Yet, once again this victory cannot be considered complete because they lost on the issues of the consent defence and the admissibility of sexual history questioning.

A POLITICS OF INSURGENCY?

A complete victory, then, cannot be claimed by the women's anti-rape movement. As well, as implied at the end of chapter four, it is clear that the women's efforts to change rape laws cannot be seen as an effort to undertake a complete jurisprudence of insurgency. However, as we aim to substantiate below, it is possible to see the present case--in a limited fashion--as promoting a jurisprudence of insurgency. In defending our position, we will start with a discussion of the process of legal change, and then move on to what was actually achieved through the reform of Canada's rape laws.

The Process of Legal Change

In the previous two chapters, we have set out evidence that the women's anti-rape movement did in fact, whether consciously or

unconsciously, carry out the basic strategy implied in the concept of a jurisprudence of insurgency. That is, (1) they explicitly chose to work through the law in order to change the law; (2) they began by exposing the original factual basis of the law they sought to change; (3) they showed that the original factual basis of the law no longer served its original purpose; rather, it objectified women and served to protect not all women but only those women who followed an acceptable life-style and maintained an acceptable social standing; and, lastly, (4) they argued that the functioning of the present law violated a higher legal principle--the inviolability of the human person--and that they were thereby denied a basic legal right to protection from violence.

If we return to what was undertaken by the government, the major guiding principle behind the legal change was the 'protection of the integrity of the person.' It appears that the women's groups effectively convinced the government that the existing law served to limit women's basic right to personal integrity, to self-determination. In response, the government undertook law reform as a means of addressing the inconsistency in the law and of addressing women's concerns. As such, it is clearly possible to interpret the case as having carried out a jurisprudence of insurgency at least in terms of process. So, a preliminary answer to our question would find that a jurisprudence of insurgency in the criminal law is possible on the processual level.

However, process alone is clearly not enough in the development and promotion of the overall goals of a jurisprudence

of insurgency. In effect, our preliminary answer is clearly limited. If the point of a jurisprudence of insurgency is to first reform, and then transform, the existing legal system in order to alter the prevailing system of social relations and replace this system with another, then purely processual results do nothing in themselves to ensure tangible results that can be used to further advance a cause. We are clearly interested in the kinds of changes achieved.

Outcome

In terms of outcome, then, we are interested in results from the viewpoint of those seeking change. It is women who sought to achieve change, to challenge male domination and female subordination in society. In discussing the case in terms of its developing and promoting a jurisprudence of insurgency, the outcome of the case needs be viewed in terms of how the legal change served women's aims.

Now, it is clear that, as developed above, the case represents a win-lose situation and not a complete victory nor a complete defeat. Given that the law-in-practice was largely ineffective, women can be seen to have won, in terms of the law-as-written, in the following areas: redefining the crime as an assaultive rather than sexually motivated violation; extending protection to cover both wives and males; extending protection to cover all sorts of sexual abuse not just penetration; and, the elimination of the evidentiary requirements of recent complaint and corroboration.

However, the women lost on the following issues: the defence of honest belief in consent; the admissibility of sexual history evidence; and, the penalties associated with the levels of the new offence.

If we return to the idea developed in chapter four that the present legal change has the potential of addressing the patriarchal system in our society, it is clear that two of the victories in the law are potentially important. On the level of legal principles, the women's groups have gained the right of the principle of the inviolability of the person, and have secured the idea that sexual discrimination in the criminal law is unjust.

First, with respect to sexual discrimination, the government eliminated reference to the gender of either the offender or victim in the new sexual assault provisions. The actual value of this change, besides the formal elimination of sexual discrimination, however, is questionable. Changing the name from rape to sexual assault and making it theoretically possible to have either male or female victims as well as female or male offenders does little to change the fact that it is primarily women who are attacked and assaulted sexually (see e.g., Chase 1982).

As well, returning to the ideas put forward by Brickey and Comack (1989) in evaluating legal changes from the perspective of a jurisprudence of insurgency, changes that aim to gain equal application of the law across gender, race, or class show little promise (see again Chapter One). In effect, while the law now provides that anyone can be the victim of a sexual assault and that

anyone can be found guilty of a sexual assault, this change does little to change the fact that women are primarily the victims and that it is primarily the poor who are subjected to the full force of the law (see Snider, 1985: 350; Boyd & Sheehy, 1989: 263; Brickey & Comack, 1989: 323-324: & see again Reiman, 1984; & Hopkins, 1986). The actual value of this change, then, is debatable. Nevertheless, the objective of eliminating sexual discrimination in the criminal law is achieved on a purely formal, law-as-written level.

Second, it is the government's objective to extend protection under the principle of the inviolability of the human person to women. However, if we return to the idea developed in our review of the literature that legal change operates on both the symbolic and instrumental levels, it would seem that this inviolability of the person victory is limited. That is, given that the criminal justice system's response to sexual assault has changed little if at all to sexual assault complainants, it is hard to claim that in practical terms more women are being protected from sexual assault.

Essentially, then, we've come to the main point in discussing the utility of the present case. The legal change would seem to be limited to a symbolic measure. That is, in the absence of any real effect in the criminal justice system's management of sexual assault, the legal change would appear to have remained on the level of law-as-written without effective translation into law-in-practice. While women have won the formal rights to be free from

sexual discrimination in the criminal law and to be free from violation as persons, the practical effect is limited.

Symbolic Utility?

As such, the government's reliance on the criminal justice system as the adopted mechanism for bringing about the desired effect is interesting. While the state, through parliament, acknowledged the right of women to be protected under the long-standing principle of the inviolability of the human person, and formally eliminated the sexual discrimination apparent in the criminal law, they undertook no new efforts to bring about the change: they relied on the repressive, reactive criminal justice system to respond to violations and undertook no progressive, proactive steps to help prevent or diminish the problem in the first place. Indeed, they increased control by expanding the kinds of behaviours subsumed under the offence and by implementing harsher penalties than those suggested by the women's groups (see also Snider, 1985: 348-350; & Roberts, 1990a: 50-51).

In one respect, this increased control is understandable in light of the timing of the reform of Canada's rape laws. As noted, the move to reform rape laws coincides closely with the then increasing popularity of the 'just deserts' model of criminal justice. As such, given that the just deserts model stresses punishment over other philosophical justifications for the imposition of criminal sanctions, it is not surprising that the reform of Canada's rape law incorporated a reliance on the

imposition of criminal penalties.

In effect, while rape and sexual assault represent a social issue that affects all women (as well as men), the government relied upon, and increased the scope and severity of, a system that by design deals with individual instances of wider social problems. In Smart's (1989: 148) terms, the criminal law is designed to deal only with "moments of antagonism." In the case of sexual violence against women, the criminal law sees and deals with specific moments of antagonism between a woman and her assailant(s), and not with the wider social problem of male sexual violence against women (see also Snider 1988).

Essentially, then, the women's groups efforts at changing the law served two contradictory purposes. On one hand, clearly, the effort was aimed at increasing women's freedom and mobility in society; yet, by working through the criminal law, the state was able to increase the scope and severity of control over people--as noted, these people will typically be the poor and underclasses. If, as the evidence suggests, the criminal justice system has changed little if at all in its response to the crime of sexual assault, then it is likely that the poor and underclasses will remain the primary targets of criminal sanction for sexual violence even though, as the women's groups have pointed out, men who sexually violate women come from all social classes. As such, sexual assault laws may not show any real change in women's actual freedom from sexual interference from, for example, their husbands.

As such, conducting a jurisprudence of insurgency through

the criminal law is dangerous. This is especially true when one realizes that the women's goal was not to extend the reach and force of criminal justice but rather falls more along the lines of human or social justice. The danger in using the criminal law lies, in large part, in the nature of the criminal law: criminal law is designed to deal with moments of antagonism, with individual instances of wider social problems.

Some of the aims of these proponents of change, then, clearly fall within the scope of a jurisprudence of insurgency. However, the specific, tangible changes aimed for in the criminal justice system's management of rape are problematic. In aiming to strengthen, expand, and reinforce the criminal sanctioning of individual male aggressors, the women's movement sought to increase freedom and self-determination at the cost of legal repression of male aggressors. It is for this reason that it is not truly possible to view the increased levels of reporting as promoting a jurisprudence of insurgency. Increased reporting advances the scope and reach of the criminal justice apparatus against males--typically lower socio-economic, underprivileged males. As such, the tangible reforms sought would not fall within the scheme of a more humanistic/socialist society, and would not therefore fall within the scope of a jurisprudence of insurgency.

As such, based on this case, it appears that the criminal law, when pushed to live up to the rule of law, will do so by extending control over those individuals who are brought to criminal justice. Nevertheless, against this limitation, the

criminal law offers proponents of change an arena wherein they may achieve symbolic, or law-as-written, victories. In the case at hand, the women's groups have achieved a symbolic victory in desexualizing the crime of rape, in extending the concept of sexual violence beyond penile penetration, and in gaining the right to charge their husbands with sexual assault. These victories, while apparently limited to law-as-written advances, are important in two senses. On the first level, they may have an important value in educating the public as well as the judiciary. Potentially, then, these victories may indirectly affect social change through changed attitudes towards women. Indeed, Roberts (1990b: 41-44) argues that the new law has played a part in bringing about the "changing social climate" in which more reporting of the offence of sexual assault has occurred, in which there is less stigma attached to the victim of the offence, and in which there are improved public attitudes towards sexual assault and its victims (also Roberts 1990a: 28).

On another level, and directly related to the potential development of a jurisprudence of insurgency, the right of women to be free from violation can now, at least in theory, be applied in any number of areas of concern to women. In terms of the 'rule of law,' women have the potential now to further apply the principle of the inviolability of the female person to other areas of concern in their subordination to men. In terms of the new legal rules, the elimination of the spousal immunity clause in cases of sexual assault may have far reaching effects.

These kinds of legal changes, clearly, bring into question the further applicability of the adage 'a man is king in his own castle.' What amounts to, in essence, the ownership and control of women's sexuality by men through the institution of marriage, has been formally eliminated through the reform of the criminal laws of rape: women have achieved the formal right to be free from personal violation, and have won the practical right to control their sexual and reproductive capacities, even in marriage. As such, the present case, if nothing else, has eliminated formally the right of men to subjugate and control women's sexuality through marriage. The present case, then, at least theoretically, opens the door--by working through the concept of the inviolability of the human person--for women to push for further reforms in attacking the existing patriarchal system of social relations.

It is possible, then, to view the present case as a step in the direction of a jurisprudence of insurgency. The women's groups can be seen to have tested some limits in the criminal law--they've discovered that the criminal law will likely be strengthened through further criminal law reform; and, they've won an important partial and temporary victory--the right to sexual self-determination in marriage.

SUMMARY (see also Figure Five)

The present study, then, in attempting to put Brickey and Comack's (1989) suggestion to test, can be summarized as follows.

As noted, the case is one where an interest group, whether

consciously or unconsciously, successfully undertook the process of a jurisprudence of insurgency. The legislature responded to the women's demands by, in effect, applying the higher legal principle of the inviolability of the human person as a response to the women's claims that rape laws denied women the basic protection implied by this higher legal principle. As such, the case in hand is an example of the successful application of the basic strategy of a jurisprudence of insurgency to criminal law reform.

At the processual level, then, the case of Canada's rape law reform provides evidence that suggests (1) undertaking a jurisprudence of insurgency through the criminal law is possible on the level of process; and, (2) the legislature may be lobbied through the strategy of a jurisprudence of insurgency to undertake legal change and to respond to the kinds of demands made through such a strategy. However, the process of a jurisprudence of insurgency in itself does not guarantee a translation of legal change into social change.

With respect to the legal change, law operates on both the symbolic and instrumental levels. The objectives of the reform--from the perspective of the government as well as, in part, the viewpoint of women--included increased reporting and more effective management of complaints through the criminal justice system. As discussed, there is little reason to believe that these objectives were realized in anything but a limited manner. The increase in reporting of the offence does little to advance a more humanistic legal system for dealing with social problems; rather, it serves to

promote and advance the legal system's control over offenders and the criminal justice system's emphasis on 'moments of antagonism' rather than the wider problems of sexual violence against women (and men) in our society. As such, on the instrumental level, it is not truly possible to say that the legal change had its desired effect. However, on the symbolic level, the specific legal change which eliminates the spousal immunity clause does offer the possibility of further developing and fostering a continued jurisprudence of insurgency. The women's movement, in effect, now have a potentially important rule that implies that the male householder no longer owns and controls his wife's sexual and reproductive capacities. As such, women have won the right to sexual self-determination, even in marriage. This victory--while it may be largely symbolic--must be considered important, and may prove important in the continued struggle to overcome the male domination and female subordination characteristic of a patriarchal society.

On the legal change level, the case of Canada's rape law reform suggest that legal change in the area of criminal law is limited to the symbolic level. On the instrumental level, as discussed, the criminal law is limited to treating individual cases of wider social problems. This individualization of social problems seems to limit the potential of the criminal law to change in order to address what is truly a collective (rather than individual) problem. However, at the symbolic level, the case in hand offers evidence to suggest that (1) specific desired legal changes in the

reform of criminal laws may be achieved by outside interest groups; and, (2) these kinds of changes, once achieved, could potentially be translated into the desired social change or employed to further work through the law towards this goal.

Lastly, on the level of social reform, the present case offers little evidence to suggest that more than minor, beginning stages to a jurisprudence of insurgency may be achieved through the reform of criminal law. As noted, on the legal change level, the basic adjustment-type changes in the criminal justice systems response to sexual assault complaints--increased founding, arrest, and conviction--did not materialize in any substantial fashion. As such, it is clearly unlikely that more far reaching changes--such as change to the patriarchal system that created rape laws and fosters the rape prone environment--could be achieved in the criminal law.

On the social change level. then. the present case is limited to offering women's groups a couple of legal change victories with which to pursue further, hopefully more productive and progressive, reforms. One of these is the victory that allows women to charge husbands with violation of their sexual and reproductive self-determination, and the other is the right of women to now make further claims with respect to the inviolability of the human person. As such, the value of the present case in terms of social reform is limited to symbolic value. The symbolic value, however, may be only potential rather than actual in that these kinds of victories need to be enhanced through further

efforts.

The present case, then, suggests that the criminal law may be an appropriate legal arena in which to begin a jurisprudence of insurgency. However, given that the potential victories seem limited and that the criminal law seems to reflexively respond with harsher sanctions, the value of the criminal law in bringing about a jurisprudence of insurgency would seem limited. In effect, it appears that the process can be carried out, and that legal changes can be achieved that may fall within the concept of a jurisprudence of insurgency, but these changes are limited in the criminal laws actual scope of effect on the social stage. As such, the criminal law may well be one of the places to start a jurisprudence of insurgency, but it does not appear to offer the possibility of bringing about far reaching social reform.

...continued

FIGURE FIVE:

OUTCOME: SYMBOLIC & INSTRUMENTAL CHANGE

LEVELS OF EFFECT
(insurgency?)

C H A N G E L E V E L S	LEVELS OF EFFECT (insurgency?)	
	Formal/Symbolic Level	Actual/Instrumental Level
	yes	n/a
	mitigated yes	no
Process of Reform		
Legal Change		
Social Reform		
	potential for further development	no

CONCLUDING REMARKS

Essentially, we have argued that the changes secured--particularly the application of the principle of the inviolability of the person to women as a group, and the removal of the spousal immunity clause--represent important advances that may be used to further test the limits of the legal system in restructuring societal relations through the elimination of systemic protection of the patriarchal advantage. However, the specific kinds of strategies for further using these state sponsored rights are not entirely clear; yet, it is fairly clear that they may be used in a number of areas of interest to women including, for example, economic domination and usurpation of women in the capitalist system that employs female labour--both productive and reproductive--to the benefit of males.

As well, as noted, the criminal law is a dangerous place to undertake the process of a jurisprudence of insurgency, the attempt to win changes in the criminal law is clearly dangerous: it opens the door for the state to further expand the reach of the criminal justice system. In effect, in attempting to further the advances of the present case, it might be wise to push for change in other areas of law. Nevertheless, it is fairly clear that the criminal law is an area of law that lends itself, in a limited fashion, to the development of a jurisprudence of insurgency.

Briefly, before closing out this study, I would simple like to make some comments on the methodology herein adopted and future

research. As developed, we began this journey by stating that this was an exploratory study. As such, given that no specific methodology for such a study had been spelt out in the literature, we developed a basic strategy and carried it out. That strategy, in essence, simply follows the chronological development of legal change and looks at the situation from the perspective of a sociology of law. The result is acceptable: we have been able to come to some general conclusions about the case with respect to a jurisprudence of insurgency. However, I am now of the opinion that a much better strategy exists; yet, that strategy would involve much more than the present strategy and it remains to be seen if the results would warrant the extra effort.

Essentially, the different strategy comes out of the working definition of the word 'case.' When we started, we took the suggestion made by Brickey and Comack (1989) that individual cases of legal change should be looked at from the perspective of a jurisprudence of insurgency. Herein, the word 'case' was taken to mean a single legal change case. The alternative view of the word case would have been to take the women's movement as a single case of a group seeking legal change. Now that this study is complete, I am of the opinion that this alternative understanding of the word case is the more appropriate one for undertaking this kind of study.

In essence, by looking at the women's movement as a single case in long-term legal change, it would be much more possible to see how individual legal changes fit together in the overall

process of reform. That is, for example, the use of the changes herein described could be looked at in subsequent legal change efforts. Towards this kind of goal, the present study merely begins the process. We set out to do an exploratory study, and that is what has been accomplished. In exploring the case, we have come to the conclusion that the process of a jurisprudence of insurgency is possible through the criminal law, and that the outcome of the present case suggests that, in the present instance, the beginnings of a jurisprudence of insurgency are actually, but in a limited fashion, possible in the criminal law.

The problem, then, is to get beyond exploration and ask more specific questions like: are certain kinds of legal changes more important than others in developing and accomplishing a jurisprudence of insurgency; what legal mechanisms allow or prevent the use of prior legal changes to be used to gain further changes in subsequent attempts to gain victories; and/or, what areas of law--criminal, civil, tort, labour, et cetera--are more valuable in seeking the kinds of changes required to transform society.

As a result, the area of future research is wide open. However, from the experience of conducting this study, I would suggest that the kind of study alluded to above holds much promise. That is, a study of the women's movement in its entirety could prove to answer many of the kinds of questions listed above. A full study of the women's movement would allow, for example, for a look at how early victories are used in subsequent change efforts. As well, given that the women's movement has undertaken legal battles

on many fronts (suffrage, abortion, equal pay, et cetera) and in different legal arenas (criminal law, civil law, and so on), the 'case' of the women's movement would allow for a number of possible studies related to the kinds of questions mentioned.

In terms of future research, then, many and varied options are open in a number of areas. However, working from our alternative definition of the word 'case,' I would suggest that the women's movement represents a very good case from which to undertake further research. Alternative 'cases' are nonetheless available: the prisoner's rights movement would provide an interesting look at the state's willingness to respond to the demands of disadvantaged groups, especially in light of the fact that their rights are limited from the start.

Lastly, the question of transforming society, especially from the perspective of non-traditional criminology, is clearly of great importance if we want to reduce the levels of deprivation and misery that are not only a source of crime but often also the result of criminal sanction. Accordingly, the idea of a jurisprudence of insurgency holds much promise and deserves further research.

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