

## ***'Honey let's just keep the doors open': A Critical study on the abrogation of spousal privileged communication in Canada and its implications in criminology***

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### **Abstract**

The doctrine of spousal privileged communication existed in the common law and the Canadian law for centuries until it was abruptly abrogated in the year 2015 by the previous conservative government in light of the victims' rights movement, without much debate or discussion in the parliament. Communications between spouses (and now partners) were privileged on the ground that they were so closely identified with each other than an aura of bias would surround any testimonial evidence they may present before a court against their partner, due to an inherent or vested interest in the trial. Until 2015, the reason this privileged communication was protected, with some limitations, was due to the preservation of marital harmony. Why was the preservation of marital harmony no more a social value in Canada? I argue that this unfounded and abrupt abrogation was unwarranted and since the same was done without any research, it will have long term implications in criminology. Therefore, this paper has three key aims, firstly, to explore the concept, meaning and the origin of spousal privileged communication in Canada and the commonwealth including the reasons behind safeguarding and fostering spousal relationships over other relationships. Secondly, the applicability and scope of spousal privileged communication in Canada pre and post 2015, i.e. Bill C-32 that abrogated spousal privileged communication in Canada. Chapter 2 will also address some key points that contradicts the intention of the legislature behind abrogating spousal privileged communication. Thirdly, the paper argues that the spousal privileged communication should have been retained, and draws upon evidence from criminological, sociological and legal realms to define four key reasons why this is so. This paper essentially calls for further understanding of the causal mechanisms that flow from the abrogation of this spousal privilege and for monitoring future outcomes through longitudinal studies.

### **Introduction**

Security and privacy are the two most fundamental reasons we lock our doors. Home is perhaps the only space that guarantees enhanced safety, privacy, foster intimate relationships, and provides shelter from unwarranted surveillance and state intervention. Interception of telecommunication and surveillance of public spaces has restricted privacy and freedom of communication and expression even among the closest bond sharer like spouses and partners within the confines of their homes or private spaces. However, Canada seems to have imposed a limitation on this as well. It may not be worth locking the doors from the privacy point of view anymore, as spouses and partners are now compellable to the Court and competent to testify against each other. Bill C-32 or the Victims Bill of Rights Act<sup>2</sup>, other than enacting Canadian Victims Bill of Rights, amended section 4 of the Canada Evidence Act<sup>3</sup> abrogating spousal privileged communication in 2015.

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<sup>2</sup> Victims Bill of Rights Act, 2015 (Canada)

<sup>3</sup> Canada Evidence Act 1985 (Canada).

In Canada, spousal privileged communication was abrogated in 2015, without any parliamentary debate or research to support the measure.<sup>4</sup> Spousal privileged communication, prior to abrogation, akin to doctor-patient, lawyer-client privileged communication, made communication between spouses confidential, hence spouses incompetent and uncompellable to the Court by the Crown Prosecution to testify against each other, except in certain named offences, generally dealing with violent behaviour and sexual offences against the spouse or the children.<sup>5</sup> Therefore, this paper has three key aims, firstly, to explore the concept, meaning and the origin of spousal privileged communication in Canada and the commonwealth including the reasons behind safeguarding and fostering spousal relationships over other relationships. Secondly, the applicability and scope of spousal privileged communication in Canada pre and post 2015, i.e. Bill C-32 that abrogated spousal privileged communication in Canada. Chapter 2 will also address some key points that contradicts the intention of the legislature behind abrogating spousal privileged communication. Thirdly, the paper argues that the spousal privileged communication should have been retained, and draws upon evidence from criminological, sociological and legal realms to define four reasons why this is so. This paper essentially calls for further understanding of the causal mechanisms that flow from the abrogation of this spousal privilege and for monitoring future outcomes through longitudinal studies.

The abrupt abrogation of the spousal testimonial privilege did not seem to be an issue to the previous conservative government lead by Prime Minister Stephan Harper. Reference may be made to the parliamentary debates in this regard, wherein the then Minister of Justice and Attorney General of Canada Peter Mackay, while introducing the bill in the parliament observed that “this (bill) would put the victims at the very epicentre of the Canadian criminal justice system...the bill would extend rights to victims of crime at every stage of our criminal justice process: during investigation and prosecution of an offence, during the corrections process, during the conditional release process or parole...”<sup>6</sup>.

It isn't hard to discern that the purpose sought from this abrogation and as highlighted by Peter Mackay during the parliamentary debate is “to ensure that all of the evidence in the truth-seeking exercises of the court can include the testimony of spouses...” whereas prior to the enactment of Bill – C32, spouses were competent witnesses for the defence and competent and compellable for the prosecution only in certain named offences, generally dealing with violent behaviour and sexual offences against the spouse or children.<sup>7</sup> Thus privileged communication ousted evidence of spouses, except in the cases mentioned above, deviating from the general of evidence that “are designed to promote an approximation of truth and assist the Courts and trier of facts in formulating legitimate conclusion”.<sup>8</sup> However, the rules relating to privileged communication have been broadly accepted as exceptions to the general rules of evidence due to an overarching societal interest, and in the present scenario, the reason spousal privilege was given exemption over general rules of evidence was the preservation of matrimonial harmony and adult independent relationships.

But what changed suddenly? This question echoed in the parliament during the ‘only’ discussion of this aspect of the Bill C-32 as well. Mme Francoise Boivin Gatineau, a parliamentarian from the province of Quebec, speaking on behalf of the opposition (NDP) highlighted her concern about the sudden abrogation of spousal testimonial privilege, but received a casual response from Peter Mackay. According to him “Some 40 criminal code offences already waive spousal immunity, and we (the conservative party) have gone further to ensure that all of the evidence in the truth-seeking exercises of the court can include the testimony of spouses for things such as murder, terrorism, and major fraud.”<sup>9</sup> To add to this list, it may be noted that this privileged communication was further limited by various other rules of evidence like the principled approach to hearsay and res gestae etc. This aspect will be highlighted under Part 2 of this paper exhaustively.

Therefore, by virtue of this paper, I seek to examine the underlying causal mechanisms and pathways pertinent from the socio-criminological perspective. Prior to Bill – C32, the main policy

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<sup>4</sup> Victims Bill Deb 20 February 2015.

<sup>5</sup> Section 4, Canada Evidence Act 1985. (Before the Bill C-32)

<sup>6</sup> Victims Bill Deb 20 February 2015.

<sup>7</sup> Section 4, Canada Evidence Act 1985.

<sup>8</sup> John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The law of Evidence in Canada* (LexisNexis Canada, 1999) 713.

<sup>9</sup> Victims Bill Debate [n 5].

behind the continuation of spousal privileged communication, which was rightly being extended to adult independent relationships and common law partners was considered “the maintenance of marital harmony and the prevention of the natural repugnance that results in having testify against his or her accused spouse”<sup>10</sup>. However, the term ‘marital harmony’ is seldom defined. Objectively and if literally interpreted, it seems to be restricted to the maintenance of harmonious relationship between two adult’s partners. But if we dwell into the essence of this relationship, the mechanisms and pathways highlight a greater societal interest than merely ‘preserving matrimonial harmony’<sup>11</sup> or assisting the state in securing prosecution.

Thus it is now a policy in Canada to compel spouses to the Court, whenever applicable, to testify against their co-spouse/partner. But to recommend a policy change of this sort, it requires “more than considering how a treatment would be expected to work across diverse-locales. When one considers policy not as a randomized trial but as a change in institutional structure, it becomes clear that theory must be brought to bear for prediction.”<sup>12</sup> Therefore in light of this policy change, and to highlight the present scenario in context of a causal graph, the intervention in the present context is the abrogation of the spousal privileged communication itself. I am referring to the abrogation of spousal testimonial privilege as an ‘intervention’ due to the previous and traditional application of this doctrine. It was considered normative for the spouses/ partners to share/communicate even the deepest secrets until Canada abruptly decided otherwise without any discourse or debate in the parliament or academic research in this regard. Please note the causal graph below that highlights the intention of the Canadian legislature in amending Section 4 of the Canada Evidence and the reason behind this abrupt policy change:



Spousal testimonies would assist (+) the prosecution in securing the conviction of the accused which would invariably lead to victim satisfaction. The (+) sign connotes a positive impact on both the conviction and enhance victim satisfaction. And through this causal graph, it must also be noted that conviction and victim satisfaction now supersedes ‘preservation of marital harmony’ and the ‘prevention of the natural repugnance that results in having to testify against his or her accused spouse’.<sup>13</sup> However, is this abrupt abrogation, based on the abovementioned premise a prudent step? This question needs to be answered in light of a larger political and social structure. The underlying causal mechanisms in the graph above are limited to conviction and victim satisfaction. Whereas there is enough causal evidence in criminology on the role of a spouse and partner in offender rehabilitation/parole decision, overcoming social isolation, child upbringing and other issues that may ensue such as secondary victimisation of a spouse etc. Therefore, Part 3 of the paper will address the underlying reasons as to why spousal/partner privileged should have been retained.

In the chapter 2 of this paper I will highlight the history of spousal privileged communication in Canada and the common law, and the reasons to accord privilege to spouses and partners over other relationships. Chapter 3 will address the scope and applicability of Spousal privilege both pre and post Bill C-32 (2015), drawing upon various extensions and limitations on this privilege to argue that the privilege was well regulated and perhaps needed minor amendments to suit the victims’ rights discourse. In chapter 4, I will critically examine the effects and criminological implications of abrogating spousal/partner privileged communication. Firstly, I will draw upon the changing social framework of the contemporary society in light of growing social isolation to argue the continuation of the privilege. Thereafter, I will highlight the role of family and spouses in the rehabilitation of the offender and how the abrogation of this privilege may prove to be counterproductive, especially with

<sup>10</sup> *R. v. Kevin Roy Hawkins and Claude* (1996) 3 R.C.S.

<sup>11</sup> *Ibid*

<sup>12</sup> Robert J. Sampson, Christopher Winship & Carly Knight, ‘Translating Causal Claims’ (2013) *American Society of Criminology* 591.

<sup>13</sup> *R v Hawkins* [n 6].

regards to this aspect. Thirdly, the criminogenic effects of escalating a conflict between parents upon the upbringing of their children and its role in juvenile delinquency and lastly the consequences of abrogation on secret trials and the possible secondary victimisation of the spouses and partners.

## **Meaning & The Common Law Origin of the Spousal Privilege Communication in Canada and the need to protect it over other relations**

### *Common Law Origins*

One of the earliest and most cited source in common law is the observation of Lord Coke in 1628 on the exception of privileged communication between spouses. He observed:

“It hath been resolved by the Justices that a wife cannot produce either against or for her husband, *quia sunt duae animae in carne una* [for they are two souls in one flesh], and it might be a cause of implacable discord and dissention between the husband and the wife, and a meane of great inconvenience.”<sup>14</sup>

Lord Coke’s statement clearly highlights the socio-cultural temperament of the 17<sup>th</sup> century. Spouses were not only incompetent and uncompellable to testify against each other, but also for each other in defence. The reasons underlying this mindset will be discussed in the following chapter, but from the earliest days of common law, citizens were duty bound to report treason or felony, except “a wife was not bound to discover the crime of her husband”.<sup>15</sup> Other than historically stemming from women’s limited role in a society, this principle is “analogous to the doctrine of self-incrimination to the extent that, it would, unless excluded by a statute, entitle a person to refuse to disclose information, or produce a document or thing if to do so could directly or indirectly incriminate his or her spouse”,<sup>16</sup> thus treating spouses as a single entity in law. However, in the cases of bigamy, “it was a settled rule that the first wife is not a competent witness although the second wife is”.<sup>17</sup> The only avenue that made a wife competent and compellable was in respect of any charge which affected her own liberty or person including dying declarations.<sup>18</sup> The reason communications between spouses have been privileged and not that of parents, children or siblings is not only of historical significance, but also highlights the significance of fostering and promoting spousal/partner relationship, especially in the times to come. This aspect will be addressed below exhaustively.

### *The need to protect spousal relationship over other relationships*

Indeed prior to the industrial revolution “a family unit was a function of several forces all working in the same direction. Individual members of families were tied by sexual and affectional bonds. If these bonds were frequently ambivalent, disharmony was prevented by economic necessity and social pressure. It was important to keep the family together because it was a producing unit, and economic disaster might very well follow a breakup.”<sup>19</sup> However, as the means of communication, recreation and market fostered, the support started to grow outside the unit of family, disintegrating the physical and economical bonds. “Economically it was no longer necessary, or even desirable, for the family to remain a unit, indeed, in the early days of child labour the dormitory system made

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<sup>14</sup> David Lusty, “Is there a common law privilege against spouse-incrimination?” (2004) 27 (1) University of New South Wales Law Journal 1.

<sup>15</sup> Henry Roscoe, Thomas C. Granger & George Sharswood, *A Digest of the law of evidence in criminal cases* (Rayner and Hodges 1840).

<sup>16</sup> *Sorby v Commonwealth*, [1983] HCA 10.

<sup>17</sup> Henry Roscoe et al. [n 13].

<sup>18</sup> *Ibid.*

<sup>19</sup> Robert M. Hutchins and Donald Slesingert, ‘Some observations on the law of evidence family relations’ (1928)

such unity impossible.”<sup>20</sup> As a result, the disintegration of family as a unit continued thereafter to an extent that individuals only had their partners to confide in, and to share the deepest secrets.<sup>21</sup> “We know these close ties are what people depend on in bad times. We’re not saying people are completely isolated. They may have 600 friends on Facebook, and email 25 people a day, but they are not discussing matters that are personally important”<sup>22</sup>

Furthermore, the researchers from the University of Arizona in their paper titled, “Social Isolation in America: Changes in Core Discussion Networks over Two Decades” observed a stark rise in social isolation in America.<sup>23</sup> While the criminogenic effects of social isolation will be discussed in chapter 3, it is pivotal to note from the present context that family as a unit, due to various reasons discussed above has been largely limited. In fact, “compared to 1985, nearly 50% more people in 2004 reported that their spouse is the only person they can confide in. But if people face trouble in that relationship, or if a spouse falls sick, that means these people have no one to turn to for help...if close social relationships support people in the same way that beams hold up buildings, more and more Americans appear to be dependent on a single beam”<sup>24</sup>

Secondly, the renowned test laid down by Wigmore known as the ‘Wigmore Criteria’ best answers the questions as to why other relationships cannot be included within the domain of this privileged communication. According to him, “four fundamental conditions must be met before a privilege is extended to any communication and indicated that these four conditions serve as the foundation of policy for determining all relation all privileges. They are:

- a) The communication must originate in confidence that they will not be disclosed.
- b) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- c) The relation must be one which, in the opinion of the community, ought to be sedulously fostered; and
- d) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.”<sup>25</sup>

In the backdrop of social fragmentation of the contemporary society the ‘Wigmore Criteria’ has been well satisfied by the spousal/partner relationship. The nature of relationship and communication shared by spouses and partners, other than that of professionals and experts, unambiguously originates in confidence, is sedulously fostered, and the injury by disclosure of communication will surpass the benefit thereby gained<sup>26</sup>, even though the Canadian legislators think otherwise. Whereas, this takes me to the moot point I wish to make in this paper, the benefit that ought to be gained by abrogating spousal privilege, i.e. assisting the prosecution by bringing all the material facts before the Court, does not and perhaps never will, in the coming years surpass the necessity to not only protect, but foster the sole relationship that is preventing a complete social isolation. Therefore, in the following chapter 2 of this paper, I will highlight that the move to abrogate spousal privilege by the previous conservative government will hardly assist prosecution in securing conviction due to the limited applicability of the spousal privileged communication prior to Bill-C32.

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<sup>20</sup> *Ibid.*

<sup>21</sup> Miller McPherson, Matthew E. Brashears & Lynn Smith-Lovin, ‘Social Isolation in America: Changes in Core Discussion Networks over Two Decades’ [2006] 71 *American Sociological Review* 353.

<sup>22</sup> Shankar Vedantam, ‘Social Isolation Growing in U.S.’ *The Washington Post* (Washington, 23 June 2006).

<sup>23</sup> Miller McPherson, Matthew E. Brashears & Lynn Smith-Lovin [n 19].

<sup>24</sup> Shankar Vedantam [n 19].

<sup>25</sup> John Sopinka et al. [5]. Miller McPherson, Matthew E. Brashears & Lynn Smith-Lovin, ‘Social Isolation in America: Changes in Core Discussion Networks over Two Decades’ [2006] 71 *American Sociological Review* 353.

<sup>26</sup> *Ibid.*

## The Scope of Spousal Privileged Communication in Canada: Pre and Post 2015 (Bill C-32)

The key question I scrutinize in this chapter pertains to the intention of the Canadian legislature behind abrogating spousal privilege, i.e. bringing material facts before the trier of facts or the Court by compelling spouses to the Court where appropriate. This seems to imply that Canada previously embarked on a rule of privilege echoed in the words of Lord Coke above in 1628.<sup>27</sup> However, the scope and nature of spousal privilege, prior to the enactment of Bill C-32 was already broad enough to bring almost all material facts before the Court. Therefore a move towards abrogation highlights nothing but penal populism especially in light of the Adult criminal court statistics in Canada. As per Statistics Canada, “most adult criminal court cases in 2013/2014 involved non-violent crime, representing 76% of all completed cases. There were 7% fewer violent crime cases in 2013/2014, whereas 63% of all cases completed in adult criminal court resulted in a finding of guilt. Guilty findings varied by province and territory, with Prince Edward Island reporting the highest proportion of guilty cases (78%), and Ontario reporting the lowest 55%”.<sup>28</sup>

With median conviction rates as high as 63% and majority of criminal offences being ‘non-violent’ (76%) with a decrease of 7% in 2014 (when the bill was tabled), the reason behind abrogation appears to fade, as very high conviction rate may also refer to wrongful convictions. However, as per Peter Mackay, “the abrogation will assist in finding of guilt in matters pertaining to murder, terrorism, and major fraud.”<sup>29</sup> While terrorism *vis-à-vis* secret trials will be dealt with exhaustively below, as most of it involves pre-emptive prosecutions and secret trials, with regards to homicide it must be noted that “homicide was relatively a rare event in Canada in 2013, representing less than 1% of all violent crime. In total, police reported 505 homicides in 2013, 38 fewer than the previous year. As a result, the national homicide rate declined to 1.44 per 100,000 population in 2013, marking an 8% decrease from the previous year and the lowest homicide rate recorded since 1966. For that matter, even attempted murder rate decreased in 2013 to 1.8 victims per 100,000 population, marking a 5% decline from the previous year and the lowest homicide rate recorded since 1966”.<sup>30</sup>

While the conviction rate and the incidence of violent crime may not be a reliable indicator of reduced crime and efficient prosecution, “the homicide rate due to its consistent and reliable reporting to the police, is often used as an indicator of the level of violence in a society”.<sup>31</sup> Therefore the statistics on the incidence of violent crime, especially murder succinctly rebuts the *prima facie* intention of the legislature behind abrogating spousal testimonies. An increased incidence of violent crime/homicide with a sharp decrease in ‘finding of guilt’ would have perhaps added some weightage to the ‘tough on crime’ agenda pursued by the previous conservative government, but in light of the statistics above and the limited scope of spousal privilege discussed below suggests a move towards penal populism.

### *Spousal Privilege Pre Bill C-32 (2015)*

The spousal privileged communication, prior to 2015, was already broad enough to promote access to justice and was receiving progressive judicial interpretation with regards to other adult relationships, hence did not merit any amendment, especially abrogation, except one discussed in the conclusion. Firstly, the pre-Bill C-32 Section 4 of the Canada Evidence Act made spouses competent witnesses for the defence and competent and compellable witnesses for the prosecution in certain named offences, generally dealing with violent behaviour and sexual offences against the spouse or the children<sup>32</sup> i.e. the spouses were competent to testify and compellable to the Court if

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<sup>27</sup> David Lusty [n 12].

<sup>28</sup> Statistics Canada, *Adult criminal Court statistics in Canada* (Catalogue no. 85-002-X, 2015) 3.

<sup>29</sup> Victims Bill Deb [n 3].

<sup>30</sup> Statistics Canada, *Canada’s crime rate: Two decades of decline* (Catalogue no. 11-630-X).

<sup>31</sup> *Ibid.*

<sup>32</sup> Canada Evidence Act [n 2].

either they or their children were the victim of violent and/or sexual offences, therefore, the privilege did not grant immunity to violent spouses and deterred similar behaviour by explicitly denying privilege in this regard.

Secondly, the spousal privilege only extended to ‘communication’ received by the spouses and not their conduct or demeanour. For example and as observed in *re Gosselin*<sup>33</sup>, if a spouse witnessed blood stains, s/he can be compelled to testify. Whereas with respect to communication, as per Section 183 of the Criminal Code<sup>34</sup>, “private communication means any oral communication, or any tele communication, that is made by an originator who is in Canada or is intended by the originator to be received by a person who is in Canada and that is made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it, and includes any radio-based telephone communication that is treated electronically or otherwise for the purpose of preventing intelligible reception by any person other than the person intended by the originator to receive it”.

From this definition, two things are unambiguous, firstly, that the spousal privilege fostered privacy and confidence amongst spouses and secondly, it deterred state surveillance, atleast from the evidential perspective, therefore promoting confidence and freedom of speech and expression not only in private spaces but also on modern telecommunication devices. While the consequence of abrogation on this medium of communication will be dealt under chapter III both from privacy and trial perspectives, an illustration would highlight this point better. For instance, in *Story v State*<sup>35</sup>, a case of homicide, a short time before the homicide occurred, the witness heard the defendant’s wife say, “Yes, he thinks more of deceased’s wife than he does of me and the children.” This statement “was held clearly violative of the rule forbidding the use of the wife’s testimony against her husband”, however as on today, the wife can be compelled to the Court with respect to this statement and may play an instrumental role in her husband’s conviction. Furthermore, spousal privilege only protected communication “during the marriage”. It does not protect communication that occurred prior to or subsequent to the dissolution of marriage,<sup>36</sup> whereas, the Supreme Court of Canada in the same case observed that “even if there was a valid, legal marriage still in place, the spousal incompetency rules did not apply where the spouses were ‘irreconcilably separated’”. This is due to the fact that the whole purpose of spousal privilege was ‘preservation of matrimonial harmony’ and when there is no matrimonial harmony, extending privilege to the spouses would be infructuous.

Thirdly, severe limits on spousal privilege were imposed by the rule of the “principled approach to hearsay”. The landmark case to illustrate this exception is *R. v. Hawkins*<sup>37</sup>. In this case, H a police officer and M a bar owner were co-accused. At the preliminary inquiry G, H’s girlfriend was a competent and compellable witness and during cross examination incriminated H by making a number of statements on oath. However, during the pendency of the trial, G and H got married and G claimed immunity in furtherance to the rule of spousal privilege. While the trial court accepted her plea, the court of appeal ordered a re-trial. Supreme Court affirming the court of appeal’s decision in this regard held that the statement given by G, when she was H’s girlfriend should be admitted as an exception to hearsay. “Under the modern principled frame work for defining exceptions to the hearsay rule, a hearsay statement will be admissible for the truth of its content if it meets the separate requirement of ‘necessity’ and ‘reliability’ ...At the same time, this modern framework should be applied in a manner which preserves and reinforces the integrity of the traditional rules of evidence. Accordingly, the new hearsay analysis should not be permitted the admission of statements which the declarant, if he or she had been available and competent at trial, would have been able to offer into evidence through direct testimony because of the operation of an evidentiary rule of admissibility.”<sup>38</sup> Therefore, to suppress the misuse of the spousal privilege, the modern principled framework could be applied in like circumstances described above, especially

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<sup>33</sup> *Gosselin v The king* 1903 33 SCR 255.

<sup>34</sup> Criminal Code, 1985 (Canada).

<sup>35</sup> *Story v State* (Tex. Crim. App. 1927) 296 S. W. 516.

<sup>36</sup> *R v Couture* (2007) 2 SCR 517.

<sup>37</sup> *R v Hawkins* [n 6].

<sup>38</sup> *Ibid.*

where individuals married in order to avoid criminal liability or testimonial responsibility. The modern principled framework is only available in circumstances where the “declarant is unavailable to testify at trial and where the party (prosecution in this case) is unable to obtain evidence of a similar quality from another source”.<sup>39</sup>

Lastly, prior to Bill C-32 Canadian Courts did a commendable job with regards to the broad and progressive interpretation of the spousal privileged communications. Various provinces extended the scope of this privilege to common law spouses and same-sex partners. For instance, in the province of Alberta, the privilege and protection for spouses also apply to “adult independent relationships” which include both common law and same sex partners.<sup>40</sup> Similarly in 2009, an Ontario Court found both the competence and the privilege of the Canada Evidence Act, ss4 (1) and 4(3), violated the Canadian Charter by discriminating against common law marriages. The Court read in the inclusion of common law relationships as a remedy.<sup>41</sup> However it was unfortunately overturned by the Ontario Court of Appeal to only protect married couples and not common law partners.<sup>42</sup> Yet, the broad interpretation of literal terms like ‘husband and wife’ denotes a strong judicial activism to acknowledge and protect even common law and other like relationships. This is pivotal in light of the changing structures of the Canadian families. “While the majority of the population continues to live in some form of family setting and married couples still make up the largest portion of family ‘types’, the Canadian family is becoming increasingly diverse.”<sup>43</sup> In 2011, 46% of the population was legally married, while 57.7% of the population aged 15 and over who lived in private households were a part of couples, whether married or living in a common-law relationship”.<sup>44</sup>

In light of above limitations on the misuse of privilege and latest statistics, it’s not hard to discern that the impact of abrogating spousal privilege on the ‘approximation of truth’ and victim satisfaction will be meagre. In contrast, the causal mechanisms I will discuss in the next chapter will necessarily call for the ‘preservation of matrimonial harmony’. But prior to that, I will highlight the scope of Spousal Privilege on other adult independent relationships and the application post Bill C – 32.

### *Spousal Privilege Post Bill C-32 (2015)*

Bill C-32 amended Section 4 of the Canada Evidence Act, Ss 4(2) of the Canada Evidence Act now reads: “No person is incompetent, or uncompellable, to testify for the prosecution by only the reason that they are married to the accused”.<sup>45</sup> Therefore now, spouses and partners can be subpoenaed to the Court and testify as a witness, but may exercise privilege in the Court, i.e. a spouse retains the right to assert privilege and may refuse to answer questions during cross-examination or otherwise about the communication during the marriage.<sup>46</sup> Thus, the spouses are compellable to the court and not incompetent anymore. This leads to even a greater issue in criminology. The Canadian legislature opened the doors for the prosecution to summon the witness spouse to the Court and left the option to either testify/or refrain upon them. But is this better than compelling them to testify? Perhaps not and may infact end up being counterproductive and may lead to secondary victimisation of the spouse/partner. In this regard, Justice Charron in *re*

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<sup>39</sup> *Ibid.*

<sup>40</sup> Robert W. Hubbard, Susan Magotiaux & Suzanne M. Duncan, *The Law of Privilege in Canada* (Thomson Reuters, 2013) 7-12.

<sup>41</sup> *Ibid.*

<sup>42</sup> *R v Nguyen* (2015) ONCA 278.

<sup>43</sup> Correctional Service Canada, *Forum on Correctional Research* (CSC 1992) Vol 7, No. 2.

<sup>44</sup> Statistics Canada, *Marital Status: Overview, 2011* (Statistics Canada 91,-209-X)

<http://www.statcan.gc.ca/pub/91-209-x/2013001/article/11788-eng.htm> accessed 18 June 2016.

<sup>45</sup> Section 4, Canada Evidence Act [n 2].

<sup>46</sup> Section 4(3) of the Canada Evidence Act: “No husband is compellable to disclose any communication made to him by his wife during marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage”. [n 2].



*Couture*<sup>47</sup> noted that “...giving the spouse a choice is more likely to be productive of family discord than to prevent it. It leaves the victim-spouse open to further threats and violence aimed at preventing him or her from testifying, and leaves him or her open to recriminations if he or she chooses to testify”. It must be noted that “these spousal attitudes are, for the most part, unconscious. They are infrequently expressed in overt behaviour, and might conceivably result not in deliberate lying on the stand, but an unconscious distortion of testimony that might unduly prejudice a jury”.<sup>48</sup> Perhaps this was the reason, as Justice Iacobucci of the Supreme Court of Canada points out, for “the early justifications for the rule that mandated a strong and absolute spousal incompetency. Essentially, spouses could not be trusted to give evidence at trial, and thus it was necessary to ensure that no evidence was adduced by them, as it was thought to be manifestly unreliable.”<sup>49</sup> Subpoenaing spouses to the stand may also lead to long term shame and guilt etc. among various other impacts, if spouses are “put through the strain of actually sitting through the difficult testimony at trial”.<sup>50</sup>

Lastly, the statutory rule of subpoenaing may itself prove to be detrimental to matrimonial accord. Individual spouses may lose confidence and may be deterred from communicating with confidence. Reference may be made to other professionals, who enjoy confidentiality and privileged communication like doctors and lawyers. In most of the cases, not only are they uncompellable but also incompetent to disclose private communication, with very few exceptions. These traditional rules are meant to promote confident and free communication between certain individuals. If spouses are subpoenaed to the Court, where victim/family members of the victim, judge, a jury other than the audience and media in certain cases are present, it’s hard to predict if the spouse will actually be able to exercise free will and not be overwhelmed by undue influence and prosecutorial coercion. It may also lead to severe mental agony and long term psychological repercussions, unless witness spouse is voluntarily willing to testify. Perhaps this is the reason spouses should have been made competent witnesses in all cases but compellable. Therefore as rightly pointed out by Justice Sopinka et al., if a “husband or wife wishes to testify against the other spouse, why society should determine that it is in the best interests of that relationship that the testimony not be received?”<sup>51</sup> Thus in light of the statistics on non-violent crime highlighted above, restricted applicability of spousal privilege (Pre-Bill C-32) with safeguards from potential mischief and an amendment that does more harm than good, it becomes evidently clear that the previous Harper led conservative government did not indulge in careful examination or policy analysis before abrogating spousal privilege and making subpoenaing a statutory prosecutorial discretion. Therefore, the following chapter will highlight some of the key reasons as to why spousal testimonial privilege is essential to safeguard and promote. These theoretical predictions, in absence of any randomized control trials “must be brought to bear for prediction”.<sup>52</sup>

### **‘Preservation of Matrimonial Harmony’ & its Criminological Implications**

As iterated previously, one of the central societal interest in preserving spousal testimony and autonomy is the ‘preservation of matrimonial harmony’, however this has seldom been examined. An English Judge in 1851 described the balancing test as one that considered not “the impropriety of violating the confidence reposed, but whether the collateral inconvenience, which would ensue if no such confidentiality were reposed, would preponderate over the direct mischief produced by a chance of failure of justice resulting from the exclusion of evidence”.<sup>53</sup> The test stands rebutted today. The ‘direct mischief produced by a chance of failure of justice resulting from exclusion of evidence’ was already and rightly narrowed down where necessary by the Canadian legislature,

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<sup>47</sup> *R v Couture* [n 40]. Para 45.

<sup>48</sup> Robert M. Hutchins & Donald Slesingert [n 17].

<sup>49</sup> Justice Iacobucci as quoted by Justice L’Heureux-Dube in *R v Hawkins* [n 6].

<sup>50</sup> *R v Hawkins* [n 6].

<sup>51</sup> John Sopinka, Sidney N. Lederman & Alan W. Bryant [n 5].

<sup>52</sup> Robert J. Sampson, Christopher Winship & Carly Knight [n 10].

<sup>53</sup> Ronald Goldfarb, *In Confidence* (1<sup>st</sup> edn, Yale University Press 2009) 26.

while the privilege was interpreted broadly beyond its archaic limits by the Canadian Judiciary. But in this chapter, I will specifically highlight the ‘collateral inconvenience’ and criminological implications that ensues abrogation of spousal privilege.

Firstly, based on empirical studies I will show how social isolation is increasing in the global north and the essentiality of preserving the only relation/bond preventing complete individual isolation and its consequences in terms of criminology along with some jurisprudence on privacy and human innate needs. Thereafter, in sub part (ii) of this chapter, I will highlight the role of family/spouses in the rehabilitation of the offender and how spousal testimony shall prove to be counter-productive in this regard. Sub part (iii) of this chapter will address the issue youth delinquency in broken families. While broken families and matrimonial discord may arise due to various issues, matrimonial discord due to the abrogation of spousal privilege leading to broken families and juvenile delinquency will be highlighted here. Sub-part (iv) of this chapter will envisage the impact of abrogation *vis-à-vis* secret trial and secondary victimisation. I will specifically highlight how this may lead to secondary victimisation of the spouses of the accused, who are already denied fair trial rights in secret trials.

### *The need to disclose secrets: Growing social isolation & its criminogenic effects*

The debate between the needs and wants is both ontological and historical. Political scientists and philosophers have been debating the nature of needs and wants from centuries. While 18th Century philosopher Rousseau talks about natural and artificial needs, Bentham suggests “horizons expand as one excels in life, desires extend with means”.<sup>54</sup> Whereas, another contribution in this debate is that from the noted psychologist Abraham Maslow through his hierarchy of needs as a forms of ‘human necessity’<sup>55</sup> even though many political scientists have discredited his model of hierarchy of needs as a model of ‘human excellence’. Yet, “on the premise that man wants to survive, one can empirically verify the existence of physiological, safety and attachment needs”.<sup>56</sup> Therefore, as per Maslow’s hierarchy of needs, when an individual acquires physiological needs and safety needs, the next is to acquire ‘love or attachment’ and these, as per Maslow are the most basic or ‘survival needs’. But ontologically, “to attribute to any need is to indicate either lack of something which it would be injuries or detrimental to the subject not only to supply or alternatively, a lack of which frustrates some end envisaged on his account”.<sup>57</sup> And if love or attachment, at least until rebutted, do form a part of the basic or fundamental human needs, a question is warranted: is the state intervention in the most fundamental relation between partners/spouses justified? As Minogue suggests “in common language, a need implies a legitimate desire, a legitimate or morally sanctioned demand. The word itself is a persuasive device and a vehicle of special pleading”.<sup>58</sup> Of course, as iterated above, when spousal relations have deteriorated beyond reconciliation, no duty is casted upon the state to protect the same as there is no ‘love or attachment’ anymore, but otherwise, fostering a strong relationship between spouses is a necessity. This necessity most importantly is recognized cross culturally as Maslow’s hierarchy of needs are both instinctoid and universal.<sup>59</sup> But how does preserving and safeguarding privacy and confidentiality foster spousal relationship? University of Utah philosophy professor Bruce Landesman suggests that “there is a psychological aspect to all confidential communications” ...“The ability to keep secrets implies ability to disclose secrets selectively and selective disclosure at one’s own discretion is important to individual autonomy. Shared secrets not only facilitate autonomy and the sense of identity; they create both intimacy with the secret sharer and a sense of isolation that can be very painful if the

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<sup>54</sup> *Ibid.*

<sup>55</sup> Ross Fitzgerald (ed), *Human Needs and Politics* (1<sup>st</sup> Edition, Pergamon Press 1978).

<sup>56</sup> *Ibid* at 205.

<sup>57</sup> *Ibid* at 196.

<sup>58</sup> *Ibid* at 201.

<sup>59</sup> Ross Fitzgerald [n 50].

secrets are not shared”<sup>60</sup>. Whereas, this sense of isolation is already increasing in America, though I will return to this shortly.

Furthermore, if we trace back the history, the “jurisprudential rationales for confidentiality and privilege, and their conflicts with the adversary system derive from the broader concept of privacy. The overall concept of privacy covers many subjects: immunity from physical intrusion, the right to be let alone, the right to be free from physical invasion of one’s property, the right to have room of one’s own.” Hence it is pivotal to note here that confidentiality and privilege derive from a broader concept of right to life and privacy, which is vehemently protected by the Canadian charter. Warren and Brandeis ended their landmark article on this issue with a rhetorical question, i.e. “If the law protects one home, should it close the front door yet, open wide the back door to idle or prurient curiosity?” Therefore, one might just keep the doors open now. The only door abrogation of spousal privilege seems to be shutting is that of love and affection, which perhaps is the only avenue saving the contemporary adult population from mass social isolation and its criminogenic effects.

Though our friends on social networks are increasing many folds, they are decreasing at an equally rapid pace outside the virtual world.<sup>61</sup> “Social isolation is a complex concept comprised of multiple dimensions including physical, emotional, and psychological. It operates at the individual, community and societal level.”<sup>62</sup> Cross sectional longitudinal studies confirm “both physical and emotional damaging effects of social isolation, which may contribute to depression, poor nutrition, decreased immunity, anxiety, fatigue, and social stigma. Collectively these factors may make it difficult for an individual to feel confident in establishing/maintaining contacts resulting in diminished social contacts, and may even contribute to premature institutionalisation and death.”<sup>63</sup>

Furthermore, when we observe mass shootings and violence, and almost uniquely from male population, it is “an expression of extreme emotion: using firepower to kill”.<sup>64</sup> Of course most men “don’t murder others when they feel angry or hard done by. But in 93 percent of cases, mass killers are under 50, they’re male and they’re socially isolated.”<sup>65</sup> Indeed, this may not always be the case. Shelly Hymel, a professor at the University of British Columbia cautions “we should not think that most people who are introverted are likely to create a major crime...it’s extremely rare”<sup>66</sup>, but the moot point here is not only limited to violent behaviour stemming out of physical isolation, but collateral consequences like greater drug and alcohol dependency that may lead to institutionalisation and violent crimes.<sup>67</sup> Even worse, it is the more economically disadvantaged that are mostly affected by this. While other violent crimes and homicide rates have gone down, with regards to increasing gun violence in Toronto, Scot Wortley, an associate professor at the University of Toronto observed “This gun violence has become increasingly concentrated within our most socially disadvantaged communities. It’s usually men, between 18 and 29, from our most

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<sup>60</sup> *Ibid* at 6.

<sup>61</sup> Sean Alfano [n 20].

<sup>62</sup> Janice Keefe, Melissa Andrew, Pamela Fancey & Madelyn Hall, *Final Report on a Profile of Social Isolation in Canada* (Mount Saint Vincent University, 2006/491) <[http://www.health.gov.bc.ca/library/publications/year/2006/keefe\\_social\\_isolation\\_final\\_report\\_may\\_2006.pdf](http://www.health.gov.bc.ca/library/publications/year/2006/keefe_social_isolation_final_report_may_2006.pdf)> accessed 19 June 2016.

<sup>63</sup> *Ibid*.

<sup>64</sup> Susan Pinker, ‘Men and Mass Killings’, *Psychology Today* (9 November 2009) <<https://www.psychologytoday.com/blog/the-village-effect/200911/men-and-mass-killing>> accessed 19 June 2016.

<sup>65</sup> *Ibid*.

<sup>66</sup> Fabiola Carletti, ‘Are quiet loners unfairly linked with violence?’ *CBCNEWS World* (18 December 2012) <<http://www.cbc.ca/news/world/are-quiet-loners-unfairly-linked-with-violence-1.1167170>> accessed 19 June 2016.

<sup>67</sup> Adele V. Harrell & George E. Peterson, *Drugs, Crimes and Social Isolation* (The Urban Institute Press, 1992).

economically disadvantaged communities, who in my own interviews are very economically and socially isolated from the rest of the Canadian Society”.<sup>68</sup>

But what role can spouses and partners play in overcoming social isolation? The answer to this question is self-explanatory. It’s not only about physical or literal comfort, but psychological relief associated with the preservation of this bond.<sup>69</sup> The “loner may still have one best friend” and this, as per Judith Wiener, a University of Toronto professor, may be perfectly healthy<sup>70</sup> but as highlighted above<sup>71</sup>, “compared to 1985, nearly 50% more people in 2004 reported that their spouse is the only person they can confide in”.<sup>72</sup> So the new ‘best friend’ as per the study is more likely to be a spouse than a friend<sup>73</sup>. If abrogation of spousal privilege deters spousal confidence and privacy, the negative consequences of the same aren’t hard to envisage. ‘Being able to confide’ in the word of Professor Landesman includes, “ability to express damaging information without losing the control over its use”. He adds, “Confidentiality is the device for doing this. A speaker may have a need to confess, to share...the burden of his guilt”.<sup>74</sup>

Many argue that “society’s interest in the dilemmas of confessors may be conflicted.”<sup>75</sup> Some academics have called for a proper balance. In this regard, professor Etzioni argues between “individual rights and social responsibility. His view is that we are not merely rights-bearing individuals but also community members who are responsible for each other”. In Professor Etzioni’s view, “civil culture has taken a backseat in the late twentieth century to more vocal claims for privacy”.<sup>76</sup> But what I present here is a system of causal mechanisms or a policy consideration, which requires a collective community effort and responsibility to protect and foster spousal relations due to an inherent larger public interest. It’s a bond that is shared by the entire society at large, including victims in whose interest the abrogation was advocated. Perhaps this is the only bond keeping the contemporary society knitted together.

Whereas, reference may also be made to Travis Hirschi’s Control Theory in this regard. If social bonds conduce individuals to be law abiding, social isolation then becomes an apt reason for criminal behaviour. This also runs parallel to the psychological explanation of the control theory, who in contrast to the sociological explanation emphasize “insensitivity to the opinion of others” as the main explanation of deviant behaviour.<sup>77</sup> Be it lack of social bonds or insensitivity towards social bonds, social isolation can subsume both the sociological explanation as well as psychological explanation to delinquency. Emile Durkheim observed many years ago, “We are moral beings to the extent that we are social beings”.<sup>78</sup> If attachment to others make us moral beings, enhance self-control, then its absence (social – isolation) ought to increase delinquency and criminality, as per control theorists. And amidst growing social isolation, when reportedly a greater percentage of individuals are only able to confide in their spouses and partners, undermining the importance of this relationship does more harm than good. Instead of enhancing a dialog between the real conflict holders, i.e. the victim and the offender<sup>79</sup>, the criminal justice system is enhancing and perhaps escalating a possible conflict between two individuals (spouses) who may also play a pivotal role in the rehabilitation of the offending spouse. Therefore, the next sub-chapter will highlight the issues associated with offender rehabilitation if a spouse is directed to play (by being subpoenaed by the prosecution) an instrumental role in the conviction of the offender.

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<sup>68</sup> Andre Mayer, ‘Canadian Cities largely safe but rising gun violence ‘disturbing’’ *CBCNEWS Canada* (Toronto, 18 July 2012) < <http://www.cbc.ca/news/canada/canadian-cities-largely-safe-but-rising-gun-violence-disturbing-1.1129887>> accessed 20 June 2016.

<sup>69</sup> Ronald Goldfarb [n 51].

<sup>70</sup> Susan Pinker [n 62].

<sup>71</sup> Miller McPherson, Matthew E. Brashears & Lynn Smith-Lovin [n 19].

<sup>72</sup> Sean Alfano [n 20].

<sup>73</sup> Miller McPherson, Matthew E. Brashears & Lynn Smith-Lovin [n19].

<sup>74</sup> Ronald Goldfarb [n 51] at 5.

<sup>75</sup> Ronald Goldfarb [n 51].

<sup>76</sup> *Ibid.*

<sup>77</sup> Travis Hirschi, *Causes of Delinquency* (Berkeley: University of California Press 1969).

<sup>78</sup> *Ibid.*

<sup>79</sup> Nils Christie, ‘Conflicts as Property’ 17(1) (1977) 1.

### *The role of family and spouses in offender rehabilitation*

“Incarceration presents a crisis to the family. From the time an individual is accused to the period following release from prison and his community reintegration, the whole family goes through numerous stages of stress. Incarceration puts heavy burdens on them in terms of role changes, the loss of a parent, child rearing difficulties and continual financial deprivation”.<sup>80</sup> However, notwithstanding these reasons, abrogation of spousal/partner privileged communication was designed to promote approximation of truth, thus maximise the findings of guilt and enhanced victim satisfaction, even though it may lead to secondary victimisation of the spouse and the entire family as a unit. This is not to suggest that every offender has a family or a partner, but every family of an offender may play a constructive role in re-integrating the offender back to the society. Rehabilitation of the offender is of paramount importance be the goal be “reduced re-offending, salvation of human souls, the healing of damaged relationships or a greater sense of safety or security in the everyday life of the communities”.<sup>81</sup> Therefore be it a utilitarian goal or otherwise, penal welfarism is equally a pivotal part of administration of criminal justice.<sup>82</sup>

### *Pre-Sentencing Stage*

The role of family infact starts as soon as an individual is accused of an offence. At this stage, if a spouse is subpoenaed to the Court to testify against their accused spouse, other than losing a crucial support system, the accused spouse maybe prompted to indulge in domestic violence, in order to control the testifying spouse<sup>83</sup> and the entire discourse may shift from emotional support, finance management etc. to other conflicts including feeling of guilt and shame.<sup>84</sup> Other than the financial burden of defending charges, the entire family as a unit plays an important role in establishing innocence and is one of the prime consideration at the stage of interim release or a bail. Indeed, not having a family “means that the vulnerable and improvised offenders are less able to access bail”<sup>85</sup> and urgent policy considerations are required in this regard, yet the fact that it is very often the family members who act as sureties in bail applications is fact well acknowledged by the apex court of Canada<sup>86</sup>. And in light of contemporary nuclear families, the sureties are more likely to be spouses than parents or siblings. This is entirely self-defeating. A spouse, who may be a possible witness to a trial, may also be a surety in a bail and may also play an instrumental role in the conviction of the accused spouse, which adversely affects him/her and their children, if any. Other than this grave confusion, at any given trial, “the initial reactions of the family are usually shock and dis-belief, followed by guilt, depression and anxiety”.<sup>87</sup> These circumstances are not only bound to exacerbate and expedite matrimonial conflict and familial breakup, but will invariably lead to extreme psychological suffering.

### *Post-Sentencing Stage*

This is the most crucial stage where family and spouses play a key role in offender rehabilitation and reintegration. For instance, reference may be made to the South London Wives Group that aims: “by meeting in groups and by the warmth of companionship, to preserve the family unit so that the husband on release has a home to return to and a better chance to resettle into normal

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<sup>80</sup> Susan C. Cobean and Paul W. Power, ‘The Role of the Family in Rehabilitation of the Offender’ 22 (1978) Int J Offender Ther Comp Criminol 29.

<sup>81</sup> Peter Raynor and Gwen Robinson, ‘Why help offenders? Arguments for rehabilitation as a penal strategy’ 1 (2009) European Journal of Probation 3.

<sup>82</sup> *Ibid.*

<sup>83</sup> *R v Couture* [n 40].

<sup>84</sup> Susan C. Cobean and Paul W. Power [n 78].

<sup>85</sup> *R v Summers* (2014) 1 SCR 575 at para 66.

<sup>86</sup> *Ibid.*

<sup>87</sup> Susan C. Cobean and Paul W. Power [n 78].

life.”<sup>88</sup> As pointed out, the key role spouses play in this regard is to preserve the family as a unit, which provides an incentive, a ray of hope to the sentenced offender to come out of prison and resettle into a normal life. This may also check an offender’s conduct inside prison. Furthermore, “The psychological separation from home and community brings with it a grief reaction. Anxiety, is common frequently with an initial flurry of letter writing, extreme testing of important relationships (such as threatening a divorce)”.<sup>89</sup> This is precisely the time frame when spouses and partners collectively support each other and stand in solidarity with each other. It is perhaps the family and friends, who act as the first support pillar in welcoming their loved one back into the society.

Secondly, the “information on the marital and family relationships” of an incarcerated offender is a key consideration in the Pre-Release Decision-Making by the Parole Board.<sup>90</sup> This also includes, recent relationship changes in the offender’s relationship status. Clause 8(j) (x) of the Decision Making Policy Manual for the Parole Board Members takes into account “recent relationship changes (separation, divorce)”.<sup>91</sup> The main consideration here is to adjudicate if an offender has an abode with relationships to encourage him/her to resettle into normal life and to deter re-offending, as the “protection of the society” is still of paramount importance.<sup>92</sup> However, if a spouse is now required to assist the prosecution in ‘approximation of truth’, and testify against the accused spouse, the relationships post-conviction/sentence are bound to be affected. Other than losing the incentive to resettle into normal life, the difference between spouses may exacerbate due to extreme emotions and “the natural repugnance that results in having testify against his or her accused spouse”.<sup>93</sup> The reason to avoid ‘natural repugnance’ was acknowledged by the Supreme Court of Canada as the second most essential reason to ‘preserve matrimonial harmony’.<sup>94</sup> But the key question now is; what percentage of adult offenders are actually married or in a similar relationship? Although spousal privilege was abrogated last year, and the requirement for these statistics acquire even greater importance now, the only detailed study “on the comparison of demographic and family characteristics of the Canadian and offender populations” was conducted by Correctional Service Canada in the year 1992.<sup>95</sup> Thereafter, all other studies, either neglected demographic characteristics on marital status or included vague details, and only from limited provinces. However, a detailed study from 1992 “provides a descriptive comparison of several demographic and family characteristics of the Canadian and federal offender populations to generate a general picture of how offender demographic and family characteristics differ from those of the general Canadian Population. This study was based on file reviews of 935 offenders admitted to the federal institutions between June and November 1992. A total of 2,806 offenders were admitted to the federal institutions during this period. Therefore, this sample represents approximately one third of all the offenders admitted to federal institutions during the study period”.<sup>96</sup>

Other than acknowledging the changing structure of the Canadian family (a shift towards common-law relationships), the findings crucially noted that 55.6% of men in the general population were legally married (15 and older) as compared to 44.6% of offenders population, however, merely 12.4% of the general male population lived in a common-law relationship when compared to 32.6% offender population. Therefore, the offenders were roughly three times more likely to be living in a common-law relationship than to be married.<sup>97</sup> Essentially, two points flow out of this two decade old study in the present context, firstly, that the Canadian Judiciary was

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<sup>88</sup> *Ibid* at 30.

<sup>89</sup> *Ibid*.

<sup>90</sup> Parole Board of Canada, ‘Decision-Making Policy Manual for Board Members’ (Edition No.5 2015) < <http://www.pbc-clcc.gc.ca/infocntr/policym/polman-eng.shtml>> accessed 21 June 2016.

<sup>91</sup> *Ibid*.

<sup>92</sup> Parole Board of Canada, ‘Contributing to Public Safety’ (2011) < <http://pbc-clcc.gc.ca/infocntr/parolec/2011-08-02/intro-eng.shtml>> accessed 21 June 2016.

<sup>93</sup> *R. v. Kevin Roy Hawkins and Claude* [n 8].

<sup>94</sup> *Ibid*.

<sup>95</sup> Correctional Service Canada, ‘Forum on Corrections Research’ (Correctional Service Canada, Vol. 7 1992).

<sup>96</sup> *Ibid*.

<sup>97</sup> *Ibid*.

doing a commendable job in broadly interpreting and extending the scope of this privilege to 'common-law relationships' in light of changing family characteristics. Secondly, these figures give weightage to the hypothesis that 'preservation of marital harmony' should continue, especially since a large proportion of adult prison population is either married or lives in a common-law relationship. Absence and dearth of robust studies and statistics in this regard is a major issue and requires urgent attention. In order to understand and study the impact of abrogation on interpersonal relations and/or recidivism, Statistics Canada must incorporate detailed report of adult relationships collected at the time an adult enters sentenced custody and subsequently at regular intervals.

It cannot be denied that access to justice and finding of guilt is a fundamental aspect of administration of criminal justice but as widely acknowledged, rehabilitation of offender is also a key consideration in sentencing.<sup>98</sup> Other than the aforesaid reasons and from a utilitarian perspective, the fact that spouses, due to the inherent nature of their bond, better positioned to rehabilitate the offender in fact incentivises the state to further protect and reinforce this bond. Rehabilitation would otherwise not only be a costly affair but perhaps not as successful either, as institutions cannot provide similar attention, comfort and encouragement that a spouse or a partner can.

But in all this, children who are much more vulnerable than their parents are often neglected. Interpersonal conflicts between parents, divorce and conflicts among parents in general have been associated with delinquency in youth. If the Supreme Court of Canada is right, and having spouses testify against each will lead to natural repugnance,<sup>99</sup> an increased conflict amongst already conflict ridden spouses and partners is bound to exacerbate the impact of their conflict upon the children, who already face secondary victimisation due to various reasons. Therefore, the following sub-part will highlight yet another pivotal reason that requires 'preservation of matrimonial harmony' from children's point of view.

### *Conflicted Parenting and its criminogenic effects on children*

The relationship between broken homes and juvenile delinquency has been a subject matter of debate across disciplines for almost a century. "It was widely accepted from about 1900 until 1932. Then the broken home was rejected for a period of time. In the past 20 years, there has been a revival of interest in the broken home as an important factor in predicting delinquency."<sup>100</sup> It is worth noting at the outset, that the broken families in the present context, due to parental imprisonment are in a much more appalling circumstances than those often studied with regards to parental conflict and adolescent's delinquency. Therefore, these children are not only the victims of parental conflict, but "may be exposed to ridicule and stigma in school and recreation".<sup>101</sup> Spouses of incarcerated offenders often "have difficulty coping with their own loneliness as well as their children's traumatic reactions and need for their parent".<sup>102</sup>

The moot point discussed above is that the abrogation of spousal privilege or having spouses testify against each other will only make relationship and conflict between spouses' worst in most cases. "Growing body of literature has found association between parental conflict and adolescent behaviour problems. These researches emphasized that when children and adolescents are exposed to frequent, intense, and unresolved parental conflict, they exhibit more externalising symptoms such as delinquency."<sup>103</sup> These conflicts have been recently empirically tested by the

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<sup>98</sup> Department of Justice, 'How sentences are Imposed' (Government of Canada, 2016) <<http://www.justice.gc.ca/eng/cj-jp/victims-victimes/sentencing-peine/imposed-imposees.html>> accessed 21 June 2016.

<sup>99</sup> *R. v. Kevin Roy Hawkins and Claude* [n 8].

<sup>100</sup> Karen Wilkinson, 'The Broken Family and Juvenile Delinquency: Scientific Explanation or Ideology?' (1974) 21 *Social Problems* 726.

<sup>101</sup> Susan C. Cobean and Paul W. Power [n 78].

<sup>102</sup> *Ibid* at 33.

<sup>103</sup> Nooshin Sabour Esmaeilli and Siti Nor Yaacob, 'Post-Divorce Parental Conflict and Adolescents delinquency in divorced families' (2011) 3 *Journal of Asian Culture and History* 34.

Cleveland State University to be associated with child neglect and maltreatment, as the parents are often overwhelmed by their own disputes.<sup>104</sup> Divorce and post-divorce parental conflict is far worse. Not only does it continue for years after divorce, it has serious repercussions on child psychology. “Sandler et al. studied the relationship between children’s mental health problems and the level of conflict between the parents by using a sample of 182 divorcing families. Results indicated that father warmth and mother warmth were both independently related to lower child-externalising behaviour problems.”<sup>105</sup> Furthermore, when involved in conflict, couples “may become hostile, aggressive, or withdrawn from their children and more inconsistent in their control and discipline. Disruption in parenting and the quality of parent-adolescent relationship has a great influence on adolescents’ well-being, internalizing problems and externalizing problems following divorce. In particular, studies have found that poor and negative parent-adolescent relationship such as low level of parental warmth, involvement, support and acceptance are significantly related with higher level of externalizing behaviour problems, delinquent and antisocial behaviours in adolescents.”<sup>106</sup>

This is not to suggest that the abrogation of spousal privilege is the sole causation of parental conflict, but to highlight the importance of preserving spousal relationship and fostering the same. It is essential to reiterate here that these families are already facing extreme hardships emotionally and often financially coupled with larger societal issues such as stigma depending on the nature of alleged crime. The role of a state in these circumstances is to prevent the escalation of conflict and assist the offender and his/her family in rehabilitation. Neglecting the inter-personal relationship between spouses after conviction or even during trial can have long term repercussions on the upbringing of children and the family as a unit. The programs designed to support families and offenders may be ineffective if the conflict and misunderstanding between spouses have surpassed the reconciliatory threshold.

Whereas, it is also pertinent to note that ‘finding of guilt’ is often a very hierarchal and a time consuming process in which family often plays an important role. If an accused is released on bail or otherwise acquitted pending appeal by the prosecution or even found guilty pending appeal in his/her own defence and if a spouse is instrumental in the finding of guilt, the accused maybe left in abandoned. The roots of this privilege are so deeply embedded in the administration of criminal justice, that many rules of substantive and procedural laws, especially those designed to safeguard the fair trial rights of the accused seems to have a paradoxical effect now. For instance, reference may be made to the right against self-incrimination in this regard. Traditionally, spouses were considered as a single entity in law and incrimination against one spouse was considered to be incrimination against other due to various vested interests like family, finances etc. This rule also stemmed out of the common law doctrine of unity.<sup>107</sup> But now such rules of evidence and procedural justice which promoted matrimonial and familial accord will have a much more constrained applicability in law. Moreover, the repercussions of abrogation may echo beyond the contours of traditional criminal courts. In light of changing dynamics of the administration of criminal justice, i.e. contemporary ‘secret trials’ adjudicated by special advocates, the abrogation of spousal/partner privileged communication poses a further threat to fair trial rights of not only the accused but of their partners too. This aspect is elaborated below.

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<sup>104</sup> Christopher A. Mallett and Patricia A. Stoddard Dare, ‘Parental Divorce: A Protection from Later Delinquency for Maltreated Children’ (2009) Social Work Faculty Publications 388.

<sup>105</sup> Nooshin Sabour Esmaeilli and Siti Nor Yaacob [n 101].

<sup>106</sup> *Ibid.*

<sup>107</sup> David Lusty [n 12].



### *Abrogation of the Spousal privilege vis-à-vis Secret Trials*

“[A]s we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns – the ones we don’t know we don’t know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones.”

-Donald Rumsfeld<sup>108</sup>

In light of the quote above, this sub-chapter will address the issue of abrogation of spousal privileged communication in light of the ‘known unknown’. The known unknown in the present context refers to secret trials. We know that various states like Canada and United Kingdom indulge in secret trials but we don’t know the peculiarities of these trials and the manner in which they are conducted. Secret trials in contrast to traditional open court trials, as the name suggests are conducted within closed courts and represent a “fundamental jurisprudential shift from the ex post facto system of penalties and punishment to the ex-ante prevention measures”.<sup>109</sup> These trials are mostly conducted under the garb of national security and rely on secret evidence to prosecute offenders, which is often based on data collected through surveillance programs like phone tapping, data gathering, wiretapping etc.

Whereas another reason they represent a fundamental shift from ex post facto system to ex-ante prevention measures is because of a contemporary shift in the rules of evidence gathering, i.e. “while evidence gathering is backward gathering, intelligence gathering is forward gathering”<sup>110</sup>. Therefore, these trials are mostly pre-emptive and derive their evidentiary base from surveillance practices as “pre-emptive predictions assess the likely consequences of allowing or disallowing a person to act in a certain way”.<sup>111</sup> This often includes instances like “no-fly list used to preclude possible terrorist activity on an airplane etc....and is often done with little or no transparency and accountability”.<sup>112</sup>

Therefore, other than altering the cardinal principals of criminal jurisprudence, i.e. “innocent until proven guilty” to “prediction of guilt”, these trials deny fair trial rights to accused in various ways, but most importantly, by denying the right to engage a defence attorney. Instead, special advocates are used to adjudicate these matters and assess secret evidence in Canada, United Kingdom and The United States.<sup>113</sup> Not only are these special advocates appointed by states, they are prohibited from revealing classified evidence and information to his/her client (accused), without the leave of the court.<sup>114</sup> The situation is a bit better in Canada due the intervention of the Supreme Court in *Charkaoui v Canada*<sup>115</sup>, “who with some differences follows the British special advocate approach by allowing security cleared special advocates to have access to the secret evidence and to challenge both whether evidence should be secret and its relevance, reliability and sufficiency.”<sup>116</sup> But the moot point in the present context is that fair trial rights are denied to the accused in these so called ‘secret trials’. However now the question is, what does the abrogation of spousal privileged communication has to do with this?

Before answering this question, I would like to reiterate the comments made by then Minister of Justice, Peter Mackay during the parliamentary debate on Bill-C32 that abrogated spousal privileged communication. He observed “we (the conservative party) have gone further to

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<sup>108</sup> David Pozen, ‘Deep Secrecy’ (2010) 62 Stanford Law Review 257.

<sup>109</sup> Ian Kerr & Jessica Earle, ‘Prediction, Preemption, Presumption: How Big Data Threatens Big Picture Privacy’ (2013) 66 Stanford Law Review 65.

<sup>110</sup> Ryan Goss, ‘To the serious detriment of the public: Secret evidence and closed material procedures’ in Lazarus et al, *Reasoning Rights* (Hart 2014).

<sup>111</sup> Ian Kerr & Jessica Earle, [n 107].

<sup>112</sup> *Ibid* at 69.

<sup>113</sup> Kent Roach, ‘Secret Evidence and its Alternatives’ in A Masferrer(ed), *Post 9/11 and the State of Permanent Legal Emergency* (Springer 2012) 179.

<sup>114</sup> *Ibid*.

<sup>115</sup> *Charkaoui v Canada* [2007] 1 SCR 350.

<sup>116</sup> Kent Roach [n 111].

ensure that all of the evidence in the truth-seeking exercises of the court can include the testimony of spouses/partners for things such as murder, terrorism, and major fraud.”<sup>117</sup> Therefore the use of spousal testimony in “terrorism” related charges was a major consideration behind abrogation of the privilege and as previously observed, most of the charges pertaining to terrorism are tried before secret courts in secret trials by special advocates.<sup>118</sup>

Firstly, the main concern with the abrogation of spousal/partner privileged communication in this regard is that the procedural laws and the exclusionary rules of evidence associated with privilege traditionally, at least granted safety to the spouses from being subpoenaed in these contemporary rights abrogating secret trials, as all other substantive and procedural safeguards continue to operate even in these trials. Furthermore, now that spouses and partners can be subpoenaed to the courts, including these ‘secret courts’, without any defence attorneys to exclusively defend their rights and interest, therefore an exercise of free will and informed consent cannot be guaranteed, especially because special advocates are not representing exclusively the interest of the accused and work both as prosecutors and defence attorneys.<sup>119</sup> Therefore there is hardly anything adversarial about these trials and privileged communication at least safeguarded spouses and partners from secondary victimisation originating from testifying in these closed trials.

Secondly, as noted above, the definition of communication as per the Criminal Code of Canada included both telecommunication and oral communication.<sup>120</sup> This means the privileged communication between spouses and partners extended both to telecommunication and oral communication discouraging state surveillance practices, as such evidence would be ousted in furtherance to the traditional rules of evidence. This highlights another reason perhaps that prompted the abrogation of this privilege. Perhaps this traditional and essential privilege hindered the collection and use of pre-emptive and contemporary forward looking evidence in trials. While it is hard to ascertain all the policy considerations that went behind abrogation of this century’s old privilege, it’s not hard to discern from the limited discourse in the parliament on this topic that one of them was combating ‘terrorism’.<sup>121</sup> But the complete abolition of this privilege raises many questions. Does an innately robust and strong state, especially in light of advancements in forensic science and the role of interdisciplinary studies in the administration of criminal justice, really need a manifestly unreliable evidence from a spouse of a partner? As criminologists we need to look beyond the immediate application of a policy and in light of the changing landscape of the administration of criminal justice and the cardinal principals of criminal jurisprudence, the longitudinal study of this policy amendment is not only a need but a necessity.

## Conclusion

This paper draws upon multiple factors and causal pathways to suggest that the abrogation of spousal privileged communication in Canada by the Canadian legislature was done in haste without any thorough parliamentary discourse and research. The fact that the scope of this archaic spousal privileged communication was being extended to other adult relationships like common law partners and same sex partners by judicial activism in Canada supported the continuation of the same even further. Progressive interpretation of this traditional rule safeguarded the same against possible misuse whereas the limited applicability of the privileged communication in the cases pertaining to domestic violence and child abuse answered the various needs of the contemporary society by denouncing and deterring such conduct by spouses upon their family and children.

However the only possible amendment that would have been reasonable in light of victim’s rights movement was to make spouses and partners competent in all cases. I agree with the

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<sup>117</sup> Victims Right Bill Debate [n 5].

<sup>118</sup> Kent Roach [n 111].

<sup>119</sup> Dinah Rose QC discussed her role as a special advocate in secret trials at the Oxford Centre for Criminology 50<sup>th</sup> Anniversary Conference, ‘Contemporary Dilemmas in Criminal Justice’ (University of Oxford, Saturday 4 June, 2016).

<sup>120</sup> Section 183 of the Criminal Code of Canada [n 33].

<sup>121</sup> Victims Right Bill Debate [n 5].

rationale of then Supreme Court of Canada Justice Sopinka et. al<sup>122</sup>, that if the spouses and partners desired to testify against each other, we are nobody to force this privilege upon them. The essence of this privilege was ‘preservation of matrimonial harmony’ and in the absence of matrimonial harmony or in a conflict ridden relationship, there is nothing to protect. However, the complete abrogation of this privileged communication was an unwarranted move and undermined the ‘larger societal interest’ that flow out of this relationship. Thus in order to study the possible impact of this policy change, I draw upon the common law origin and the evolution and broad interpretation of this privilege in Canada to meet the test of time in the second chapter. In this chapter I addressed why the relationship between spouses and partners take precedence over any other relationship and thus require state protection, especially in light of today’s socio-political climate.

Building upon chapter 2, I addressed the scope of spousal privilege pre and post Bill C-32 (2015) in chapter 3. I made an attempt to specifically highlight all the limitations that already existed in the Canadian Criminal jurisprudence to safeguard this privilege from possible misuse and the extension of the same to other relationships by the Canadian judiciary kept the privilege in pace with the modern day society. Thereafter I highlighted how the move to make spouses compellable in all the cases may end up being counterproductive by instigating domestic violence in order to prevent spousal disposition before the court. This also highlighted how no consideration was given to the safety and wellbeing of the spouses in furtherance to an act of penal populism.

Thereafter, I took a critical policy analysis of the abrogation of the privileged communication. I exhibited how social isolation is increasing in today’s fragmented world and more people feel the only person they can confide in is their spouse or partners. In doing so I drew upon psychological and various other parameters to highlight how social isolation can have far more negative consequences on the society at large, if left unaddressed. In the next sub chapter on the role of family and spouses in offender rehabilitation I drew upon fundamental principles of sentencing that includes rehabilitation of an offender, be the purpose be utilitarian or otherwise. This sub chapter crucially highlighted how spouses and family play a pivotal role from the time the charges are pressed, until confirmed by the apex court. Having spouses testify may defeat the design and purpose of sentencing that require offender rehabilitation and reduced recidivism.

Subsequently, Subpart (iii) of chapter 4 addressed the issue of broken families and the role of conflicted parenting and its criminogenic effects on children. This sub-part is based on/draws upon various empirical researches to support the hypothesis that ‘preservation of matrimonial harmony’ is much more than preserving an interpersonal bond between two adults. In the end I drew upon the limited jurisprudence on secret trials to understand the modern day, intelligence based penal system and the consequences of abrogating spousal privilege on the same.

However, dearth of academic research and lack of data, especially on the familial and marital status of the offenders throughout Canada is an issue that requires urgent attention. Data is essential to concretize the various hypothesis I drew upon to support the continuation of the privileged communication, especially in other common law countries where the same still exists in whatever form. Even though this abrogation may *prima facie* seem to be insignificant, a long term study of this policy change is of paramount importance to better understand the underlying causal mechanisms highlighted above. Perhaps we have a lot to learn from the ‘Minneapolis domestic violence experiment’ and other like experiments. While the mandatory arrest laws should deterrence initially on a smaller sample, in many cases it proved to be essentially counterproductive.<sup>123</sup> The fact that this doctrine or rule of exclusion of evidence based on privileged communication was so deeply embedded in our culture, society and the administration of criminal justice, the criminological implications associated with policy amendment may take time to appear. Perhaps as rightly suggested by Warren and Brandis, we should ask ourselves, “If the law protects one home, should it close the front door yet, open wide the back door to idle or prurient curiosity?”<sup>124</sup> The answer maybe self-explanatory.

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<sup>122</sup> John Sopinka, Sidney N. Lederman & Alan W. Bryant [n 5].

<sup>123</sup> Robert J. Sampson, Christopher Winship & Carly Knight [n 11].

<sup>124</sup> Ronald Goldfarb [n 52].