LAWS3305, Thurs Oct 24/13
Guest Lecturer: Amy Conroy
Women's Equality

Elizabeth Workman's Trial
Domestic Violence and the Emergence of the Idea of 'Battered Woman's Syndrome' as Self-Defence

- Elizabeth Workman: married to James Workman, known violent alcoholic
- hung in front of Lambton County building in Sarnia in 1873 for killing her husband
- couple often overheard arguing loudly by neighbours
- on Oct 24, 1872, Elizabeth's close friend Sam Butler attempted to defend her in an argument between Elizabeth and her husband – he physically assaulted her husband after knowing he had assaulted Elizabeth
- Sam seen leaving Workman residence in early morning hrs
- neighbours heard a series of 'blows', groans and screams from James
- Elizabeth seemed 'out of sorts', said she gave James 'what he would not forget for a while'
- James Workman found dead when Elizabeth called neighbours to see what was wrong w/him
- May 1873: Elizabeth and Sam both arrested for James's killing
- Butler was acquitted based on lack of evidence
- jury had recommended mercy, but didn't go any good – found guilty of murder and sentenced to death
- **this case illustrates that even the jury recognized that Elizabeth was not wholly morally culpable**

At the time, the idea of battered women's syndrome had not been explored.
Available defences for women who killed abusive husband's in Workman's time:

Provocation:

- required proof of severe abuse, sudden reaction
- reduced charge of murder for manslaughter

Self-defence:

- actions had to occur during the confrontation or with confrontation imminent

R v Lavallee (1986):
Angelique Lyn Lavallee:

- a battered woman in a volatile common law relationship
- killed her partner by shooting him in the back of the head as he left the room
- shooting occurred following an argument where Angelique was physically abused
- he had threatened to kill her if she didn't kill him
- Lavallee's case reached the SCC because of conflict over the evidence submitted
- SCC acquitted Lavellee, recognizing “battered woman's syndrome” as a defence to murder
- To come to this conclusion, SCC altered the traditional interpretation of the requirement of “imminent” danger
- the issue in the case was that the court had to look at a number of factors in the traditional self-defence excuse; “imminent danger” -- looking at Lavalee's situation, it wasn't necessarily the case that there was going to be imminent danger in terms of immediate physical harm, but a woman might act in self-defence because of the specific fear that her life might be in danger

SCC decision:

- in the case of battered women, it is not appropriate to ask
  - why she would put up with the teatment
  - why she would continue to live w/such a man
  - why she would not pack her bags and go
- mental state of accused must be judged against cumulative effect of months / years of abuse
- to require women to wait until "the knife is uplifted, the gun pointed or the fist clenched" ignores issues re: women's size, strength, socialization and lack of training

SCC decision provoked great controversy

- on the issue of equality, it is argued that Lavallee:
  - indicates progress in terms of recognizing that battered women may respond in self-defence, differently than the "reasonable man"
  - illustrates need to reconsider criminal law to ensure that it is adequately incorporates experiences of women

Legal / Social Regulation of Marriage

Laws:

- "in law husband and wife are one person, and the usband is that person" -- popular English Common law tradition
- women required to relinquish personal property to their husbands upon marriage, could not legally hold real property apart from their husbands

Social norms:

- were equally as important as the law in terms of regulation of marriage
- aimed to protect the traditional norms dictating family roles
- emphasized a woman's responsibility as bearer / caregiver of children

- social norms maintained the expectations of marriage

Birth Control and Abortion in Late Nineteenth Century Canada

- historically, abortion in the first trimester not viewed as morally wrong
  - earliest laws distinguished early abortions from those induced after "quickening" (the feeling of fetal movement)
  - abortion not a statutory crime in British law until 1803

Birth rate declined at the end of the 19th C:

- marriage rates remained relatively stable
- fecundity rates improved (a woman's ability to get pregnant – but perhaps not deliver)
- figures indicate rise in abortions contributed to fall in birth rate (Canada and elsewhere)

- "Race suicide": An approach to married life that de-emphasized family, emphasized "luxury and gratification of passion"
- Women held responsible for this fall in marital fertility; shirking their responsibility of child-bearers

Birth Control and Abortion in Late 19th C Canada:

Theodore Roosevelt, attributig the shrinking size of the Anglo-Saxon family to women shirking their

national duty:

> "The woman who flinches from childbirth stands on par with the soldier who drops his rifle and runs in battle"

- dramatic concern over fall of birthrate and failing to serve their country in the way that the law was supposed to support & enforce

Criminal Code Provisions Relating to Writing on Birth Contorl

Criminal Code 1892, s. 179(c):

"Everyone is guilty of an indictable offense and liable to two years' imprisonment who knowingly, without lawful excuse or justification, offers to sell, advertises, publishes an advertisement of or has for sale or disposal any medicine, drug or article intended or represented as a means of preventing conception or causing abortion"

- to space out births, Canadian women had traditionally relied upon:
  - abstinence
  - nursing
  - "coitus interruptus"
  - self-induced abortion
  - (ill-informed) understanding of the women's cycle
- physicians typically informed patients of "natural," but not "mechanical" means of controlling conception

Abortions often attempted in private, by means of:

- drinking of 'abortifacient' drug
- hot baths
- violent exercise
- consumption of large qualities of gin
- dilation of the cervis (e.g. With a catheter)
- if unsuccessful, women may have turned to an abortionist (illegal)

Abortion Services – Advertisements

- clearly places that one could go to obtain an abortion; had to be somewhat hidden; criminal law starting to close in on these activities making it dangerous for all parties

Cotton root pills - "safe and absolutely pure. Most powerful Female Regulater known. Should not be taken during pregnancy."

- the laws generally were supporting traditional notions of marital roles – women as having a duty to the state, to themselves, to the community, to their husbands, to continue the birth rate
- societal norms very much in support of these ideas

Modern arguments:

- women's reproductive capabilities present a primary location for subordination of women
- women's emancipation requires release from biological and social constraints related to reproduction

When the court has been faced with cases involving gender equality, the court has acknowledged this

imbalance and inequality issues.
- acknowledged that heterosexual marriage and gender division of labour disadvantage women, esp upon marriage breakdown
- relied upon s. 15 and need to establish equality between the sexes

Equality focus largely disappears in reproductive freedom cases
- disputes often focus on r'ship between woman and fetus

Abortion Law in Canada – 1969
- before 1969, all abortions constituted criminal offence

1969 Ominus Bill:
- reformed criminal law on abortion
- provided limited access to abortion service where pregnancy presented danger to life or health of a woman
- introduced new provisions allowing aboritons upon reccommendation of hospital committee (3 physicians)

Dr Henry Morgentaler
- ignored CC limitation and opened abortion clinics without observing statutory limitations
- was prosecuted and **acquitted by** juries in ON and QC (despite clear evidence against him)
- incorporated various *Charter* arguments into his defense (including ss. 7 and 15)

7: right to life, liberty and security of the person; 15: right to equality

SCC decision in Morgentaler:
- effected drastic change to circumstances relating to abortion for Canadian women
- provided women with some assurance of access to abortion services and other key protected reproductive rights
- represents the first of a series of post-*Charter* decisions on women's reproductive autonomy

After Morgentaler were a number of developments: division of powers between the federal and provincial governments
- many people & sectors of public and provinces did not agree that this was the right way to move forward
- another case that came out base on the division of powers between the federal and provincial governments: Nova Scotia wanted to stop the delivery of abortion services
  - on its face, aimed at the administration of healthcare, but created a situation in which a woman would not be able to access healthcare

Continuing Barriers to Abortion Services, Contraception:
Abortion:
- cost
- issues surrounding autonomous rights of doctors (and other decision-makers)
- long wait periods
- gestational limits
- unsolicited anti-choice counseling
- funding and resulting hospital mergers (linked to religion)

Contraception:

- generally not covered by provincial health plans
- requires autonomy and financial resources
- professional resistance (ex: plan B)

- some doctors wish to not provide these services; at what point can the law require doctors to provide these services? Doctors need to be willing to prefer, but don't have to provide. This creates a lot of tension in the way that referrals are done, esp in a small place (ex: P.E.I.)
- one of the most logical steps to lowering abortion costs = contraception, but there are still, even today, barriers to accessing contraception (not covered by health plans.)
  - financial burden for oral contraception can act as a barrier
  - requires certain autonomy and access to resources

Did the Supreme Court mess up – should they have framed it as more of an equality issue?