Toward a Reconceptualization of Battered Women: Appealing to Partial Agency

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ABSTRACT

Despite growing awareness of the severity of domestic violence, the lives of battered women are too often misconstrued by the Canadian public and the judicial system. The author argues that stereotypes of victimized battered women emanating from the courts and feminist theory may both prevent women who kill their partner from making valid claims of self-defence and generally undermine women's fight against oppression. The author reviews the doctrine of the battered woman syndrome and its application in the context of self-defence to illustrate how the courts' treatment of the doctrine conveys a narrow and incomplete depiction of battered women. An alternative theoretical framework based on battered women's partial agency is proposed as a means to address feminist theory's simplified representation of battered women. Various law and policy reform initiatives in the criminal justice system are explored to assess how the law may validate and promote battered women's partial agency.

ABRÉGÉ

Malgré la prise de conscience grandissante au sujet de la gravité de la violence conjugale, il arrive trop souvent, au Canada, que le public et le système judiciaire perçoivent de façon erronée la réalité des femmes battues. Selon la thèse défendue par l'auteure, les stéréotypes qui émanent des tribunaux et de la théorie féministe et qui mettent l'emphase sur le fait que les femmes battues sont des victimes risquent, d'une part, d'empêcher les femmes qui se voient contraintes de tuer leur partenaire d'invoquer la légitime défense et, d'autre part, de nuire de façon générale à la lutte des femmes contre l'oppression. L'auteure examine la doctrine du syndrome de la femme battue et son application dans le contexte de la légitime défense, afin d'illustrer comment le traitement réservé à cette doctrine par les tribunaux ne reflète que de façon étroite et incomplète la réalité des femmes battues. Un nouveau cadre théorique fondé sur l'agentivité partielle («*partial agency*») des femmes battues est mis de l'avant dans le but de combler les lacunes inhérentes à la représentation des femmes battues par la théorie féministe. L'auteure examine diverses initiatives de réforme du droit et des politiques dans le système de justice pénale afin d'évaluer de quelle manière le droit peut mettre en lumière et promouvoir l'agentivité partielle des femmes battues.

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Introduction

We have come quite a way since male violence against women[1] was regarded as a private matter. Today domestic violence is recognized as a crime, and women who suffer at the hands of their partner can seek justice. However, despite society's increasing awareness of domestic violence, misconceptions regarding battered women persist. Battered women are seen as victims and sometimes they are seen as agents. Society continues to question how it is that women find themselves involved with abusive partners. Or more importantly, why it is that they do not leave. Rarely do we hear people question what causes a man to become abusive toward his partner.

The public as well as the law generally overlook gender inequality, the underlying foundation of male violence against women. In fact, the law does not reflect the complex reality and commonality of women's struggle within abusive relationships. As Elizabeth Schneider observes, we tend to focus on the individual battered woman and her experience in isolation, rather than the context in which she, and all women live:

> In the media and in legal and legislative arenas, the problems that battered women face are viewed in isolation; they are rarely linked to gender socialization, women's subservient position within society and the family structure, sex discrimination in the workplace, economic discrimination, problems of housing and lack of child care, lack of access to divorce, inadequate child support, problems of single motherhood, or

[1] While I am aware of the growing number of incidents of lesbian and homosexual battering, this thesis is confined to an analysis of male battering of women. Throughout my paper I will refer to male battering of women as male violence against women, intimate violence and domestic violence.

> lack of educational and community support. The focus is still on the individual woman and her "pathology" instead of on the batterer and the social structures that support the oppression of women and that glorify or otherwise condone violence.[2]

Rather than defining battered women in the context of society's structural inequalities, battered women lives are misconstrued.

In response to emerging stereotypes of battered women, this thesis represents an attempt to reconceive feminist legal theory's explanation of domestic violence in an effort to reform the law's understanding of battered women.

This paper begins with a critical analysis of the criminal law's depiction of battered women in the context of self-defence. I argue that notwithstanding the positive advancements the doctrine of the battered woman syndrome created for women who kill their partner, the concept conveys a narrow and inaccurate depiction of battered women as passive victims. I contend that the image of a victimized battered woman obscures not only the complexity of domestic violence, but may also limit her chance in making a valid claim of self-defence. I review case law since the Supreme Court of Canada's landmark decision in *R.* v. *Lavallee*[3] to determine the extent to which the courts have embraced the victimized image of battered women.

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[2] E. Schneider, *Battered Women and Feminist Lawmaking* (New Haven: Yale University Press, 2000) at 72, 73 [hereinafter *Feminist Lawmaking*].
[3] [1990] 1 S.C.R. 852 [hereinafter *Lavallee*].

In the next chapter, I review dominance feminism's explanation for male violence against women and argue that the theory emphasizes and promotes women's victimization. I suggest that the theory's simplified representation of women in an effort to obtain legal recognition of gender-specific violations such as domestic violence may do more harm than good in the long run. Dominance feminism's account of women's position in society undermines our fight against oppression and masks our capacity for self-assertion and agency.

In the following part, I propose the formulation of a new theoretical framework based on partial agency[4] that more accurately reflects the reality of women living in abusive relationships. Partial agency acknowledges women's victimization while additionally recognizes the context of their struggle under an oppressive patriarchal structure.

In the last chapter, I attempt to demonstrate how the criminal justice system can participate in promoting battered women's partial agency before women resort to the killing of their abuser. I review a number of legal reform initiatives including mandatory arrest and prosecution policies and specialized domestic violence courts and assess their effectiveness in validating and fostering battered women's partial agency.

[4] See K. Abrams, "Sex Wars Redux: Agency and Coercion in Feminist Legal Theory" (1995) 95 Col. L. Rev. 304 [hereinafter *Sex Wars* Redux] for more on the concept of partial agency.

Chapter 1 The Battered Woman Stereotype

A. Recognition of the Battered Woman Syndrome in Canadian Law

For many years, feminist legal scholars have maintained that criminal law epitomizes androcentric norms.[5] In fact, the doctrine of the battered woman syndrome emerged in the legal community as a result of the work of these scholars attempting to surmount the unremitting gender-bias embodied in criminal law. More particularly, to grant battered women who kill their abusers the right to claim self-defence[6], American[7] feminist legal scholars drew on psychologist Lenore Walker's[8] extensive work in the field of battered women. Dr. Lenore Walker coined the expression "battered woman syndrome" to describe the key psychological and sociological factors found in abused women.

In response to widespread misconceptions regarding battered women and intimate violence, the doctrine of the battered woman syndrome, first applied in

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[5] For example, the male perspective is apparent in the legal analysis of sexual assault; the idea that consent is a determinant factor in establishing sexual assault clearly implies that rape is understood from a male standpoint. See E. Sheehy, *Personal Autonomy and the Criminal Law: Emerging Issues for Women* (Ottawa: Canadian Advisory Council on the Status of Women, 1987) [hereinafter *Personal Autonomy and the Criminal Law*].

[6] E. Comack, *The Legal Recognition of the Battered Woman Syndrome* (Ottawa: Canadian Research Institute for the Advancement of Women, 1993) at 40 citing E. Sheehy, *Personal Autonomy and the Criminal Law, ibid.*

[7] See E. Schneider, "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering" (1986) 9 Women's Rts. L. Rep. 195 [hereinafter *Describing and Changing*] Schneider acknowledges the efforts of the Women's Self-Defense Law Project, developed in the late 1970's. Also see P. Crocker, "The Meaning of Equality for Battered Women Who Kill Men in Self-Defence" (1985) 8 Harv. Women's L.J. 121.

[8] L. Walker, *The Battered Woman* (New York: Harper and Row, 1979) [hereinafter *Battered Woman*]; L. Walker, *The Battered Woman Syndrome* (New York: Springer, 1984) [hereinafter *Battered Woman Syndrome*].

the United States[9], constituted a means to dispel myths associated with battered women that hindered their fair defence. Elizabeth Schneider, one of the leading proponents of the legal recognition of the battered woman syndrome in the United States, explained the purpose underlying the inclusion of the testimony:

> Expert testimony on battered woman syndrome was developed to explain the common experiences of, and the impact of repeated abuse on, battered women. The goal was to assist the jury and the court in fairly evaluating the reasonableness of the battered woman's action and to redress the historical imbalance (views of women as being unreasonable), at least where the testimony was proffered as relevant to self-defence.[10]

In an attempt to dismantle the traditional gender-bias in the law of self-defence and allow for equal treatment of women in the courts, the inclusion of expert testimony explaining women's distinct experience was established to demonstrate the reasonableness of a battered woman's actions in circumstances where she kills out of self-defence.[11]

The Supreme Court of Canada's decision in *R.* v. *Lavallee*[12] represents a turning point in Canadian case law. The Court recognized and acknowledged the distinct reality of women who plead the defence of self-defence, and thus held admissible expert evidence on the battered woman syndrome. Angelique Lyn Lavallee, charged with the second-degree murder of her common-law partner, was acquitted by a jury. The Manitoba Court of Appeal overturned the verdict,

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[9] *State* v. *Kelly,* 97 N.J. 178, 478 A. 2d 364 (1984).
[10] *Describing and Changing, supra* note 7 at 198.
[11] *Ibid.* at 197.
[12] *Supra*, note 3.

and the Supreme Court of Canada reinstated the acquittal. It is useful to review the facts of the case.

Ms. Lavallee, a twenty-two year old woman, had lived with her boyfriend, Kevin Rust, for a few years. The relationship was an abusive one; Lavallee was hospitalized on several occasions with severe bruises, a fractured nose, multiple contusions and a black eye. The evening of the fatal shooting, while partying with friends, Lavallee and Rust had an argument in her upstairs bedroom. As Rust was leaving the bedroom, Lavallee shot him in the head and killed him. In her statement to the police she claimed that Rust had yelled at her, hit her and threatened to "get her" once their friends left.

Lavallee pleaded self-defence. She did not testify in court. Yet, a psychiatrist, Dr. Shane, an expert witness, gave evidence for the defence regarding the battered woman syndrome. He recounted Lavallee's ongoing terror, the continuing pattern of abuse which she endured over the years, as well as the fear that her own life was threatened on the night of the shooting.

Writing for the majority[13], Madam Justice Wilson described in some detail the significance of admitting evidence on the battered woman syndrome. Recognizing the average person's lack of familiarity with domestic violence, Madam Justice Wilson affirmed the relevance of the expert testimony in order to

[13] Sopinka, J. concurred as to the acquittal, yet dissented on another issue.

familiarize the jury with the psychological effects of battering on women. The Court also explained the value that battered woman syndrome testimony had in helping juries overcome traditional assumptions:

> Expert evidence on the psychological effect of battering on wives and common law partners must, it seems to me, be both relevant and necessary in the context of the present case. How can the mental state of the appellant be appreciated without it? The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction for the average person confronted with the so-called "battered woman syndrome". We need help to understand it and help is available from trained professionals.[14]

The Court held that expert evidence on the battered woman syndrome was relevant in providing the fact-finder a framework to assess the reasonableness of the battered woman's actions under the circumstances (whether she had a reasonable apprehension of death when she acted), and finally to assess whether she reasonably believed that she had no alternative.[15]

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[14] *Supra*, note 3 at para. 31.

[15] Subsection 34(2) of the *Criminal Code,* R.S.C. 1985, c. C-46 which provides for the defence of self-defence read as follows at the time of the judgment:

> Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
>
> (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes, and
>
> (b) he believes on reasonable and probable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

The requirement for an imminent attack was read into the provision before the *Lavallee* decision. In *R.* v. *Whynot* (1983), 9 C.C.C. (3d) 449 (N.S.S.C. App. Div.) Jane Stafford, an abused woman, shot her sleeping partner, was acquitted by a jury, and on appeal a new trial was ordered because the court held the defence of self-defence not applicable without an imminent attack.

Cognizant that the legal test of self-defence under section 34(2) of the *Criminal Code* requires an objective standard of reasonableness[16], Madam Justice Wilson describes how the battered woman's syndrome is also both relevant and necessary in the case of a battered woman who kills her batterer insofar as the standard is premised on the reality of the *reasonable man*:

> If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man".[17]

The Court rejected this requirement in *Lavallee:* "The requirement imposed in Whynot that a battered woman wait until the physical assault is "underway" before her apprehensions can be validated in law, would in the words of an American court, be tantamount to sentencing her to 'murder by instalment'". *Lavallee, supra* note 3 at para. 52.

[16] Subsection 34(2) imposes an objective standard of reasonableness whereby *the accused* must show that she acted under *reasonable* apprehension of death or grievous bodily harm, and that she *reasonably* believed that she could not otherwise save herself from death or grievous bodily harm. It is noteworthy that section 34(2) requires both an objective and subjective inquiry as held by the Supreme Court of Canada in *Reilly* v. *The Queen* [1984] 2 S.C.R. 396 at 404:

> Subsection (2) of s.34 places in issue the accused's state of mind at the time he caused death. The subsection can only afford protection to the accused if he apprehended death or grievous bodily harm from the assault he was repelling and if he believed he could not preserve himself from death or grievous bodily harm otherwise than by the force he used. Nonetheless, his apprehension must be a reasonable one and his belief must be based upon reasonable and probable grounds. The subsection requires that the jury consider, and be guided by, what they decide on the evidence was the accused's appreciation of the situation and his belief as to the reaction it required, so long as there exists an objectively verifiable basis for his perception.
>
> Since s.34(2) places in issue the accused's perception of the attack upon him and the response required to meet it, the accused may still be found to have acted in self-defence even if he was mistaken in his perception. Reasonable and probable grounds must still exist for this mistaken perception in the sense that the mistake must have been one which an ordinary man using ordinary care could have made in the same circumstances. [emphasis in original]

[17] *Lavallee, supra* note 3 at para. 38.

Madam Justice Wilson refers to Dr. Lenore Walker's Cycle of Violence[18], which demonstrates the heightened sensitivity a battered woman has with respect to her partner's violent acts to highlight how the battered woman syndrome testimony may be valuable in demonstrating a woman's reasonable apprehension of death or grievous bodily harm on a particular occasion. Justice Wilson remarks that "without such testimony I am skeptical that the average fact-finder would be capable of appreciating why her subjective fear may have been reasonable in the context of the relationship. After all, the hypothetical man "reasonable man" observing only the final incident may have been unlikely to recognize the batterer's threat as potentially lethal."[19]

In assessing the reasonableness of a woman's belief that killing her batterer is the only way to save her life, the Court refers to the learned helplessness theory developed by psychologist Martin Seligman. Originally applied to explain animal behaviour, Dr. Lenore Walker adapted it to explain why women may find it difficult to leave an abusive relationship. The Court held that the theory could provide insight into why some women fail to leave an abusive relationship. "The same psychological factors that account for a woman's inability to leave a battering relationship may also help to explain why she did not attempt to escape at the moment she perceived her life to be in danger."[20]

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[18] The Walker Cycle of Violence provides that there are three distinct phases within an abusive relationship: (1) tension building, (2) the acute battering incident, and (3) loving contrition. See *The Battered Woman Syndrome, supra* note 8 at 95-100.
[19] *Lavallee, supra* note 3 at para. 50.
[20] *Ibid.* at para. 57.

Undoubtedly, the emergence of the battered woman syndrome constitutes a positive development for battered women who kill their abusers in self-defence. The application of the battered woman syndrome provides women, historically excluded from the traditional male-bias of the law of self-defence, equal access and opportunity to claim self-defence. In admitting evidence of the battered woman syndrome, the courts have acknowledged that the traditional requirements of objective reasonableness under the self-defence doctrine "make it difficult for battered women to plead self-defence unless they kill in the same situation as most men pleading self-defence do, in the midst of an ongoing assault."[21]

Expert testimony of the battered woman syndrome has also helped judges and juries overcome traditional assumptions and popular myths regarding battered women and the context in which they live and deal with abusive partners. The expert evidence operates to overcome stereotypical images of battered women, including the notion that they somehow provoke the violence inflicted on them, and thus deserve it; that the abuse could not be as severe as they claim, if it were so, they would leave; and that battered women take pleasure from the abuse.

Finally, by according weight to a woman's distinct experience in the context of battering, it has been suggested that the Court applied the technique of

[21] M. Shaffer, "R. v. Lavallee-A Review Essay" (1990) 22 Ottawa L. Rev. 607 at 614 [hereinafter *A Review Essay*].

contextualization, a form of legal reasoning frequently employed by feminist legal scholars. The concept of contextualization signifies that issues are understood in context, rather than in abstract.[22] The inclusion of evidence on the battered woman syndrome reflects a realization that "individual action, however, cannot be abstracted from its context."[23] Marilyn MacKrimmon explains how contextualization gives weight to factors that are absent under traditional self-defence doctrine:

> ...the model of self-defence did not recognize the constraints on a woman's actions arising from culturally constructed images of what constitutes a good wife, the training of girls to be obedient, the prevalence of woman battering, the police response to battering, the lack of social services for battered women who leave or the number of women killed when they threaten to leave or do leave.[24]

The contextualization, or the underscoring of constraints imposed by socialization and economic considerations of a battered woman's experience in cases of self-defence exemplifies an important gain for battered women who kill their batterers.

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[22] C. Boyle, "The Battered Woman Syndrome and Self-Defence" (1990) 9 Can. J. Fam. L. 171 at 174.
[23] M. MacKrimmon, "The Social Construction of Reality and the Rules of Evidence" (1991) 25 U.B.C.L. Rev. 36 at 40.
[24] *Id.*

B. Reflections on the Battered Woman's Script

Notwithstanding the advancements prompted by the doctrine of the battered woman syndrome, there has been a growing concern within the feminist legal community that an inaccurate and distorted depiction of both battered women and intimate violence has developed as a result of its misuse and misinterpretation within the legal community. As they feared, the battered woman syndrome, intended to overcome traditional perceptions characterizing battered women as "unreasonable", and to elucidate judges and juries as to the reasonableness of a battered woman's actions when she kills her batterer, evolved into a "syndrome" associated with the battered woman's *impaired* state of mind, rather than the reasonableness of her actions.[25] The expression "battered woman syndrome" in itself has been viewed as problematic since the use of the word *syndrome* suggests that battered women suffer from some sort of *condition* or mental disorder. In fact, the medicalization of this violence against women transforms a societal problem into a woman's problem[26]:

> The unfortunate consequence of this woman-centred focus is that it perpetuated the underlying assumption that it was the woman who was the deviant member of the relationship. Although one of the central features of the "battered woman syndrome" is that women are not to blame for domestic violence, the syndrome unwittingly falls into the tendency to blame the victim by its exclusive inquiry into explaining the victim's conduct.[27]

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[25] *Describing and Changing, supra* note 7 at 198,199.
[26] E. Sheehy, J. Stubbs & J. Tolmie, "Defending Battered Women on Trial: The Battered Women Syndrome and its Limitations" (1992) 16 Crim. L.J. 369 at 393.
[27] *A Review Essay, supra* note 21 at 621.

The *syndromization* of the battered woman's experience furthermore reconfirms the androcentric nature of criminal law by deeming deviant any experience that departs from that of male experience.[28]

Further difficulty with the doctrine of the battered woman syndrome, documented by feminist legal scholars, is the overemphasis on the notion "learned helplessness". As mentioned earlier, Dr. Lenore Walker adapted the learned helplessness theory to explain why women fail to leave an abusive relationship. The theory posits that a battered woman's depression and passivity is a learned response to the continued abuse, which prevents her from leaving her abuser.[29] The concept of learned helplessness, employed in cases of self-defence to explain a battered woman's inability to leave her abusive relationship despite repeated violence, is considered problematic for two reasons. I will discuss each reason in turn.

First, learned helplessness carries an image of helplessness, passivity and incapacity, and its association to battered women fosters a stereotype of a passive, victimized battered woman. The focus on learned helplessness obscures the tenacity and courage a battered woman actually possesses to endure persistent violence, emotional and psychological abuse. It is encouraging to note that in *Lavallee* the Supreme Court of Canada did in fact observe that battered women might exhibit various behavioural traits. "The fact that she may

[28] *Ibid.* at 620.
[29] *The Battered Woman Syndrome, supra* note 8 at 86-94.

have exhibited aggressive behaviour on occasion or tried (unsuccessfully) to leave does not detract from a finding of systematic and relentless abuse."[30]

In fact, the theory does not account for the apparent contradiction between a battered woman's helplessness and the strength displayed in order to act in self-defence. As a central component of the battered woman syndrome, the concept of learned helplessness is problematic as it obscures the complexity of intimate violence, blurs a battered woman's potential for agentic behaviour, and furthermore tilts the legal inquiry toward an analysis of the woman's psychology make-up. As a result, the inquiry "translat[es] women's victimization into a problem with women [which] masks the pervasiveness and extent of men's ability to oppress, harm or threaten us. It protects the legal system from having to confront the central problem of battering—male violence, male power and gender hierarchy..."[31]

Second, the battered woman syndrome, rooted in learned helplessness theory, used to respond to the question "why doesn't she leave?" is a problem because it represents a misleading and inaccurate account of why some women remain in abusive relationships. I suggest that focusing on a woman's learned helplessness only works to strengthen embedded societal stereotypes of battered women. The concept of learned helplessness describes an inaccurate

[30] *Lavallee, supra* note 3 at para.61.
[31] C. Littleton, "Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women" in D.K. Weisberg, ed., *Applications of Feminist Legal Theory to Women's Lives* (Philadelphia: Temple University Press: 1996) 327 at 331, 332 [hereinafter *Perspectives on Male Battering of Women*].

account of intimate violence, suggesting that (1) a battered woman is psychologically unbalanced, and can therefore not leave as a *normal* person would, (2) violence is the only feature that connects the battered woman to her batterer, and (3) separation is the best solution.[32]

Developed in part to explain why a woman would stay in an abusive relationship, the learned helplessness theory places undue focus on a battered woman's dysfunctional mental state of mind, rather than the reasonableness of her actions, and the context in which she acted. The expression, similar to the concept of the *battered woman syndrome*, implies that a battered woman suffers from some sort psychological impairment, which likely conforms to the perception the legal community may have of battered women, thereby perpetuating a distorted image of battered women.[33] Recent case law[34] shows that the battered woman syndrome, and its association with learned helplessness, is not only utilized to demonstrate the reasonableness of a battered woman's actions, but is also invoked to illustrate her irrationality, helplessness, and inadequacies.

Furthermore, an emphasis on learned helplessness masks the power struggle which underpins abusive relationships.[35] Limiting the discussion to the battered woman's helplessness and her inability to make decisions as a result of the

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[32] *Ibid.* at 332.
[33] *Describing and Changing, supra* note 7 at 214.
[34] See, Part C, Post Lavallee Concerns and Development, below for details.
[35] M. Mahoney, "Victimization or Oppression? Women's Lives, Violence, and Agency", in M. Albertson & R. Mykitiuk, eds., *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (New York: Routledge, 1994) 59 at 60 [hereinafter *Victimization or Oppression*].

abuse, presents battering as a simple backdrop of individual episodes of abuse. In reality, male battering of women is an exercise in control and power, which often does not cease with separation, as Martha Mahoney observes:

> When battering is seen only as discrete episodes of physical assault, this facilitates the position that leaving the relationship is the sole appropriate form of self-assertion. But battering reflects a quest for control that goes beyond separate incidents of physical violence and that does not stop when the woman attempts to leave. A focus on control reveals the danger that violence will continue as part of the attempt to reassert power over the woman. [36]

In addition, the concept of learned helplessness overlooks and disregards the idea of preserving the relationship between the woman and her partner. In its explanation of why a woman remains in a violent relationship, learned helplessness does not attribute any value to the preservation of the relationship.

Notwithstanding the abuse a battered woman may endure, her batterer is, nevertheless her partner, lover and confidante. "The requirement that battered women leave pretends away the work involved in forging a family and the love and commitment at stake in relationship."[37] In the circumscribed inquiry into a battered woman's learned helplessness, no weight is given to this consideration. The assumption that no emotional interdependence exists between a woman and her batterer, is yet another manifestation of the law's male bias.

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[36] *Ibid.* at 75.
[37] *Id.* [footnote omitted].

Learned helplessness appears to be employed to excuse battered women from acting rationally. Requiring a battered woman to retreat rests on the supposition that a *rational person* would invariably flee such a relationship. This construct of the rational person has stripped away the context in which social beings live, and ignores our desire, as well as the value we ascribe to interconnectedness.[38]

What are the traits of the rational person? Legal liberalism, which has shaped the law's vision of the rational person, is premised on the idea that the human being strives for autonomy and individuality, and "fear[s] annihilation from the other"[39]. Robin West contends that male jurisprudence is grounded in, what she describes as the "separation thesis".[40] She points out, however, that this conceptualization does not reflect *women's* true nature. Rather her "connection thesis" posits that women seek and value intimacy and connection while at the same time fear separation.[41]

Given that men and women are distinct in this regard, it follows that from a feminist perspective, traditional legal theory provides an incomplete account of humanity, one that excludes women. In fact, the values and the dangers that embody women's lives are not embraced in legal theory.[42] Robin West explains:

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[38] MacKrimmon, *supra* note 23 at 48.
[39] R. West, "Jurisprudence and Gender" (1988) 55 U. Chi. L. Rev. 1 at 7, 8.
[40] *Ibid.* at 6-10.
[41] *Ibid.* at 14-16. On a note of caution, I should point out that West's position could be viewed as an essentialist representation of men and women.
[42] *Ibid.* at 58.

> ...Nor does the Rule of Law recognize, in any way whatsoever, muted or unmuted, occasionally or persistently, overtly or covertly, the contraction which characterizes women's, but not men's lives: while we value the intimacy we find so natural, we are endangered by the invasion and dread the intrusion in our lives which intimacy entails, and we long for individuation and independence...[T]he distinctive values women hold, the distinctive dangers from which we suffer, and the distinctive contradictions that characterize our inner lives are not reflected in legal theory because legal theory (whatever else it's about) is about actual, real life, enacted, legislated, adjudicated law, and women have, from law's inception, lacked the power to make law protect, value, or seriously regard our experience.[43]

Since legal liberalism is based on the notion that human beings value autonomy, it thereby operates to deny, and even discount women's need for connection.[44] If the legal system were to recast its assumption regarding separation "[w]hat would legal doctrine and practice look like if it took seriously a mandate to make women safer *in* relationships, instead of offering separation as the *only* remedy for violence against women?"[45] To account fully for women's perceptions of reasonableness in regard to separation, I believe that women's desire for safe connection, should be recognized and considered in the context of battered woman syndrome evidence.[46]

Finally, a more accurate explanation of why a woman remains in an abusive relationship rather than one that rests on her learned helplessness must support the reasonableness of a woman's belief that escape is always an option. It could be reasoned that not all women fit the learned helpless profile and as such more

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[43] *Ibid.* at 59, 60.
[44] *Ibid. at 49.*
[45] *Perspectives on Male Battering of Women*, *supra* note 31 at 335.
[46] *Id.*

consideration should be attributed to factors such as the perceived risks of leaving, statistical evidence demonstrating an escalation of violence after separation[47], the desire to preserve the relationship, the desire to maintain a home for the children, the perceived fear of shaming the family and the community, and the lack of access to adequate shelter and housing.[48] A description of constraints such as these can assist in understanding the reasonableness of a woman's belief that leaving does not necessarily represent the safest option.[49] "By making it seem as if staying in an abusive relationship is a faulty decision resulting from psychological deficits, battered woman syndrome deprives jurors of important information that would allow them to view battered women as reasonable actors rather than as dysfunctional victims."[50] That being said, however, there may likely be some reluctance to this line of reasoning since it would require the law as well as the legal community to acknowledge the prevalence of violence against women in our society. [51]

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[47] *Spousal Violence After Marital Separation,* Juristat 20(7) (Ottawa: Canadian Centre for Justice Statistics, Statistics Canada, 2001). Data from various studies including the 1999 General Social Survey on Victimization and the 1993 Violence Against Women Survey indicate that separation does not stop violence. In 63% of the cases surveyed, violence either started after separation or escalated. See also W. DeKeseredy & L. MacLeod, *Woman Abuse: A Sociological Story* (Toronto: Harcourt Brace, 1997) at 70-71 (citing results of Statistics Canada's Homicide Survey for the period 1974-1992 which indicate that "separation entails a sixfold increase in risk to wives, compared with coresiding couples") and M. Crawford, R. Gartner & M. Dawson, "Woman Killing: Intimate Femicide in Ontario, 1974-1994" (Toronto: Women We Honour Action Committee, 1997) at 157-159. The results of the studies conducted suggest that "separation is associated with higher risks of intimate femicide".

[48] N. Bala et al., *Spousal Violence in Custody and Access Disputes* (Ottawa: Status of Women Canada, 1998) at 7.

[49] See Chapter 2, Section B (2), below, for discussion on "separation assault".

[50] M. Shaffer, "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After R. v. Lavallee" (1997) 47 Univ. of Toronto L.J. 1 at 13 [hereinafter *The Battered Woman Syndrome Revisited*].

[51] *Id.*

I have argued that the battered woman syndrome overemphasizes the pathology of the battered woman rather than the reasonableness of her conduct and has reduced her to an incapacitated victim thus resulting in the creation of a new battered woman stereotype. In fact, in the United States misuse of the battered woman syndrome has transformed a battered woman's experience into a neatly-constructed category which a woman must fit to gain judicial recognition:

> A stereotype about battered women's behaviour is emerging that threatens to create a separate standard of reasonableness for battered women. Some courts seem to treat battered woman syndrome as a standard to which all battered women must conform rather than as evidence that illuminates the defendant's behavior and perceptions. As a result, a defendant may be considered a battered woman only if she never left her husband, never sought assistance, and never fought back. Unless she fits this rigidly-defined and narrowly-applied definition, she is prevented from benefiting from battered woman syndrome testimony.[52]

Defining the battered woman in conformity to a new legal category or standard is of serious concern insofar as it compartmentalizes a battered woman's experience. This legal representation creates an artificial profile that a battered woman must fit to be deemed an *authentic* battered woman, and as such *essentializes* the reality of all battered women. Arguably, women who depart from the battered woman category are misrepresented and deprived of telling their complete story, thereby decreasing their chances for invoking self-defence.

Just as essentialist critiques in feminist theory posit that no unitary notion of womanhood exists, the battered woman syndrome is problematic implying the

[52] Crocker, *supra* note 7 at 144.

existence of a battered woman prototype. While it true that battered women all share some form of abuse in their lives, adopting a legal prototype simplifies the experiences of many women in living abusive relationships. Many women do not identify with the image of the victimized battered woman but perceive themselves as survivors thus defying the stereotype.[53] Furthermore, the term "battered woman" is misleading for it implies that male violence against women is limited to physical abuse.[54] bell hooks describes the stigma associated with the term battered woman:

> ...the term "battered woman" is used as though it constitutes a separate and unique category of womanness, as though it is an identity, a mark that sets one apart rather than being simply a descriptive term. It is as though the experience of being repeatedly violently hit is the sole defining characteristic of a woman's identity and all other aspects of who she is and what her experience has been are submerged.[55]

As suggested by bell hooks, women's lives are shaped by a multiplicity of considerations, including their race, class and culture. In the characterization of battered woman, silence regarding a woman's race presumes that she is

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[53] See L. MacLeod, *Battered But Not Beaten: Preventing Wife Battering in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1987) at 41. Testimonies of various women in abusive relationships suggest that not only do they see themselves as the strong ones, but often perceive their partners as the weak ones:

> "I can't quite make sense of what the women here [at the shelter] are saying about the patriarchal structure of society and about power and society making men more powerful and all that. When I was growing up, may mother was for sure stronger than my Dad in every way but physically. She was smarter, could do more, and more people respected her. I think it's the same with my husband and me. There's no way he's stronger than me, except physically, and that's why he hits me, because he feels so low."
>
> "My husband and all the men I've ever known are like little boys. We're really like their mothers underneath. Everyone keeps telling me to leave him; they say he'll destroy me. But they don't know how strong I am and how weak he is underneath."

[54] b. hooks, *Talking Back, Thinking Feminist, Thinking Black* (Toronto: Between the Lines, 1988) at 87. See DeKeseredy & MacLeod, *supra* note 47 at 5, 6 for a description of the various forms of abuse. See also, Bala et al., *supra* note 48 at 8-10.

[55] hooks, *ibid.* at 87, 88.

Caucasian. Paradoxically, despite popular and, incorrect assumptions that intimate violence occurs largely within poor and ethnic communities, the image of the typical battered woman is modeled on the experience of the white, middle-class woman. This deficient or *essentialist* characterization of battered women is of concern in that it fails to capture the diversity of battered women's responses to abuse. In the case of battered women who plead self-defence after killing their partners, the category means losing out on a potentially valid claim for self-defence.

An intersectional analysis[56] of battered women enables one to acknowledge that women of colour, Aboriginal women, Latin-American women, Asian women and immigrant women are likely to face different obstacles than those typical of white women. For instance, Aboriginal women[57] and women of colour plagued by historical discrimination based on their race may be reticent in seeking police assistance for fear that this may further stigmatize their community or place shame on their families. Similarly, refugee or immigrant women may resist "outside" assistance for fear of jeopardizing their immigrant or refugee status.[58] And, passive victimized descriptions of battered women are troublesome for

[56] The notion of intersectionality embraces both gender and racial subordination. See K.W. Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" in eds., M. Albertson Fineman & R. Mykitiuk, *The Public Nature of Private Violence: The Discovery of Domestic Violence* (New York: Routledge, 1994) 93.

[57] See J. Stubbs & J. Tolmie, "Race, Gender, and the Battered Woman Syndrome: An Australian Case Study" (1995) 8 C.J.W.L. 122 for a review of the Australian decision *R.* v. *Hickey* (14 April 1992), (Supreme Court NSW) and a discussion on how the battered woman syndrome misrepresents the experience of Aboriginal women.

[58] See C. Sheppard, "Women as Wives: Immigration Law and Domestic Violence" (2000) 26 Queen's L.J. 1 for a discussion on how immigration policies, particularly the family sponsorship program exacerbate the difficulties confronted by immigrant women who are dependent on violent partners.

black women who must overcome racially based stereotypes portraying them as aggressive and hostile.[59]

An attempt to utilize an intersectional approach to the battered woman syndrome by incorporating the diversity of women's experiences can allow for a better understanding of battered women and the complexity of male violence against women.[60]

C. Post Lavallee Concerns and Developments

The experience in the United States courts has shown that due to the misinterpretation or misuse of the battered woman's syndrome, battered women charged with killing their batterers must conform to a newly created category of the battered woman in order to win their case:

> [C]ontrary to feminist intention, battered women now appear to be measured against a new legal stereotype of the "battered woman". Rather than reconceiving the idea of the reasonable man, courts have replaced the hysterical woman with a battered one. If a woman does not meet the battered woman stereotype, she will be, as she always has been, judged as a reasonable man. Instead of meeting the challenge of acknowledging the equal potential of women and men to act in reasonable self-defence, courts have continued to view women under a separate and unequal standard of behavior. [61]

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[59] S.A. Allard, "Rethinking Battered Women Syndrome: A Black Feminist Perspective" (1991) 1 UCLA Women's L.J. 191 at 197.

[60] As MacKrimmon points out: "...as a starting point it may be sufficient to accept that we will never know and understand human experiences until we break out of stereotypical thinking about behaviour of both men and women...stereotypes effectively limit the possibility of knowledge and understanding by filtering out all but a small set of attributes..." MacKrimmon, *supra* note 23 at 45.

[61] Crocker, *supra* note 7 at 137.

As early as the mid-1980's, American feminist legal scholars reviewed the courts treatment in cases of battered women who killed their batterers and concluded that battered woman syndrome testimony generated a new standard, namely the *reasonable battered woman standard*. They argued that the courts in fact reinforced sex stereotypes insofar as the battered woman's actions are measured against the *reasonable man* or the *reasonable battered woman*.[62] The courts insistence on the battered woman's learned helplessness rather than the reasonableness of her actions "resonate with familiar stereotypes of female incapacity."[63]

As a result, the use of battered woman syndrome testimony in the United States appears to have placed women in a double bind implying that women who depart from this judicially-defined stereotype are prevented from presenting potentially legitimate claims of self-defence, and thus do not benefit from the equal right to trial.[64]

American case law has shown that the courts did not recognize as standard battered woman behaviour evidence demonstrating a battered woman's efforts to leave her abusive relationship, for instance, to fight back[65] or to contact her friends, family or the police[66]. Whereas, when a woman never attempted to

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[62] *Id.*
[63] *Describing and Changing, supra* note 7 at 199.
[64] *Ibid.* at 195-200.
[65] *State* v. *Anaya,* 456 A. 2d 1255 (Me. 1983) discussed in Crocker, *supra* note 7 at 145-147.
[66] *State* v. *Kelly,* 33 Wash. App. 541, 655 P. 2d 1202 (1982).

leave, or contact family or friends, the courts allowed the introduction of battered woman syndrome testimony since these circumstances demonstrated that the woman conformed to the battered woman standard.[67]

To what extent does the American experience reflect the situation in the Canadian legal community? Have Canadian courts and lawyers also misheard and/or misinterpreted expert testimony on the battered woman syndrome thus embracing the battered woman stereotype and reverting to commonly held cultural assumptions about women? If so, has the battered woman stereotype also placed women dealing with the criminal justice system in a double bind? If not, what is the experience in Canadian courts? Has the use of the battered woman syndrome effectively expanded the self-defence option for battered woman? Has there been any variation in the content of testimony on the battered woman syndrome since *Lavallee?* I will attempt to answer these questions.

Without a doubt the 1990 Supreme Court of Canada decision in *Lavallee* was well received by the feminist legal community, most particularly, because the decision exemplified a legal recognition of the gender-bias in the law of self-defence. As noted earlier, the Supreme Court of Canada recognized that a woman's experience, especially a battered woman's perceptions, are not captured in the hypothetical *reasonable man* standard found in section 34 of the *Criminal Code*.

[67] Crocker, *supra* note 7 at 145, 146.

In October 1995, in response to the *Lavallee* decision, and following a four-year campaign undertaken by the Canadian Association of Elizabeth Fry Societies, the federal government established the Self-Defence Review (SDR) headed by Judge Lynn Ratushny of the Ontario Court of Justice. As a result of an increased understanding of the impact of abusive relationships on women and its utility in the context of self-defence, the SDR was mandated, in part, to provide advice on identifying women in prison who might be considered for the Royal prerogative of mercy. The process was significant in that it recognized that women convicted and imprisoned before the *Lavallee* decision and denied the benefit of battered woman syndrome testimony in the context of self-defence, were given a second chance in telling their story.[68]

Among the terms of reference of the SDR was the undertaking to:

> review the cases of women under sentence in federal and provincial institutions who apply for a remedy and who are serving a sentence for homicide in circumstances in which the killing allegedly took place to prevent the deceased from inflicting serious bodily harm or death and to make recommendations in appropriate cases to the Government of Canada for individual women whose circumstances merit consideration for the granting of royal prerogative of mercy.[69]

[68] *Self-Defence Review-The Final Report* (Ottawa: The Government of Canada, 1997) [hereinafter *Self-Defence Review*]. For a thorough commentary of the Self-Defence Review, see E. Sheehy, "Review of the Self-Defence Review" (2000) 12 CJWL 197 [hereinafter *Review of the Self-Defence Review*].

[69] Self-Defence Review, *ibid.* at 5.

Contrary to the expectations of many, however, the results of the SDR were a clear disappointment.[70] In fact, the applications of 91 out of 98 women were rejected. Not one woman was released from prison. Judge Ratushny recommended that three women be granted unconditional pardons because she believed that their self-defence pleas would have succeeded. The government finally granted two *conditional* pardons to two women who had already completed their sentence and a remission of sentence to the third who was on parole.

In terms of the Self-Defence Review's impact on the legal understanding of the battered woman syndrome in Canada, it has been argued that, while the SDR does not reinforce negative stereotypes of battered women nor narrow the scope of *Lavallee*, it does appear to weaken the feminist assertion that battered woman syndrome testimony challenges the male-bias inherent in self-defence law.[71] The report indicates that the self-defence analysis is equally applicable to men.[72] Indeed, men may be subject to abuse and invoke *Lavallee*, however, "men do not have the same collective experience or analysis of female violence against them nor the social, economic, and legal structures that maintain it."[73]

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[70] Judge Ratushny also made recommendations for the improvement of self-defence law. These recommendations relate to: the undue complexity of the law of self-defence and the lack of guidance for judges and juries; legislative reform to self-defence provisions, including reducing them to one sole provision; and the addition of a subsection which would describe pertinent circumstances in the determination of the reasonableness of the accused's belief that the use and extent of force was necessary; a modification to prosecutorial practices and to sentencing for murder). For a detailed account of law reform recommendations, see *Self-Defence Review, supra* note 68 at 75-94.

[71] *Review of the Self-Defence Review, supra* note 68 at 211, 212.

[72] *Self-Defence Review, supra* note 68 at 7.

[73] *Review of the Self-Defence Review, supra* note 68 at 212.

Indeed, the *Lavallee* decision may have produced vigorous discussion in the feminist and non-feminist academic community, however, notwithstanding the praise offered by scholars, many alluded to the potential misuse of the testimony and the dangers of the emerging prejudicial stereotype of battered women which would prevent women, who do not conform to the *battered woman profile*, from making pleas of self-defence.[74] Recently, Professor Martha Shaffer, reviewed post-*Lavallee* cases in which women charged with a criminal offence raised the battered woman syndrome as part of their defence or as a factor in sentencing. She discovered that the use of the evidence is developing "in ways that feminists will find troubling"[75]. I discuss her findings and general conclusions below.

I should note at the outset that due to limitations in relation to the accessibility of relevant and complete data, Shaffer is not categorical in her conclusions as to the impact of the *Lavallee* decision and the battered woman syndrome on women charged with killing their abusive partners. She observes, nonetheless, that the admissibility of battered woman syndrome testimony has not led to securing a notable number of self-defence claims for women.[76] She additionally remarks that players within the legal system are also inclined to perceive battered women as dysfunctional and incapable of autonomous action.[77]

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[74] Boyle, *supra* note 22 at 177; *A Review Essay, supra* note 21 at 624; MacKrimmon, *supra* note 23; I. Grant, "The <Syndromization> of Women's Experience" (1991) 25 U.B.C.L. Rev. 51 at 54; Sheehy, Stubbs & Tolmie, *supra* note 26 at 394.
[75] *The Battered Woman Syndrome Revisited*, *supra* note 50 at 2.
[76] *Ibid.* at 17-18.
[77] *Ibid.* at 19-24.

To illustrate this holding, for example, Shaffer cites *R.* v. *Fournier*[78], a case in which a woman, charged with using a forged document, attempted to invoke the battered woman syndrome in a defence of duress. The sentencing judge remarked that he agreed with the jury's finding, that Ms. Fournier acted as "an independent and autonomous individual and not as a 'battered woman' with no will of her own..."[79]

In another case, *R.* v. *Eagles*[80], also cited by Shaffer, Ms. Eagles was charged with uttering a death threat against her husband of 25 years. Evidence proffered at trial demonstrated that Mr. Eagle had physically and emotionally abused his wife throughout their marriage. The trial judge acquitted Ms. Eagle on the basis that, as a woman that *suffers* from the battered woman syndrome, she clearly lacked the necessary *mens rea*. Instead of viewing Ms. Eagles actions as reasonable in the circumstances of a battered woman attempting to 'fight back', the judge could only perceive her as an irrational woman incapable of exercising choice.

Professor Shaffer further reflects on whether the looming battered woman stereotype may have operated to influence guilty pleas in cases where women were charged with killing their batterers. Recognizing that there are a number of considerations at play in deciding to enter a guilty plea, Shaffer suggests that one

[78] [1991] N.W.T.R. 377 (N.W.T.S.C.).
[79] *The Battered Woman Syndrome Revisited, supra* note 50, citing Lilles Terr. Ct. J.
[80] [1991] Y.J. No. 147 Q. L.

may nonetheless relate to a concern that the defendant does not conform to the battered woman stereotype:

> The more a woman may have displayed anger or aggressive tendencies, have experienced problems with alcohol or drug abuse, have been involved in criminal activities, or have demonstrated autonomous behaviour in other spheres of her life, the more risky a defence based on battered woman syndrome may become. It is also possible that the more a woman departs from the stereotype, her own defence counsel may be unable to perceive that 'battered woman syndrome' could found a complete defence".[81]

Shaffer cites two cases which might lead us to question whether the stereotype of the battered woman has influenced a woman's decision to plead guilty: *R.* v. *Whitten*[82]. Mrs. Whitten was charged with second-degree murder for the killing of her common law spouse. She pleaded guilty despite facts which would have made self-defence a strong option—the defendant was an alcoholic, had been violent on earlier occasions and had a psychiatric history; *R.* v. *Bennett* (No.1)[83]. Ms. Bennett was charged with the first-degree murder in the stabbing of her common-law partner. She pleaded guilty to manslaughter despite the strong evidence of battered woman syndrome arising from the testimony of a psychiatrist. The judge even considered striking Ms. Bennett's plea. Ms. Bennett was a verbally aggressive woman who had problems with alcohol.

It is conceivable that some defence lawyers view battered women through this stereotypical prism, and accordingly do not instruct their clients fully as to the likely success of proceeding with a plea of self-defence. Arguably, as a result,

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[81] *The Battered Woman Syndrome Revisited, supra* note 50 at 25.
[82] (1992), 110 N.S.R. (2d) 148 (N.S.S.C.).
[83] (1993) O.J. No. 1011 (Q.L.).

women may feel pressured to forego a trial in which a plea of self-defence would be tested.[84]

Based on her findings, Professor Shaffer concludes that "at least some of the players in the criminal justice system understand battered woman syndrome as deviance and expect battered women to exhibit a purely passive demeanour."[85]

Since *Lavallee*, the Supreme Court of Canada has ruled on two cases involving women and self-defence. In *R.* v. *Pétel*[86], the Court confirmed that an inquiry under s.34(2) of the *Criminal Code* does not require an immediate attack, but rather an assessment of an accused's subjective belief of danger.

Recently, in *R.* v. *Malott*[87], the Supreme Court of Canada re-examined the application of the battered woman syndrome testimony. The decision largely focuses on the standard for reviewing a trial judge's charge to jury. However, the judgment[88], drawing on feminist legal scholarship, provides an insightful analysis as well as instructive advice regarding the application of expert evidence on the battered woman syndrome.

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[84] See, above, discussion on the Self-Defence Review. Judge Ratushny's final report identifies the high number of guilty pleas as problematic and makes recommendations for the creation of specific prosecutorial guidelines.
[85] *The Battered Woman Syndrome Revisited, supra* note 50 at 33.
[86] [1994] 1 S.C.R. 3 [hereinafter *Pétel*].
[87] [1998] 1 S.C.R. 123 [hereinafter *Malott*].
[88] I am especially referring to the reasons of Madam Justice L'Heureux-Dubé.

The facts of the case are as follows: Margaret Malott was convicted for the second-degree murder of her common-law partner and of attempted murder of his girlfriend. Until one month before the incident, Ms. Malott had lived with the deceased and their two children for nineteen years. Throughout the relationship she was abused physically, sexually, emotionally and psychologically. She had complained to the police on several occasions, but discovered that since the deceased was a police informant on drug deals, the police had told him about her complaints resulting in an escalation of violence toward Malott. The couple separated and contact between the two continued after their separation, as the deceased often visited his mother, where Malott and her daughter were staying. The day of the shooting, the deceased picked up Malott, as previously arranged, and drove to the medical centre in order to obtain illegal drugs for his drug trade. Before leaving, Malott took a gun and some bullets and placed them in her purse. The couple argued on their way to the medical centre, and apparently the deceased threatened and choked Malott. Finding the medical centre closed, Malott returned to the car, where fearing the deceased's reaction, and aware that he kept a gun in the car, she shot her partner to death. She then took a taxi to the deceased's girlfriend's residence, where she both shot and stabbed her but did not kill her. The jury found Margaret Malott guilty of second-degree murder and attempted murder. In light of the severity of the battered woman syndrome, the jury however recommended that Malott receive the minimum sentence.

Before reviewing the judgment handed down by the Supreme Court of Canada, it is noteworthy that unlike Ms. Lavallee, Margaret Malott testified in court. Most likely hearing from her directly not only added credibility to her experience, but may also have worked to refute the stereotype of the passive battered woman. Providing the battered woman a voice in court contributes to the demystification surrounding battered women and validates their experience.

In a unanimous decision[89], the Supreme Court of Canada dismissed Malott's appeal. The appeal focused on an evidentiary issue rather than a substantive one. Writing for the Court, Justice Major held that the trial judge's charge to the jury, as a whole, adequately dealt with evidence on the battered woman syndrome as it relates to the defence of self-defence. The Court further sets out what it describes as the principles of the defence as dictated in *Lavallee*:

> 1. **Why an abused woman might remain in an abusive relationship.** As discussed in Lavallee, expert evidence may help to explain some of the reasons and dispel some of the misconceptions about why women stay in abusive relationships.
>
> 2. **The nature and extent of the violence that may exist in a battering relationship.** In considering the defence of self-defence as it applies to an accused who has killed her violent partner, the jury should be instructed on the violence that existed in the relationship and its impact on the accused. The latter will usually but not necessarily be provided by an expert.
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> 3. **The accused's ability to perceive danger from her abuser.** Section 34(2)(a) provides that an accused who intentionally causes death or grievous bodily harm in repelling an assault is justified if he or she does so

[89] Sopinka, J. did not take part in the judgment.

"under reasonable apprehension of death or grievous bodily harm". In addressing this issue, Wilson J. for the majority in Lavallee rejected the requirement that the accused apprehend imminent danger. She also stated at pp. 882-83:

> Where evidence exists that an accused is in a battering relationship, expert testimony can assist the jury in determining whether the accused had a "reasonable" apprehension of death when she acted by explaining the heightened sensitivity of a battered woman to her partner's acts. Without such testimony I am skeptical that the average fact-finder would be capable of appreciating why her subjective fear may have been reasonable in the context of the relationship. After all, the hypothetical "reasonable man" observing only the final incident may have been unlikely to recognize the batterer's threat as potentially lethal... The issue is not, however, what an outsider would have reasonably perceived but what the accused reasonably perceived, given her situation and her experience.

4. **Whether the accused believed on reasonable grounds that she could not otherwise preserve herself from death or grievous bodily harm.** This principle was summarized in Lavallee as follows (at p. 890)

> By providing an explanation as to why an accused did not flee when she perceived her life to be in danger, expert testimony may also assist the jury in assessing the reasonableness of her belief that killing her batterer was the only way to save her own life. [90]

The Court essentially outlines the utility of the battered woman syndrome evidence and underscores the need for these principles to be communicated to a jury in cases related to the battered woman syndrome and self-defence. It is unclear, however, if these principles are in fact to be regarded as model instructions that trial judges are obligated to respect.[91]

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[90] *Malott, supra* note 87 at para. 20 [emphasis added].
[91] *Review of the Self-Defence Review, supra* note 68 at 217.

In my view, it is Madam Justice L'Heureux-Dubé and Justice McLachlin's (as she was then) obiter dictum that makes this decision significant. Writing for both herself and Justice McLachlin, Justice L'Heureux-Dubé provides a candid and instructive overview of the value of battered woman syndrome testimony. She begins by noting that the battered woman syndrome is not a defence in and of itself, but rather provides evidence which is relevant to the legal inquiry in the context of a battered woman who kills her batterer in self-defence. Madam Justice L'Heureux-Dubé also explains how the inclusion of this evidence acknowledges law's gender-bias, particularly in relation to the "objective" standard of reasonableness. She observes that women's perspective must form part of the objective test:

> It [Lavallee decision] accepted that a woman's perception of what is reasonable is influenced by her gender, as well as by her individual experience, and both are relevant to the legal inquiry. This legal development was significant, because it demonstrated a willingness to look at the whole context of a woman's experience in order to inform the analysis of the particular events...[A] majority of the Court accepted that the perspectives of women, which have historically been ignored, must now equally inform the "objective" standard of the reasonable person in relation to self-defence.[92]

Furthermore, Justice L'Heureux-Dubé expresses caution with respect to potentially rigid and mechanical application of the battered woman syndrome evidence. She refers to the new stereotype of the battered woman which has been discussed in feminist legal doctrine and warns of the dangers this stereotype may engender:

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[92] *Malott, supra* note 87 at para. 38.

> It is possible that those women who are unable to fit themselves within the stereotype of a victimized, passive, helpless, dependent, battered woman will not have their claims to self-defence fairly decided. For instance, women who have demonstrated too much strength or initiative, women of colour, women who are professionals, or women who might have fought back against their abusers on previous occasions, should not be penalized for failing to accord with the stereotypical image of the archetypal battered woman.[93]

The reasons expressed by Justice L'Heureux-Dubé are encouraging in that the Court acknowledges and underscores the concerns relating to the use of the learned helplessness theory within the legal inquiry of self-defence. In fact, Justice L'Heureux-Dubé suggests that we should be wary of fueling society's stereotypes of women by placing undue focus on the learned helplessness theory, rather than the reasonableness of a woman's actions and perceptions. She notes "[b]y emphasizing a woman's "learned helplessness", her dependence, her victimization, and her low self-esteem, in order to establish that she suffers from "battered woman syndrome", the legal debate shifts from the objective rationality of her actions to preserve her own life to those personal inadequacies which apparently explain her failure to flee from her abuser."[94]

In order to shift the focus from the battered woman's learned helplessness and to confront this emerging stereotype, Justice L'Heureux-Dubé advises the courts to direct their legal inquiries into the reasonableness of the woman's actions in the context of her experience, in addition to the social considerations which animate her perceptions and explain her inability to leave:

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[93] *Ibid.* at para. 40.
[94] *Ibid.* at para. 41.

> As Wilson J. herself recognized in Lavallee, at p.887, "environmental factors may also impair the woman's ability to leave—lack of job skills, the presence of children to care for, fear of retaliation by the man, etc. may each have a role to play in some cases". To this list of factors I would add a woman's need to protect her children from abuse, a fear of losing custody of her children, pressures to keep the family together, weaknesses of social and financial support for battered women, and no guarantee that the violence would cease simply because she left. These considerations necessarily inform the reasonableness of a woman's belief or perceptions of, for instance, her lack of an alternative to the use of deadly force to preserve herself from death or grievous bodily harm.[95]

These perspicacious reasons illuminate the advancements made to the law of self-defence as a result of the battered woman syndrome evidence, yet also address the problems that the legal community must continue to tackle with a view to utilizing battered woman syndrome evidence appropriately.

In terms of its impact on developments in the law of self-defence as it relates to battered women, *Malott* appears, to date, to have made inconsequential changes in this area. A quickcite search in *Quicklaw* indicates that the decision has been cited 23 times since its ruling in February 1998. The majority of these cases cited the *Malott* case insofar as it currently considered the leading authority with regard to the standard of review required for jury instruction.[96]

In sum, it appears that Canadian courts do not face the same problems found in the United States courts with respect to the battered woman stereotype. However, as the Self-Defence Review shows, battered woman syndrome

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[95] *Ibid.* at para. 42.

[96] For example, *R.* v. *Hibbert* [2002] S.C.J. No.40; *R.* v. *Charlebois* [2000] 2 S.C.R. 674; R. v. Russell [2000] 2 S.C.R. 731; *R.* v. *Lavoie* (2000) 271 A.R. 321 (Alta C.A.); *R.* v. *Pengelly* (2000) 136 O.A.C. 183.

testimony has not effectively expanded the self-defence option for battered women since Lavallee.[97]

[97] Elizabeth Sheehy found that in 1995 "almost no women had been acquitted on the basis of self-defence using *Lavallee* but instead most had entered into a plea bargain for manslaughter, even when the evidence seemed to support a self-defence claim". *Review of the Self-Defence Review, supra* note 68 at 200.

Chapter 2 Theoretical Inquiry into Male Violence Against Women

A. Beyond Dominance Feminism: Recognition of, and Resistance to, Victimization

As a theory explaining women's status in society, dominance feminism maintains that women's unequal position is rooted in the unequal power distribution within society, namely that of male domination and female subordination.[98] Inequality between the sexes is not viewed as biological nor is it seen as a question of difference. According to dominance theorists, women's subordination in society is socially constructed. Women do not choose their subordinate status in society, it is enforced upon them.[99] Catharine MacKinnon, the most central proponent of dominance feminism[100], describes women's place in society as follows:

> How do you know when a group is on the bottom? It may be some indication when they can be assaulted, and authorities ignore them; physically abused, and people turn away or find it entertaining; economically deprived, and it is seen as all they are worth; made the object of jokes, and few ask what makes the jokes funny; imagined as animallike (sic), confined to a narrow range of tasks and functions, and told it is all harmless or inevitable and even for their benefit as well as the best they can expect, given what they are. These are all true for women.[101]

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[98] C. MacKinnon, *Feminism Unmodified* (Cambridge: Harvard University Press, 1987) at 40. [hereinafter *Feminism Unmodified*].

[99] *Ibid.* at 23. MacKinnon asserts:

> ...if gender is an inequality first, constructed as a socially relevant differentiation in order to keep that inequality in place, then sex inequality questions are questions of systematic dominance of male supremacy...

Ibid. at 42.

[100] As the most renowned spokesperson of the dominance theory, I largely rely on Catharine MacKinnon's work. Yet others have also contributed to the theory. See for example, C. Littleton, "Reconstructing Sexual Equality" (1987) 75 Cal. L. Rev. 1279.

[101] *Feminism Unmodified, supra* note 98 at 30.

According to dominance theorists, violence against women, in all its forms-sexual assault[102], pornography[103], sexual harassment[104] and domestic violence-epitomizes the subordination of women. Essentially, these actions, or *acts of dominance*[105], not only control women, but keep them in their place. It is in light of this view, that it is argued that dominance feminism has provided a theoretical foundation to understanding the pervasiveness of violence against women in our society.

MacKinnon contends that sexuality constitutes the ultimate source of gender[106] inequality. She views sexuality as a social process which creates, defines and maintains sex roles.[107] She claims that, "[m]en and women are created through the erotization (sic) of dominance and submission."[108] In fact, sexuality, which embodies male power, is "defined by men, forced on women, and constitutive of the meaning of gender."[109] Dominance theory posits the notion that women are socially subordinated through the expression of male sexual domination, exposed in rape, sexual harassment, pornography and prostitution.

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[102] Rape is described as a form of power and male domination over women in S. Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon and Schuster, 1975).
[103] A. Dworkin, *Pornography: Men Possessing Women* (New York: Plume, 1981). Dworkin contends that pornography eroticizes male dominance and female subordination as well as normalizes the degradation of women.
[104] C. MacKinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979) [hereinafter *Sexual Harassment of Working Women*]. Sexual harassment is characterized as a practice which perpetuates the sexual objectification of women.
[105] C. MacKinnon, *Toward A Feminist Theory of the State* (Cambridge: Harvard University Press, 1989) at 127 [hereinafter *Feminist Theory of the State*].
[106] The term *gender* does not refer to sex or biological identification of women, but rather the social construction of the sexes. As Simone de Beauvoir once declared, "one is not born, one rather becomes a woman" in *The Second Sex* (New York: Knopf, 1968) at 249.
[107] *Feminist Theory of the State*, *supra* note 105 at 3, 4.
[108] *Ibid.* at 113.
[109] *Ibid.* at 128.

MacKinnon goes on to state that as a result of our sexual and overall subordination, as women, we are all potentially victims:

> [F]or a woman to be sexualized means constant humiliation or threat of it, being invisible as human being and center stage as sex object, low pay, and being a target for assault or being assaulted. Given that this is the situation of all women, that one never knows for sure that one is the next on the list of victims until the moment one dies...[110]

It can be argued that dominance feminism further promotes women's victimization by evoking the inevitability of women's inferior status:

> Recall that more than one-third of all girls experience sex, perhaps are sexually initiated, under conditions that even this society recognizes are forced or at least unequal. Perhaps they learn this process of sexualized dominance as sex. Top-down relations feel sexual. Is sexuality throughout life more than ever not on some level a reenactment of, a response to, that backdrop? ... Sexually abused women -- most women -- seem to become either sexually disciplined or compulsively promiscuous or both in series, trying to avoid the painful events, or repeating them over and over almost addictively, or both, in an attempt to reacquire a sense of control or to make them come out right. Women also widely experience sexuality as a means of male approval; ... Violation can be sustained, even sought out, to this end. Sex can, then, be a means of trying to feel alive by redoing what has made one feel dead, of expressing a denigrated self-image seeking its own reflection in self-action in order to feel fulfilled, or of keeping up one's stock with the powerful. [111]

Women's inevitable role as sexual objects ensures that we remain subordinate to the power and control of men in society.[112] MacKinnon also maintains that women are, in fact, complicit in our subordination. As participants in our

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[110] *Ibid.* at 151.
[111] *Ibid.* at 147.
[112] MacKinnon describes sexuality as "an enforcement mechanism for male dominance over women", *ibid.* at 216.

subordinate status[113], MacKinnon suggests that it is virtually impossible to "break free" of patriarchal conditioning: "...[w]omen know the world is out there because it hits them in the face. No matter how they think about it, try to think it out of existence or into a different shape, it remains independently real, keeps forcing them into certain moulds. No matter what they think or do, they cannot get out of it."[114]

MacKinnon defines women fundamentally in relation to what men do to them.[115] She states that "[w]omen have been the nature, the matter, *the acted upon* to be subdued by the acting subject seeking to embody himself in the social world."[116] Arguably, the use of the expression *acted upon,* clearly supports the dominance feminism's central theme that a woman's *being,* is being a victim. Moreover, a *powerless* victim.

This being said, dominance feminism has given rise to notable legal gains for women. It has contributed both a novel approach to sex discrimination law and developed a theoretical foundation to understanding the pervasiveness of violence against women in our society. For example, dominance theorists challenged the apparent gender neutrality of the law and exposed gender-

[113] Interestingly, MacKinnon does, acknowledge the significance of consciousness-raising as a method to understanding to women's knowing. Unfortunately, she does not explain how she reconciles her opposing assertions; on the one hand, she advances the idea of women's complicity in their subordination, and, on the other, she acknowledges an aspect of women's agency by advocating consciousness-raising among women. See *ibid.* at 83-105.
[114] *Ibid.* at 123.
[115] M. Mahoney, "Women and Whiteness in Practice and Theory: A Reply to Catharine MacKinnon " (1993) 5 Yale L.J. & Feminism 217 at 217 [hereinafter *Women and Whiteness*].
[116] *Feminist Theory of the State, supra* note 105 at 124 [emphasis added].

specific abuses ranging from sexual harassment to pornography. Sexual harassment was legally recognized as an injury and a legal remedy was formulated for "victims of sexual and economic exploitation in the workplace."[117]

Despite laudable attempts by dominance theorists to eliminate oppressive practices endured by women, I argue that dominance theory recounts a misleading characterization of women as it describes them largely as victims. I take issue with dominance feminism's account of women's subordinate position because the theory's emphasis on victimization fosters and perpetuates traditional stereotypes of passive women in need of protection. This is evident in the pornography debate in the United States in the early 1980's.

Some feminists reacted strongly to the anti-pornography discourse led by dominance feminists. They criticized the theory's depiction of women in pornography as victims of male coercion.[118] They argued that the exclusive focus on women's sexual subordination impedes any potential evaluation or account of women's sexual pleasure and women's agency as sexual actors:

> Sexuality is simultaneously a domain of restriction, repression, and danger as well as a domain of exploration, pleasure, and agency. To focus only on pleasure and gratification ignores the patriarchal structure in which women act, yet to speak only of sexual violence and oppression ignores women's experience with sexual agency and choice and unwittingly increases the sexual terror and despair in which women live.[119]

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[117] *Sexual Harassment of Working Women, supra* note 104.
[118] C.S. Vance, *Pleasure and Danger: Toward a Politics of Sexuality* (Boston: Routledge, 1984); Ann Snitow et al., *Powers of Desire: the Politics of Sexuality* (New York: Monthly Review Press, 1983).
[119] Vance, *ibid.* at 1.

These anti-pornography critics suggested that the exclusive focus on women's victimization not only thwarts women's attempt to experiment with alternative forms of sexual expression, but can also potentially alienate women who have transcended traditional sexual boundaries.

They further contended that dominance feminism's distorted pictures of women and its overemphasis on victimization will lead women to think of themselves as victims.[120] They claimed that this overemphasis will affect the way others perceive women and eventually lead women to internalize the negative characteristics inherent in victimhood.[121]

Finally, the anti-pornography critics maintained that "dominance-based depictions"[122] of women represents a simplification of women's sexuality, which they perceive as more complex than that suggested by dominance theorists.[123] They were concerned that these images reinforce and perpetuate conservative visions of women's sexuality, seen as purely associated with marriage and procreation.[124] They view women's sexuality as a locus for liberation, exploration

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[120] *Ibid.* at 4-7.
[121] K. Abrams, "Constitution of Women" (1997) 48 Ala. L. Rev. 861 at 874 [hereinafter *Constitution of Women*] citing K. Roiphe, *The Morning After: Fear, Sex and Feminism on Campus* (1993) and C. Paglia, "Rape and Modern Sex War" in *Sex, Art, and American Culture* (1992), [reference omitted].
[122] This expression is used by Kathryn Abrams in *Sex Wars Redux*, *supra* note 4.
[123] Vance, *supra* note 118 at 5.
[124] L. Duggan, N. Hunter & C.S. Vance, "False Promises: Feminist Anti-pornography Legislation in the U.S." in V. Burstyn, ed., *Women against Censorship* (Vancouver: Douglas & McIntyre, 1985) 130 at 141-143.

and self-definition[125], as well as a form of resistance "permitting women to experience pleasures that were sanctioned or proscribed under patriarchal social norms."[126] They sought to underscore women's agency within the realm of sexuality, and as such, objected to the minimization of women's self-direction advocated by dominance feminism through the depictions of victimized women.[127]

Portraying women as victims in order to obtain legal protection is troublesome because it provides an inaccurate description of women which tends to be adopted by players in the justice system. Legal representations of women are too often limited to rigid, dichotomous characterizations of women as either victims or agents.[128] In sexual harassment claims[129] in the United States plaintiffs are required to demonstrate that the harassment is pervasive enough to constitute a hostile environment. Until recently, plaintiffs had to produce evidence indicating "serious psychological injury" to legitimize their cases. As such, the law

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[125] Vance, *supra* note 118 at 24. Vance maintains that feminism should emphasize sexual exploration:

> Feminism should encourage women to resist not only coercion and victimization, but also sexual ignorance...feminism should support women's experiments and analyses, encouraging the acquisition of knowledge. We can begin by examining our own experience sharing it with each other, knowing that in sexuality as in the rest of social life, our adventures, risks, impulses, and terrors provide clues to the future. Feminism must insist that women are sexual subjects, sexual actors, sexual agents; that our histories are complex and instructive; that our experience is not blank, nor a mere repetition of what has been said about us, and that the pleasure we have experienced is as much a guide to future action as the brutality.

Id.

[126] *Sex Wars Redux, supra* note 4 at 312.

[127] *Ibid.* at 312, 313.

[128] *Ibid.* at 344.

[129] *Harris* v. *Forklift Sys. Inc.*, 114 S. Ct. 367 (1993) The Supreme Court ultimately rejected the "serious psychological injury" requirement.

constructed an image of sexually harassed women who must also be psychologically impaired in order to bring legitimate cases before the court.

Dominance feminism's propensity to underscore women's victimization risks minimizing women's agency and thereby fails to account for the complexity of our collective struggle for resistance to oppression. Some feminists argue that muting women's agency could even prevent women from recognizing their own potential for resistance.[130] Moreover, subjugating women's free will to a form of collusion in their own subordination, as dominance theorists expound, suppresses any possibility of agency, and places women in a position of absolute futility regarding any attempt to defy their own oppression. As noted by Martha Minow, "[v]ictim talk can have a kind of self-fulfilling quality, discouraging people who are victimized from developing their own strengths or working to resist the limitations they encounter."[131] If all women's choices were in fact tainted by their subordination, resistance would appear impossible.

In response to the minimization of women's agency associated with dominance feminism, feminist legal scholars sought to underscore the possibility that depictions of victimized women undermine our fight against oppression.[132] Although many scholars essentially espoused dominance feminisms' explanation

[130] *Ibid.* at 343.
[131] M. Minow, "Surviving Victim Talk" (1993) 40 UCLA L. Rev. 1411 at 1429 [hereinafter *Surviving Victim Talk*].
[132] A backlash to dominance feminism's insistence on victimization was also apparent in popular culture in the early 1990's. In response to women's victimization, commentators such as Katie Roiphe and Naomi Wolf asserted women's complete autonomy or what they called "power feminism". See E. Schneider, "Feminism and the False Dichotomy of Victimization and Agency" (1993) 38 N.Y.L. Sch. L. Rev. 387 at 389-390 [hereinafter *False Dichotomy of Victimization and Agency*] and Sex Wars Redux, *supra* note 4 at 329-332.

of women's inequality or oppression, they nevertheless endeavoured to highlight women's agency.

For example, Angela Harris has pointed to the danger of highlighting women's victimization which she explains can contribute detrimentally to women's self-definition:

> [T]he story of woman as passive victim denies the ability of women to shape their own lives, whether for better or for worse. It also may thwart their abilities...[W]omen who rely on their victimization to define themselves may be reluctant to let it go and create their own self-definitions.[133]

In the context of sexual assault of women, Sharon Marcus has criticized dominance theorists for overemphasizing the inevitability of rape, and for downplaying women's potential for resistance. She asserts that rather than depicting women as perpetual targets of violation, one should understand rape as a cultural script, or a "process of gendering":

> The language of rape solicits women to position ourselves as endangered, violable, and fearful and invites men to position themselves as legitimately violent and entitled to women's sexual services. This language structures physical actions and responses as well as words, and forms, for example, the would-be rapist's feelings of powerfulness and our commonplace sense of paralysis when threatened with rape.[134]

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[133] A.P. Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stan. L. Rev. 581 at 613.

[134] S. Marcus, "Fighting Bodies, Fighting Words: A Theory of Politics of Rape Prevention" in J. Butler & J.W. Scott, eds., *Feminists Theorize the Political* (New York: Routledge, 1992) 385 at 390.

Marcus shows that by understanding rape as a process of gendering, women should focus on resistant responses to rape, rather than scripted responses of fear and paralysis.[135] She proposes resistance strategies to counter women's socialized passive response to fear which ultimately foster women's expression of agency.[136]

These examples demonstrate how the suppression of women's agency produced by dominance feminism has threatened to mask women's capacity for strength, action and resistance. I contend that efforts should be directed to empowering women to recognize their potential for resistance as advocated by these feminist legal scholars, rather than emphasizing the futility of their *condition* as victims.

B. An Alternative Theoretical Framework: Partial Agency[137]

In the last few years feminist legal scholars have expressed the need for a theory which recognizes the co-existence of women's inequality, or victimization, as well

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[135] *Ibid.* at 387-395.

[136] Marcus refers to Pauline Bart & Patricia H. O'Brien's rape prevention text entitled *Stopping Rape: Successful Survival Strategies* which challenges the general belief that "fighting back" will only cause a woman more injury, implying that rape itself is not an injury. Marcus discusses verbal self-defense as a prevention strategy:

> Flight can work more effectively than rational negotiations since it simply breaks away from a script of polite, empathetic response to a potential aggressor. Verbal self-defense can successfully disrupt the rape script by refusing to concede the rapist's power. Treating the threat as a joke; chiding the rapist; bargaining to move to a different place, to perform only certain acts, or to have the rapist put any weapons he might have aside, are all examples of verbal methods which have in some cases thwarted rape attempts because they assert a woman's agency, not her violability, and a woman's power, rather than her fearful powerlessness. *Ibid.* at 396.

[137] This expression was coined by Kathryn Abrams in Sex Wars Redux, *supra* note 4. Her work has heavily influenced the content of my work.

as their agency. Kathryn Abrams, who has objected to the minimization of women's agency found in dominance feminism, proposes a theory that juxtaposes both women's victimization as well as their oppression. Elizabeth Schneider has also emphasized the problems victimization presents to feminist legal theory.[138] While Martha Mahoney has called for strategies which demonstrate both agency and oppression. She observes:

> Why is it so difficult to see both agency and oppression in the lives of women?...In our society, agency and victimization are each known by the absence of the other; you are an agent if you are not a victim, and you are a victim if you are in no way an agent. In this concept, agency does not mean acting for oneself under conditions of oppression; it means being without oppression, either having ended oppression or never having experienced it at all. This all-agent or all-victim conceptual dichotomy will not be easy to escape or transform.[139]

A theoretical framework which fuses the dichotomous notions of victimization and agency could set the groundwork for a better understanding of intimate violence, as well as other forms of violence against women. I suggest that an appeal to the concept of partial agency may assist in explaining women's victimization in the context of women's recurring struggle under patriarchy.

As an alternative framework, partial agency endeavours to reconcile the dichotomous characterizations of women as victims or autonomous agents, by highlighting the juxtaposition of "women's capacity for self-direction and resistance, on the one hand, with often-internalized patriarchal constraint, on the

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[138] *Describing and Changing, supra* note 7; *False Dichotomy of Victimization and Agency, supra* note 132.
[139] *Victimization or Oppression, supra* note 35 at 64.

other."[140] I suggest that partial agency represents a theoretical basis in response to the opposing characterizations of women that emanate from dominance feminism and judicial decisions. Partial agency strives to counter the old and new stereotypes of battered women which reinforce their oppression.

In the following section I will briefly examine the concept of agency and its sources, as described by liberal philosophers. It is this central understanding of agency which underlies legal theory as well as the construction of the legal subject. An examination of these dominant accounts of agency will show that the self is essentially defined as an autonomous entity, whose being and self-determination can be shaped only by himself or herself. The description voiced by feminist theorists will demonstrate an alternate account, which defines the individual in context, and thus acknowledges that various societal forces shape a woman's agency.

What is "agency" and what conditions must exist in order to exercise it? The term "agency" conjures up notions of selfhood or identity, choice, freedom, autonomy, and self-determination. The question of human agency and its formulation of a responsible agent, has been considered by philosophers for many years. The dominant vision of liberal philosophers depicts the individual as an autonomous, independent being who makes choices based on his or her own

[140] *Sex Wars Redux, supra* note 4 at 346.

beliefs, and governs his or her actions independently from others.[141] Individuals are thus defined as individualistic, self-determining and defined as "separate from others"[142].

According to philosophy professor Joseph Feinberg, the concept of autonomy encompasses several characteristics that make up the self. These are integrity, moral independence, moral authenticity, initiative, self-reliance and self-determination.[143] Self-sufficiency and independence are the unifying theme of his conception of agency. Although he suggests that these qualities exemplify the *ideal* autonomous person, Feinberg acknowledges the impact that our social environment has on the degree of autonomy a person may exercise. While he appears to recognize that an autonomous person has a history and exists within a community, he discounts any possible interdependence which may influence self-determination.[144]

Aristotle was one of the earliest philosophers that explored the idea of the *internal* and *external* self. He defined autonomous action as emanating from the "inner" self, and involuntary action as originating in the "outside" self, that is, by way of external influences. Thus Aristotle maintained that acting according to one's own desires is equated as a manifestation of autonomy.

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[141] J. Kupfer, *Autonomy and Social Interaction* (Albany: State University of New York Press, 1990) at 9,10.
[142] West, *supra* note 39 at 5-7.
[143] J. Feinberg, "Autonomy" in J. Christman, ed., *The Inner Citadel: Essays on Individual Autonomy* (New York: Oxford University Press, 1989) 27 at 30-43.
[144] *Ibid.* at 31, 32. With respect to the quality of self-identity, Feinberg states that the autonomous person "is not exhaustively defined by his relations to any particular others..."

But do all desires originate from within the self?[145] According to Isaiah Berlin's formulation of the concept of freedom, both external and internal barriers may hamper the exercise of our true will.[146]

It appears that although some liberal theorists acknowledge the idea of external influences as potential obstacles to autonomous action, they underestimate the power of these influences. They view a "clear line between inner and outer, self and other, subject and object; desires come from within, restraints, from without; desires are formed by subjects, by selves, they are thwarted by objects, by others."[147]

A feminist account of agency or autonomy contrasts with that of liberal philosophers. Feminists oppose the dominant liberal understanding of autonomy which virtually discounts the significance of relational interdependence and socialization in the formation of individual autonomy. Some feminists view the dominant conception of autonomy as an inadequate reflection of the complexities of women's lives, and more specifically, an incomplete observation of the way women's autonomy and therefore agency is played out.[148]

For example, Diana Meyers, a liberal feminist focusing largely on the "traditional woman" who works in the home, asserts, that it is misleading and simplistic to

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[145] J. Grimshaw, "Autonomy and Identity in Feminist Thinking" in M. Griffiths & M. Whitford, eds., *Feminist Perspectives in Philosophy* (Bloomington: Indiana University Press, 1988) 90 at 90, 91.
[146] N.J. Hirschmann, "Toward a Feminist Theory of Freedom" (1996) 24 Pol. Theory 46 at 48,49. The "Berlin model" of freedom is comprised of negative liberty, referring to the absence of external constraints, and positive liberty which denotes internal constraints.
[147] Hirschmann, *ibid.* at 49 (referring to Isaiah Berlin view of negative liberty).
[148] Grimshaw, *supra* note 145 at 805-808; Hirschmann, *ibid.* at 47.

contend that a person is either autonomous or not autonomous.[149] She takes issue with the fact that, viewed through the dominant liberal prism of autonomy, women conditioned to be caregivers, would not qualify as "autonomous". Her work shows that autonomy and agency consist of a gradation of possibilities ranging from complete dependence to full autonomy of the self, thus demonstrating the complexity of personal autonomy. She explains how feminine socialization[150] can indeed have an impact on the degree of autonomy a woman can exhibit.

Meyers acknowledges the inherent variability of the notion of autonomy by affirming that the concept is composed of different forms and remarks that "autonomy at the highest level of generality is not necessary for autonomy at lower levels".[151] She identifies three forms of autonomy: programmatic, episodic and partial access autonomy which I will briefly review.

Programmatic autonomy refers to one's ability to confront broad decisions, such as life plans, or the various goals a person may desire to pursue. Episodic autonomy, on the other hand, pertains to the way a person deals with a specific, an immediate situation or action. Therefore, a person may evade a situation, or confront it, and thus handle it in a particular way. The degree of autonomy demonstrated in the response, observes Meyers, depends on "the extent that the

[149] D.T. Meyers, "Personal Autonomy and the Paradox of Feminine Socialization" (1987) 84 J. of Phil. 619 at 619-622 [hereinafter *Personal Autonomy*].
[150] "[t]he set of practices which instills in girls the gentle virtues of femininity along with homespun feminine goals", *ibid.* at 619.
[151] *Ibid.* at 625.

convictions and attitudes entering into the decision have been previously examined and endorsed."[152] Finally, partial access autonomy designates a form of autonomy that exhibits partial access to one's authentic, unconditioned self.[153]

These distinct forms of autonomy may be exercised with what Meyers calls "autonomy competency" consisting of skills that enable individuals to make decisions and skills such as "autobiographical retrospection, detection, and reconciliation of conflicts within the self, and identification with preferred components of the self."[154] She reasons that feminine socialization reduces women's ability to develop the necessary skills of autonomy competency. She, nevertheless, maintains that traditional women do achieve a degree of autonomy, given that their true self is not completely absent.

While feminine socialization is factored into Meyers' conception of autonomy, I suggest that its narrow focus on a woman's domestic role prevents her from adequately considering how patriarchy's structural inequities identified by dominance feminists and structural feminists, influence women's individual and collective autonomy.[155] I argue that these structural or systemic differences, similar to feminine socialization have an effect on the exercise of our autonomy.

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[152] *Id.*
[153] D.T. Meyers, *Self, Society and Personal Choice* (New York: Columbia University Press, 1989) at 42-48 [hereinafter *Society and Personal Choice*] and *Personal Autonomy, ibid.* at 624-626.
[154] *Society and Personal Choice, ibid.* at 52, 53.
[155] K. Abrams, "From Autonomy to Agency: Feminist Perspectives on Self-Direction" (1999) 40 Wm. and Mary L. Rev. 805 at 817-823 [hereinafter *Feminist Perspectives on Self-Direction*].

Structural feminists maintain that socialization within a patriarchal society shapes women as social beings. Male-oriented customs, practices and laws essentially create gender roles, hence women's roles in society. Structural feminists emphasize that, "these rules become constitutive not only of what women are allowed to do but of what they are allowed to *be* as well; how women are able to think and conceive themselves, what they can and should desire, what their preferences are."[156] Women's status in society is therefore understood as a product of socialization by which "more powerful groups tend to socialize less powerful groups to various forms of subordination."[157]

According to dominance feminists, as noted earlier[158], sexual domination defines who women are, and may "constrain the range of women's choices by making them afraid to live, work, or walk in particular areas, or reluctant to engage in particular practices or voice particular views."[159] As a result of this *external* influence, women may feel inferior to men or even conceive themselves as sexual objects. This form of conditioning often causes women to hold these values to the extent that they form part of a woman's *internal* self. Thus external and internal sources of the self are fused into one.

Other structural feminists, such as political theorist Nancy Hirschmann have challenged the dominant account of the self invoking the notion of social

[156] Hirschmann, *supra* note 146 at 52 [emphasis added].
[157] *Feminist Perspectives on Self-Direction, supra* note 155 at 821.
[158] See above, Section A.
[159] *Feminist Perspectives on Self-Direction, supra* note 155 at 819 [footnote omitted].

constructivism. Social constructivism maintains that human beings are constructed and shaped by "the particular constellation of personal and institutional social relationships that constitute our individual and collective histories."[160]

Social constructivism bridges the dichotomy of internal and external constraints thereby suggesting that the source of constraints is not always readily identifiable. Hirschmann describes the interrelationship of internal and external constraints:

> Because our conceptual and material world has been formulated and developed by these masculinist perspectives, such rules are not simply external restrictions on women's otherwise natural desires; rather, they create an entire cultural context that make women seem to choose what they are in fact restricted to.[161]

As a result, social constructivism appears to imply that women's choices and authentic freedom are impeded by patriarchal practices and customs in society. While social constructivism suggests that women are *constructed* or *created* as subordinate, the underlying theme embraces the notion of duality in social construction, namely construction and deconstruction. While some individuals in society may exercise more power in *construction*, one could maintain that, it is important to recognize that women may also participate in the process of their own self-definition by resisting the established construction. In other words, if "social construction suggests that by saying women are inferior, women *are*

[160] Hirschmann, *supra* note 146 at 51.
[161] *Ibid.* at 52.

inferior; that is, culture, ethics, and law encode the belief and it becomes materialized. But this materialization is never total, hence the ability to challenge the claim even as one lives."[162]

Rejecting liberal individualism, political theorist Jennifer Nedelsky similarly calls for a redefinition of autonomy which would "incorporate our experience of embeddedness in relations, both inherent, underlying reality, of such embeddedness and the oppression of its' current social forms."[163]

In conclusion, a feminist perspective of agency suggests that the self and expressions of autonomy are far more complicated than that described by liberal theorists and espoused in legal theory. Central to the feminist account of agency is the emphasis on the power of socialization in shaping and directing an individual's autonomy. Agency is assessed along a continuum—it is never absolute, and the degree of agency varies with its context.

Consequently, it is conceivable that women, through their expressions of self-direction undertake to purge themselves of social influences by exhibiting power over their ascribed social destiny. Women's actions can be reinterpreted as displays of resistance to their subordination. Partial agency embodies this conception.

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[162] *Ibid.* at 58.
[163] J. Nedelsky, "Reconceiving Autonomy: Sources, Thought, and Possibilities" (1989) 1 Yale J. of Law and Feminism 7 at 10.

C. Partial Agency in the Context of Battered Women

The liberal legal subject defined in legal theory and the negative stereotypes of battered women operate to taint our understanding of women's resistance to male violence. In the context of battered women, partial agency theory is an attempt to reconcile the dichotomous characterizations of battered women thereby challenging incorrect assumptions surrounding women's response to domestic violence.

Battered women are victims, but they are also agents and survivors. Partial agency regards battered women's responses as manifestations of a form of agency. These manifestations include her various outreach attempts, daily struggles to preserve her relationship and the safety of her children, and possibly attempts to leave her partner. As Abrams recounts, battered women demonstrate agency in various ways:

> A woman's self-assertion may be prominent in some contexts of her life and virtually absent in others. Examined across time, or in different areas of a woman's life, it may present a multi-faceted picture of her ability to direct her course. These characteristics may be attributable in part to the greater external and internal constraints imposed upon women and other members of disempowered groups, but they also reflect the response of a subject who is formed by a complex array of social influences.[164]

Shaped by a web of factors, a battered woman's reaction and manner in coping with abuse, does not meet popular expectations of simple confrontation.

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[164] *Feminist Perspectives on Self-Direction, supra* note 155 at 835 [footnotes omitted].

Martha Mahoney's work on the redefinition of separation as well as her strategy to reconceptualize intimate violence as a form of control and power is an excellent illustration of how partial agency addresses women's subordination and their fight against this oppression.

Mahoney recounts that passive, helpless stereotypes of battered women tend to mask the efforts of resistance. Efforts to work things out within the relationship, for instance, go unnoticed. In fact, battered women appear to be limited to two choices, to remain within the relationship which is perceived as suspect, or leave.[165] When a woman stays in an abusive relationship she is seen as a (irrational) victim; if she leaves she is seen as exercising agency.

The perpetual focus on "Why didn't she leave?" is problematic. It not only nourishes the social and judicial assumptions which assimilate agency to the woman's departure from her abuser, but also obscures the complexity of intimate violence. Advocating a battered woman's departure from her abusive relationship is built clearly on a liberal conception of agency: the free, autonomous individual. As remarks Mahoney, "[t]he categories of 'staying' and 'leaving' collapse women's actions into categories that hide many acts of self-assertion. A woman might tell her partner to stop, seek counseling, and make

[165] *Victimization or Oppression, supra* note 35 at 60.

him promise not to do it again. But these acts of agency are subsumed into the category of 'staying' and seen as a problematic failure to leave."[166]

In effect, the emphasis on explaining a battered woman's inability to leave an abusive relationship thwarts any exploration into the struggles she faces in attempting to confront her abuser, protect herself and her children and rebuild her relationship. The requirement that a battered woman just get up and leave an abusive relationship implies that she is a free agent only in the leaving. Yet, statistics and media reports point to the escalation in violence at separation.[167] In fact, "[o]nce we concede exit as the test of agency, we are forced to explain women's deficiencies at agency."[168]

As discussed earlier, judicial inquiry into a battered woman's self-defence when accused of homicide after killing her assailant is centered on explaining why she did not leave her partner.[169] The idea of assimilating agency with a battered woman's separation from her batterer is dangerous insofar as her credibility is jeopardized if she does not leave thereby reinforcing misconceptions that women exaggerate and/or lie about abuse. Alternatively, if she is believed, her inability to leave suggests that she is somehow irrational.

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[166] *Ibid.* at 76.
[167] *Ibid.* at 73-76.
[168] *Ibid.* at 78.
[169] *Id.*

In an effort to transforming judicial assumptions with regard to the requirement that a battered women leave, Mahoney has labeled the violence a woman encounters when she leaves or threatens to leave her batterer as *separation assault*. She defines the concept as follows:

> Separation assault is the attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return. It aims at overbearing her will as to where and with whom she will live, and coercing her in order to enforce connection in the relationship. It is an attempt to gain, retain, or regain power in a relationship, or to punish the woman for ending the relationship.[170]

This concept of separation assault helps to underscore the escalation of violence that women often face with separation. By defining this attack, the dynamics of intimate violence as a form of power and control are exposed. It exposes the batterer's efforts to exert control over his partner as well as the woman's resistance in attempting to leave. In separation assault, the attack is clearly a result of a battered woman trying to exercise some form of autonomy.

Additionally, the idea of defining separation assault "helps to counteract stereotypes of dependency in battered women"[171]. By deflecting attention from the battered woman's mental state and her learned helplessness, identifying separation assault as part of expert testimony on the battered woman syndrome[172] can redirect the inquiry into the reasonableness of the woman's

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[170] M. Mahoney, "Legal Images of Battered Women: Redefining the issue of Separation" (1991) 90 Mich. L. Rev. 1 at 66 [hereinafter *Legal Images of Battered Women*].
[171] *Ibid.* at 80.
[172] I am referring to the battered woman syndrome testimony in the context of self-defence or when a battered woman is charged with a criminal offence. As Mahoney states: "[s]eparation assault can help reveal captivity". *Ibid.* at 87.

beliefs. A battered woman is aware of the potential of danger should she undertake to end the relationship. In effect, "separation assault confirms the difficulties of exit"[173], and therefore by introducing this concept and evidence of past separation attempts as elements of the battered woman testimony could allow for a more accurate understanding of the battered woman's experience.[174]

However, as Mahoney points out, while separation assault allows for the recognition of battered women's agency (or partial agency), this approach has shortcomings. It does not reveal other ways battered women assert themselves; it does not completely shift the focus on requirement to leave, and as a result, separation assault may be perceived as "an excuse for flunking the test"[175]. Despite these shortcomings, identifying separation assault is a positive step that fosters battered women's partial agency. The battered woman is described as both a victim and an agent.

[173] *Ibid.* at 81.
[174] *Ibid.* at 71, 79-82. I am not suggesting that the notion of learned helplessness be discarded. Rather, I believe that the concept of separation assault offers an explanation for the battered woman's sense of helplessness and her constraint.
[175] *Ibid.* at 81.

Chapter 3 Reinforcing Women's Agency through Law in the context of Intimate Violence

I have described how the insistence of feminist theorists on women's victimization contributed to the legal recognition and definition of gender-specific violations, and how the minimization of women's agency has generated misconceptions of battered women by concealing the complexity of their experiences. We need to inform the law on how both women's victimization and agency shape women's experiences. By giving prominence to women's partial agency and valuing their struggle for autonomy, I suggest that we can endeavour to rethink both popular and legal assumptions regarding battered women and male violence against women.

In this chapter, I explore the role of policy and the law in validating, promoting, and rewarding battered women's partial agency, especially for the purposes of curbing battered women's resort to self-help. While I recognize that the law represents only one locus for change, with increasing media coverage of judicial decisions and the justice system in general, I contend that the law continues to be a powerful source of influence.

In an effort to assist battered women, I have stressed the importance of recognizing the distinct experiences and situations of women in abusive relationships. Despite certain commonalities each battered woman is different. For instance, white middle-class women abused by their partners do not face the

same barriers as immigrant or refugee women. Economic dependence, the inability to speak French or English, the fear of being outcast by the family and the fear of deportation are particular considerations with which immigrant and refugee women must deal. Black and aboriginal women face obstacles linked to racist attitudes. While disabled women and women living in rural or remote areas may feel isolated and may lack access to appropriate services and support.

Indeed, the criminal justice system is a source of support for battered women, however, given that feminist law reform strives to reduce gender inequality, it is imperative to link policy initiatives in non-criminal spheres to battered women as well.[176] Clearly, it is not sufficient to address domestic violence solely in the criminal context. As Walter DeKeseredy and Linda MacLeod remark:

> ...[government] departments rarely consider how reductions in unemployment insurance, factory closures, higher taxes, and so on affect rates of woman abuse. Rather, they expect that police forces and courts will address male-against-female victimization. Unfortunately, real life does not play itself out this way. In real life, jobs, welfare, housing, employment equity, child care, gender inequality, and a host of other factors affect the ways in which men treat women. [177]

Policy decisions underlying legislative reform in the area of employment insurance, employment equity, welfare, social services and housing should give consideration to the situation of women in abusive relationships.

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[176] DeKeseredy & MacLeod, *supra* note 47 at 162,163; *Battered Women and Feminist Lawmaking, supra* note 2 at 197, 198.
[177] DeKeseredy & MacLeod, *ibid.* at 163.

Furthermore, given that "[m]any battered women do not feel like powerless victims, and will not respond positively to services that treat them like victims instead of survivors"[178], strategic policy developed to provide choices for women in abusive relationships must be flexible in order to respond and address the variety of their needs. This includes the recognition that separation from the abuser is not necessarily viewed as the solution. Some women may prefer to remain in the relationship as long as the abuse stops, others may have suffered from an isolated incident of physical abuse and do not want their partners to be punished, while other women may fear that exposure to the criminal justice system will only increase future violence. "While there is no one intervention strategy that will work for all women, one critical measure of the effectiveness of any strategy is its capacity for placing resources—material, emotional and spiritual—in the hands of battered women."[179] Legal remedies which aim to punish batterers often do not reflect the wishes of battered women.

In the context of the criminal justice system I will examine specific initiatives implemented to address intimate violence, namely mandatory arrest and prosecution policies, the Domestic Violence Court Process, anti-Domestic Violence legislation and criminal harassment legislation. I will then assess their effectiveness in responding to the needs of women in abusive relationships.

[178] MacLeod, *supra* note 53 at 41.
[179] D. Coker. "Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking" (1999) 47 UCLA Law Rev. 1 at 102 [hereinafter *Enhancing Autonomy for Battered Women*].

Mandatory arrest and prosecution (or "no-drop") policies were introduced in Canada in the early 1980's in response to inadequate criminal justice response to domestic violence.[180] Until that time, domestic violence was seen as a private matter that did not call for police intervention. However, public pressures and lobbying by women's groups led the government to accept the fact that domestic violence is indeed a social problem requiring state intervention.

Mandatory policies were implemented to reduce the incidence of domestic violence in Canada and interestingly, were premised on the assumption that a potential violent reaction by an abuser would be reduced if the onus for laying charges rested with the police and prosecutors. Some feminists expressed caution with respect to government involvement because they feared that the structure of the criminal justice system would increase gender inequality by effectively limiting women's choices in the process.[181] In fact, many feminists perceived criminal justice intervention as a social control mechanism which would likely have a differential impact on traditionally marginalized women, including aboriginal women, poor women and women of colour.

[180] T. Brown, *Charging and Prosecution Policies of Spousal Assault: A Synthesis of Research, Academic, and Judicial Responses* (Ottawa: Department of Justice Canada, Research and Statistics Division, 2000). Mandatory arrest requires that police arrest a person whenever there is a probable cause to believe that a crime of domestic violence has occurred, even if the victim opposes the arrest. Mandatory prosecution means that crown prosecutors proceed with prosecuting an individual for domestic violence regardless of the preferences of the victim.

[181] See DeKeseredy & MacLeod, *supra* note 47 at 119-121 for discussion on the position of women's groups in the early 1980's which eventually led to the criminalization of woman abuse.

In terms of the effectiveness of this initiative from the perspective of women suffering from abuse, two recent studies indicate that while there may be strong support for mandatory charging, there appears to be a certain level of dissatisfaction relating to mandatory prosecution.[182]

Most victims of domestic violence who participated in recent Canadian studies suggested the utilization of a more flexible post-charge approach to allow them to express their preferences in relation to the prosecution of their partners. Many expressed a sense of disempowerment due to their lack of involvement in deciding whether or not to proceed with the prosecution of their partner. Many conveyed their frustration with a policy that conflicts with their wish to reconcile with their partner. Some indicated that they engaged the criminal justice system not for a desire to punish their partners but as a bargaining tactic in their attempt to negotiate with their partner, or as a source for assistance in stopping the abuse.[183]

The findings relating to mandatory arrest and prosecution policies appear to confirm that the rigidity of a system that treats all women alike is not an initiative that promotes battered women's partial agency. I am not suggesting that these

[182] Brown, *supra* note 180 at 3-6. Among others, Brown makes reference to a 1996 Yukon study, see T. Roberts, "Spousal Assault and Mandatory Charging in the Yukon: Experiences, Perspectives and Alternatives" (Ottawa: Department of Justice Canada, Research and Statistics Division, 1996). The findings confirm the distinct needs of the First Nations community. Many of the First Nation respondents support the mandatory charge policy but suggest that the traditional criminal justice system does not respond to their goals of family healing; reference is also made to a study conducted in Ontario, see T.C. Landau, "Women's Experiences with Mandatory Charging for Wife Assault in Ontario, Canada: A Case Against Prosecution" (2000) 7 International Review of Victimology 141.
[183] Brown, *ibid.* at 6.

policies be abandoned. However, as many battered women have indicated, a more flexible post-charge approach would permit women to exercise choice and control over the specific circumstances in their lives.

Following the introduction of mandatory policies and as a result of a significant increase in the number of charges, specialized domestic violence courts were created in several Canadian provinces.[184] Designated courts, with specialized judges and prosecutors were set up to respond to the particular needs and interests of victims. With this holistic approach to intimate violence, the domestic violence court process provides victims/survivors with various support services including victim/witness assistance to ensure appropriate remedies[185] and specialized counselling/educational programs for abusers.

The existence of a specialized domestic violence court process signals the recognition that intimate violence, contrary to other forms of assault, involves individuals with emotional bonds who require a process that is sensitized to the myriad of considerations at play[186] including the fact that not all battered woman are victims or perceive themselves as such, and that most if not all, want to be involved in the decision-making process. To the extent that the domestic violence

[184] These jurisdictions include the Yukon, Alberta, Manitoba and Ontario.
[185] Remedies include court-mandated treatment for the abuser or supervised probation.
[186] DeKeseredy & MacLeod, *supra* note 47 at 175 (citing J. Ursel, "The Winnipeg Family Violence Court" in M. Valverde, L. MacLeod & K. Johnson, eds., *Wife Assault and the Canadian Criminal Justice System: Issues and Policies* (Toronto: University of Toronto Press, 1995)).

court process aims to address and respond to the wishes of battered women[187], it could be said that they are effective in validating women's struggle for autonomy and freedom from abuse.[188]

Certain jurisdictions enacted special anti-domestic violence legislation in consultation with community organizations to provide victims of intimate violence with a range of remedies unavailable under other legislation.[189] It is useful to examine one of these acts to verify the extent to which it fosters women's resistance to abuse.

The Saskatchewan *Victims of Domestic Violence Act*[190] was the earliest legislative initiative of its kind in Canada. The *Domestic Violence Act* permits a woman suffering from abuse to obtain an Emergency Intervention Order intended to provide immediate, short-term protection. The order can restrain her abuser from communicating with or contacting her or members of her family; give her exclusive occupation of the home; direct a peace officer to remove the abuser

[187] It should be noted that access may be an issue for women in rural or isolated communities, as domestic violence courts are largely situated in urban centres.
[188] See J. Ursel, "Considering the Impact of Battered Women's Movement on the State: The Example of Manitoba" in C. Andrew & S. Rodgers, eds. *Women and the Canadian State* (Montreal: McGill-Queen's University Press, 1997) at 175. In her evaluation of the Winnipeg Family Violence Court, Jane Ursel observed a change in sentencing patterns, which in her view, attests to the Court's increased sensitivity to women's needs.
[189] Alberta: *Protection Against Family Violence Act,* S.A.1998, c. P-27; Saskatchewan: *Victims of Domestic Violence Act,* S.S. 1994, c.V-6.02 [hereinafter *Domestic Violence Act*]; Manitoba: *Domestic Violence Stalking, Prevention, Protection and Compensation Act,* S.M. 1998, c.41; Prince Edward Island: *Victims of Family Violence Act,* S.P.E.I. Cap. V-3.2; Yukon: *Family Violence Prevention Act,* S.Y. 1997, c.12; Ontario: *Domestic Violence Protection Act,* S.O. 2000, c.33 (not yet proclaimed).
[190] The act was proclaimed on February 1, 1995. Its provincial equivalents provide for essentially similar remedies.

from the home; and direct a peace officer to accompany her or the abuser to the home to supervise the remove of personal belongings.[191]

Longer-term remedies are provided in a Victim's Assistance Order[192] which provides for the same measures as the emergency intervention order, as well as others, such as monetary compensation from the abuser for expenses incurred as a result of the abuse. If these orders are breached, the abuser can be arrested.

An important aspect of this legislation relates to the specialized training and selection of the justices of the peace responsible for assessing the particular circumstances of each case. They are available 24 hours a day, speak Cree,

[191] Section 3 of the Act provides:

(1) An emergency intervention order may be granted *ex parte* by a designated justice of the peace where that designated justice of the peace determines that:
    (a) domestic violence has occurred; and
    (b) by reason of seriousness or urgency, the order should be made without waiting for the next available sitting of a judge of the court in order to ensure the immediate protection of the victim.
(2) In determining whether an order should be made, the designated justice of the peace shall consider, but is not limited to considering, the following factors:
    (a) the nature of the domestic violence;
    (b) the history of domestic violence by the respondent toward the victim;
    (c) the existence of immediate danger to persons or property;
    (d) the best interests of the victim and any child of the victim or any child who is in the care and custody of the victim.
(3) An emergency intervention order may contain any or all of the following provisions:
    (a) a provision granting the victim and other family members exclusive occupation of the residence, regardless of ownership;
    (b) a provision directing a peace officer to remove, immediately or within a specific time, the respondent from the residence;
    (c) a provision directing a peace officer to accompany, within a specified time, a specific person to the residence to supervise the removal of personal belongings in order to ensure the protection of the victim;
    (d) a provision restraining the respondent from communicating with or contacting the victim and other specific persons;
    (e) any other provision that the designated justice of the peace considers necessary to provide for the immediate protection of the victim.

[192] *Domestic Violence Act, supra* note 189, s.7.

Dene and French, which provides a larger number of women access to this service in their own language.[193] The accessibility of this type of service is significant as it represents more choices for women.

Another, laudable feature of the legislation is the provision to remove the abuser from the residence. This measure is not only less disruptive for the abused woman and her children, but arguably provides her with a sense of empowerment. This may be particularly so for a disabled woman whose home is undoubtedly equipped to accommodate her needs.[194]

A recent report evaluated the effectiveness of the Saskatchewan *Victims of Domestic Violence Act* and more specifically the effectiveness of the emergency intervention orders. The report found that the orders are an effective way of helping victims of domestic violence and "fills gaps in the criminal justice's response to domestic violence".[195] In addition, the results indicated that there was "some evidence that victims [experienced] financial difficulties while orders are in place."[196]

The Saskatchewan *Domestic Violence Act* and its provincial and territorial equivalents are clearly a step in the right direction in terms of fostering women's

[193] DeKeseredy & MacLeod, *supra* note 47 at 177.
[194] *Final Report:The Canadian Panel on Violence Against Women* (Ottawa: Ministry of Supply & Services, 1993) at 217 [hereinafter *Canadian Panel on Violence Against Women*]; Bala et al., *supra* note 48 at 37.
[195] *A Further Review of the Saskatchewan Victims of Domestic Violence Act* (Ottawa: Department of Justice Canada, Research and Statistics Division, 1998) at ix.
[196] *Ibid.* at xii.

resistance to domestic violence by providing assistance to women attempting to break free from the abuse.

In August 1993 the government created the new criminal harassment offence, commonly referred to as "anti-stalking", with a view to strengthening the protection offered to victims of domestic violence. The criminal harassment offence provides:

> 264. (1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.
>
> (2) The conduct mentioned is subsection (1) consists of
> (a) repeatedly following from place to place the other person or anyone known to them;
> (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
> (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be or;
> (d) engaging in threatening conduct directly at the other person or any member of their family.
> (3) Every person who contravenes this section is guilty of
> (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
> (b) an offence punishable on summary conviction...[197]

Does the enactment of a criminal harassment offence respond to the needs of battered women? The Criminal Code reform appears to suggest that it may respond more appropriately in cases where women feel they are at risk of being

[197] *Criminal Code*, *supra* note 15. Bill C-15A, recently proclaimed into force, increased the maximum penalty from five to ten years.

abused.[198] Yet, can it be characterized as an effective tool that rewards women's resistance?

Some praised the introduction of the new legislation because it allows police interventions before a potential assault takes place, validates women's fears and offers protection against separation assault.[199] However, most do not see the anti-stalking legislation as a strategy that empowers women or effectively counters male violence against women. In fact, critics argue that the legislation "ignore[s] the systemic roots of woman abuse and again place the burden of responsibility and proof on individual men and women who are characterized simplistically as brutish aggressors and helpless victims."[200]

While anti-stalking may sensitize the police to the threats that women endure, it appears unlikely that anti-stalking is an effective tool in promoting women's resistance to oppression. As Martha Mahoney notes, anti-stalking "invokes the notion of the woman as the object of male obsession and the target of attack, but it does nothing to show her resistance to violence before and after separation."[201]

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[198] DeKeseredy & MacLeod, *supra* note 47 at 134.
[199] *Ibid.* at 135 (citing H. Johnson, *Dangerous Domains: Violence Against Women in Canada* (Toronto: Nelson, 1996); *Canadian Panel on Violence Against Women, supra* note 194 at 48; *Victimization and Oppression, supra* note 35 at 82.
[200] DeKeseredy & MacLeod, *supra* note 47 at 136; See R. Cairns Way, *The Criminalization of Stalking: An Exercise in Media Manipulation and Political Opportunism* (1994) 39 McGill L.J. 379. Rosemary Cairns Way critically examines the context in which the criminal harassment provision was enacted, focusing particularly on the media's representation of anti-stalking and the political opportunism which led to the enactment; *Victimization and Oppression, supra* note 35 at 82, 83.
[201] *Victimization and Oppression, ibid.* at 82.

Criminal justice reform initiatives such as those described in this chapter, although not sufficient in and of themselves in assisting battered women, should be applauded for their efforts to expand women's choices. Nevertheless, further steps are needed to address the fact that violence against women, linked to the overarching problem of gender equality, requires reform initiatives which emphasize the connection between intimate violence, economic dependence and poverty.[202] The development of a coordinated community response linking the social welfare system and the justice systems would further assist women in their struggle for freedom from abuse.[203] In the future, partial agency should inform policy and legal reform.

[202] *R.* v. *Lalonde* (1995) 37 C.R. (4th) 97 (Ont. Ct.Gen.Div.) is an interesting case in which an abused mother of four was charged with defrauding the Ministry of Community and Social Services. She made misrepresentations in relation to her living arrangements with her partner to ensure that she would continue to receive family benefit cheques. Ms. Lalonde pleaded the defence of necessity and a judge found her not guilty.

[203] *Canadian Panel on Violence Against Women, surpa* note 194 at 198, 199; MacLeod, *supra* note 53 at 90-92; *Feminist Lawmaking, supra* note 2 at 196-198. In the United States, domestic violence and welfare advocates lobbied for changes in the welfare scheme thus enabling individual States to enact a *Family Violence Option* which exempts victims of domestic violence from the welfare scheme's time limits and sixty-month ceiling on benefits.

Conclusion

I have argued that while feminist theorists' insistence on women's victimization sensitized the law to gender-specific violations, it has also limited the law's understanding of the challenges that women confront. The battered woman syndrome and its association to learned helplessness demonstrates how the law operates to taint and simplify the complexity of domestic violence. Battered women are victims of violence but they are capable of exercising agency.

I proposed an alternative theoretical framework in an effort to redefine battered women in light of both their victimization and their experience in violence. Partial agency attempts to illuminate the constraints battered women face in context of patriarchy. However, effective change will not be possible until we transform social attitudes and structural practices which support the oppression of women. We must therefore ensure that lawmakers make the link between violence against women and their overall subordination and take women's partial agency into account in the formulation of policy and legal reform.

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