The legacy of *R v Lavallee*

The defence of victims of intimate partner violence who face criminal charges

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To all the Angelique Lynn Lavallee

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LIST OF ABBREVIATIONS

BWS	Battered woman syndrome
IPV	Intimate partner violence
SCC	Supreme Court of Canada
SEF	Social evidence framework
PTSD	Post-traumatic stress disorder

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ABSTRACT

Intimate partner violence is a current social scourge that must be better understood by our criminal justice system and its actors. Many reports focus on victims' experiences in the justice system, yet an important question remains: what happens when victims are accused? R v Lavallee, rendered in 1990 by the Supreme Court of Canada, marks a significant shift for victims who face criminal charges (victims-accused). Angelique Lynn Lavallee, charged with murder for shooting her abusive partner, successfully claimed self-defence. A psychiatrist, who testified on her behalf, concluded that she suffered from battered woman syndrome and acted reasonably in firing on her partner. The Court accepted the legal relevance of battered woman syndrome and recognized that in cases like Lavallee's, the reasonableness of the accused's conduct must be assessed from the stance of a reasonable woman who experiences intimate partner violence. Several scholars have investigated the impact of R v Lavallee. Some have observed that judges apply the case in contexts of duress and necessity. However, many academics have criticized the use of battered woman syndrome, arguing its ineffectiveness as a lawyering strategy. Based on the work of Rebecca Bradfield and R v Malott's concurrent opinion, our thesis demonstrates the potential of an alternative analytical framework—the social evidence framework—to defend victims-accused who act in self-defence, duress, and necessity. Our thesis is interesting for scholars from different fields (such as criminal law, victimology, and feminist studies). It centers on the judicial treatment of IPV victims and the importance of infusing social sciences in our analysis of criminal responsibility. Our project also aims to assist criminal justice actors by raising their awareness toward accomplishing their respective tasks.

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La violence conjugale est un fléau social actuel qui doit être mieux compris par notre système de justice criminelle et ses acteur(rice)s. Bien que plusieurs rapports s'intéressent à l'expérience des personnes victimes dans le système de justice pénale, une importante question demeure : qu'en est-il lorsque la personne victime est aussi la personne accusée? R c Lavallée, rendu en 1990 par la Cour suprême du Canada, marque le début d'une nouvelle ère pour les personnes victimes accusées d'avoir commis une infraction criminelle (victimes-accusées). Angelique Lynn Lavallée, accusée de meurtre après avoir tué son conjoint violent, a soulevé avec succès la légitime défense. Lors de son procès, un psychiatre a témoigné qu'elle souffrait du syndrome de la femme battue et qu'elle avait agi de manière raisonnable. La Cour suprême a accepté la pertinence du syndrome et a reconnu que dans un cas comme celui de Lavallée, le caractère raisonnable de la conduite de l'accusée doit être évalué à la lumière de son expérience comme femme victime de violence conjugale. Plusieurs auteur(e)s ont étudié l'impact de R c Lavallée. Certain(e)s ont observé que les juges appliquent cet arrêt dans des contextes de contrainte et de nécessité. Or, plusieurs chercheur(se)s ont aussi critiqué le recours au syndrome, arguant qu'il n'est pas une stratégie de défense efficace pour les victimes-accusées. À partir des écrits de Rebecca Bradfield et de l'opinion concurrente de R c Malott, notre mémoire démontre le potentiel d'un cadre d'analyse alternatif—le cadre d'analyse social—pour défendre les victimes-accusées qui agissent en légitime défense, contrainte et nécessité. Notre mémoire est intéressant pour les chercheur(se)s issu(e)s de diverses disciplines (telles que le droit criminel, la victimologie et les études féministes). Il est axé sur le traitement judiciaire des personnes victimes de violence conjugale et sur l'importance de recourir aux sciences sociales pour analyser la responsabilité criminelle. Il vise aussi à conscientiser et assister les acteur(rice)s du système de justice criminelle.

INTRODUCTION

I am not longer accepting the things I cannot change. I'm changing the things I cannot accept.
—Angela Davis

Intimate partner violence (IPV) is a worldwide issue that infringes human rights and leaves lasting scars on survivors. Although it is criminalized in most countries,[1] this gender-based violence remains a current social issue of great concern. Recent studies have shown that safety measures implemented during the COVID-19 pandemic exacerbated women's social isolation, thus increasing the rate, severity, and complexity of violence against women.[2] The 2021 "wave of femicides"[3] in Québec, which experts have identified as the tip of a "shadow pandemic"[4] iceberg, prompted the provincial government to release extra funds to front-line services such as women's shelters.[5] Several laws such as the *Criminal Code* have recently been modified,[6] and bills

[1] See United Nations Women, "Facts and Figures: Ending Violence against Women" (last modified February 2022), online: *UN Women* <www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures> (at least 158 countries have passed laws against IPV).

[2] See e.g. Minna Lyons & Gayle Brewer, "Experiences of Intimate Partner Violence during Lockdown and the COVID-19 Pandemic" (2022) 37 J Fam Vio 969; Matteo Antonio Sacco et al, "The Impact of the COVID-19 Pandemic on Domestic Violence: The Dark Side of Home Isolation during Quarantine" (2020) 88:2 Med Leg J 71; Brad Boserup, Mark McKenney & Adel Elkbuli, "Alarming Trends in US Domestic Violence during the COVID-19 Pandemic" (2020) 38:12 Am J Emer Med 2753.

[3] This term refers to the alarming rate of intimate partner feminicides in 2021 in Québec. See e.g. Vincent Larin, "Vague de féminicides : QS presse la CAQ d'investir en habitation", *Le Journal de Québec* (2021), online: <www.journaldequebec.com/2021/06/23/vague-de-feminicides-qs-presse-la-caq-dinvestir-en-habitation>; Vincent Larouche, "Un juge impose une peine sévère en citant la vague de féminicides", *La Presse* (2021), online: <https://plus.lapresse.ca/screens/298a2cfd-0ed6-4755-bdf0-68aac2d97154__7C___0.html?utm_content=ulink&utm_source=lpp&utm_medium=referral&utm_campaign=internal+share>.

[4] See e.g. Government of Canada, "The shadow pandemic: Combatting violence against women and girls in the COVID-19 crisis" (last modified 6 January 2023), online: *Government of Canada* <www.international.gc.ca/world-monde/stories-histoires/2020/shadow-pandemic_pandemie-ombre.aspx?lang=eng>.

[5] See e.g. Cabinet de la vice-première ministre et ministre de la Sécurité Publique, "Violence conjugale et féminicides – Le gouvernement du Québec agit : près de 223 M$ pour mieux protéger les femmes" (23 April 2021), online: *Gouvernement du Québec* <www.quebec.ca/nouvelles/actualites/details/violence-conjugale-et-feminicides-le-gouvernement-du-quebec-agit-pres-de-223-m-pour-mieux-proteger-les-femmes-30729>.

[6] At the federal level, see e.g. *Criminal Code*, RSC 1985, c C-46 [CrC] ss 515(3)(a) (obligation to consider, at the bail hearing stage, the intimate context of the offence(s)), 515(6)(b.1) (reverse onus at bail hearing in IPV contexts), 515(4.2)(a.2) (condition that the accused wear an electronic monitoring device), 718.3(8) (possibility to impose, in IPV cases, a term of imprisonment greater than the maximum term of imprisonment provided for the offence); *Divorce Act*, RSC 1985, c 3 (2nd Supp) s 2(1) (the definition of "family violence" was broadened to include a pattern of coercive and controlling behaviours). At the provincial level, see e.g. *Act to Assist Persons who Are Victims of Criminal Offences and to Facilitate their Recovery*, CQLR c P-9.2.1, s 25 para 3 (no time

are currently being debated[7] to both strengthen victims' protection and adapt to new knowledge on IPV. Among the action plans and policies adopted by the Québec government since 1985[8] a consensus is emerging: IPV is a complex social concern that must be addressed by a collaborative approach, which entails offering adequate assistance to victims via coordination among community organizations, ministers, and government agencies. The importance of such coordination has been strengthened by the 2020 groundbreaking report *Rebâtir la confiance*.[9] The committee of experts who compiled this report attended to a significant barrier to ending IPV: victims do not trust the justice system, which makes them reluctant to report the violence perpetrated against them. The 192 recommendations detailed in *Rêbatir la confiance* were well received; many have been implemented, such as free hours of legal advice and the creation of specialized courts for sexual violence and IPV cases. The concerted approach favored by specialized courts is expected to foster a trauma-informed environment that better supports victims and makes criminal justice actors more aware of the realities of IPV.

These efforts to meet IPV victims' needs (to be further protected, considered, and informed) are laudable. However, in the criminal justice landscape, they fail to address a relatively unknown consequence of IPV: given the coercive context of IPV, some victims have no other choice than to break the law, yet they face criminal charges. What happens when victims become accused?

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limit to fill a qualification application for crimes of IPV); *Act Respecting Labour Standards*, CQLR c N-1.1, ss 79.1–79.6 (absences from work due to IPV).

[7] See e.g. Bill C-332, *An Act to amend the Criminal Code (controlling or coercive conduct)*, 1st Sess, 44th Parl, 2021 (first reading 18 May 2023) (criminalization of coercive control).

[8] See e.g. Secrétariat à la condition féminine, *Integrated Government Strategy to Counteract Sexual Violence, Domestic Violence and to Rebuild Trust 2022-2027* (Québec: Government of Québec, 2020); Secrétariat à la condition féminine, *Plan d'action spécifique pour prévenir les situations de violence conjugale à haut risque de dangerosité et accroître la sécurité des victimes: 2020-2025* (Québec: Government of Québec, 2020), online (pdf): <https://cdn-contenu.quebec.ca/cdn-contenu/adm/org/SCF/publications/plans-strategiques/plan_action_prevenir_situations_vc_haut_risque_2020_2025.pdf>; Secrétariat à la condition féminine, *Government Action Plan on Domestic Violence : 2018-2023* (Québec: Government of Québec, 2018), online (pdf): <https://cdn-contenu.quebec.ca/cdn-contenu/adm/org/SCF/publications/plans-strategiques/Plan_violence_ENG_.pdf> [Secrétariat à la condition féminine, *2018-2023 Action Plan*]; Government of Québec, *Preventing, Detecting, Ending: 2012-2017 Action Plan on Domestic Violence* (Québec: Government of Québec, 2012), online (pdf): <www.scf.gouv.qc.ca/fileadmin/Documents/Violences/Plan_d_action_2012-2017_version_anglaise.pdf> [Government of Québec, *2012-2017 Action Plan*].

[9] Elizabeth Corte & Julie Desrosiers, *Rebâtir la confiance : Rapport du comité d'experts sur l'accompagnement des victimes d'agressions sexuelles et de violence conjugale* (Québec: Secrétariat à la condition féminine, 2020), online (pdf): <https://cdn-contenu.quebec.ca/cdn-contenu/adm/org/SCF/publications/violences/Rapport-accompagnement-victimes-AG-VC.pdf>.

This question is of paramount importance because criminal charges levelled against victims amplify their traumatic experiences and undermine their trust in the justice system, putting them at greater risk for future abuse.[10] Victims and accused are treated as distinct categories within the criminal process, which assumes that offenders commit crimes against victims and society.[11] But when this boundary is blurred—when victims offend—the question remains whether our criminal justice system is capable of nuanced and sensitive responses towards them. Does our criminal justice system consider contexts of victimization in determining whether victims' conduct should be condemned?

Our thesis begins with where these questions were first addressed in Canadian law: *R v Lavallee*.[12] Rendered in 1990 by the Supreme Court of Canada (SCC), this case has marked a significant shift in the judicial treatment of victims-accused. Angelique Lynn Lavallee, regularly abused by her intimate partner, faced a murder charge for shooting him in the back of the head while he was leaving their bedroom. She successfully raised self-defence. During her trial, a psychiatrist relied on battered woman syndrome (BWS)—a psychiatric condition akin to post-traumatic stress disorder (PTSD)—to demonstrate that Lavallee acted reasonably in killing her abusive partner. According to the SCC, the reasonableness of Lavallee's conduct had to be assessed from the standpoint of a reasonable woman who shares Lavallee's experience of IPV. Expert testimony on BWS was thus necessary to guarantee a fair trial for Lavallee: expert evidence enabled her jury to gain an understanding of IPV free of myths and stereotypes.

Chapter 1 examines the impact of *Lavallee*. The case has attracted much attention within the legal community, especially among inspiring feminist scholars such as Elizabeth Sheehy, Martha Shaffer, Isabel Grant, Melanie Randall, and Sheila Noonan. These scholars have variously praised

[10] See e.g. *Ibid* (section 7.9 "Les plaintes croisées en violence conjugale" at 137–38, where the Committee made specific recommendations regarding the phenomenon of cross-complaints). See generally Anita Grace, "'They Just Don't Care': Women Charged with Domestic Violence in Ottawa" (2019) 42:3 Man LJ 153; Susan Miller, "The Paradox of Women Arrested for Domestic Violence: Criminal Justice Professionals and Service Providers Respond" (2001) 7:12 Vio Against Women 1339.

[11] See Benjamin L Berger, "Mental Disorder and the Instability of Blame in the Criminal Law" in François Tanguay-Renaud & James Stribopoulos, eds, *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Oxford: Hart Publishing, 2012) 117 at 133.

[12] [1990] 1 SCR 852, 55 CCC (3d) 97 [*Lavallee*].

and attacked *Lavallee*. On the one hand, the case has been applauded for its "judicial sensitivity."[13] On the other hand, *Lavallee* has been criticized for introducing the BWS framework in victims' trials.[14] Those who commend *Lavallee* typically focus on the way the SCC has reshaped the relevance of past abuse and nuanced its understanding of blame: following *Lavallee,* evidence of abuse is no longer confined to the sentencing stage (bearing upon the offender's moral blameworthiness) and is now introduced at the conviction stage to inform the reasonableness inquiry (bearing upon the criminal liability of the offender). This more nuanced approach toward victims-accused has led many academics to research *Lavallee*'s impact on women's self-defence claims. Some scholars have studied *Lavallee*'s influence on homicide cases in which women used defensive force, while others have advocated for a broader application of the case to other criminal defences (e.g. necessity, duress, and provocation). Conversely, those who have criticized *Lavallee* for introducing the BWS framework in victims' trials typically argue that this framework jeopardizes women's access to fair trials.[15] Our thesis builds on such scholarly observations by addressing two main shortcomings of the BWS framework: (1) this framework depicts women as ill and irrational, an effect theoretically irreconcilable with a claim of reasonableness; and (2) the notion of learned helplessness—a key component of BWS—constructs an image of women as passive and submissive, which limits the diversity of IPV trajectories.

In response to the criticisms levelled against the BWS framework, alternative frameworks have been developed to convey the realities of IPV in criminal trials. Chapter 2 focuses on the legal relevance of one such alternative—the social evidence framework (SEF)—and discusses the theoretical possibility of maximizing its potential. Developed by Australian legal scholar Rebecca Bradfield for women's self-defence claims made under Australian law, the SEF is echoed by *R v*

[13] The terms "judicial sensitivity" and "legal sensitivity" are derived from the literature and refer to our legal institutions' ability and willingness to adopt legal reasonings, interpret law, and draw conclusions that capture traumatic experiences such as IPV.

[14] The BWS framework is an evidentiary approach whereby a woman's experience of abuse is complemented with medical evidence on BWS.

[15] For victims-accused, fair trials are those in which women's criminal conduct are contextualized to their victimization contexts. This contextualization requires that women's experiences of abuse are not only introduced and explained to triers of fact but also considered legally relevant to victims-accused's defence. See Elizabeth A Sheehy, *Defending Battered Women on Trial: Lessons from the Transcripts* (Vancouver, BC: UBC Press, 2014) [Sheehy, "Lessons from the Transcripts"] (fair trials consist in "trial[s] in which [women] can put to the [fact finders] the full contexts of their acts and [in jury trials] receive the benefit of judicial instruction that relates the contexts in which they [acted]" at 9).

Malott's concurrent opinion.[16] Like the BWS framework, the SEF relies on the accused's experience of abuse, yet these frameworks differ in that they contextualize women's conduct through very different lenses. Embracing other theories of IPV and an intersectional approach,[17] the SEF holds promise for victims-accused because it relies on social science knowledge to posit IPV as a social problem, promoting a more accurate and nuanced understanding of victims' criminal responsibility. Chapter 2 advocates for (1) transposing the SEF in Canadian criminal law; (2) using it to assess claims of self-defence, duress, and necessity; and (3) broadening it to encompass the notion of violent resistance as part of victims' resilience.

Chapter 3 goes beyond the theoretical discussion on Bradfield's framework. Based on 16 written decisions,[18] it investigates implementing the SEF as a viable alternative framework to defend victims-accused in Canada. Our case law analysis reveals an overwhelming reliance on the BWS framework and reaffirms feminist critiques of the use of BWS evidence in victims-accused's trials. This chapter, divided into two parts, first concentrates on the extent to which the SEF is currently being implemented. We observe (i) a tendency among courts toward departing from the BWS framework and relying exclusively on women's narratives of violence in the reasonableness inquiry; and (ii) a very scarce use of the SEF (in only two cases). Chapter 3 then turns to the future implementation of the SEF to demonstrate the merits of such a framework. Unsurprisingly, shifting toward implementing the SEF poses challenges—most notably, judges' reluctance to consider collective failures, as a society, to address IPV and, as a corollary, their over-reliance on the BWS framework. We also observe significant discrepancies among judges' understanding of IPV. Lastly, this chapter bridges theory and practice by discussing practical avenues to implement the SEF.

The central theme of our thesis—IPV—is analyzed from a feminist and social justice perspective; therefore, IPV is broadly defined and approached as a form of gender-based violence.

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[16] [1998] 1 SCR 123, 36 OR (3d) 802 [*Malott* SC] (L'Heureux-Dubé and McLachlin JJ., concurring).

[17] E.g. Evan Stark's coercive control theory, the Duluth's model (the "Power and Control Wheel"), and the notion of social entrapment. For academic work on the intersectional approach, see Julie Stubbs & Julia Tolmie, "Race, Gender and the 'Battered Woman Syndrome': An Australian Case Study" (1995) 8:1 Can J Women & L 122 [Stubbs & Tolmie, "Race and Gender"].

[18] These decisions were extracted from a case law research that (i) used three legal databases (WestlawNext Canada, Lexis Advance Quicklaw, and Soquij Intelligence juridique); (ii) covered the period from 1990 (issuance of *Lavallee*) to now; and (iii) filtered all decisions mentioning, referring to or citing *Lavallee* and/or *Malott.*

From this definition flows the term "victims-accused," which refers to victims who, just like Lavallee, experience (or have experienced) IPV while being accused.

Intimate Partner Violence (IPV)

> *[IPV] includes psychological, verbal, physical and sexual abuse as well as acts of financial domination. It is not the result of a loss of control but is rather a means chosen to dominate another person and assert one's power over that person.*[19]

IPV is a power dynamic wherein a wide range of behaviors are perpetrated to gain—and maintain—control over a "current or former spouse, common-law partner [or] dating partner."[20] The control dynamic underlying IPV is known as "coercive control," a term coined by Evan Stark, an American social worker and theorist.[21] Coercive control is not a form of IPV *per se* but a means of conceptualizing IPV. In modern and democratic societies, in which women are granted formal equality, IPV has evolved into a more sophisticated form, an insidious pattern of subordination of women in their personal lives. Controlling tactics are countless,[22] including

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[19] Government of Québec, *2012-2017 Action Plan*, *supra* note 8 at 1. In addition to these various forms of IPV, the concept of coercive reproduction has emerged from American studies conducted in the 2010s. Coercive reproduction consists of controlling behaviours interfering with contraception and pregnancy. See Sylvie Lévesque, Catherine Rousseau & Cindy Pétrieux, "Mieux répondre aux besoins des femmes ayant vécu de la coercition reproductive" in Carole Boulebsol et al, eds, *Pratiques et recherches féministes en matière de violence conjugale : Coconstruction des connaissances et expertises* (Québec : Presses de l'Université du Québec, 2022) 325–44. See also *R v Hutchinson*, 2014 SCC 19 (Hutchison was found guilty of aggravated sexual assault for deliberately poking holes in the condom, resulting in the complainant's forced pregnancy; the condom sabotage constitutes fraud under section 265(3)(c) CrC that vitiated the complainant's consent).

[20] CrC, *supra* note 6 s 2 "Intimate partner." This definition was broadened over the years: the CrC initially referred to "spouse" and then "spouse or common-law partner"; it now refers to "intimate partner." The current definition is more inclusive and aligns with research on IPV. The inclusion of former partners reflects the reality of post-separation violence. See Martha R Mahoney, "Legal Images of Battered Women: Redefining the Issue of Separation" (1991) 90:1 Mich L Rev 1 [Mahoney, "Redefining the Issue of Separation"] (Mahoney coined the term "separation assault"). Similarly, the addition of dating partners is consistent with data showing that IPV is not limited to married and common-law spouses. See e.g. Statistics Canada, *Family violence in Canada: A statistical profile, 2018*, by Shana Conroy et al, in *Juristat*, Catalogue 85-002-X (Ottawa: Statistics Canada, 2019), online (pdf): <www150.statcan.gc.ca/n1/en/pub/85-002-x/2019001/article/00018-eng.pdf?st=CQZvTE9B> ("[i]n 2018, violence between people in boyfriend/girlfriend-type relationships was more common than violence between spouses [17% of all victims of violent crime versus 13%]" at 24).

[21] See Evan Stark, *Coercive Control: How Men Entrap Women is Personal Life* (Oxford: Oxford University Press, 2007) [Stark, *Coercive Control*]; Evan Stark, "Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control" (1995) 58:4 Alb L Rev 973 [Stark, "Re-Presenting Woman Battering"].

[22] See Home Office, *Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework* (Government of United Kingdom, 2015) at 4, online (pdf): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf> [Home Office, *Controlling or Coercive Behaviour*].

intimidating, monitoring, humiliating, isolating and "microregulat[ing] everyday behaviors associated with stereotypic female roles, such as how women dress, cook, clean, socialize, care for their children, or perform sexuality."[23] Coercive control thus includes but goes well beyond physical and sexual violence.

Feminine Form Used to Refer to Victims of IPV

In addition to endorsing Stark's widely-accepted theory of coercive control, the term "IPV" used throughout our thesis is shaped by the work of Michael P. Johnson, professor of sociology and women's studies.[24] Johnson's typology of intimate violence was developed to refute the IPV gender-symmetry (or bidirectionality) argument,[25] which asserts that men are victims of IPV just as much as women. Under Johnson's typology, coercive control patterns—which he terms "intimate terrorism"—ought to be distinguished from two other forms of violence within intimate relationships: violent resistance and couple situational violence.[26] The term "IPV" used in our thesis refers to intimate terrorism (intimate violence meant to dominate) and therefore excludes acts of violent resistance and couple situational violence.

Furthermore, Johnson's work reaffirms the gendered nature of intimate terrorism: situational couple violence is the most prevalent form of intimate violence and the only gender-symmetric

[23] Stark, *Coercive Control*, *supra* note 21 at 5.

[24] See Michael P Johnson, "Gender and Types of Intimate Partner Violence: A Response to an Anti-Feminist Literature Review" (2011) 16 Agg & Vio Beh 289 [Johnson, "Response to an Anti-Feminist Literature Review"]; Michael P Johnson, *A typology of domestic violence: Intimate terrorism, violent resistance, and situational couple violence* (Boston: Northeastern University Press, 2008) [Johnson, *Typology of domestic violence*].

[25] See Johnson, "Response to an Anti-Feminist Literature Review", *supra* note 24 (the "gender-symmetry debate" at 291). See also Andy Myhill, "Measuring Coercive Control: What Can We Learn From National Population Surveys" (2015) 21:3 Violence Against Women 355. Johnson and Myhill point to sampling bias in the data supporting the gender symmetry argument: general population surveys are dominated by situational couple violence; perpetrators and victims of intimate terrorism are unlikely to respond to these surveys (mainly because perpetrators do not want to get involved and victims fear reprisals). See generally Catherine Flynn et al, "Les définitions théorique, politique et empirique de la violence conjugale : Lorsque la neutralité contribue à réaffirmer la domination masculine" in Carole Boulebsol et al, eds, *Pratiques et recherches féministes en matière de violence conjugale : Coconstruction des connaissances et expertises* (Québec : Presses de l'Université du Québec, 2022) 35–49; Stark, "Re-Presenting Woman Battering", *supra* note 21 ("what distinguishes intimate violence against women from partner violence against men is not the frequency or even the level of physical hitting, but the fact that for women, but not for men, the hitting is embedded in a strategy of control that is reinforced by a number of points of structural inequalities" at note 52).

[26] Violent resistance is a coping mechanism employed by victims of intimate terrorism. Couple situational violence consists in mutual violence triggered by external factors (e.g. stress, alcohol problems). Unlike intimate terrorism, violent resistance and couple situational violence consist of punctual acts of violence not intended to dominate.

one. Intimate terrorists are primarily men; violent resistance acts are perpetrated mainly by women. Consequently, and without denying the existence of male victims,[27] our thesis uses the feminine form to refer to victims of IPV, including the term battered woman.[28] Our choice is "unapologetically intended"[29] to convey the disproportionate rate of women victims.

Victims-Accused

Often referred to as "primary victims" [30] in the literature, victims-accused are victims of IPV who face criminal charges. Very little data is available on the prevalence of this phenomenon (i.e. the frequency with which victims are accused). However, it is well-known that victims face criminal charges in different contexts,[31] the best known of these being cross-complaint contexts.[32] Criminal charges faced by victims-accused are not limited to crimes committed against abusive partners (such as acts of violent resistance)[33] and may stem from violent or nonviolent acts. For instance, one woman facing fraud charges and another charged with impaired driving both had their experiences of IPV considered in their claims of necessity.[34]

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Our thesis is relevant for scholars and researchers from various fields, including criminal law, criminology, victimology, and feminist theories. More specifically, our project contributes to

[27] Johnson recognizes the existence of male victims of intimate terrorism but reaffirms that women are disproportionately targeted by intimate terrorism. For literature on male victims, see especially Dr Benjamin Roebuck et al, *Male Survivors of Intimate Partner Violence in Canada* (Ontario: Office of the Federal Ombudsman for Victims of Crime, 2020), online (pdf): <http://www.victimsfirst.gc.ca/res/cor/ipv-ipv/Male Survivors of IPV in Canada, 2020.pdf>.

[28] We will use this term because it is used in literature on BWS, but we believe that it erroneously conveys a limited view of IPV, that of physical and visible violence.

[29] Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montréal: McGill-Queen's University Press, 2018) at 16 (Craig made the same terminological choice to convey the gendered nature of sexual violence).

[30] Julia Tolmie et al, "Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence" (2018) 2018:2 NZ L Rev 181 (partners who perpetrate IPV are named predominant, main or principal aggressors).

[31] See e.g. *Ibid* at 182 (several examples of women's criminal offending); Isabel Grant, "Exigent Circumstances: The Relevance of Repeated Abuse to the Defence of Duress" (1997) 2 Can Crim L Rev 331 at 333 [Grant, "Exigent Circumstances"] (four types of situations in which women might be coerced into committing a crime).

[32] I.e. for the same event, each partner claims having been abused by the other (cross-complaints; possibly cross-accusations).

[33] Indeed, primary victims might react aggressively toward their partners. IPV and violent resistance are two sides of the same coin: IPV might induce acts of violent resistance on the victim's part.

[34] See *R v Lalonde* (1995), 22 OR (3d) 275, 37 CR (4th) 97 (Ont Gen Div) [*Lalonde*]; *R v Mazerolle*, 2013 NBPC 21 [*Mazerolle*].

the academic conversation on judicial ethics and access to justice, the judicial construction of IPV, the judicial treatment of IPV victims, and the importance of infusing social science evidence in our understanding of criminal responsibility within criminal justice. Furthermore, our thesis aspires to assist criminal justice actors by raising their awareness toward accomplishing their respective tasks: prosecutors, from the very beginning of the criminal process, in exercising their discretionary power to lay criminal charges against primary victims;[35] defence lawyers, in defending victims-accused who act in self-defence, duress or necessity; and judges, in determining guilt or innocence.

[35] In assessing whether there is a reasonable prospect of conviction, prosecutors must consider any potential defence. The reasonable prospect of conviction must remain throughout the proceedings. See e.g. Directeur des poursuites criminelles et pénales, *ACC-3 : Accusation – Décision d'intenter et de continuer une poursuite* (2022) at para 8, online (pdf): <https://cdn-contenu.quebec.ca/cdn-contenu/adm/org/dpcp/PDF/directives/DIR_ACC-3_DPCP.pdf>.

CHAPTER 1

LAVALLEE: FROM VICTIM TO ACCUSED

Lavallee is undoubtedly a landmark case for the judicial treatment of victims-accused. This case exemplifies the notion of victim-accused: in addition to enduring IPV during three or four years, Angelique Lynn Lavallee was tried for shooting her intimate partner. That is, she was accused of murder after having survived years of abuse at the hands of her intimate partner. Her murder charge must thus be understood as a tragic outcome of the violence she suffered. Lavallee's story challenged the deeply entrenched dichotomy between victim and perpetrator. She was both a victim and an accused; and she was entitled to be treated accordingly.

Our thesis investigates the possibility of expanding *Lavallee*'s framework to assess victims-accused's criminal responsibility. More specifically, our thesis argues that victims-accused's access to fair trials is likely to increase in implementing a SEF, i.e. in connecting victims' unique experiences of violence to social science knowledge of IPV. This chapter lays the necessary groundwork of our argument by explicating *Lavallee*'s significance and outlining its potential for justice.[36] Part 1 describes how *Lavallee* is an atypical self-defence case. The requirements of imminence and non-existence of viable options for alternate behavior complicate claims of self-defence made by women. Part 2 then elaborates on our understanding of *Lavallee*'s main rulings: (1) in victims-accused's trials like Lavallee's, the reasonable person—the legal standard at the heart of self-defence—is a battered woman; (2) expert testimony is necessary to dispel prevalent myths and stereotypes about IPV, contextualize the reasonable person, and ultimately, fairly assess Lavallee's claim; and (3) evidence on BWS, adduced by expert evidence, is legally relevant because it allows fact finders to understand IPV and normalize Lavallee's conduct (i.e. shooting her intimate partner). This chapter concludes by discussing the impact of *Lavallee*: the critiques pertaining to the BWS framework used in *Lavallee*; *Lavallee*'s application on duress and necessity claims; and its influence on homicide cases in which self-defence was arguable.

[36] Our thesis pursues an ideal of justice that lies both in trials (process) and verdicts (outcomes). Fair trials require careful consideration of the accused's victimization context; just verdicts mean that victims-accused who had no options other than breaking the law should be acquitted.

1. AN ATYPICAL SELF-DEFENCE CASE

On August 30, 1986, Lavallee shot her partner in the back of the head. The shot occurred in the couple's bedroom during a party,[37] and her partner was killed by a single bullet as he was leaving the bedroom. Lavallee was charged with second degree murder and successfully raised self-defence.

The evidence adduced at Lavallee's trial revealed that she was physically abused by her intimate partner on a frequent basis.[38] Lavallee did not testify but provided a statement to the police that was put in evidence, in which she explained:

> Me and [Kevin] argued as usual and I ran in the house after Kevin pushed me. *I was scared, really scared.* … I went upstairs and hid in my closet from Kevin. … Next thing I know he was coming up the stairs for me. He came into my bedroom and said "Wench, where are you?" … [H]e saw me in the closet. *He wanted me to come out but I didn't want to come out because I was scared. I was so scared.* He grabbed me by the arm right there. There's a bruise on my face also where he slapped me. He didn't slap me right then, first he yelled at me then he pushed me and I pushed him back and he hit me twice on the right hand side of my head. I was scared. *All I thought about was all the other times he used to beat me, I was scared, I was shaking as usual.* The rest is a blank, all I remember is he gave me the gun and a shot was fired through my screen. … [H]e loaded [the gun] the second shot and gave it to me. And I was going to shoot myself. … [H]e started going like this with his finger and said something like "You're my old lady and you do as you're told"… He said "*wait till everybody leaves, you'll get it then" and he said something to the effect of "either you kill me or I'll get to you*" that was what it was. He kind of smiled and then he turned around. I shot him but I aimed out.[39]

Evidence corroborated Lavallee's version of the events surrounding the shooting: an argument between Lavallee and her partner escalated; her partner got verbally and physically violent towards Lavallee; and Lavallee fired two shots.[40] Dr. Shane, a psychiatrist specializing in

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[37] See *Lavallee*, *supra* note 12 at 856 line f to g.

[38] The evidence of past abuse led at trial was summed up by the SCC. See *Ibid* at 857 line i to 858 line d. It consisted of (1) Lavallee's statement to the police; (2) her trips to hospital for her physical injuries; (3) the testimony of a physician who treated Lavallee and disbelieved the false explanations she provided for her injuries; and (4) the testimony of her partner's friend who witnessed several fights between Lavallee and the deceased.

[39] *Ibid* at 856 line h to 857 line g [emphasis added]. For other statements made by Lavallee, see Sheehy, "Lessons from the Transcripts", *supra* note 15 at 31–2.

[40] See *Lavallee*, *supra* note 12 at 858 line d to 859 line a (a mutual friend of the couple, neighbours, and guests testified on the circumstances surrounding the gunshots). See also Sheehy, "Lessons from the Transcripts", *supra* note 15 at 21, 33–6 (corroborative evidence was adduced, such as damages to the closet door and the wall behind, as well as bruising on the deceased's knuckles consistent with use of force and bruising on Lavallee).

the treatment of battered women, interviewed Lavallee[41] and opined that she acted reasonably under the circumstances. Lavallee was acquitted by her jury, but the Manitoba Court of Appeal overturned her acquittal and ordered a retrial. The case was appealed to the SCC, which held that Lavallee acted lawfully (i.e. in self-defence), overturned the Manitoba Court of Appeal's retrial order, and restored the jury's acquittal.

Lavallee's legal team rightfully anticipated that it would be difficult for her jury—composed of one female and eleven male jurors—[42] to understand that she acted lawfully in shooting her partner. Legal scholars also believed that Lavallee's self-defence claim was unlikely to succeed.[43] Such doubts are attributable to the law of self-defence applicable to Lavallee's case, which provided that

> [Everyone] 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 grounds*, that he cannot otherwise preserve himself from the death or grievous bodily harm.[44]

Self-defence constitutes a justification in the eyes of the law: the use of defensive force is justified by the necessity (and the right) of self-preservation.[45] Defensive force does not result from a true choice: because of the danger and the lack of lawful alternatives, the use of responsive force should not attract criminal liability.[46]

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[41] Dr. Shane's opinion relied on various sources, including five interviews with Lavallee, one interview with Lavallee's mother as well as medical and police records. Some of these sources were hearsay because their content was not put in evidence. The admissibility of expert evidence that relies on hearsay was brought before the SCC, which ruled that expert evidence based on hearsay remains admissible. However, the extent to which an expert's opinion is based on hearsay will impact the probative value given to this opinion: the more an expert's opinion relies on hearsay, the less its weight will be. See *Lavallee*, *supra* note 12 at 891 line g to 897 line i.

[42] See Sheehy, "Lessons from the Transcripts", *supra* note 15 at 20.

[43] See e.g. *Ibid* at 1; Martha Shaffer, "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After *R. v. Lavallee*" (1997) 47 UTLJ 1 at 2 [Shaffer, "Syndrome Revisited"]; Sheila Noonan, "Battered Woman Syndrome: Shifting the Parameters of Criminal Law Defences (or (re)inscribing the familiar?)" in Anne Bottomley, ed, *Feminist Perspectives on The Foundational Subjects of Law* (London: Cavendish, 1996) 191 at 198 [Noonan, "Shifting the Parameters"].

[44] CrC, *supra* note 6 s 34(2) [emphasis added]. Although this version was repealed in 2012, parts 1 and 2 of this chapter concentrate on the law applicable to Lavallee's case. The current version, which is inherited from *Lavallee*, will be discussed in part 3 of this chapter, below.

[45] See e.g. *R v Pilon*, 2009 ONCA 248 at para 68.

[46] According to one school of thought, the fact that an action taken in self-defence does not result from a free choice makes it morally (or normatively) involuntary. Hugues Parent, *Traité de droit criminel : L'imputabilité*

In Lavallee's case though, she reacted to her partner's threat to kill her after the party and stood about 6 feet away from him when she fired the fatal shot.[47] She shot her partner in the back of the head as he was leaving the bedroom, while a few guests were present in the couple's house. These facts may have raised the question of whether Lavallee's use of force was necessary. That is, outside observers unfamiliar with the phenomenon of IPV may have believed that Lavallee did not face an imminent danger (s 34(2)(a) CrC) and/or that she was not out of options to protect herself from her partner (s 34(2)(b) CrC). For her self-defence claim to be successful, Lavallee had to overcome two hurdles commonly faced by victims-accused: the apparent lack of imminent danger (division 1.1) and the oversimplified question of "why didn't she leave?" (division 1.2).

1.1. Imminent Danger

When Lavallee shot her partner, the law of self-defence was not aimed at justifying actions like hers because it required the danger to be imminent. The requirement of imminence was not explicitly set out in section 34(2)(a) CrC. In *Lavallee*, Wilson J. observed that "[case] law has, however, read that requirement into the defence [of self-defence]."[48] This requirement limits the time interval between an assault and the use of defensive force, ensuring that actions motivated by revenge will not fall within the scope of self-defence. The rule of imminence, though, assumes that defensive force is used in the context of a sudden conflict that arises in a public place (e.g. a bar) between two men (unknown to each other) whose respective size, weight, and strength are similar.[49] This gender-biased narrative underwriting the doctrine of self-defence contrasts sharply with the narrative of *Lavallee*: Lavallee's story is one of escalating violence[50] inflicted in the private sphere between intimate partners whose morphological traits are quite different. Her case

et les moyens de défense, t 1, 5th ed (Montréal : Thémis, 2019) at 40–1. Law professor Hugues Parent explains that along with reason, will (i.e. autonomy, freedom to choose) is an essential psychological component of any voluntary conduct. Any conduct that lacks one of these components is morally (or normatively) involuntary and should not be condemned. See generally *R v Bouchard-Lebrun*, 2011 SCC 58 ("human behaviour will trigger criminal responsibility only if it results from a 'true choice' or from the person's 'free will'. This principle signals the importance of autonomy and reason in the system of criminal responsibility" at para 48).

[47] See Sheehy, "Lessons from the Transcripts", *supra* note 15 at 20, 30.

[48] *Lavallee*, *supra* note 12 at 876 line a to b.

[49] See *Ibid* ("a one-time barroom brawl between two men of equal size and strength" at 876 line d to f).

[50] See Sheila Noonan, "Strategies of Survival: Moving Beyond the Battered Woman Syndrome" in Ellen Adelberg & Claudia Currie, eds, *In Conflict with the Law: Women and the Canadian Justice System* (Vancouver: Press Gang, 1993) 247 [Noonan, "Strategies of Survival"] ("the seamless web of violence" at 249).

was thus atypical in that the facts were perfectly opposed to the tacit scenario underlying the law of self-defence.

As *Lavallee* demonstrates, the rule of imminence was unresponsive to women's experiences of IPV.[51] Because of factors such as their strength and size, women kill their intimates under a particular set of circumstances, one that considerably departs from the male-dominated narrative described above:

> [W]omen who kill abusive partners typically resort to the use of a weapon. It is also common that women who kill in the context of domestic violence do so at a time when there is a lull in the violence perpetrated by their partner, such as while he is asleep, incapacitated due to alcohol or otherwise distracted. These characteristics of homicide by women are readily explicable in terms of unequal nature of physical aggression between a male and what usually will be a smaller, lighter and less physically able woman. However, these same characteristics mean that women's actions are unlikely to be judged as self defence and as justifiable.[52]

Lavallee was not the first victim-accused whose claim of self-defence was challenged by the doctrinal requirement of imminence. *R v Whynot*[53] illustrates the rigid application of the imminence rule. In 1982, Jane Whynot shot her husband while he was drunk and asleep, shortly after he threatened to "deal with"[54] her son. The evidence adduced at trial revealed that her partner terrorized Whynot and her children for five years. Charged with first-degree murder,[55] Whynot claimed she defended herself and her son.[56] She was acquitted by her jury, but the Nova Scotia Court of Appeal, concluding that Whynot did not face imminent danger because her partner was

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[51] See Shaffer, "Syndrome Revisited", *supra* note 43 ("[o]n one reading of the facts, Lavallee could be said to have acted before the threat to her was imminent by shooting Rust as he was returning to the party" at 3).

[52] Julie Stubbs, "Battered Woman Syndrome: An Advance for Women or Further Evidence of the Legal System's Inability to Comprehend Women's Experience" (1991) 3:2 Current Issues Crim Just 267 at 268. See generally Elizabeth Sheehy, Julie Stubbs & Julia Tolmie, "Securing Fair Outcomes for Battered Women Charged with Homicide: Analysing Defence Lawyering in *R v Falls*" (2014) 38:2 Melbourne UL Rev 666 [Sheehy, Stubbs & Tolmie, "Securing Fair Outcomes"] (Sheehy, Stubbs and Tolmie analyzed *R v Falls*, in which Falls drugged her abusive partner and shot him in the head while he was sleeping, to document effective lawyering strategies to defend victims who kill in non-traditional scenarios. Effective lawyering strategies include adducing expert evidence, evidence of the deceased's violence, and the accused's testimony).

[53] *R v Whynot* (1983), 61 NSR (2d) 33, 37 CR (3d) 198 (NS SC (AD)) [*Whynot*].

[54] *Ibid* at para 13.

[55] Despite her lawyer's offer to plead guilty to manslaughter, Whynot stood trial for first-degree murder because her partner was shot while unconscious. See Sheehy, "Lessons from the Transcripts", *supra* note 15 (the "[Attorney General] believed that her actions displayed 'planning and deliberation'" at 5).

[56] See CrC, *supra* note 6 s 37 (s 37 was repealed in 2012, and the defence of the others was incorporated into the defence of person set out in s 34).

asleep, set aside the verdict of the jury and ordered a new trial.[57] Before her second trial, Whynot pled guilty to manslaughter. As law professor Elizabeth Sheehy highlights,

> [Whynot] was condemned by prosecutors and judges for not choosing the appropriate route to deal with Stafford's reign of terror. But no one specified what that route was. S*he was credited with "choice" and therefore responsibility* for how she secured her and her children's safety, while [the provincial Attorney General], arguably one of the most powerful men in the province, claimed that he had no choice and therefore bore no responsibility for the legal injustice committed against her. The State justified its response by reference to "the law" and its principles, when a jury of her peers understood all too clearly that "the law" had nothing to offer to [Whynot].[58]

In addition to the imminence rule, victims-accused like Lavallee face another major barrier, which is mostly based on ignorance regarding the phenomenon of IPV. This barrier concerns the question, commonly raised by the average person,[59] of why a woman remained in an abusive relationship. This question is intertwined with the impediment posed by the rule of imminence: the less imminent the danger, the greater the expectation that a woman could (and should) leave instead of using defensive force.[60]

1.2. "Why Didn't She Leave?"

When it comes to IPV, the infamous question "why didn't she leave?" is inevitable and misleading. The thought that victims could (and should) leave their partners is embedded in people's minds.[61] As feminist author Ann Jones argues, this question is contingent upon the often

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[57] See *Whynot, supra* note 53 at para 41.

[58] Sheehy, "Lessons from the Transcripts", *supra* note 15 at 7 [emphasis added]. See also Christine Boyle, "A Feminist Approach to Criminal Defences" in Richard F Devlin, ed, Canadian Perspectives on Legal Theory (Toronto: Emond Montgomery, 1991) 273 [Boyle, "A Feminist Approach"] ("[w]hile [*Whynot*] uses an apparently gender-neutral concept of imminent attack, [it] is an explicit direction not to view the facts from the perspective of the woman involved. It even closes out the jury, which at least has the potential, and had in this case the ability, to contextualize legal doctrine of its own accord" at 278).

[59] The terms "average juror", "average member of the public", "average person", "average fact-finder", and "layperson" were used interchangeably by Wilson J. in *Lavallee*. These terms refer to a person who lacks knowledge on IPV. See also *Malott* SC, *supra* note 16 ("the average judge and juror" at para 43).

[60] See Shaffer, "Syndrome Revisited", *supra* note 43 ("[o]n one view, since Rust's attack on her was not imminent, Lavallee had other options: she could have preserved herself from Rust by leaving the house, by calling the police, or by simply seeking assistance from one of the guests at the party" at 3).

[61] See Ann Jones, *Next Time, She'll Be Dead: Battering and How to Stop It*, revised ed (New York: Open Road Integration Media, 2015) (in IPV situations, "few people will ask: What's wrong with that man? What makes him think he can get away with that? Is he crazy? Did the cops arrest him? Is he in jail? When will he be prosecuted? Is he likely to get a serious sentence? Is she getting adequate police protection? Are the children provided for? Did the court evict him from her house? Does she need any other help? Medical help maybe, or legal aid? New housing? Temporary financial aid? Child support? No, the first question, and often the only question, that leaps to mind is: Why [didn]'t she leave?" at 168–69).

false assumption that leaving will end the violence; and it decontextualizes IPV by ignoring the myriad of obstacles that complicate separation (e.g. financial dependence, lack of support, fear of retaliation).[62] Not surprisingly then, this question harms victims-accused's claims, as it "assumes not only that there are viable options for alternative behavior, but that [victims] should have employed them, and that doing so would have [led] to [their] safety".[63]

To the question "why didn't she leave?", law professor Martha R. Mahoney replies "[w]ho says she didn't leave?".[64] Mahoney ably deconstructs the "why didn't she leave?" question by describing the path followed by women who leave, a path that too often leads to a dead end:

> If we ask the woman, "What did you do?" the answer very often turns out to be, "I sought help."
> (…)
> When we ask the woman, "Exactly what did you do in your search for help?" the answer often turns out to be that she left—at least temporarily.
> (…)
> When the woman is asked, "[W]hat happened to you when you left?" we discover the lack of available resources.
> (…)
> Finally … [w]e say, "What did he do when you left?" At that moment, we will hear the story of the attacks on her autonomy.[65]

"Why didn't she leave?" is legally relevant to self-defence: this question is tied to the lack of alternatives requirement codified in section 34(2)(b) CrC. For a self-defence claim to succeed, the fact finder must conclude that leaving was neither an available option for the victim nor an effective means to protect herself. Conversely, if a trier of fact concludes that leaving was possible and would have ended the violence, the use of force will be deemed unnecessary and the self-defence claim doomed to fail.

Both the rule of imminence and the question "why didn't she leave?" were recognized and addressed in *Lavallee,* making the law of self-defence more adapted to the phenomenon of IPV.

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[62] See *Ibid* (this question "is not a real question. It doesn't call for an answer; it makes a judgment. It mystifies. It transforms an immense social problem into a personal transaction, and at the same time pins responsibility squarely on the victim" at 169). See also Mahoney, "Redefining the Issue of Separation", *supra* note 20 (post-separation violence is a dangerous reality that must be introduced in criminal trials as an important factor impeding women's ability to leave). Post-separation violence is part of the SEF and will be further discussed in chapter 2.

[63] Mary Ann Dutton, "Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome" (1993) 21:4 Hofstra L Rev 1191 at 1226 [footnotes omitted].

[64] Mahoney, "Redefining the Issue of Separation", *supra* note 20 at 61.

[65] *Ibid* at 61–3.

2. THE GOVERNING PRINCIPLES

We believe that *Lavallee* can be dissected into three main rulings: reasonableness, expert evidence, and BWS. As the holding on expert evidence stems from the one on reasonableness, these rulings are discussed in relation to each other (division 2.1). Indeed, a woman's experience of IPV is relevant to assessing her self-defence claim; therefore, expert evidence is necessary to understand the phenomenon of IPV. Whereas the SCC treats expert evidence and BWS as intertwined,[66] the ruling on BWS ought to be discussed separately because evidence on BWS is not inextricably linked to expert evidence (division 2.2). Lavallee adduced expert evidence on BWS, yet BWS evidence should be regarded as a type of expert evidence that conveys to fact finders a narrow vision of IPV experiences.[67]

2.1. The Reasonable Person Demystified by Expert Evidence

A. Reasonableness

Self-defence claims are submitted to a subjective-objective test: the subjective component refers to the accused's state of mind, whereas the objective component focuses on the reasonableness of the accused's conduct. Under section 34(2) CrC (former version), the objective requirement was threefold: an accused must reasonably believe that they (1) are unlawfully attacked (s 32 CrC); (2) face death or grievous bodily harm (s 34(2)(a) CrC); and (3) have no option other than resorting to force to protect herself (s 34(2)(a) CrC).[68] Reasonableness (the objective component) is assessed by applying a legal standard known as the reasonable person. Thus, not only must an accused honestly believe (subjective component) that they face imminent danger and lack alternatives, but these beliefs must be reasonable (objective component) such that a reasonable person, put in the same circumstances as the accused, would hold the same beliefs.[69]

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[66] See *Lavallee*, *supra* note 12 at 873 line g to 891 line g (part on "The Relevance of Expert Testimony to the Elements of Self-Defence"). Some authors also discussed expert evidence on BWS and suggested that these rulings (necessity of expert evidence and legal relevance of BWS) are inseparable. See e.g. Lee Stuesser, "The Defence of Battered Woman Syndrome in Canada" (1990) 19:1 Man LJ 195 at 198–201.

[67] Chapter 2 discusses other analytical frameworks (i.e. the coercive control framework and the SEF) to convey IPV experiences in criminal trials.

[68] The SCC in *Lavallee* barely discussed the criterion of unlawful attack, yet in *R v Pétel*, [1994] 1 SCR 3, 87 CCC (3d) 97 [*Pétel*], the SCC listed three elements of self-defence that ought to be subjectively and objectively assessed: the accused must reasonably (1) believe in the existence of an unlawful attack; (2) apprehend death of grievous bodily harm; and (3) believe there is no alternative to avoid the danger (at 12 line f to j).

[69] See *Lavallee*, *supra* note 12 at 873 line i to 874 line a; *Malott* SC, *supra* note 16 at paras 38, 40.

Lavallee clarifies what characteristics and experiences this reasonable person shares with victims-accused like Lavallee.

Wilson J., writing an unanimous decision, recognized that our conceptualization of the reasonable person is dominated by male experiences.[70] Since Lavallee was a woman who endured years of violence, her experience as a woman (her size, strength, socialization, and experience of IPV) must inform the standard of reasonableness applied to her case.[71] The reasonable person standard contextualized to the accused's experience of IPV is known as the "blended"[72] or "modified"[73] objective standard.

Contextualizing reasonableness to the accused's experience of IPV has two main implications. First, it repudiates the rule of imminence (or, at the very least, relaxes it). Wilson J. explained that requiring an ongoing physical attack so that a woman can legally defend herself is unresponsive to the physiological differences between men and women:

> [D]ue to their size, strength, socialization and lack of training, women are typically no match for men in hand-to-hand combat. 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 installment."*[74]

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[70] See *Lavallee*, *supra* note 12 at 874 line h to j. But see *R v Khill*, 2021 SCC 37 [*Khill*] ("not all personal characteristics or experiences are relevant," i.e. "reasonableness is not considered through the eyes of individuals who are overly fearful, intoxicated, abnormally vigilant or members of criminal subcultures" at para 56).

[71] See *Lavallee*, *supra* note 12 at 883 line a, d to e. See also Christine Boyle, "The Battered Wife Syndrome and Self-Defence: Lavallee v. R." (1990) 9:1 Can J Fam L 171 [Boyle, "Syndrome and Self-Defence"] (*Lavallee* "seems to be part of a trend at the SCC level toward recognizing the fact that people do not experience the world in gender-neutral ways" at 174–5). However, although each experience of IPV is unique, BWS limits this diversity. In depicting women as helpless and irrational, BWS excludes women whose experiences differ from this victimization model. Critiques of BWS will be discussed in division 3.1 of this chapter, below.

[72] *Khill*, *supra* note 70 at para 54.

[73] *Ibid*. See also *R v Latimer*, 2001 SCC 1 [*Latimer*] ("[a] modified objective test falls somewhere between the [objective and subjective standards]. It involves an objective evaluation, but one that takes into account the situation and characteristics of the particular accused person" at para 32).

[74] *Lavallee*, *supra* note 12 at 883 line d to f [footnotes omitted]. See also *R v Charlebois*, 2000 SCC 53 at para 16; *R v Cinous*, 2002 SCC 29 at paras 34, 40 [*Cinous*]. This repudiation of imminence as a strict requirement was considered by courts of appeal in ordering new trials. See e.g. *R v Young*, 2008 BCCA 393 at paras 44, 54, 56 (a new trial for second-degree murder was ordered because the trial judge erroneously insisted on imminence and excluded BWS from the jury's consideration, yet the deceased made previous threats that could constitute unlawful attacks under section 34(2) CrC). *Contra R v Chase*, 2010 ABPC 4 (the trial judge unduly insisted on imminence in concluding that "immediately before the stabbing, the accused did not have any reasonable belief that she was in danger of death or grievous bodily harm" at para 93). Several legal scholars discussed the relaxation of the imminence requirement. See e.g. Toni Pickard, Phil Goldman & Renate M Mohr, *Dimensions of Criminal Law*, 3rd ed (Toronto: Emond Montgomery, 2002) at 889; Anne-Marie Boisvert, "Légitime défense

Second, this contextualization reshapes the relevance of the evidence to be presented to triers of fact. The logical link between the evidence and the legal ingredients of the defence is redefined in that evidence of past abuse (including its cumulative effect) becomes relevant.[75]

These implications strikingly depart from *Whynot*, in which it was decided that Whynot reacted "in anticipation"[76] of "imaginary assault,"[77] excluding evidence on the deceased's violent character.[78] *Lavallee*'s most outstanding contribution thus resides in the relevance—at the conviction stage—of the experience of abuse in assessing self-defence claims.[79] As pointed out by the Honourable Justice Lynn Ratushny, the case's "real significance for the law of self-defence lies in the fact that the Court took a *broad view of the evidence that is relevant* to the legal elements of that defence."[80] This exercise requires that judges and juries accurately understand IPV, a task for which they need assistance.

B. Expert Evidence

For victims-accused's claims to be fairly assessed,[81] fact-finders' understanding of IPV must exclude stereotypical assumptions. In *Lavallee*, the Crown argued that expert evidence was unnecessary. Wilson J. rejected the Crown's contention and enumerated several questions likely

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et le syndrome de la femme battue : R. c. Lavallée" (1991) 36:1 McGill L J 191 at 192; Boyle, "Syndrome and Self-Defence", *supra* note 71 at 175–6.

[75] Although BWS considerably limits the diversity of IPV experiences, various passages of *Lavallee* indicate the Court's willingness to consider Lavallee's experience of IPV in the reasonableness analysis. On the reasonable apprehension of death, see e.g. *Lavallee*, *supra* note 12 ("the mental state of an accused at the critical moment she pulls the trigger cannot be understood except in terms of the cumulative effects of months or years of brutality" at 880 line d to e). On the lack of alternatives, see e.g. *Lavallee*, *supra* note 12 ("the question the jury must ask itself is whether, given the history, circumstances, and perceptions of the appellant, her belief that she could not preserve herself from being killed by [her partner] that night except by killing him first was reasonable" at 889 line c to e).

[76] *Whynot*, *supra* note 53 at para 41.

[77] *Ibid*.

[78] See *Ibid* (for the Court, the evidence related to Whynot's partner's character was unrelated to her defence and "served only to create sympathy for the respondent" at para 35).

[79] However, the diversity of IPV experiences is limited by BWS, which assumes that battered women react in a similar fashion to IPV (helplessness). The standard of the reasonable person is thus contextualized to a woman's experience of violence only to the extent that she fits the syndrome. Critiques of BWS will be discussed in division 3.1 of this chapter, below.

[80] Lynn Ratushny, *Self-Defence Review: Final Report* (Ottawa: The Review, 1997) at 16 [emphasis added]. This broader view of the relevance will be further discussed in chapter 2, which concentrates on an alternative framework, the SEF, to assess victims-accused's criminal responsibility.

[81] See *Lavallee*, *supra* note 12 at 891 line f to g (fairness and integrity command that jurors are informed about the phenomenon of IPV and its effects); *Malott* SC, *supra* note 16 (myths and stereotypes on IPV impact "the capacity of judges and juries to justly determine a battered woman claim of self-defence" at para 36).

to inhabit jurors' minds. These questions revolve around the "why didn't she leave?"[82] question and reflect a misunderstanding of IPV: "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?"[83] The assumptions underlying these questions might have impeded assessing whether Lavallee was honest in her account (subjective component) and what responses were reasonable under the circumstances (objective component). Thus, Wilson J. concluded, jurors need expert assistance to ensure that their assessment of claims like Lavallee's[84] will not be affected by "popular mythology"[85] about IPV. Given the historical tolerance of IPV and despite its recent formal disapproval, Wilson J. was satisfied that IPV and its effects constituted "special knowledge,"[86] warranting expert evidence. Expert evidence was necessary as it deconstructed prevalent myths and stereotypes about IPV.[87]

If unassisted, jurors might have believed that Lavallee was not as severely battered as she claimed because she displayed aggressive behavior towards her partner; could have left instead of shooting him; and killed him in the absence of danger because he was leaving their bedroom.

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[82] For more on "why didn't she leave?", see division 1.2 of this chapter, above.

[83] *Lavallee*, *supra* note 12 at 871 line h to j.

[84] Interestingly, Wilson J.'s wording does not restrict these claims to self-defence. See *Lavallee*, *supra* note 12 ("a woman who comes before a judge or jury with the *claim that the has been battered* and *suggests that this may be a relevant factor in evaluating her subsequent actions*" at 872 line i to 873 line a [emphasis added]). The application of *Lavallee* to duress and necessity claims will be discussed in division 3.2 of this chapter, below.

[85] *Ibid* at 873 line a. See also *Malott* SC, *supra* note 16 at para 36; Boyle, "Syndrome and Self-Defence", *supra* note 71 (the Court's decision to admit expert evidence displays "judicial willingness" to "challenge intuitive views of the facts" at 174). The necessity to avoid stereotypical assumptions on IPV has led the Crown to adduce expert evidence (on the effects of IPV) to explain behaviours that could impede the complainant's credibility. See e.g. *R v M(RC)*, [2005] OJ No 3966, 67 WCB (2d) 499 (Ont Sup Ct); *R v S (JP)*, [2001] OJ No 1890, 50 WCB (2d) 161 (ONCA) at para 11; *R v F (DS)*, [1999] OJ No 688, 43 OR (3d) 609 (ONCA) (evidence on BWS was adduced "to properly appreciate the complainant's explanation for not immediately leaving the relationship and disclosing the abuse" at para 64); *R c Imming*, [1998] QJ No 3560, 37 WCB (2d) 396 (CS Qc) (evidence on BWS was adduced because the jury "could logically and reasonably draw a negative inference of the conduct of the complainant in that she did not flee the house at the time of the alleged violence" at para 7). But see *R v Hercules*, 2022 ONCJ 112 at para 56 (the trial judge referred to the notion of learned helplessness and socio-economic factors mentioned in *Malott*'s concurring opinion to explain the complainant's inability to leave the accused); *R v S (PS)*, 2008 CarswellOnt 9332 (Ont Sup Ct) (expert evidence was ruled unnecessary given social awareness on IPV).

[86] *R v Abbey*, [1982] 2 SCR 24, 68 CCC (2d) 394 at 42.

[87] However, legal scholars investigating the impact of *Lavallee* have observed that expert evidence on BWS has created a new stereotype, that of the "real" battered woman. This critique will be discussed in division 3.1 of this chapter, below.

Expert evidence thus played a crucial role in (1) restoring Lavallee's credibility who believed that her life was endangered and that the use of force was her only option (subjective component); and (2) demonstrating that her perceptions were reasonable from the stance of a reasonable woman who share Lavallee's IPV experience (objective component).[88]

Dr. Shane, called by Lavallee's defence team, opined that Lavallee suffered from BWS. In complementing Lavallee's experience of IPV with BWS evidence, Dr. Shane's testimony was part of the BWS framework used to assess Lavallee's criminal liability.

2.2. Battered Woman Syndrome

BWS was coined in the 1980s by Dr. Lenore E. Walker, an American psychologist,[89] to describe the psychological responses of women who experience IPV. BWS results from Walker's efforts to understand why battered women remain in violent relationships. Essentially, this syndrome is a "psychiatric explanation"[90] that "can be relevant to the legal inquiry into a battered woman's state of mind."[91] BWS is not a defence *per se* but can be introduced in assistance of a defence.[92]

BWS is akin to (or is a subcategory of) PTSD but is not explicitly recognized as a diagnosis under the DSM-V.[93] It includes a cluster of behavioral and psychological characteristics displayed by women subjected to repeated and prolonged abuse, such as avoidance mechanisms, memory and judgement impairments, and heightened anxiety.[94] Most importantly, BWS is characterized by two components: the cyclical nature of violence and the notion of learned helplessness. Women

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[88] For a discussion on the atypical nature of *Lavallee*, see part 1 of this chapter, above. See generally Sheehy, Stubbs & Tolmie, "Securing Fair Outcomes", *supra* note 52 at 690–91 (expert testimony carries four main functions: (1) describe the phenomenon of IPV; (2) alleviate risks of stereotypical assumptions by fact-finders; (3) connect the accused's evidence with the legal requirements of self-defence; and (4) restore the accused's credibility in her account of the events and the violence she suffered).

[89] See Lenore E Walker, *The Battered Woman Syndrome* (New York: Springer, 1984); Lenore E Walker, *The Battered Woman* (New York: Harper & Row, 1979).

[90] *Malott* SC, *supra* note 16 at para 37.

[91] *Ibid*.

[92] See *Lavallee*, *supra* note 12 ("the fact that [Lavallee] was a battered woman does not entitle her to an acquittal" at 890 line h to i); *Malott* SC, *supra* note 16 at para 37 *in limine*.

[93] See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, 5th ed (Washington, DC: American Psychiatric, 2013) at 265–90 (part on "Trauma and Stressor Related Disorders"). See generally Glen Luther & Dr Mansfield Mela, "The Top Ten Issues in Law and Psychiatry", (2006) 69 Sask L Rev 401 at paras 18, 21.

[94] See Melissa Hamilton, *Expert testimony on Domestic Violence: A Discourse Analysis* (El Paso: LFB Scholarly, 2009) at 74–95 (judicial constructions of IPV in California).

suffering from BWS experience violence as part of a three-stage cycle: tension-building, battering episode, and honeymoon. Through repeated episodes of violence, women develop the belief that they are unable to escape the violence. Their belief is explained by the notion of learned helplessness,[95] whereby women internalize the sense that they have no control over the abuse and cannot prevent their partners' violence nor leave.

The SCC recognized—for the first time in *Lavallee*—the legal relevance of BWS, highlighting that its main components (cycle of violence and learned helplessness) are connected to the requirements of self-defence.[96] Regarding a woman's apprehension of danger (s 34(2)(a) CrC), the cyclical nature of violence entails a certain degree of predictability, enabling women to anticipate the violence (its occurrence, nature and severity). Wilson J. concluded that "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."[97] Regarding a woman's belief in the lack of alternatives (s 34(2)(b) CrC), learned helplessness provides a psychological explanation for the failure to leave: this notion "may help to explain why [the woman] did not attempt to escape at the moment she perceived her life to be in danger."[98]

Dr. Shane explained that Lavallee was terrified "to the point of feeling trapped, vulnerable, worthless, and *unable to escape* the relationship despite the violence"[99] (lack of alternatives requirement). Lavallee's shooting, he added, "was a final desperate act by a woman who sincerely believed that *she would be killed* that night"[100] (apprehension of danger requirement). This portion of Dr. Shane's testimony illustrates how BWS accords with the legal ingredients of self-defence.

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[95] The phenomenon of learned helplessness was first identified in experiments on caged dogs subjected to electric shocks. These experiments revealed that after a few shocks were administrated, the dogs no longer tried to escape even if they were offered a chance to. See Martin E Seligman et al, "Alleviation of Learned Helplessness in the Dog" (1968) 73:3 J Abnor Psychol 256.

[96] See also *Malott* SC, *supra* note 16 at paras 19–21 (legal relevance of BWS to self-defence claims).

[97] *Lavallee*, *supra* note 12 at 882 line f to g [emphasis added], 890 line a to b (to the same effect). See also Pickard, Goldman & Mohr, *supra* note 74 at 890.

[98] *Lavallee*, *supra* note 12 at 888 line a to b, 890 line c to e (to the same effect).

[99] *Lavallee*, *supra* note 12 at 859 line g to j [emphasis added]. In the same vein, Dr. Shane mentioned that "there were steel fences in [Lavallee's] mind which created for her an incredible barrier psychologically that prevented her from moving out" (at 888 line e to f).

[100] *Ibid* at 859 line h to j [emphasis added].

Feminist litigators initially welcomed BWS since it aimed to deconstruct the idea that "battered women are *prima facie* unreasonable because they remain in relationships that 'reasonable' people would have rejected."[101] As illustrated by *Whynot,* a gender-biased standard (the reasonable man) was applied to women's self-defence claims prior to *Lavallee*, leading to unfair outcomes. *Whynot* illustrates that the law of self-defence—designed by men to achieve justice for men—was unable to grasp women's experiences.[102] BWS, feminists hoped, would help triers of fact to perceive battered women as reasonable actors: "in the minds of many jurors, if 'reasonable' people did find themselves being beaten, they would immediately leave their abusers. Without information on battered women, there is a *danger that juries will be ill-equipped to evaluate claims of self-defence* brought by battered women who kill their mates."[103] Relying on BWS as a defence strategy has, however, produced unexpected and undesirable results.

3. THE IMPACT OF *LAVALLEE* (LITERATURE REVIEW)

Lavallee was rendered more than 30 years ago, yet it remains significant to victims-accused's claims. Section 34 CrC was modified in 2012[104] and includes an objective component (i.e. reasonableness) that is found in two out of the three criteria set out in section 34(1) CrC.[105] By comparing the former and current codifications of self-defence, table I shows that the objective standard of reasonableness remains under the current law. The requirements in bold are measured following *Lavallee*'s contextualization of reasonableness, which means that reasonableness must be determined according to the accused's characteristics (e.g. her gender) and her experience of IPV.[106]

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[101] Martha Shaffer, "*R. v. Lavallee*: A Review Essay" (1990) 22 Ottawa L Rev 607 at para 22 [Shaffer, "Review Essay"].
[102] See e.g. Sheehy, "Lessons from the Transcripts", *supra* note 15 ("when battered women required legal defence for killing violent men, they found themselves disadvantaged by the law of self-defence, premised on norms that represented men's, not women's lives and experiences" at 23).
[103] Shaffer, "Review Essay", *supra* note 101 at para 22 [emphasis added].
[104] See *Citizen's Arrest and Self-Defence Act*, SC 2012, c 9, s 2.
[105] There are some distinctions between the former and the current versions of self-defence. For example, the lack of alternatives to avoid the danger, which was a mandatory condition under the old law, has become a relevant factor in assessing the reasonableness of the accused's conduct. For a full discussion on the reform of section 34 CrC, see *Khill*, *supra* note 70 at paras 35–50.
[106] For a full discussion on *Lavallee*'s contextualization of reasonableness, see subdivision 2.1A of this chapter, above.

Table I: Former and Current Codifications of Section 34 *Criminal Code*

	Former Codification of Section 34 CrC[107]	**Current Codification of Section 34 CrC**[108]
Requirements	(1) **Accused believes in the existence of an unlawful attack**; (2) **Accused apprehends death of grievous bodily harm**; and (3) **Accused believes there is no alternative to avoid the danger**.	(1) **Accused believes that force is being used or that threat of force is being made;** (2) Responsive force is being used to protect or defend; and (3) **Accused's conduct is reasonable.**

In addition to maintaining the objective standard of reasonableness, the current wording of section 34 CrC is inherited from *Lavallee*. Indeed, section 34(2) CrC codifies *Lavallee*'s contextualization factors: it provides that, in assessing whether the accused's conduct was reasonable (third requirement), courts must consider several factors,[109] such as the imminence of the use of force[110] as well as "the size, age, gender and physical capabilities of the parties to the incident."[111] Furthermore, factors such as "the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force"[112] ought to be considered.

While the reform of section 34 CrC demonstrates the continued relevance of *Lavallee*, the impact of this case goes well beyond the current codification of the law of self-defence. *Lavallee*'s vast "potential [to] influence judicial reasoning"[113] and to achieve fairer outcomes for women has attracted significant attention from scholars. To situate our thesis and be part of this academic

[107] See *Pétel*, *supra* note 68 at 12 line f to j.
[108] See *Khill*, *supra* note 70 at para 37 (this decision was rendered under the new law of self-defence). See also *R v Bengy*, 2015 ONCA 397 ("reasonable belief" and "reasonable response" at para 28).
[109] See Ratushny, *supra* note 80 at 22 (Ratushny J. recommended that the word "reasonable" and the factors relevant to its assessment be clarified). See also *R v Cormier*, 2017 NBCA 10 (two modifications brought to the law of self-defence stem from *Lavallee*, "one being that *imminence of the attack* is not a rigid requirement in order for the defence to succeed, but is a factor to be considered when assessing the reasonableness of an accused's response; the other being the *nature of the abusive relationship* between the accused and the victim is also a factor when assessing the reasonableness of the accused's actions" at para 41 [emphasis added]).
[110] See CrC, *supra* note 6 s 34(2)(a). Imminency is thus not a formal requirement of self-defence but rather a relevant factor in determining whether an accused acted reasonably. See *Khill*, *supra* note 70 ("[t]he significance of imminence as a discrete factor was contextualized with greater nuance following the Court's analysis of self-defence in the context of domestic violence in *Lavallee*" at para 32).
[111] CrC, *supra* note 6 s 34(2)(e).
[112] *Ibid* s 34(2)(f).
[113] Boyle, "Syndrome and Self-Defence", *supra* note 71 at 178.

conversation, the following part reviews the existing literature on the impact of *Lavallee*. The literature has concentrated on three main issues: the reliance on BWS in battered women's trials (division 3.1); *Lavallee*'s application to other criminal defences where reasonableness is in issue (division 3.2); and *Lavallee*'s impact on the outcomes of homicide self-defence cases (division 3.3). Based on this discussion of *Lavallee*'s consequences, chapter 2 advocates for an alternative framework to assess women's criminal responsibility.

3.1. Use of Battered Woman Syndrome in Criminal Trials: Critical Perspectives

Despite initial optimism, BWS was and still is widely criticized. Legal feminist scholar Julie Stubbs, for example, qualifies BWS as "a construction which meets the law's needs not women's needs."[114] Of the criticisms levelled against BWS,[115] two were acknowledged in *Malott*'s concurring opinion[116] and revolve around the fairness of women's trials: the creation of a new stereotype (subdivision A); and the pathologization of women's responses to IPV (subdivision B).[117]

A. The Creation of a New Stereotype

Ruling expert evidence as necessary was aimed at debunking stereotypes surrounding IPV, yet BWS discourse seems to have created a new stereotype: the "real"[118] and "authentic"[119] battered woman. BWS's emphasis on helplessness produced the stereotype of the

[114] Stubbs, *supra* note 52 at 270.
[115] BWS is also criticized on other grounds, such as methodological weaknesses in Dr. Walker's research that may affect the reliability of her theory. See e.g. Marilyn McMahon, "Battered Women and Bad Science: The Limited Validity and Utility of Battered Woman Syndrome" (1999) 6:1 Psychiatry Psychol & L 23; RJ Delisle, "Annotation to R. v. M. (M.A.)" (1998) 12 CR (5th) 207 at 209–12 (lack of procedural fairness at the SCC level in taking judicial notice of Dr. Walker's work despite the body of literature that disagrees with her work). Research has also challenged the passivity and powerlessness experienced by battered women. See e.g. Ruth Lewis et al, "Protection, Prevention, Rehabilitation or Justice? Women's Use of the Law to Challenge Domestic Violence" (2000) 7:1-3 Intl Rev Victimology 179 ("women make very careful decisions, in very difficult circumstances, about their safety. They make these decisions on a daily basis – 'what kind of mood is he in?', 'if I do x, how will he respond?', 'will he find out if I seek help from in/formal networks?', 'what's the best way to challenge him about his behavior?' Rather than 'learned helplessness' many women demonstrate 'active negotiation and strategic resistance'" at 191).
[116] See *Malott* SC, *supra* note 16 paras 39–41. *Malott*'s concurring opinion will be discussed in chapter 2.
[117] See Shaffer, "Syndrome Revisited", *supra* note 43 (Shaffer analyzed 35 cases in which women raised BWS [as part of their defence or as a relevant factor in sentencing] and observed that battered women are perceived as dysfunctional individuals and that a new stereotype of battered women has emerged [period researched: 1990–1996]).
[118] Shaffer, "Review Essay", *supra* note 101 at paras 30–2.
[119] Shaffer, "Syndrome Revisited", *supra* note 43 at 13–8.

powerless, dependent, and passive woman, excluding women who do not fit this stereotype (e.g. racialized[120] and Indigenous women,[121] professional women, women affected by substance disorders, and those with a criminal record).[122] The construction of "battered woman" led Crown and defence experts to debate over whether a woman qualifies as such. These debates shift the focus from the fundamental question of "did she act reasonably?"[123] to "is she a battered woman?"[124] The reasonable man standard was replaced by an equally problematic standard: "battered women must either be reasonable 'like a man' or reasonable 'like a battered woman'".[125] In other words, those who do not conform to the image of the battered woman may be prevented from introducing their experiences of victimization into trial. Unable to convey the violence they suffered, these women are unlikely to "have their claims [of] self-defence [be] *fairly* decided."[126] BWS not only fails to account for the diversity of IPV experiences and victimization trajectories, it also threatens the reasonableness requirement.

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[120] Our thesis uses the term "racialized women" rather than "women of color". See Ontario Human Rights Commission, *Under suspicion: Research and consultation report on racial profiling in Ontario* (2017), online: <www.ohrc.on.ca/en/under-suspicion-research-and-consultation-report-racial-profiling-ontario> ("[t]he term 'racialized' is widely preferred over descriptions such as 'racial minority,' 'visible minority' or 'person of color' as it expresses race as a social construct rather than a description of people based on perceived characteristics" in the introductive section on terminology).

[121] See especially Stubbs & Tolmie, "Race and Gender", *supra* note 17. See also Noonan, "Shifting the Parameters", *supra* note 43 (Noonan analyzed BWS cases of racialized and aboriginal women and observed that courts received these women's claims with skepticism and that "it is exceedingly difficult for the models of passivity and learned helplessness to explain their actions" at 213 [period researched: 1990–1996]); Sheehy, "Lessons from the Transcripts", *supra* note 15 at 126–98 (in chapters 4 and 5, Sheehy discusses the overrepresentation of Aboriginal women among victims of IPV as well as racism and colonization as additional barriers faced by Aboriginal women defendants); Elizabeth Sheehy, *What Would a Women's Law of Self-Defence Look Like?* (Status of Women Canada, 1995) at 16–8 [Sheehy, "Women's Law"]; Elizabeth Sheehy, "Battered Woman Syndrome: Developments in Canadian Law After R v Lavallee" in Julie Stubbs, ed, *Women, Male Violence and the Law* (Sydney: Institute of Criminology, 1994) 174 at 183–84) [Sheehy, "Developments in Canadian Law"].

[122] See *Malott* SC, *supra* note 16 at para 40.

[123] See *Lavallee*, *supra* note 12 at 890 line h to j; *Ibid* para 41.

[124] See *Malott* SC, *supra* note 16 at para 41; Sophie Bélanger, *Le syndrome de la femme battue et le recours à l'expert lors de procès de femmes maricides : une analyse de discours* (Master Thesis, Université de Montréal, 2004) [unpublished] (Bélanger analyzed expert discourse in three homicide trials in Québec in which women killed their abusive partners and raised BWS [period researched: 2001–2002]; she noted that "le discours des experts de la Couronne vise globalement à contrecarrer l'idée que l'accusée avait développé un sentiment d'impuissance acquise face à la situation de violence conjugale qu'elle vivait" at 109).

[125] Donna Martinson et al, "A Forum on *Lavallee v. R.*: Women and Self-Defence" (1991) 25 UBC L Rev 23 at para 86.

[126] *Malott* SC, *supra* note 16 at para 40 [emphasis added]). See also Noonan, "Strategies of Survival", *supra* note 50 ("the individual woman's account of her relationships and the reason for her actions are only relevant to the degree to which they successfully converge with medical and legal accounts of the syndrome" at 253). This stereotypical threshold also applies at the sentencing stage: battered women who meet the standards of the BWS

B. The Depiction of Women as Mentally Ill

While BWS was meant to characterize common behaviors displayed by battered women, it depicts women as ill and irrational.[127] This portrayal, known as the "syndromization"[128] or "medicalization"[129] of women's experiences, is theoretically irreconcilable with a claim of self-defence: one who is casted as cognitively impaired runs the risk of not being perceived as reasonable.[130] Similarly, a BWS lens individualizes IPV. According to law professor Melanie Randall, who qualifies BWS as a "double-edged sword,"[131] the focus on helplessness obscures women's resilience in the face of a myriad of

> *conditions of inequality* [that] often impose severe *limitations on the options* which are actually available to women, including a lack of second stage housing, sex segregation and unequal pay in the labour market, a lack of available and affordable child care facilities, the social, ideological, and economic pressures to "keep the family together," and the stigmatizing and victim-blaming attitudes.[132]

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can invoke it as a mitigating circumstance (linked to moral blameworthiness) and receive a less severe sentence (in nature and length). See Elisabeth C Wells, *Judicial Attributions in Sentencing: The Battered Woman Syndrome Before and After R. V. Lavallee* (PhD Thesis, University of Guelph, 2008) [unpublished] (Wells studied sentencing decisions on homicides cases pre-and post-*Lavallee* and concluded that battered women depicted as passive and vulnerable received non-custodial sentences, whereas battered women depicted as resistant and aggressive received harsher sentences). See generally CrC, *supra* note 6 s 718.1 (moral blameworthiness is a component of the principle of proportionality); *R v Naslund*, 2022 ABCA 6 at paras 108–20 (BWS affects the offender's degree of moral blameworthiness).

[127] See Monique Poulin, *Le droit à la légitime défense en situation de violence conjugale : un régime de tutelle pour les femmes* (Master Thesis, Université Laval, 2000) [unpublished] (Poulin analyzed decisions in which BWS was used and argued that BWS operates like a guardianship for women [period researched: 1990–1999]).

[128] Martinson et al, *supra* note 125 at paras 86–107. See also Boyle, "A Feminist Approach", *supra* note 58 at 280–82; Shaffer, "Review Essay", *supra* note 101 at paras 25–9.

[129] Elizabeth Sheehy, Julie Stubbs & Julia Tolmie, "Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations" (1992) 16 Crim L Rev 369 at 393 [Sheehy, Stubbs & Tolmie, "Defending Battered Women"].

[130] See Stubbs, *supra* note 52 at 270; Julianne Parfett, "Beyond Battered Woman Syndrome Evidence: An Alternative Approach to the Use of Abuse Evidence in Spousal Homicide Cases" (2001) 12 Windsor Rev Legal & Soc Issues 55 (BWS is "fundamentally opposed to the notion that women's behaviour in an abusive relationship can be reasonable when viewed objectively" at 88); Bélanger, *supra* note 124 at 147–48; Boisvert, *supra* note 74 at 212–13. Moreover, in focusing on women's victimization, BWS seems to excuse rather than justify women's actions. See e.g. Sheehy, "Lessons from the Transcripts", *supra* note 15 ("pattern of verdicts in which battered women are 'excused' by reason of their psychological frailties or provocations, but they are not 'justified' or vindicated by acquittal based on self-defence" at 232); Noonan, "Strategies of Survival", *supra* note 50 at 252.

[131] Melanie Randall, "Domestic Violence and the Construction of Ideal Victims: Assaulted Women's Image Problems in Law" (2004) 23 St Louis U Pub L Rev 107 at 108. See also Shaffer, "Syndrome Revisited", *supra* note 43 (the "dual nature" of BWS at 6).

[132] Randall, *supra* note 131 at 125.

Many factors—be they social, economic, legal, or safety-related—"shape women's choices."[133] These factors are relevant in criminal trials like Lavallee's in which the inquiry aims to determine whether one's criminal conduct results from a veritable choice.[134] Scholars have made recommendations regarding the future use of BWS, ranging from its demedicalization to its abandonment in criminal trials,[135] yet criminal courts to this day still rely on BWS.[136] This judicial acceptance might be explained by several factors, such as BWS' "legitimacy by carrying the scientific label 'syndrome'."[137]

In addition to revealing the undesirable effects of BWS, research has identified that courts are more flexible in receiving BWS evidence: it has been admitted even when the accused was no longer living with her abuser; accepted at the sentencing stage for offences not committed against violent partners (e.g. robbery and drug trafficking); and introduced without expert assistance.[138] Legal academics have also noted that BWS has supported other defences, such as necessity and

[133] Sheehy, "Lessons from the Transcripts", *supra* note 15 at 54. The importance of social, legal, economic, and safety considerations will be discussed in chapter 2, as these factors are part a SEF to assess victims' criminal responsibility.

[134] An individual's conduct must result from a true choice to attract criminal liability. See Parent, *supra* note 46 at 40–1.

[135] See e.g. Sheehy, Stubbs & Tolmie, "Defending Battered Women", *supra* note 129 at 394 (the title "syndrome" should be dropped, and the range of experts should be broadened to include shelter workers and feminist counsellors); Noonan, "Strategies of Survival", *supra* note 50 (women's responses must be de-pathologized and shelter workers welcomed in courtrooms); Randall, *supra* note 131 at 132–36 (middle-ground between a BWS and a social framework); Shaffer, "Syndrome revisited", *supra* note 43 (BWS should not be limited to a psychological explanation); Parfett, *supra* note 130 (BWS is ineffective and unnecessary to acquit battered women in cases of self-defence); Poulin, *supra* note 127 (BWS should be replaced by the deceased's propensity to violence rule).

[136] This finding is borne out in the results of our case law research, which will be discussed in chapter 3.

[137] Stubbs, *supra* note 52 at 269. See also David M Paciocco, *Getting Away With Murder: The Canadian Criminal Justice System* (Toronto: Irwin Law, 2000) ("[o]ur dependance on psychiatry has torn us from a contextual examination of the facts and invited us to apply its deceptively simple and unscientific paradigms and models" at 311); *Malott* SC, *supra* note 16 (the psychiatric approach taken by BWS should be nuanced by considering a woman's social context). *Malott*'s concurring opinion, the starting point in Canadian criminal law to replacing the BWS framework for a SEF, will be discussed in chapter 2.

[138] See Sheehy, "Developments in Canadian Law", *supra* note 121 (Sheehy analyzed ten reported decisions in which the accused relied on BWS [period researched: 1990–1993]). See also Sheehy, "Women's Law", *supra* note 121 at 7–11. For another broadening of the use of BWS, see Laura Burt, "The Battered Woman Syndrome and the Plea of Self-Defence: Can The Victim and The Accused be Strangers? A Note on *R. v. Eyapaise*" (1993) 27 UBC L Rev 93 (Burt argues that current or former intimate relationship is not necessary to rely on BWS to support a self-defence claim).

duress.[139] This last finding is worth expounding, as it represents a major step forward for victims-accused.

3.2. *Lavallee*'s Application to Claims of Duress and Necessity

As early as 1991, feminist jurist Donna Martinson argues that *Lavallee*'s rulings on reasonableness and imminence should not be limited to self-defence cases. *Lavallee*'s "non-narrow, contextual approach"[140] "opens the door to the dramatic reconstruction of other defences which may have disadvantaged women,"[141] namely provocation,[142] duress,[143] and necessity.[144] Given the circumscribed scope of provocation,[145] our thesis concentrates on claims of duress and necessity.

The broader application of *Lavallee* is echoed by the *Malott*'s concurring opinion. In their concurring reasons, L'Heureux-Dubé and McLachlin JJ. relied on the reasonableness component to broaden *Lavallee*'s application: the admissibility and necessity of expert evidence informing the reasonableness of women's conduct in criminal cases, they explained, are "not limited to instances where a battered woman is pleading self-defence but is potentially relevant to *other situations where the reasonableness is at issue* (e.g. provocation, duress, or necessity)."[146]

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[139] BWS was also used to negate *mens rea*. For a no *mens rea* defence supported by BWS, see e.g. *Lalonde*, *supra* note 34 (fraud); *R v Eagles*, [1991] YJ No 147 (Y Terr Ct) (uttering threats). These cases were widely discussed in scholarly work. See e.g. Poulin, *supra* note 127; Shaffer, "Syndrome Revisited", *supra* note 43; Noonan, "Shifting the Parameters", *supra* note 43; Sheehy, "Developments in Canadian Law", *supra* note 121. The no *mens rea* defence will not be further discussed in our thesis because we concentrate on defences grounded in the conduct expected of a reasonable person.

[140] Martinson et al, *supra* note 125 at para 11.

[141] *Ibid*. See also Sheehy, Stubbs & Tolmie, "Defending Battered Women", *supra* note 129 (*Lavallee* might challenge "the narrow interpretations of defences such as duress, automatism, and necessity" at 391 [footnotes omitted]).

[142] Martinson et al, *supra* note 125 at paras 13–22, 30–5.

[143] *Ibid* at paras 23–6, 36–41.

[144] *Ibid* at paras 27–8, 42–5.

[145] The defence of provocation can solely be raised for a murder charge, and if successful, does not result in an acquittal. See CrC, *supra* note 6 s 232(1).

[146] *Malott* SC, *supra* note 16 at para 36 *in fine* [emphasis added]. For some legal scholars, reasonableness is not the only commonality linking self-defence, duress, and necessity: the notion of moral (or normative) involuntariness is another similarity between self-defence, duress, and necessity. See e.g. Hugues Parent, "La légitime défense en droit pénal canadien : anatomie d'un moyen de défense" (2004) 83:3 R du B can 659 ("[i]ssues du même terreau, celui d'un droit criminel fondé sur l'autonomie de la volonté et la plénitude de l'intelligence, la nécessité, la contrainte et la légitime défense constituent trois versions de la même approche visant à excuser l'individu qui n'avait pas d'autres choix véritable, au moment du crime, que de perpétrer l'acte illégal" at 663–64). According to this school of thought, an action taken under self-defence, duress, and necessity does not result from a veritable choice, which renders the action morally involuntary. It is essential though to

Like in self-defence claims, the objective standard of reasonableness of duress and necessity claims should be assessed contextually. In *Hibbert*,[147] the SCC compared these three defences and reached the same conclusion: "consistency demands that each defence's 'reasonableness' requirement be assessed on the same basis."[148] In fact, scholarly research has revealed that victims-accused claiming duress (subdivision A) and necessity (subdivision B) benefit from *Lavallee*'s contextualization of reasonableness.

A. Duress

Abused women may often be coerced into committing crimes.[149] Their criminal conduct, which must be seen as a symptom of the violence they endure, has attracted feminist legal scholars' attention. Sheehy, for example, asserts that

> [i]f one examine[s] the cases of women charged for failure to protect their children from abuse by their partners and women charged with other offences against the person (…) one would discover women who have been traumatized by violence and who have been coerced in one

distinguish moral involuntariness from moral blamelessness. See *R v Ruzic*, [2001] 1 SCR 687, 153 CCC (3d) 1 [*Ruzic*] ("morally involuntary conduct is not always inherently blameless" at para 41). Under duress or necessity, the conduct is morally involuntary but not morally blameless: the conduct is wrong (morally blamable) but excused because it is morally involuntary. Under self-defence, the conduct is morally blameless and morally involuntary: the conduct is right (morally blameless) because justified by the right of self-preservation, but the conduct is also morally involuntary. For further discussion of the differences and similarities between duress and necessity (excuses) and self-defence (justification), see especially *R v Ryan*, 2013 SCC 3 at paras 18–26 [*Ryan* SC]. See also *Khill*, *supra* note 70 at para 47 *in limine*; *R v Hibbert*, [1995] 2 SCR 973, 90 CCC (3d) 193 [*Hibbert*]. *Contra* Carissima Mathen & Michael Plaxton, "*R. v. Ryan*: Leaving Battered Women to the 'Justification' of Self-defence" (2013) 98 CR (6th) 258 at 258–59 (Mathen and Plaxton question the need to maintain a distinction between justification and excuse, especially given the removal of any reference to justification under section 34 CrC). Moral involuntariness is also inextricably linked to reasonableness, as reasonableness is the minimal threshold for a conduct to be deemed morally involuntary. The principle of moral involuntariness demands that the accused's subjective beliefs be verified by applying the modified objective standard. See e.g. *Ryan* SC ("it would be contrary to the very idea of moral involuntariness to simply accept the accused's subjective belief without requiring that certain external factors be present" at para 52); *Hibbert* at para 57; Martha Shaffer, "Coerced into Crime: Battered Women and the Defence of Duress" (1999) 4 Can Crim L Rev 271 at 327–28 [Shaffer, "Coerced into Crime"].

[147] *Supra* note 146.

[148] *Ibid* at para 60 *in limine*.

[149] See e.g. House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 43-2, No 18 (4 February 2021) (Andrea Silverstone), online (pdf): <www.ourcommons.ca/Content/Committee/432/JUST/Evidence/EV11093829/JUSTEV18-E.PDF> (the executive director of Sagesse Domestic Violence Prevention Society mentioned that she "started [her] career working in a halfway house for women coming out of federal corrections. …[T]he majority of clients who were in the halfway house ended up in conflict with the law because of abusive partners who had coercively controlled them into drug trafficking, prostitution, theft and a whole variety of activities" at 1305).

way or another to refrain from intervening in their partners' violence against others or to become involved in criminal activity.[150]

Confusion has traditionally surrounded the law of duress because two versions of duress coexist: a statutory[151] and common law version.[152] Each version is defined according to its respective criteria, scope, and limitations. After being partially struck down, the statutory version was complemented by the common law duress defence.[153] The law of duress was clarified by the SCC in *Ryan*.[154] Table II, drawn from *Ryan*, illustrates the similarities and differences between statutory and common law duress. More importantly, this table conveys how *Lavallee* should be applied: the requirements in bold are evaluated on the modified objective standard of the reasonable person, i.e. from the stance of a woman who experiences IPV.[155]

Table II: Statutory and Common Law Versions of Duress

	Statutory Defence of Duress	**Common Law Defence of Duress**
Requirements	(1) Threat of death or bodily harm; (2) **Accused believes that the threat will be executed**; (3) Accused is not a party to a conspiracy or criminal association; (4) **No safe avenue of escape**;	(1) Threat of death or bodily harm; (2) **Accused believes that the threat will be executed**; (3) Accused is not a party to a conspiracy or criminal association; (4) **No safe avenue of escape**; (5) Close temporal connection between the threat and its execution; and

[150] Sheehy, "Developments in Canadian Law", *supra* note 121 at 187.
[151] See CrC, *supra* note 6 s 17.
[152] See *Ibid* s 8(3). The coexistence of the codified and common law versions of duress was acknowledged in *R v Paquette*, [1977] 2 SCR 189, 30 CCC (2d) 417 [*Paquette*].
[153] See *Ruzic*, *supra* note 146 at paras 48–55. The immediacy and presence criteria infringe section 7 of the *Charter*, i.e. the principle of fundamental justice that only morally voluntary conduct should attract criminal liability. This infringement is not justified under section 1 of the *Charter*. In *Ruzic*, the SCC replaced the immediacy requirement (a requirement that resembles that of imminence for self-defence) by the common law temporal criterion. In so doing, the SCC preconized a more flexible and inclusive interpretation of the duress defence, like the relaxation of imminence in *Lavallee*. *Contra R v Langlois*, [1993] RJQ 675, 80 CCC (3d) 28 (CA Qc) [*Langlois*] (the Québec Court of Appeal declared section 17 CrC in its entirety unconstitutional and inoperative, and the Court held that the common law version of duress was available to all parties by virtue of section 8(3) CrC).
[154] *Supra* note 146.
[155] The blended or modified objective standard refers to the reasonable person standard contextualized to the accused's relevant experiences, background, and personal characteristics. This contextualized standard is also known as the "reasonable person similarly situated". See *Ryan* SC, *supra* note 146 at paras 47, 50, 53, 60, 64–5, 68, 73. For more details on *Lavallee*'s contextualized reasonableness test, see subdivision 2.1A of this chapter, above.

	(5) **Close temporal connection between the threat and its execution**;[156] and (6) **Proportionality between the threat and the response**.[157]	(6) **Proportionality between the threat and the response**.[158]
Scope[159]	Principals[160]	Parties[161]
Limitations	**Offences excluded**	
	High treason or treason; murder; piracy; attempted murder; sexual assault; sexual assault with a weapon; threats to a third party or causing bodily harm; aggravated sexual assault; forcible abduction; hostage taking; robbery; assault with a weapon or causing bodily harm; aggravated assault; unlawfully causing bodily harm; arson; abduction; and detention of young persons.[162]	Unclear[163]

[156] See *Ruzic*, *supra* note 146 (the test is "whether the threat was effective to overbear the accused's will at the moment of the offence" at para 86). The test is meant to ensure that the conduct is necessary and thus morally involuntary.

[157] See *Ryan* SC, *supra* note 146 at paras 43–54. Moreover, requirements 2, 4, and 5 should be analyzed as a whole. See *Ryan* SC, *supra* note 146 ("the accused cannot reasonably believe that the threat would be carried out if there was a safe avenue of escape and no close temporal connection between the threat and the harm threatened" at para 51).

[158] See *Ibid* at paras 55–80.

[159] The scope of the defence refers to the modes of committing a crime, i.e. the accused's level of involvement in the offence (as principal or as party). See CrC, *supra* note 6 s 21.

[160] See generally *Ibid* s 21(1)(a). See also *Ryan* SC, *supra* note 146 at paras 36, 42, 83; *Paquette*, *supra* note 152 at paras 10–1, 13–4.

[161] See generally CrC, *supra* note 6 s 21(1)(b)–(c), 21(2). See also *Ryan* SC, *supra* note 146 at paras 36, 42, 83; *Paquette*, *supra* note 152 at para 15.

[162] See CrC, *supra* note 6 s 17. The constitutionality of these exclusions was challenged in several instances. See e.g. *R v Willis*, 2016 MBCA 113, leave to appeal to SCC refused, 37428 (4 May 2017) (the exclusion of the offence of murder does not infringe section 7 of the *Charter*); *R v Aravena*, 2015 ONCA 250 at para 86, leave to appeal to SCC refused, 36747 (7 April 2016) (the common law version of duress is available to persons charged as parties to murder; the Court made a relevant *obiter dictum* on the constitutionality of the murder exception to the statutory version of duress, which was not brought up); *Langlois*, *supra* note 153 (the whole text of section 17 CrC, including the list of offences, was declared inoperative); *R v Allen*, 2014 SKQB 402 (the exclusion of the offences of robbery and assault with a weapon violates section 7 of the *Charter* and is not justified under section 1).

[163] See *Ryan* SC, *supra* note 146 ("it is unclear in the Canadian common law of duress whether any offences are excluded" at para 83). The SCC admitted that the juxtaposition of the versions creates a "rather incoherent situation that principals who commit one of the enumerated offences cannot rely on the duress defence while parties to those offences, however, can" (at para 83). This incoherence would likely not arise in Québec given *Langlois*. See *Langlois*, *supra* note 153.

Law professor Vanessa MacDonnell welcomes the extension of *Lavallee* to duress claims, an expansion she describes as a "logical evolution in the law."[164] She contends that "the reason for admitting expert evidence on [BWS] in duress cases is the same as in self-defence cases,"[165] namely the necessity to assist triers of fact in assessing the reasonableness of a woman's conduct.

In the 1990s, the challenges of transposing *Lavallee*'s reasonableness test to duress claims were discussed by Martha Shaffer and Isabel Grant, two legal scholars interested in the legal responses toward violence against women.[166] Both scholars pointed to several hurdles faced by abused women, such as the criteria of a safe avenue of escape, especially in the context of offences committed over an extended period;[167] crimes perpetrated in response to a generalized, even-present fear of further violence;[168] and the difficulties arising from BWS.[169] More significantly, the involvement of third party innocent victims, especially in cases of serious crimes, constitutes a specific hurdle to duress claims.[170] Unlike self-defence, actions taken in duress are not directed against violent partners, which raises the question as to whether the act was necessary to stop the

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[164] Vanessa MacDonnell, "Novel Applications of the Statutory Defence of Duress" (2011) 84 CR (6th) 316 at 316. The article was written before the issuance of *Ryan* SC. Among the "novel aspects" of *R v Ryan*, 2011 NSCA 30 [*Ryan* CA] discussed by MacDonnell, the possibility that the deceased may also be the threatener seems to have been ruled out by the SCC. See *Ryan* SC, *supra* note 146 at para 32. Moreover, the admissibility of BWS in duress claims was not an issue before the SCC, which suggests that MacDonnell's comments on this aspect are still valid. The evidence adduced in *Ryan* will be scrutinized in chapter 3.

[165] MacDonnell, *supra* note 164 at 318. MacDonnell referred to four Canadian duress cases in which *Lavallee* was applied yet not always explicitly named in the decision. See e.g. *Mazerolle*, *supra* note 34.

[166] See Shaffer, "Coerced into Crime", *supra* note 146; Isabel Grant, "Exigent Circumstances", *supra* note 31. Both scholars argue that experiences of abuse (including the dynamics of violence and the dangers of separation) should inform the reasonableness inquiry. Similar arguments (on the relevance of IPV experiences to duress claims) were made in other jurisdictions. See e.g. Beth I Z Boland, "Battered Women Who Act under Duress" (1994) 28:3 New Eng L Rev 603; Meredith Blake, "Coerced into Crime: The Application of Battered Woman Syndrome to the Defense of Duress" (1994) 9 Wis Women's LJ 67; Laurie Kratky Dore, "Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders" (1995) 56:3 Ohio St LJ 665.

[167] The widely held view that women can stop the violence by leaving impedes women's duress claims. See Grant, "Exigent Circumstances", *supra* note 31 at 349–54 (Grant remarked that "the longer the course of the offences, the more likely that the trier of fact will find that the accused had a reasonable means of escape" at 362); Shaffer, "Coerced into Crime", supra note 146 at 317–20.

[168] See Shaffer, "Coerced into Crime", *supra* note 146 at 319–22.

[169] See Grant, "Exigent Circumstances", *supra* note 31 at 354–59 (BWS' narrowness, which precludes several women from having their experiences of violence recognized, "fits more clearly into a conception of duress based on the accused's will being 'over-borne' rather than a construction of the defence which portrays the accused's response as reasonable given her terrible circumstances" at 354).

[170] See *Ibid* at 359–62.

abuse:[171] "[i]n addition to the predictable 'why [didn]'t she leave?' question, women may now also [face] the 'why didn't she kill her battered instead?' inquiry."[172] In light of these impediments, Grant concludes that duress claims are more difficult to prove than self-defence claims,[173] while Shaffer advocates for reforming the codified law of duress.[174]

B. Necessity

Perka v R[175] and *Latimer*[176] are the leading cases on the common law defence of necessity.[177] For this defence to be successful, there must be (1) a clear and imminent risk; (2) no reasonable legal alternative; and (3) proportionality between the harm inflicted and the harm avoided. The first and second requirement are measured according to the modified objective standard.[178] Like duress claims, logic and consistency require that these criteria be evaluated following *Lavallee*'s reasonableness test. However, unlike duress claims, proportionality is assessed on a purely objective standard.[179]

Little academic work discusses the impact of *Lavallee* on necessity claims. Professor Christine Boyle argues that *Lavallee* challenges the requirement of imminence.[180] *Lalonde,*[181] the

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[171] See *Ibid* at 365.
[172] *Ibid* at 369.
[173] *Ibid* (Grant analyzed Canadian, American, Australian, and English case law and observed that "with few exceptions, battered women's duress claims have been rejected by the court" at 307). The Canadian cases reviewed by Grant include *Lalonde*, *supra* note 34; *R v Fournier*, [1991] NWTR 367, 15 WCB (2d) 314 (NWT SC) (forgery); *R v Bernardo*, [1995] OJ No 2249, 42 CR (4th) 96 (Ont Ct J (Gen Div)) (murder); *R v Bernardo*, [1995] OJ No 1380, 42 CR (4th) 85 (Ont Ct J (Gen Div)) (murder); and *R v Robins*, [1982] CA 143, 66 CCC (2d) 550 (CA Qc) (kidnapping).
[174] This reform, Shaffer specifies, would benefit everybody, not just women. A reformed approach to duress would entail, among other things, that duress claims might be asserted to all offences, including murder. Although the statutory version of duress was modified in 2001 in *Ruzic*, the list of excluded offences remains unchanged.
[175] [1984] 2 SCR 232, 14 CCC (3d) 385.
[176] *Supra*, note 73 at paras 26–42.
[177] See CrC, *supra* note 6 s 8 (3).
[178] See *Latimer*, *supra* note 73 at paras 28–32. But see *Ryan* SC, *supra* note 146 at para 74 (the SCC elaborated on why proportionality in duress claims is assessed on a modified objective standard, whereas the very same requirement in necessity claims is assessed on a purely objective standard).
[179] See *Ryan* SC, *supra* note 146 at 74.
[180] See Boyle, "Syndrome and Self-Defence", *supra* note 71 (the case demonstrates that "substantive doctrine may be subjected to criticism for failing to be responsive to fact patterns more typically faced by women than men" at 178). The imminence requirement, implicit in the former version of self-defence and explicit in the statutory version of duress, was either relaxed (in *Lavallee* for self-defence) or declared unconstitutional (in *Ruzic* for duress). For self-defence, see subdivision 2.1A of this chapter, above. For duress, see subdivision 3.2A of this chapter, above.
[181] *Supra* note 34.

first Canadian necessity case relying on *Lavallee*, was analyzed by legal scholar Sheila Noonan.[182] This case, she signals, confirms that "women's criminality cannot properly be situated or understood other than against the backdrop of their abusive histories and relationships."[183]

Finally, scholars interested in the impact of *Lavallee* have researched its influence on the fate of women like Lavallee's who defended themselves but were charged with homicide.

3.3. Self-Defence Homicide Cases

In 1995, in light of *Lavallee*'s "non-discriminatory interpretation of the law of self-defence,"[184] Justice Ratushny was appointed to review cases of women sentenced for homicides in circumstances in which self-defence was apparent. When appropriate, Justice Ratushny was to recommend the granting of the royal prerogative of mercy.[185] The outcomes of this review were extremely disappointing: among the 98 cases reviewed, only seven women received a recommendation for relief, and no women were released from prison.[186]

Sheehy observed that BWS evidence was used in sentencing women charged for killing or injuring their partners (as a mitigating factor), yet in these cases self-defence was arguable and could have warranted acquittals.[187] Similarly, in 1997, Shaffer noted that *Lavallee* "does not appear to have led to a dramatic increase in successful self-defence claims by women."[188] This observation

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[182] See Sheila Noonan, "*Lalonde*: Evaluating the Relevance of Bws Evidence" (1995) 37 CR (4th) 110.
[183] *Ibid* at 116.
[184] Elizabeth Sheehy, "Review of the Self-Defence Review" (2000) 12:1 Can J Women & L 197 at 198 [Sheehy, "Self-Defence Review"].
[185] Justice Ratushny was also appointed, among other things, to make recommendations for possible legislative modifications to the law of self-defence. See Ratushny, *supra* note 80 at 11.
[186] For a complete discussion on the Judge Ratushny's review, see Sheehy, "Self-Defence Review", *supra* note 18; Sylvie Frigon & Louise Viau, "Les femmes condamnées pour homicide et l'Examen de la légitime défense (Rapport Ratushny) : portée juridique et sociale" (2000) 31:1 Criminologie 97. See also Noonan, "Strategies of Survival", *supra* note 50 (Noonan wrote this article before Ratushny J. was appointed to conduct an *en bloc* review and discussed strategies to free sentenced battered women who killed in self-defence).
[187] See Sheehy, "Developments in Canadian Law", *supra* note 121 ("these are not the results that a generous reading of *Lavallee* would produce" at 179); Sheehy, "Women's Law", *supra* note 121 at 11–6.
[188] Shaffer, "Syndrome Revisited", *supra* note 43 at 17 (among the 16 cases of women charged with murder or manslaughter of a violent partner, 11 were found guilty of manslaughter, nine resulting from guilty pleas). See also Sheehy, "Women's Law", *supra* note 121 (Sheehy analyzed 13 reported cases relying on *Lavallee* and observed that "not a single woman has been found not guilty of homicide in reliance upon *Lavallee*, and that *Lavallee* has not produced the acquittals it should" at 7 [period researched: 1990–1994]). But see *R c Vaillancourt*, [1999] RJQ 652, JQ no 571 (CA Qc) (the Court of Appeal acquitted Micheline Vaillancourt because the trial judge erred in failing to instruct the jury, in light of *Lavallee*, that the reasonable person is a woman who experiences IPV).

raises the question of whether *Lavallee* has contributed to fairer results for battered women charged with homicide. Sheehy, Stubbs and legal scholar Julia Tolmie observed that many battered women are convicted for manslaughter, a phenomenon due to the high rate of guilty pleas for manslaughter.[189] These pleas raise "grave concerns about the integrity of a justice system in which the prosecution appears to be overcharging and then accepting guilty pleas in circumstances where there is reasonable doubt as to the defendant's guilt."[190] The authors condemn the prosecutorial practice of pursuing murder charges, which exert overwhelming pressure on victims-accused: facing a mandatory sentence of life imprisonment, many women do not want the run the risk of receiving such sentence and plead guilty to manslaughter even if self-defence is debatable.[191]

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Despite the alarming rate of guilty pleas for manslaughter and BWS' perverse effects, *Lavallee* has undoubtfully promoted a more nuanced understanding of blame. In instructing lower courts to consider a woman's experience of IPV in assessing the reasonableness of her conduct, the case has marked a new era, one of judicial sensitivity toward

[189] See Sheehy, "Lessons from the Transcripts", *supra* note 15 (Sheehy analyzed 91 cases of abused women charged for killing their partners in which self-defence was arguable and observed that out of the 56 women who were convicted of manslaughter, 49 pleaded guilty [period researched: 1990–2005]). See also the summary chart of her book (in appendix) (at 320–36). Sheehy's results are consistent with research conducted in 2012. See Elizabeth Sheehy, Julie Stubbs & Julia Tolmie, "Battered women charged with homicide in Australia, Canada and New Zealand: How do they fare?" (2012) 45:3 Austl & NZ J Crim 383 (72% of the 36 Canadian cases were murder charges and 61% of these 36 cases resulted in convictions for manslaughter, yet in most cases, self-defence could have been argued [period researched: 2000–2010]); Elizabeth Sheehy, Julie Stubbs & Julia Tolmie, "Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand" (2012) 34:3 Sydney L Rev 467 [Sheehy, Stubbs & Tolmie, "Comparative Analysis"].

[190] Sheehy, Stubbs & Tolmie, "Comparative Analysis", *supra* note 189 at 491. See also Sheehy, Stubbs & Tolmie, "How do They Fare?" (Sheehy, Stubbs and Tolmie observed, among the Canadian cases, that "where the prosecution pressed manslaughter rather than murder charges, 100% of women who went to trial were acquitted" at 391); Sheehy "Lessons from the Transcripts", *supra* note 15 at 199–243 (Sheehy discusses the ethical and moral conflict Crown prosecutors face in prosecuting victims-accused); Ratushny, *supra* note 80 at 164–83 (Ratushny J. made interesting recommendations, such as a mandatory pre-charge screening process in homicides cases as well as prosecutorial guidelines related to the decision to prosecute and the plea discussions process).

[191] In pleading guilty to manslaughter, a woman avoids life imprisonment and may benefit from two mitigating factors (evidence that she suffered BWS and her guilty plea), lowering the severity of the sentence. See Sheehy, "Lessons from the Transcripts", *supra* note 15 ("plea bargains were leveraged from eight of the seventeen women in [her] study charged with first-degree murder and from thirty-one of those forty-nine women charged with second-degree murder" at 118). For a full discussion on the implications of mandatory minimum sentences for battered women charged with homicide, see Elizabeth Sheehy, "Battered Women and Mandatory Minimum Sentences" (2001) 39:2 Osgoode Hall LJ 529.

victims-accused.[192] Lavallee was seen as a primary victim who had victimized, a status that has loosened the "border between the categories of perpetrator and victim."[193] Since *Lavallee*, victims-accused—those who fit BWS— have their abusive relationships considered relevant in their trials.

We join our voice to that of several scholars who believe that *Lavallee*'s potential for justice is much greater than the introduction of BWS in criminal trials.[194] *Malott*'s concurring opinion, discussed in the next chapter, commends women's social context as relevant to assessing the reasonableness of their conduct. Chapter 2 is part of the ongoing academic conversation on the need to replace the BWS framework. Several academics, eager to address the criticism levelled against BWS, have developed alternative frameworks to convey, in criminal trials, the IPV phenomenon and its effects on women. Chapter 2 concentrates on one of these frameworks—the SEF—and advocates for implementing this framework to assess victims-accused's claims of self-defence, duress, and necessity.

[192] "Judicial sensitivity" and "legal sensitivity" are terms derived from the literature. See e.g. Berger, *supra* note 11 (the term "legal insensitivity to psychopathy" [at 130] refers to the exclusion of psychopathic disorders from the realm of the doctrine of mental disorder). Berger concludes "that the system is insensitive to [mental] conditions" like FASD, Autism Spectrum Disorder, Asperger's Syndrome, and Psychopathy (at 130–31). See also Randall, *supra* note 131 (*Lavallee* constitutes a "gender sensitive reading of self-defence in relation to murder charges and an expanded legal understanding of the circumstances surrounding this particular form of spousal homicide" at 119); Frigon & Viau, *supra* note 186 (commenting on the number of cases reviewed by judge Ratushny, Frigon and Viau asked "si les juges avaient été plus sensibles à la réalité des femmes et avaient appliqué un standard de 'l'homme raisonable' dont elles n'auraient pas été exclues, combien de détenues [auraient] été acquittées?" at 107 [emphasis added]).

[193] Berger, *supra* note 11 at 133.

[194] *Contra* Chantale Boivin, Sylvie Bombardier & Sabrina Girard, "La légitime défense et le syndrome de la femme battue : son évolution depuis l'arrêt Lavallée" (2000) 14 RJEUL 161 (BWS has several negative implications, to the point that "on en vient à se demander si l'affaire Lavallée est vraiment une bonne chose tant pour les femmes battues que pour le droit criminel canadien" at 174 [emphasis added]).

CHAPTER 2

THE SOCIAL EVIDENCE FRAMEWORK TO ASSESS VICTIMS-ACCUSED'S CLAIMS OF SELF-DEFENCE, DURESS, AND NECESSITY IN CANADA

We need, among other things, theoretical frameworks of violence in women's lives which are more focused on women's strengths, resilience, and resistance as a way to correct the pathologizing and stigmatizing discourses which construct women as damaged, helpless, and irrational victims, as in the "battered woman syndrome."[195]

As explained in chapter 1, many aspects of the BWS framework used in *Lavallee* have been criticized.[196] Serious concerns revolve around its effectiveness as a legal defence strategy. Some critics center on the ways in which BWS pathologizes women's responses, a pathologization that is theoretically irreconcilable with claims of reasonableness. Critics also point to the difficulty of applying BWS to diversified victimization trajectories.[197] For example, Noonan expresses concerns with the submissive behavior that women relying on BWS are expected to display, remarking that "[j]urisprudence and commentary in the United States suggest that incarceration is likely in circumstances in which a woman leaves, fights back, attacks the abuser when he is asleep, seeks outside assistance in ending the violence, or otherwise fails to display characteristically passive behaviour."[198] Thus, women who do not fall within the one-size-fits-all mold of BWS demonstrably face credibility issues and might have their claims dismissed. Sheehy challenges the too-narrow understanding of women's criminal responsibility (i.e. the limited impact of BWS on women's allegations of defensive force).[199] The realities of IPV in women's lives, she explains, should be fully acknowledged by State institutions (e.g. our criminal justice system), a task that could be accomplished by "enlarging [our] understanding of the forms and consequences"[200] of IPV. This chapter contributes to such an understanding by examining the theoretical possibility of revisiting and broadening *Lavallee*'s framework via a more nuanced approach, whereby women's narratives of violence are juxtaposed with social science evidence on

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[195] Randall, *supra* note 131 at 154.
[196] Our thesis focuses on concerns about whether BWS improves access to justice for victims-accused.
[197] For a discussion of these critiques, see division 3.1 of chapter 1, above.
[198] Noonan, "Strategies of Survival", *supra* note 50 at 254 [footnotes omitted].
[199] See Sheehy, "Developments in Canadian Law", *supra* note 121 (Sheehy observed that of 10 reported cases, women pled guilty and relied on BWS as a mitigating factor in 8 cases, yet in 6 of these 8 cases, women had solid grounds to argue self-defence).
[200] *Ibid* at 186.

IPV. Chapter 3 then investigates implementing such an approach in case law and demonstrates the merits of this approach by analyzing court decisions.

Part 1 of this chapter advocates for using a SEF, a framework in which evidence on women's experiences of IPV (division 1.1) is complemented with social science evidence on IPV (division 1.2). A SEF differs from the BWS framework applied in *Lavallee* in which Lavallee's experience of IPV (experiential evidence) was adduced and relied upon to introduce evidence on BWS. In relying on BWS evidence, Lavallee's experience was barely situated in a broader social context of violence against women (social science evidence). The use of a SEF in victims-accused's trials is grounded in *Malott*'s concurring opinion, a 1998 SCC decision, and the work of Rebecca Bradfield, an Australian legal scholar.[201] Bradfield's work complements *Malott*'s concurring opinion in providing a comprehensive evidentiary framework that redresses three common and erroneous assumptions about IPV. The SEF developed by Bradfield is thoroughly addressed in division 1.2 of this chapter. Part 2 of this chapter concentrates on the legal relevance of the SEF, connecting its components with the legal ingredients of self-defence, duress, and necessity. This part argues that such a framework might ensure fairer trials to victims-accused in preventing stereotypical assumptions of IPV (assumptions that damage the accused's credibility) while reaching the evidentiary threshold (the evidential burden) of their defence. Overall, in this chapter, we contribute to the academic conversation on the defence of victims-accused and the judicial construction of IPV by

(i) incorporating another dimension of women's resilience into Bradfield's framework, namely the notion of violent resistance;
(ii) broadening the SEF, developed for self-defence claims, to claims of duress and necessity; and
(i) transposing this framework, which is currently applicable in Australia, to Canadian criminal law.

[201] See Rebecca Bradfield, "Understanding the Battered Woman Who Kills her Violent Partner: The Admissibility of Expert Evidence of Domestic Violence in Australia" (2002) 9:2 Psychiatry Psychol & L 177.

1. WOMEN'S EXPERIENCES COMPLEMENTED BY SOCIAL SCIENCE EVIDENCE

Generally speaking, a SEF is a conceptual model whereby "research results are used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case."[202] Canadian courts have increasingly applied a SEF in diverse contexts and at various stages of the criminal process. Such a framework has been applied, for instance, in cases of *Charter* 9[203] infringements to understand the experiences of racialized communities with police;[204] in a claim of provocation to adduce evidence on religious and cultural beliefs held by members of the Muslim community;[205] and, most commonly, in sentencing cases to understand the systemic or background factors contributing to Aboriginal offenders' criminality.[206] In all these instances, a SEF operates similarly: offender's narratives are combined with knowledge garnered from social sciences that "provide[s] the necessary *context* for understanding and evaluating the case-specific [evidence]."[207]

For victims-accused, the use of a SEF to assess victims' criminal responsibility is rooted in *Malott*'s concurrent opinion. Margaret Ann Malott, who shot to death her former partner and

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[202] Laurens Walker & John Monahan, "Social Frameworks: A New Use of Social Science in Law" (1987) 73:3 Va L Rev 559 at 559. See also *R v Spence*, 2005 SCC 71 ("'[s]ocial fact' evidence has been defined as social science research that is used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case" at para 57).

[203] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[204] See *R v Lee*, 2019 SCC 34 [*Le*]. See also *Luamba c Procureur général du Québec*, 2022 QCCS 3866 (evidence on racial profiling in the context of traffic stops adduced to determine whether section 636 of the *Highway Safety Code* infringes sections 7, 9, and 15(1) of the *Charter*). See generally Benjamin Perryman, "*Adducing Social Science Evidence in Constitutional Cases*" (2018) Queen's LJ 121 (social science evidence is increasingly used in *Charter* analyses made by the SCC).

[205] See e.g. *R v Humaid*, [2006] OJ No 1507, 37 CR (6th) 347 (ONCA) [*Humaid*]. See generally Marie-Pier Robert, *La défense culturelle : un moyen de défense non souhaitable en droit pénal canadien* (Cowansville : Éditions Yvon Blais, 2004).

[206] See *R v Ipelee*, 2012 SCC 13 [*Ipelee*]; *R v Gladue*, [1999] 1 SCR 688, 133 CCC (3d) 385. For an application of the Gladue framework in sentencing a victim-accused, see e.g. *R v Kahypeasewat*, 2006 SKPC 79. Social science evidence was also used to impose fit sentences to Black offenders. See e.g. *R v Morris*, 2021 ONCA 680 ("systemic and background factors, including those attributable to anti-Black racism, may be relevant when sentencing Black offenders" at para 92); *R v Jackson*, 2018 ONSC 2527.

[207] *Ipelee*, *supra* note 206 at para 60 [emphasis added]. For example, under the Gladue framework, social science evidence is led on the history of colonialism (and its symptoms). This evidence, which situates the offender's criminal conduct within a broader social context that contributes to the offender's criminality, allows sentencing judges to gauge the offender's moral blameworthiness and fulfill their duties under section 718.2e) CrC. See *Ipelee*, *supra* note 206 (colonialism is "translated into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples" at para 60).

stabbed his girlfriend in 1991, adduced expert evidence on BWS in support of her claims of self-defence, intoxication, and provocation. She was found guilty of second-degree murder (of her former partner) and attempted murder (of her former partner's girlfriend). Her appeal on both convictions was dismissed by the Ontario Court of Appeal.[208] Malott then appealed her second-degree murder conviction to the SCC, claiming the insufficiency of the trial judge's charge to the jury on BWS and self-defence. The SCC dismissed the appeal, reiterating the legal relevance of BWS. The significance of *Malott*, however, lies in its concurrent opinion. L'Heureux-Dubé and McLachlin JJ. acknowledged what Wilson J. in *Lavallee* briefly referred to:[209] a woman's social context informs the reasonableness of her conduct. Without dismissing the legal relevance of BWS, L'Heureux-Dubé and McLachlin JJ. acknowledged its adverse effects and affirmed that "[t]here are other elements of a *woman's social context* which help to explain her inability to leave her abuser, and which do not focus on [BWS's stereotypical] characteristics," such as a "woman's need to protect 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."[210] *Malott*'s concurring reasoning has not made *Lavallee* old law but has pushed its framework forward. Indeed, the concurring judges did not explicitly reject BWS evidence but urged lower courts to understand women experiences of IPV as both individualized and "shared with other women, within the context of a society and a legal system which has historically undervalued women's experiences."[211]

In cases of victims-accused, a SEF consists in introducing women's unique experiences of IPV (division 1.1) and complementing their narratives with social science evidence on IPV (division 1.2). A SEF differs from the BWS framework, yet these frameworks serve very similar purposes: like the BWS framework, a SEF seeks to contextualize presumably criminal conduct and to "extend traditional legal doctrine to the kinds of life experiences likely to be faced by

[208] *R v Malott*, [1996] 30 OR (3d) 609, OJ No 3511 (ONCA).
[209] See *Lavallee*, *supra* note 12 (although she accepted that cognitive impairments might explain women's reluctance to end violent relationships, Wilson J. briefly indicated that contextual factors may also impact women's ability to leave; among these, she named "a lack of job skills, the presence of children to care for, fear of retaliation by the man" at 887 line e to f).
[210] *Malott* SC, *supra* note 16 at para 42.
[211] *Ibid* at para 43.

women."[212] However, the central questions addressed by these frameworks differ significantly: a SEF "is not so much directed at the questions 'was the accused a battered woman?' and 'did she suffer from learned helplessness?' but rather 'what was the nature of the threat she faced?' and 'what lawful protection did she realistically have available to her?'"[213]

1.1. Women's Experiences of Intimate Partner Violence: Experiential Evidence

A SEF, just like the BWS framework, builds on a woman's narrative, that is, her experience of IPV (experiential evidence). To convey the dangerousness of IPV and the lack of viable options to end it, experiential evidence should cover

(i) the nature of the violence (that is, how violence manifests itself in the relationship);
(ii) its extent (that is, how pervasive the violence is in the accused's life);
(iii) its cumulative effect, as women do not "respon[d] to individual incidents of abuse (that is, the immediate events surrounding their offending)"[214] but to their cumulative experiences of victimization; and
(iv) the coping mechanisms employed by the accused (that is, how she coped with the violence) and their outcomes (that is, how these coping strategies impact the violence inflicted upon her).

Experiential evidence pertains, first and foremost, to the subjective component of a defence (i.e. the accused's state of mind, that is, her apprehension of danger and her belief in the lack of options).[215] It also accounts for the diversity of IPV experiences. Women experience IPV differently, as "each case will involve an individualized package of behaviors developed through

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[212] Julie Stubbs & Julia Tolmie, "Falling Short of the Challenge: A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome" (1999) 23:3 Melb U L Rev 709 at 712 (comparison of Australian, Canadian, and American use of BWS).
[213] *Ibid* at 712.
[214] Tolmie et al, *supra* note 30 at 191.
[215] Canadian criminal law requires justice to be individualized: criminal defences with a subjective component (e.g. provocation, self-defence, duress, necessity) require evidence on the accused's state of mind (their personal beliefs, apprehensions, and perceptions). See e.g. *Humaid*, *supra* note 205 (Humaid was indicted of first-degree murder of his wife and claimed he acted in provocation. He introduced expert evidence on the gravity of women's infidelity under Muslims' code of honour. The Court of Appeal found no error in the trial judge's instructions to the jury, concluding that "the expert evidence could not assist this appellant [since] [t]here was *no evidence that the appellant shared the religious and cultural beliefs attributed by [the expert] Dr. Ayoub to Muslims in general*. It is not enough to lead evidence that Muslims, or any other group, have certain religious or cultural beliefs that could affect the gravity of the provocative conduct in issue and that the accused is a member of that group" at para 82 [emphasis added]).

a process of trial and error for the particular victim by the person who knows her most intimately. These behaviors may be subtle and readily understood only by the victim and perpetrator as, for example, when they are designed to exploit fears that are personal to the individual victim."[216] Likewise, the cumulative effect of the violence is "specific to [each woman] and may be contingent on a mix of external influences and personal vulnerabilities."[217]

Moreover, experiential evidence can—theoretically—meet the objective component of the defence (i.e. the reasonableness of the accused's conduct). Justice Julianne Parfett and legal scholar Monique Poulin argue that the accused's experience of IPV in itself suffices to establish the reasonableness of her conduct.[218] Both scholars rely on the Scopelliti rule,[219] commonly known as the propensity to violence rule, which provides that in self-defence claims, evidence on the victim's past use of violence is admissible.[220] Past violence both known and unknown to the accused is relevant: past violence unknown to the accused enhances the credibility of her claim of being abused, whereas past violence known to her informs the reasonableness of her apprehension of danger.[221] For Parfett, Lavallee did not need BWS evidence and could have substantiated her self-defence claim by relying entirely on her past experience of IPV: the abuse she suffered and her resulting coping mechanisms enabled her to foresee the violence and to assess how limited her options to deal with the violence were. Parfett's argument is theoretically valid; however, in practice, as Poulin observed, the propensity to violence rule is seldom applied in support of victims-accused's claims. In fact, although the propensity to violence rule is often successfully applied in non-intimate contexts, Poulin was only able to identify one case of victim-accused, *R c*

[216] Julia R Tolmie, "Coercive control: To criminalize or not to criminalize?" (2018) 18:1 Criminology & Crim Just 50 at 54.
[217] *Ibid*.
[218] See Parfett, *supra* note 130; Poulin, *supra* note 127.
[219] See *R v Scopelitti*, [1981] 63 CCC (2d) 481, 34 OR (2d) 524 (ONCA) [*Scopelitti*]. The Scopelliti rule was endorsed by the SCC in *Pétel*, *supra* note 68 (Colette Pétel claimed self-defence in a different context: she protected herself and her daughter against her daughter's intimate partner, a drug trafficker). The *Scopelliti* rule was codified in 2012 under section 34(2)(f) CrC, which provides that the history of abuse is legally relevant in assessing whether the accused acted reasonably.
[220] Note that in applying the Scopelitti rule to a victim-accused's self-defence claim, "victim" refers to the main aggressor. The same comment applies to a victim-accused's claim of duress or necessity.
[221] See *Scopelitti*, *supra* note 219 ("evidence of previous acts of violence by the deceased, not known to the accused, is not relevant to show the reasonableness of the accused's apprehension of an impending attack (…) [yet] [it] is admissible to show the probability of the deceased having been the aggressor and to support the accused's evidence that he was attacked by the deceased" at 492).

Lafleur,[222] in which evidence of past abuse replaced the BWS framework. Thus, she argues, BWS puts an extra burden on abused women to have their experiences of IPV considered relevant—a fact that leads Poulin to qualify BWS as a guardianship for abused women.[223]

Bradfield, though, differently conceives the role of experiential evidence. She opines that adducing evidence on the accused's experience of IPV is only a first step toward implementing the SEF, which juxtaposes experiential evidence on IPV with social science evidence on IPV. Experiential evidence is first introduced to fulfill the subjective component of a defence and set the factual foundations for introducing social science evidence, which, in turn, enables fact finders to examine the accused's conduct through a social lens. Indeed, Bradfield argues,

> [a]lthough a woman must be able to convey the continuum of abuse, operating against this construction is the fact that domestic violence is generally viewed in the community and at trial episodically as the product of "situational" factors. (…) [Triers of fact might need broader knowledge on power dynamics to] draw together the disparate accounts provided by various witnesses about isolated incidents of violence into a cohesive account of constant and persistent danger.[224]

Just as a woman's apprehension of danger should be complemented by social science evidence on IPV, so too should a woman's belief in the lack of alternatives because even if she explains the reasons why she did not leave (experiential evidence), "the 'common sense' of the jury might lead them to think that if she had left on this occasion, she would be safe."[225] To counter these common sense assumptions, her account needs to be complemented by broader knowledge on IPV that sheds light on "the 'external' realities for women who leave."[226] Broader social knowledge on IPV (social science evidence) thus comes into play as a second step.

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[222] [1996] JQ no 1145, 50 CR (4th) 386 (CS Qc) (Nicole Lafleur only relied on evidence on past abuse to meet the air of reality test of self-defence).
[223] See Poulin, *supra* note 127 (unlike *Pétel*, in which Pétel did not adduce BWS evidence in support of her self-defence claim, "l'utilisation du syndrome de la femme battue… démontr[e] l'espèce de tutelle qu'on impose aux femmes vivant en milieu conjugal" : "l'existence d'un lien conjugal entre l'accusée et l'agresseur … impose le fardeau de répondre aux critères d'un diagnostic qui assimile ces femmes à des personnes dérangées mentalement" at 94).
[224] Bradfield, *supra* note 201 at 184.
[225] *Ibid* at 185.
[226] *Ibid*.

1.2. Social Science Evidence on Intimate Partner Violence

> *[A social evidentiary framework] is intended to convey the objectively dangerous nature of serious domestic violence and the myriad of real-life factors that operate to assist a man in entrapping a victim of domestic violence, including the many obstacles to obtaining help.*[227]

Over the last four decades, alternative theories have emerged to understand IPV and its effect on women. Of these theories, the three most common are BWS, coercive control theory, and SEF.[228] BWS has been widely criticized since its judicial acceptance in *Lavallee*,[229] and the coercive control theory[230] has gained awareness in Canada in the last decade.[231] Little attention, however, has been paid to the relevance of social science evidence in victims-accused's trials in Canada. Addressing this critical oversight, the ensuing discussion is devoted to the SEF developed by Bradfield to assess self-defence claims made by abused women charged with homicide.

Bradfield's work seeks to counter the prominent critiques of BWS, namely its narrowness (excluding women who do not fit the victimization model of BWS) and its pathologization effect (casting women as ill and irrational). Bradfield's three-pronged SEF conceives IPV as a pattern of control rather than a series of isolated incidents (branch 1); depicts women as resilient actors whose options are shaped by a broad range of contextual factors (branch 2); and juxtaposes the experiences of IPV with other systems of oppression (branch 3). The SEF, we argue, promotes an understanding of IPV that is grounded in victims' lived experiences, allowing for a more accurate and nuanced understanding of their criminal responsibility. The three branches are meant to correct three common errors in the fact-finding process of women's trials. These errors, Bradfield explains, stem from central misconceptions about IPV regarding "the *nature* of domestic violence, the *response patterns* of women in violent relationships, and the *cultural or racial context* of the accused."[232] Bradfield's work is rooted in *Malott*'s concurring opinion (social

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[227] Sheehy, Stubbs & Tolmie, "Securing Fair Outcomes", *supra* note 52 at 693.
[228] See *Ibid* at 691–96. See also Sheehy, "Lessons from the Transcripts", *supra* note 15 at 161–98 (in chapter 5, Sheehy discusses a form of expert evidence, quite rare, called the multiple, serialized battering, a term that captures various and cumulative experiences of IPV undergone by teen mothers).
[229] For a discussion on the literature on BWS, see division 3.1 of chapter 1.
[230] See Stark, "Re-Presenting Woman Battering", *supra* note 21; Stark, *Coercive Control*, *supra* note 21.
[231] See Elizabeth Sheehy, "Expert Evidence on Coercive Control in Support of Self-Defence: The Trial of Teresa Craig" (2018) 18:1 Criminology & Crim Justice 100 [Sheehy, "Coercive Control"]. See also Sheehy, "Lessons from the Transcripts", *supra* note 15 at 234–37.
[232] Bradfield, *supra* note 201 at 180 [emphasis added].

context is relevant to the inquiry into reasonableness)[233] and arises from widespread consensus among scholarly work on IPV, such as Stark's conceptualization of IPV, the "Power and Control Wheel," Johnson's typology on intimate violence, and the notion of "social entrapment."[234]

A. Conceptualization of Intimate Partner Violence as a Pattern of Control (Branch 1)

IPV cannot be understood as a series of isolated incidents detached from the overall pattern of power and control within which the violence is situated.[235]

Although BWS and the SEF converge in recognizing the relevance of past abuse in women's trials, how past abuse is translated significantly differs. Under the BWS framework, women's apprehension of danger is made reasonable because of the cyclical nature of violence (which allows women to foresee the aggression), whereas the SEF redefines IPV as a pattern control (where women are exposed to ongoing danger).[236]

The first branch of Bradfield's SEF embraces a broader and more realistic understanding of IPV. By conceptualizing IPV as a pattern of controlling behaviors, the SEF aims to resolve the massive disconnect between IPV as it is inflicted upon women and IPV as it is conceptualized under the CrC. On the one hand, IPV is experienced as a pattern of repeated behaviors taking place over time.[237] On the other hand, IPV is not recognized as an offence *per se* under the CrC. Rather, a broad range of crimes, when committed directly or indirectly against the offender's intimate partner,[238] are labelled as intimate violence. IPV is thus prosecuted as single acts rather than a

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[233] Bradfield explicitly mentions *Malott*'s concurring opinion. See *Ibid* at 187.

[234] Social entrapment, a theory that resembles the coercive control theory, was developed to understand women's entrapment in abusive relationships. See Tolmie et al, *supra* note 30.

[235] Bradfield, *supra* note 201 at 178.

[236] See *Ibid* (the construction of IPV as discrete incidents is closely related to the requirement of imminence: "[i]f domestic violence is viewed episodically, then in non-confrontational situations, there is no imminent threat" at 184). This comment is no less accurate in Canadian criminal law, where imminence is relevant to claims of self-defence, duress, and necessity: imminence is a factor, among others, to assess reasonableness in self-defence claims; the law of duress requires a close temporal connection between the danger and the response; and the law of necessity requires a clear and imminent peril.

[237] See Alafair Burke, "Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization" (2007) 75:3 Geo Wash L Rev 552 at 566 (Burke discusses the gap between the legal understanding of IPV and the lived experiences of IPV).

[238] Indeed, violence can be inflicted directly upon the victim (e.g. assault) or indirectly (e.g. destroy the victim's property, hurt her animal). See e.g. Directeur des poursuites criminelles et pénales, *VIO-1 : Violence conjugale* (2021), online (pdf): <www.dpcp.gouv.qc.ca/ressources/pdf/envoi/VIO-1.pdf> [DPCP, *VIO-1*] ("[l]'expression 'violence conjugale' désigne toute forme de violence … contre un partenaire intime au sens de l'article 2 C.cr. … ou encore, contre les proches, les biens ou les animaux de compagnie de ce partenaire. Elle vise également les cas où le partenaire intime est la cible d'une infraction criminelle de la part du contrevenant, même s'il n'en

course of conduct, which inevitably shapes how it is constructed in criminal trials and understood by criminal justice actors. Its construction as episodes of violence triggered by external factors (e.g. financial pressure and consumption of alcohol)[239] constitutes an "incident-based approach"[240] that offers only a fragmented[241] and compartmentalized[242] understanding of IPV. Consequently, this approach provides "limited room to introduce an understanding of the complexity of the dynamic in court."[243]

For victims-accused, this incident-based model is especially problematic, as it entails a "close temporal focus"[244] on the circumstances preceding the criminal act. Although *Lavallee* has broadened this temporal focus in accepting the relevance of past abuse to the reasonableness inquiry, the BWS framework reinforces the episodical construction of IPV. Indeed, BWS supposes that IPV follows a three-stage cycle whereby violence occurs during a specific stage (the battering episode),[245] thereby framing IPV as episodes of violence.

The first branch of Bradfield's SEF significantly overlaps with Stark's conceptualization of IPV as coercive control, a core of insidious[246] and controlling tactics that undermine women's autonomy, liberty, and personhood. Stark describes coercive control as "the emerging strategy of

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est pas la victime directe (ex. : infraction commise à l'égard du nouveau conjoint de l'ancienne épouse du contrevenant)" at para 4).

[239] See Bradfield, *supra* note 201 at 183 (these external triggers mask the veritable cause of IPV [i.e. the man's desire to dominate his partner] and reinforce the episodical construction of IPV).

[240] Office of the Federal Ombudsman for Victims of Crime, *Understanding Coercive Control in the Context of Intimate Partner Violence in Canada: How to Address the Issue through the Criminal Justice System?*, by Carmen Gill & Mary Aspinall (New Brunswick: UNB Fredericton, April 2020) at 32, 35, 37, online (pdf): <www.victimsfirst.gc.ca/res/cor/UCC-CCC/Research%20Paper%20on%20Coercive%20Control%20-%20April%2020.pdf>.

[241] See Bradfield, *supra* note 201 at 178.

[242] See *Ibid*.

[243] Gill & Aspinall, *supra* note 240 at 18. For example, in a criminal trial for an assault committed on July 7, 2022, the relevant facts are generally limited to the events occurring on or temporally close to July 7, 2022, and the larger pattern of control is made invisible. *Contra* CrC, *supra* note 6 ss 264, 372(3). The offences of criminal harassment (s 264 CrC) and harassing communications (s 372(3) CrC) are exceptions to the incident-based approach because they target courses of conduct instead of isolated events.

[244] Bradfield, *supra* note 201 at 179.

[245] For a discussion on the cyclical nature of IPV, see division 2.2 of chapter 1, above.

[246] See Stark, *Coercive Control*, *supra* note 21 (coercive controlling behaviours are ambiguous because they "build on practices that are governed by gender norms in relationships, such as ceding major financial decisions to men or quitting work to 'make a home', or target devalued activities to which women are already consigned, like cooking, cleaning, and childcare" at 210–11). See also Tolmie, *supra* note 216 (definitional difficulties might stem from the criminalization of controlling behaviours: "the concept [of coercive control] blurs the line between criminal and non-criminal behaviour. If abusive behaviour exploits existing gender norms, when does 'normal' end and 'abuse' begin?" at 56 [reference omitted]).

choice for men who seek to dominate female partners in liberal democratic societies."[247] Controlling tactics, he asserts, constitute liberty crimes rather than crimes against the person, as they include but go far beyond physical violence and seek to isolate, entrap, and control women.[248] Despite the fear and the state of subordination, deprivation, and entrapment induced by these controlling tactics, women can hardly meet the requirements of BWS, as this theory requires "severe traumatic episodes."[249] The coercive control framework, Stark argues, should replace the BWS framework, for it accurately conveys the effects of IPV on women. Risk posed to women "is taken to be a function of *both* the pattern of violence *and* the pattern of control, the former because it directly endangers the victim's physical and psychological integrity, the latter because it isolates the victim and compromises her capacity to escape or to survive assault."[250]

Sheehy examined the use of coercive control theory in Canadian trials.[251] In her analysis of Theresa Craig's murder trial,[252] Sheehy discussed the advantages and challenges of relying on the

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[247] Stark, *Coercive Control*, *supra* note 21 at 171.

[248] See *Ibid* (coercive control "subordinates women to an alien will by violating their physical integrity (domestic violence), denying them respect and autonomy (intimidation), depriving them of social connectedness (isolation), and appropriating or denying them access to the resources required for personhood and citizenship (control)" at 15). See also Canadian Femicide Observatory for Justice and Accountability, *#CallItFemicide: Understanding gender-related killings of women and girls in Canada*, Myrna Dawson et al (2019), online (pdf): <www.femicideincanada.ca/callitfemicide2019.pdf> ("men who use [coercive-controlling] tactics often do not need to resort to physical violence to achieve control of their partners; rather, they accomplish this through fear of potential consequences if women do not comply" at 47). See also Home Office, *Controlling or Coercive Behaviour*, *supra* note 22 at 4 (non-exhaustive list of controlling or coercive behaviours).

[249] Stark, "Re-Presenting Woman Battering", *supra* note 21 at 1000.

[250] *Ibid* at 1023. Social entrapment, which encompasses the cumulative effect of controlling tactics, will be discussed in subdivision 1.2B of this chapter, below.

[251] See Sheehy, "Coercive Control", *supra* note 229. See also Sheehy, "Lessons from the Transcripts", *supra* note 15 at 234–37. But see Parfett, *supra* note 130 (Parfett criticizes the coercive control theory, as it "draws heavily on studies performed with hostages, instead of domestic abuse victims" [at 58] and should not be transposed to situations of IPV). It is worth mentioning though that Stark, the pioneer of the coercive control theory, has extensive experience in working with women who have experienced IPV.

[252] See *R v Craig*, 2011 ONCA 142. Craig shot her husband while he was asleep. The evidence revealed that Craig experienced years of psychological and verbal abuse yet experienced little physical violence. Dr. Stark, who testified for the defence, opined that the appellant was under the deceased's coercive control, which made her afraid of him and trapped in the relationship. Nevertheless, the trial judge did not put self-defence before the jury, concluding that Craig did not meet the evidential test. The Ontario Court of Appeal confirmed the trial judge's decision, mentioning that "nothing in the appellant's testimony or in her statements to the neighbours, the 911 operator and the police … suggest that she apprehended death or grievous bodily harm at the hands of the deceased, or that she believed she had to kill him to save herself. It is fair to say, based on her evidence and statements, that *what she feared was not death or grievous bodily harm*, but having to live with the deceased at least until her son was on his own, in the isolated, destitute, loveless and seemingly hopeless environment the deceased had created for them" (at para 38 [emphasis added]).

coercive control model.[253] She observed that even if expert evidence is adduced, "women [like Craig] who have not experienced extreme violence"[254] might have difficulty claiming self-defence. Sheehy suggests that criminalizing coercive control might shed light on the level of danger and entrapment posed by controlling behaviors. Coercive control is currently not criminalized in Canada[255] and remains largely "invisibl[e] on the public stage."[256] However, Bill C-332[257] has been drafted and is currently being debated.[258] It is hoped that this legislative change will "make the broader context of the relationship evidentially relevant"[259] and prompt decision makers to understand IPV as a threatening pattern of control. The dangerousness of coercive violence is confirmed by recent research: controlling behaviors are among the best predicators of further use of physical violence.[260]

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[253] Among its advantages, the theory concentrates on the deployment of controlling tactics rather than focusing on whether the woman suffers from BWS, and it casts women as survivors and reasonable actors. These advantages will be discussed below, as they are part of the SEF developed by Bradfield.

[254] Sheehy, "Coercive Control", *supra* note 229 at 112.

[255] But see *JL c R*, 2021 QCCA 1509 [*JL*] (controling behaviours might, put together, amount to criminal harassment: "les gestes rapportés [i.e. controlling behaviours], lorsque considérés dans le contexte global de violence conjugale, de domination et de manipulation dans lequel ils s'inscrivent, sont par leur nature susceptibles de correspondre au comportement menaçant interdit sous l'article 264(2)d) C.cr." at para 64).

[256] Stark, *Coercive Control*, *supra* note 21 at 194.

[257] *Supra* note 7. This Bill seeks to amend the CrC to create an offence of coercive conduct (s 264.01 CrC). A recent report sheds light on the costs and benefits of criminalizing coercive control. See House of Commons, *The Shadow Pandemic: Stopping Coercive and Controlling Behaviour in Intimate Relationships* (April 2021) at 27–9, (Chair: Iqra Khalid), online (pdf): <www.ourcommons.ca/Content/Committee/432/JUST/Reports/RP11257780/justrp09/justrp09-e.pdf>. See also House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 43-2, No 18 (4 February 2021) (Professor Janine Benedet), online (pdf): <www.ourcommons.ca/Content/Committee/432/JUST/Evidence/EV11093829/JUSTEV18-E.PDF> (one of the main benefits of criminalizing coercive control is that of "nam[ing] and mak[ing] visible behaviour[s] that sometimes [are] treated as not really anything because it hasn't escalated to [physical] violence" at 1200). Coercive control is a recent criminal offence in England and Wales, Ireland, Australia, France, and several American states. For further details on the criminalization of coercive control in these countries, see e.g. Evan Stark & Marianne Hester, "Coercive Control: Update and Review" (2019) 25:1 Violence Against Women 81; Amanda L Robinson et al, "Practitioner (mis)understandings of coercive control in England and Wales" (2018) 18:1 Criminology & Crim Just 29.

[258] See also *An Act to amend the Criminal Code and the Judges Act (violence against an intimate partner)*, SC 2023, c 7, ss 2–3. Sections 2 and 3 of this Act modified the *Judges Act*, RSC 1985, c J-1 to allow the Canadian Judicial Council to create seminars on matters related to coercive control. To this day, there is no equivalent in Québec, i.e. no legislation nor Bill under debate on the importance to train judges on coercive control. See *An Act to create a court specialized in sexual violence and domestic violence*, SQ 2021, c 32 (the Act uses the term "domestic violence"; and the term "coercive control" is never used).

[259] Tolmie, *supra* note 216 at 52.

[260] See e.g. Holly Johnson et al, "Intimate Feminicide: The Role of Coercive Control" (2019) 14:1 Fem Crim 3; Andy Myhill & Katrin Hohl, "The 'Golden Thread': Coercive Control and Risk Assessment for Domestic Violence" (2016) 34:21–22 J Inter Violence 4477.

To frame IPV as a pattern of control in victims-accused's trials, Bradfield suggests that copies of the "Power and Control Wheel"[261] be provided to fact finders. This model, known as the Duluth model, details the range of controlling tactics deployed by violent partners to create and maintain a power imbalance within intimate relationships. Under this model, controlling behaviors include blaming attitudes, isolation, intimidation, emotional abuse, and other coercive tactics. Among these tactics, abusive partners might force their partners into dropping charges or doing something illegal. This model thus frames women's criminal offending as a consequence of the control exerted upon them, suggesting that their conduct does not result from a true choice (moral involuntariness).

Bradfield's first branch, which embraces Duluth's and Stark's understanding of IPV, broadens the traditional understanding of IPV within our criminal justice system. This reconceptualization faithfully captures how IPV is inflicted on women. If IPV is to be reframed, so must understanding of how women react to such violence: women must be recognized as suffering from violence while resisting it. Accordingly, the second branch of the SEF addresses women's responses to IPV, especially their calculated attempts (or the lack thereof) to escape violence. Decision makers should be cognizant that a myriad of social, economic, and legal considerations inform women's options. Decision makers who wonder "why didn't she leave?" must know that leaving might not end the violence. In fact, it might even worsen it.

B. Women's Resilience: Reconciliation of Victimization and Agency (Branch 2)

> *It is imperative to convey to the jury the many reasons why a woman may remain in a violence relationship (that was as bad as she said), the things that she had done previously to cope with the violence and importantly that 'leaving' is not a panacea.*[262]

Instead of solely explaining women's responses from the perspective of victimization (i.e. according to learned helplessness), social science evidence on IPV aims to "recognize oppression and resistance in the lives of women, [and] reject exit as the test of truth or the core of

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[261] Ellen Pence & Michael Paymer, *Education groups for men who batter: the Duluth model* (New York: Springer, 1993) (this model derives from interviews with more than 200 abused women, many of whom "criticized theories that described battering as cyclical rather than as a *constant force in their relationships*; that attributed the violence to men's inability to cope with stress; and that failed to acknowledge fully the *intention of batterers to gain control* over their partners' actions, thoughts, and feelings" at 2 [emphasis added]). A copy of the "Power and Control Wheel" is provided in Appendix 1.

[262] Bradfield, *supra* note 201 at 185.

agency."[263] Unlike BWS, Bradfield's SEF reconciles victimization and agency, two notions that, according to several scholars, are neither dichotomous nor "mutually exclusive."[264] Being a victim of IPV does not preclude a woman from being rational and resilient. Conceiving women as reasonable agents is both consistent with governmental orientations on IPV[265] and essential from a strategic perspective to defend women.[266]

Research conducted on women's reactions to IPV has found that women are not helpless nor submissive;[267] however, their resilience is likely to discredit their accounts of victimization (in downplaying their fear and the danger they face) and to influence the reasonableness inquiry (in suggesting that leaving was a viable means to end the violence).[268] Bradfield's second branch centers on women's reluctance to leave, yet this branch overlooks a very important dimension of women's resilience. The second branch, we argue, should be broadened to include another manifestation of women's agency: their violent responses toward their partners, which are termed as violent resistance.

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[263] Martha R. Mahoney, "Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings" (1992) 65:3 S Cal L Rev 1283 at 1285 [Mahoney, "The Idea of Leaving in Love"].

[264] Stubbs & Tolmie, "Race and Gender", *supra* note 17 at 141. See also Boyle, "A Feminist Approach", *supra* note 58 ("concerns [about BWS] have been expressed about the emphasis on victimization rather than on the accused's action in surviving" at 281); Edward W Gondolf & Ellen R Fisher, *Battered Women as Survivors: An Alternative to Treating Learned Helplessness* (Lexington, Mass: Lexington Books, 1988) (a survivor theory is more suited than BWS to explain women's reactions to IPV: this theory focusses on women's strength and resilience).

[265] Among the nine guiding principles adopted by the government of Québec in its 2012-2017 Action plan, one holds that State's intervention should respect "victims' autonomy and [be] based on their capacity to regain control over their lives." See Government of Québec, *2012-2017 Action Plan*, *supra* note 8 at 2. These principles are reiterated in the current action plan. See Secrétariat à la condition féminine, *2018-2023 Action Plan*, *supra* note 8 at 23.

[266] Reasonableness is the theoretical foundation of self-defence, duress, and necessity. For a discussion on the reasonableness component of these defences, see the introduction of division 3.2 of chapter 1, above.

[267] See e.g. Lewis et al, *supra* note 112; Dutton, *supra* note 63 at 1226–31 (replacing the question of "why didn't she leave?" with that of "what are the strategies previously used (or not used) by the victim in responding to the domestic violence?", Dutton grouped the array of women's coping strategies under three categories: personal [e.g. physically resisting], informal [seeking help from relatives] and formal [e.g. pressing charges, going to shelters]).

[268] For more details on "why didn't she leave?" and how this question impacts victims-accused's claims, see division 1.2 ("Why Didn't She Leave?") and subdivision 2.1B ("Expert Evidence") of chapter 1, above.

Johnson's Typology of Intimate Violence: Violent Resistance

Women's aggressive behavior (e.g. threats and use of physical violence) exemplifies the "false dichotomy"[269] between victims and agents. In *Lavallee*, Wilson J. astutely observed that "[t]he fact that [Lavallee] exhibited aggressive behaviour on occasion (…) does not detract from a finding of systematic and relentless abuse," yet women's aggressivity is at odd with helplessness, a central trait of BWS.[270] Under a framework that conceives of IPV as a pattern of control (branch 1) and insists on women's resilience, victims' aggressivity ought to be understood as a coping mechanism, a way to redress the power differential. The underlying intent or the goal pursued by the violent behavior differentiates victims' use of violence from IPV. The intent is thus of paramount importance, for it means that not all violent acts against one's intimate partner fall under the definition of IPV. This nuance is acknowledged by the Director of Criminal and Penal Prosecutions of Québec: its directive on IPV indicates that, in a context of cross-accusations,[271] prosecutors should identify "l'agresseur principal ou dominant."[272]

Women's previous use of violence might work against them to qualify the relationship as mutually violent. Framing an abusive relationship as mutually violent amounts to negating the power imbalance between the partners, which might considerably impact women's credibility of their claims of danger and entrapment. Women's intermittent violent acts should rather be explained by relying on Johnson's typology of violence.[273] Johnson's work, developed in the early 1990s, differentiates three types of violence in intimate relationships: (1) intimate terrorism, a term akin to coercive control that refers to a pattern of controlling behaviors;[274] (2) violent

[269] Elizabeth M Schneider, "Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse" (1992) 67 NYL Rev 520 at 548–49.
[270] For a full discussion on critical perspectives of the use of BWS in criminal trials, see division 3.1 of chapter 1, above.
[271] Cross-accusations are contexts where, for the same event, each intimate partner accuses the other of having been violent.
[272] DPCP, *VIO-1*, *supra* note 236 at para 15.
[273] See Johnson, "Response to an Anti-Feminist Literature Review", *supra* note 24; Johnson, *Typology of domestic violence*, *supra* note 24.
[274] See Johnson, "Response to an Anti-Feminist Literature Review", *supra* note 24 (intimate terrorism "involves the combination of physical and/or sexual violence with a variety of non-violent control tactics, such as economic abuse, emotional abuse, the use of children, threats and intimidation, invocation of male privilege, constant monitoring, blaming the victim, threats to report to immigration authorities, or threats to "out" a person to work or family" at 290). As explained earlier, our thesis' understanding of IPV encompasses the notion of intimate terrorism and excludes intimate violence that is not meant to control (i.e. violent resistance and couple situational violence). For a full discussion of the definition of IPV embraced by our thesis, see introduction, above.

resistance, which consists in violent reactions of many women who experience intimate terrorism to resist the violence;[275] and (3) situational couple violence, which is "not part of a general pattern of coercive control, but rather occurs when couple conflicts become arguments that turn to aggression that become violent"[276] for various reasons. According to Johnson, a woman who occasionally displays aggressivity toward her partner attempts to cope with the violence. Her violent reactions should thus fall under the category of violent resistance. Unlike intimate terrorism, violent resistance and situational violence do not involve an intent to dominate.

When relevant, Johnson's typology could be introduced to triers of fact to nuance their analysis: occasional violent responses on primary victims' part do not render the violence inflicted upon them any less dangerous or less harmful, nor does it mutualize the violence as couple situational violence.[277] Women are no less victims of IPV because they react violently, nor are they helpless because they remain in violent relationships.

Women's Reluctance to Leave

The idea that leaving is a realistic and effective means to end the violence is widely shared among the public[278] and must be challenged in victims' trials.[279] For many, staying is a

[275] Violent resistance is recognized by the government of Québec. See Secrétariat à la condition féminine, *2018-2023 Action Plan*, *supra* note 8 ("[t]here are other types of violence between intimate partners as well. One example would be violent counterattacks used by the victim to resist the violence or control exerted by their partners *and to defend or protect themselves*" at 5 [emphasis added]). Johnson's conceptualization of violent resistance seems to be partly endorsed by the government. Indeed, violent resistance is not always used for defence or protection purposes. A victim might react aggressively to express her anger toward her abusive partner, which means that her act would not qualify as defensive force. See Johnson, *Typology of domestic violence*, *supra* note 24 (violent resistance includes "violence that is expressive of the frustration generated by abuse borne over a long period of time" at 53).

[276] Johnson, "Response to an Anti-Feminist Literature Review", *supra* note 24 at 290. See also Secrétariat à la condition féminine, *2018-2023 Action Plan*, *supra* note 8 at 5 (the government of Québec recognizes [and differentiates IPV with] situational violence as a form of violence between intimate partners).

[277] Furthermore, a nuanced understanding of victims' aggressive behaviour by all criminal justice actors is likely to strengthen victims' confidence in the criminal justice system. See e.g. Grace, *supra* note 10 (based on interviews with 18 women charged in IPV contexts, Grace assessed the impact of primary aggressor policies [i.e. policies requiring police officers to identify the predominant aggressors] and concluded that primary victims of IPV "charged and arrested with intimate partner violence become very wary of the police and are unlikely to call in them in the future" at 161).

[278] "Public" refers to average members of the public, i.e. persons unfamiliar with the dynamics, realities, and impacts of IPV.

[279] See Mahoney, "The Idea of Leaving in Love", *supra* note 261 (Mahoney examined the treatment of exit in legal reasoning and observed that "[w]hen women are harmed in love [IPV cases] or work [sexual harassment cases], the idea of exit becomes central to the social and legal dialogue in which our experience is processed, reduced, reconstructed and dismissed" at 1283).

counterintuitive response that "generates a demand for explanation: either these events did not happen, or they were not truly harmful, or this individual has exceptional problems, qualities that caused failure to exit [and] qualities that need to be explained."[280] According to BWS, the failure to leave is explained by a woman's psychological deficiencies; that is, by an induced state of helplessness (learned helplessness) whereby violence makes her unable to see the exit possibilities visible to outside observers. The second branch of the SEF challenges the issue of exit by suggesting that remaining with a violent partner may be an informed decision to survive the violence, a decision that may be explained "without implying psychological deviance on [the women's] part."[281]

Interested in the impact of generalizations and stereotypes on the fact-finding process,[282] legal academic Marilyn MacCrimmon argues that the standard adopted in *Lavallee* remains a male one. Lavallee's failure to leave her partner was compared to the reasonable man's: implicit in *Lavallee* is the idea that any reasonable person would, as soon as the violence begins, quit rather than tolerate further abuse. Such an assumption (that any reasonable person would have quit) decontextualizes women's decisions to remain in abusive relationships. The so-called reasonable man analysis fails to consider the relational context of IPV in that "no value is placed on preserving a relationship nor is any credence given to a belief that the battered will reform."[283] MacCrimmon advocates for a shift in the cognitive model to assess reasonableness, that of the reasonable woman. Unlike the reasonable man model (which presupposes that leaving is the reasonable response) or the battered woman model (which presupposes that staying is the reasonable response because the woman's judgement is impaired), the reasonable woman model requires that women's decisions to remain in abusive relationships be fully contextualized. Under this model, a woman's experience of IPV is individualized to account for the diversity of

[280] *Ibid* at 1305.
[281] Shaffer, "Syndrome Revisited", *supra* note 43 at 11–2.
[282] See Martinson et al, *supra* note 125 ("The Social Construction of Reality and the Rules of Evidence" at paras 49–85).
[283] *Ibid* at para 71. The accused's version of how she coped with the violence might, among other things, touch upon the relational component of IPV (love, apologies, and promises to change might explain women's decisions to remain with or return to abusive partners). See also Bradfield, *supra* note 201 (IPV is a complex dynamic where women fear and love their partners); *Lavallee*, *supra* note 12 at 880 line d to i (Wilson J. recognized the relational context of IPV as a relevant factor to grasping women's dilemma); Michael A Anderson et al, "'Why Doesn't She Just Leave?': A Descriptive Study of Victim Reported Impediments to Her Safety" (2003) 18 J Fam Vio 151 (the study, based on 485 victims surveyed in an IPV advocacy center, has revealed that relational factors [i.e. promises to change, apologies, and love] significantly contribute to women's decisions to remain or return).

victimization trajectories, but it is also rooted in its wider social context: "[e]vidence to support the reasonableness of [a woman's] fear would include not just evidence about the specific battering relationship, but evidence about the prevalence of battering, violence in the home, the number of battered women killed by their batterers, the lack of community or police help, the lack of resources of battered women, etc."[284]

In challenging the assumption that leaving is the only reasonable response, Bradfield's second branch sheds light on a myriad of contextual factors that shape women's options.[285] This branch supplements *Malott*'s concurring opinion, which recognizes that social, economic and safety-related factors inform the reasonableness of a woman's belief on the lack of options to protect herself.[286] The second branch emerges from a consensus among scholars and researchers who argue that women face multiple barriers to end the violence.[287] These hurdles can be grouped

[284] Martinson et al, *supra* note 125 at para 80.
[285] See Bradfield, *supra* note 201 ("independent evidence that outlines the 'external' realities for women who leave violent relationships" at 185).
[286] See *Malott* SC, *supra* note 16 at para 42.
[287] See e.g. Sheehy, "Lessons from the Transcripts", *supra* note 15 at 57–87 (Sheehy approaches the "why didn't she leave?" question from a social angle, asking what can be done, collectively, to protect abused women); Silke Meyer, "Why Women Stay: A Theoretical Examination of Rational Choice and Moral Reasoning in the Context of Intimate Partner Violence" (2012) 45:2 Austl & NZ J Crim 179 (economic dependence and the presence of children are two contextual factors that explain women's decisions to stay in abusive relationships); Randall, *supra* note 131 at 124–6; Parfett, *supra* note 130 at 68; Poulin, *supra* note 127 at 106; Lewis et al, *supra* note 112 (women's options to deal with IPV are limited by considerations such as the way "law conceives men, women and men's violence (it is only relatively recently that the justice system has intervened in this hitherto private area of life); the immediate personal and wider socio-economic context in which they live (do socio-economic structures allow her to live financially independent of her violent partner?); the risk of further, potentially lethal violence from her partner (many men are outraged at their partner's public challenge to the violence" at 193); Shaffer, "Syndrome Revisited", *supra* note 43 at 11–2 ("external" factors that might discourage women from leaving); Dutton, *supra* note 63 at 1231–40 (thorough literature review of contextual factors such as fear of retaliation, economic resources, concerns for children, and availability of social support).

under four broad categories: (1) economic obstacles;[288] (2) legal obstacles;[289] (3) social, cultural, and religious obstacles;[290] and (4) safety-related obstacles.[291]

[288] Economic barriers combine the cumulative effect of IPV (financial dependence) and systemic inequalities. Controlling tactics might target women's economic well-being and lead to financial dependence. See e.g. Nicola Sharp-Jeffs, "Coercive or controlling behaviour: how it relates to economic abuse" (2017), online (pdf): <https://survivingeconomicabuse.org/wp-content/uploads/2021/01/Controlling-or-Coercive-Behaviour-briefing-1.pdf> (controlling behaviours might amount to economic violence, such as "[c]ontrol[ling] [one's] ability to go to school or place of study"; "[p]reventing a person from having access to transport or from working"; and "[r]eputational damage" at 4); Kathryn Showalter, "Women's employment and domestic violence: A review of the literature" (2016) Agg & Vio Behav 31 at 37 (correlation between IPV and women's employment instability due to workplace disruptions). See generally Judy L Postmus et al, "Economic Abuse as an Invisible Form of Domestic Violence: A Multicountry Review" (2020) 21:2 Trauma, Violence & Abuse at 261. See generally Statistics Canada, *Average female and male earnings and female-to-male earnings ratio*, Table 11-10-0143-01 (Ottawa: Statistics Canada, 2015), online: <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1110014301&pickMembers%5B0%5D=1.1&cubeTimeFrame.startYear=2000&cubeTimeFrame.endYear=2011&referencePeriods=20000101%2C20110101> (between 2000 and 2011 in Canada, female-to-male average earnings ratio ranged from 61.7 to 68.6, meaning that women earn approximatively 2/3 of the average salary of men); Cynthia K Sanders & Meg Schnabel, "Organizing for Economic Empowerment of Battered Women" (2006) 14:3 J of Community Prac 47 (concrete strategies meant to overcome women's financial deprivation since "[e]conomic issues are frequently mentioned by battered women as the primary reason for staying with an abusive partner" at 48).

[289] The justice system's inadequate responses toward women impact their confidence in this system. See generally Corte & Desrosiers, *supra* note 9 (based on the premise that victims of IPV and sexual violence has lost confidence in the justice system, the report contains 192 recommendations to rebuilt trust). For obstacles stemming from the criminal justice system, see e.g. Conseil du statut de la femme, *Les personnes victimes d'agressions sexuelles ou de violence conjugale face au système de justice pénale: état de la situation* (Québec: Conseil du statut de la femme, 2020), online (pdf): <https://csf.gouv.qc.ca/wp-content/uploads/Etu_violence_justice_20201007_vweb.pdf>; Michèle Frenette et al, *Femmes victimes de violence et système de justice pénale : experiences, obstacles et pistes de solution* (2018), online (pdf): <https://sac.uqam.ca/upload/files/Rapport_femmes_violence_justice.pdf> (women's reluctance to file complaints and the obstacles they face in navigating the criminal justice system). For obstacles stemming from family and child protection law, see e.g. Simon Lapierre et al, "The legitimization and institutionalization of 'parental alienation' in the Province of Québec" (2020) 42:1 J Soc Welfare & Fam L 30 (IPV is confused and diluted with the notion of "parental alienation"); Dominique Bernier & Catherine Gagnon, *Violence conjugale devant les tribunaux de la famille: Enjeux et pistes de solution* (2019), online (pdf): <https://sac.uqam.ca/upload/files/Violence-conjugale-devant-les-tribunaux-de-la-famille-FMHF.pdf> (IPV is seldom recognized and named in family courts, leading to inappropriate responses); Simon Lapierre & Isabelle Côté, "Abused women and the threat of parental alienation: Shelter workers' perspectives" (2016) 65 Child & Youth Serv Rev 120 (women are increasingly accused or threatened to be accused of "parental alienation" for trying to protect their children from the father's violence); Simon Lapierre & Isabelle Côté, "On n'est pas là pour régler le problème de violence conjugale, on est là pour protéger l'enfant : La conceptualisation des situations de violence conjugale dans un centre jeunesse du Québec" (2011) 57:1 Serv Soc 31 (child protection services erroneously conceive IPV and parenting skills as different and separate matters, which lead to inadequate measures).

[290] See e.g. Renate Klein, *Responding to Intimate Violence Against Women: The Role of Informal Networks* (New York: Cambridge University Press, 2012) (friends, neighbours, coworkers and family members provide crucial informal support to victims of IPV [e.g. in disrupting ongoing assaults, providing safe spaces, and referring victims to services]; conversely, a lack of support or unsupportive attitudes [e.g. blaming victims, framing the violence as communication problems, dismissing the seriousness of the violence, excusing perpetrators and exerting pressure to keep the family together] have proven to be additional obstacles to

These "external realities"[292] contribute to women's entrapment in abusive relationships. As Randall signals, these factors "seriously constrain the extent to which women can exercise *choice* and *autonomy* and the extent to which they are able to resist the violence."[293] The inquiry into women's criminal liability, she adds, should focus on "conditions which often keep women *trapped* in relationships with violent men (including indifferent or inadequate police response, financial dependence, child care responsibilities, poverty, and the husband's threat to kill her and her children if she leaves, etc.)."[294]

The term "social entrapment,"[295] coined in 2018 to understand women's difficulty to end the violence, is a three-dimensional term that encompasses (1) the isolation, fear, and coercion induced by the partner's controlling tactics;[296] (2) the institutional responses to the violence experienced

separating); Nora Montalvo-Liendo, "Cross-cultural factors in disclosure of intimate partner violence: An integrated review" (2009) 65:1 J Adv Nurs 20; Richard L Beaulaurier et al, "External Barriers to Help Seeking for Older Women Who Experience Intimate Partner Violence" (2007) 22 J Fam Vio 747 (external barriers to help-seeking include inappropriate responses from family members and clergy, as well as the (un)responsiveness of community support).

[291] See e.g. Chloé Deraiche & Nancy Gough, "Dynamique de la violence conjugale postséparation" in Carole Boulebsol et al, eds, *Pratiques et recherches féministes en matière de violence conjugale : Coconstruction des connaissances et expertises* (Québec : Presses de l'Université du Québec, 2022) 305; Québec, Bureau du coroner, *Agir ensemble pour sauver des vies : Premier rapport annuel du Comité d'examen des décès liés à la violence conjugale* (Québec: Government of Québec, 2020) at 19, online (pdf): <www.coroner.gouv.qc.ca/fileadmin/Media/Rapport_annuel_2018-2019_Version_amendee_20201207.pdf> (separation, actual or pending, is a risk factor for intimate partner femicides); Québec, Institut national de santé publique du Québec, *Rapport d'analyse des décès liés à la violence conjugale au Québec entre 2008 et 2018* (Québec: Government of Québec, 2020), online (pdf): <www.inspq.qc.ca/sites/default/files/publications/2766_deces_violence-conjugale.pdf> ("une séparation récente ou imminente caractérisait près de la moitié des situations de violence conjugale où un décès est survenu" at 4).

[292] Bradfield, *supra* note 201 at 185.

[293] Randall, *supra* note 131 at 132. See also Tolmie et al, *supra* note 30 ("institutional responses to IPV must be accompanied by a realistic appreciation of the limitations of the responses that are currently on offer and an understanding of *what is reasonable to expect of someone in the victim's position*" at 195 [emphasis added]).

[294] Randall, *supra* note 131 at 132 [emphasis added]. See also Stubbs, *supra* note 52 (Stubbs criticizes BWS as an effective lawyering strategy because BWS "does little to demonstrate that a defendant's behaviour might be rational and explicable in the face of ongoing and life-threatening violence, and in the context of the economic, social, cultural and religious factors which limit women's options" at 270).

[295] Tolmie et al, *supra* note 30. See also Sheehy, "Lessons from the Transcripts", *supra* note 15 at 57–87 (the notion of social entrapment is exemplified in Bonnie Mooney's case, a battered woman who survived her former partner's violence and sued the State for its negligent and unresponsive responses to her help-seeking endeavours).

[296] The first dimension of social entrapment coincides with Stark's theory. See generally Stark, "Re-Presenting Woman Battering", *supra* note 21 (Stark argues that abusive relationships ought to be reframed and understood "in terms of progressive entrapment" at 1024).

by women, exemplified by the constellation of obstacles that complexify separation;[297] and (3) the complexification of women's entrapment by structural inequities. The notion of social entrapment, like the SEF, encapsulates women's experiences of violence (experiential evidence) and social science evidence on IPV:

> Careful inquiry into the particular facts of each case across these three dimensions [of social entrapment] is required: What are the coercive and controlling behaviours employed by the predominant aggressor and how have these specifically limited the primary victim's ability to be self-determining over time? How have informal networks and agencies responded to her (or others') help-seeking endeavours? How have any intersecting structural inequities (for example, those produced by experiences of poverty, historical trauma, colonization, racism and disability) exacerbated these other dimensions?[298]

The last dimension of social entrapment (i.e. the ways structural inequities exacerbate women's entrapment) pertains to the last branch of Bradfield's SEF, which considers how systems of oppressions—such as racism, poverty, heterosexism, colonialism, and disablism—overlap with sexism,[299] intensifying both the violence and the obstacles to end it.[300]

C. Intersectionality: The Catalytic Effect of Systems of Oppression (Branch 3)

> *If [our] efforts instead began with addressing the needs and problems of those who are most disadvantaged … then others who are singularly disadvantaged would also benefit.*[301]

Bradfield's third branch advocates for the importance of adducing evidence of overlapping inequities. Women who demonstrate additional vulnerabilities face another layer of obstacles in addition to those faced as abused women. The juxtaposition of systems of oppression (e.g. gender, race, poverty, drug addiction, unemployment, immigration status and disablism)

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[297] See Tolmie et al, *supra* note 30 at 194–95 (powerful examples drawn from the Family Violence Death Review Committee of New Zealand of institutional responses that impede women's efforts to end the violence, such as a victim being told that if she pursued her complaint against her abusive partner, she will likely be arrested for her use of physical violence). See also Sheehy, "Lessons from the Transcripts", *supra* note 15 ("[p]olice, prosecutorial, and judicial failures, together with the other social, legal, and economic barriers … prolong women's entrapment by raising the 'costs' of leaving and driving the women back to their abusers" at 87 [footnotes omitted]).

[298] Tolmie et al, *supra* note 30 at 185–86.

[299] IPV is a gendered-based violence: women are disproportionality targeted and impacted by intimate terrorism, a term akin to coercive violence. For the purposes of our thesis, the term IPV encompasses the notions of coercive violence and intimate terrorism. For a full discussion on our definition of IPV, which alludes to the gender-symmetry debate, see the introduction, above.

[300] The importance of an intersectional approach will be discussed in subdivision 2.2C of this chapter, below.

[301] Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U Chicago Legal F 139 at 167.

intensifies a woman's entrapment in that it exacerbates the danger she faces (branch 1), and the obstacles to end the violence (branch 2): "the number and extent of inequities a victim experiences, the more scope a predominant aggressor has to isolate, control and coerce her and the less likely she is to be able to access help and safety."[302]

Lavallee teaches us that the reasonable person is a woman who shares the accused's experience of IPV. Consequently, decision makers must be made aware of the prevalence of IPV among certain communities (to which the accused belongs), the level of acceptability regarding IPV toward these communities (e.g. normalization of the violence), and the extent to which options to deal with the violence are available (e.g. lack of adapted resources). The evidence adduced can be specific to marginalized communities (e.g. Indigenous women;[303] Black women;[304] immigrant

[302] Tolmie et al, *supra* note 30 at 197. See also See also Sheehy, "Lessons from the Transcripts", *supra* note 15 at 126–98 (in chapter 4 [cases of Aboriginal women who killed non-Aboriginal male partners] and chapter 5 [cases of Aboriginal women who killed Aboriginal male partners], Sheehy explores the overrepresentation of Aboriginal women among victims of IPV as well as racism and colonization as additional barriers faced by Aboriginal women defendants); Stubbs & Tolmie, "Race and Gender", *supra* note 17 ("if [the accused] had been realistically located in the circumstances she faced as an aboriginal woman, her self-defence claim would not have needed to be strengthened by evidence of the battered woman syndrome" at 143).

[303] See e.g. Jacinthe Dion, Virginie Attard, Mylène Fernet & Catherine Richardson/Kinewesquao, "Les violences envers les femmes autochtones" in Carole Boulebsol et al, eds, *Pratiques et recherches féministes en matière de violence conjugale : Coconstruction des connaissances et expertises* (Québec : Presses de l'Université du Québec, 2022) 175 (specific barriers to help-seeking); Commission d'enquête sur les relations entre les Autochtones et certains services publics, *Rapport final de la Commission d'enquête sur les relations entre les Autochtones et certains services publics : écoute, réconciliation et progrès* (Québec: Governement of Québec, 2019), online (pdf): <www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Rapport/Rapport_final.pdf>; National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019), online (pdf, vol 1a): <www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf> and (pdf, vol 1b): <www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1b.pdf> [National Inquiry into Missing and Murdered Indigenous Women and Girls, *Final Report*].

[304] See e.g. Patricia Duhaney, "A critical race feminist perspective on racialized women's experiences of intimate partner abuse" in Sandra Walklate, ed, *Handbook of Victims and Victimilogy* (London: Routledge, 2017) 174; Patricia Duhaney, "Criminalized Black Women's Experiences of Intimate Partner Violence in Canada" (2022) 28:11 Violence Against Women 2765 (complexities and cumulative effect of IPV in Black women's lives).

women;[305] and women belonging to the 2SLGBTQI+ community[306]) and might also stem from any other context of vulnerability (e.g. homelessness;[307] limited access to transport networks;[308] and disablism[309]).

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Our discussion on the SEF ends with a note of caution. For Bradfield, the question "why didn't she leave?" must be addressed by looking at all the obstacles a woman encounters (branch 2), which are exacerbated by systems of oppression or any other vulnerability (branch 3). In light of recent initiatives meant to help women, one might be tempted to downplay the importance of the above-mentioned obstacles in the reasonableness inquiry. However, a measure can pursue laudable goals yet not have the anticipated effects or worse, have adverse effects.[310] For

[305] See e.g. Sastal Castro Zavala, Louise Lafortune & Tatiana Sanhueza Morales, "L'adaptation des services des maisons d'aide et d'hébergement aux femmes immigrantes et issues de l'immigration" in Carole Boulebsol et al, eds, *Pratiques et recherches féministes en matière de violence conjugale : Coconstruction des connaissances et expertises* (Québec : Presses de l'Université du Québec, 2022) 193 at 195–98 (obstacles faced by immigrant women victims of IPV are grouped under three categories : personal, cultural/religious, and structural barriers); Anne-Marie Bellemare, "L'intervention en matière de violence conjugale auprès des femmes demandeuses d'asile" in Sonia Gauthier & Lyse Montminy, eds, *Expériences d'intervention psychosociale en contexte de violence conjugale* (Québec : Presses de l'Université du Québec, 2012) 151; Colleen Sheppard, "Women as Wives: Immigration Law and Domestic Violence" (2000) 26 Queen's LJ 1 (specific obstacles posed to immigrant women in the context of spousal sponsorship).

[306] See e.g. Taryn Lindhorst, Gita Mehrotra & Shawn L Mincer, "Outing the abuse: Considerations for effective practice with lesbian, gay, bisexual, and transgender survivors of intimate partner violence" in Lettie L Lockhart & Fran S Danis, eds, *Domestic Violence: Intersectionality and culturally competent practice* (New York: Columbia University Press, 2010) 232; Leigh Goodmark, "When is a Battered Woman Not a Battered Woman: When She Fights Back" (2008) 20:1 Yale JL & Feminism 75 at 104–13 (specific obstacles faced by lesbian women, such as their reluctance to seek outside help, the disbelief and skepticism met when disclosing the violence, the lack of supportive resources).

[307] See e.g. Catherine Flynn et al, "La violence de partenaires intimes et l'itinérance dans les parcours de vie des femmes" in Carole Boulebsol et al, eds, *Pratiques et recherches féministes en matière de violence conjugale : Coconstruction des connaissances et expertises* (Québec : Presses de l'Université du Québec, 2022) 265.

[308] See e.g. Tolmie et al, *supra* note 30 (for some women, "[a]ttending an appointment might mean managing their children's care, pooling limited resources to access public transport and making long journeys linking different forms of transport" at 194).

[309] See e.g. Isabelle Boisvert, Fanny Bréart de Boisanger & Hugo Tremblay, "Des actions systémiques nécessaires pour contrer la violence caractéristique du quotidien des femmes en situation de handicap physique" in Carole Boulebsol et al, eds, *Pratiques et recherches féministes en matière de violence conjugale : Coconstruction des connaissances et expertises* (Québec : Presses de l'Université du Québec, 2022) 261; Michelle S Ballan & Molly Freyer, "Trauma-Informed Social Work Practice with Women with Disabilities: Working with Survivors of Intimate Partner Violence" (2017) 18:1 Advances in Soc Work 131.

[310] For example, some authors claim that the criminalization of coercive behaviours, although aimed at protecting victims of IPV, might have adverse effects on women, such as charging women in separation contexts. See e.g. Tolmie, *supra* note 216 at 60–2 (studies have shown that women who try to protect themselves and their children

example, as the late law professor Cheryl Hanna flagged, in enhancing State's intervention (e.g. in criminalizing coercive control), we must be wary of heightening our expectations that abused women can and must leave:

> [T]he more remedies the law offers for the harms of violence against women, the more an individual woman may find herself in a catch-22. If she seeks outside help, the argument that she was entrapped becomes less convincing. Similarly, if she kills to liberate herself, the notion that violent resistance was necessary becomes a less persuasive defense in a world in which state intervention was at *least theoretically available*.[311]

The theoretical availability of State intervention, such as programs and legal recourses, should not prevail over how a woman's experience taint her perceptions. For the reasonableness inquiry to be properly contextualized, the reasonableness of a woman's belief in the lack of alternatives must be "assessed from the perspective of an ordinary [woman] who shares the attributes, experiences and circumstances of the accused."[312] This contextualization exercise means that a woman's belief might differ from another woman's depending on their specific situation. Without invalidating State attempts to offer solutions, we must remember that trust is cultivated over years. An Aboriginal woman or a Black woman, for instance, might perceive the State's role and its ability to protect her from further abuse through a historical prism that associates State with violence and trauma.[313] Likewise, we should not put the burden on a woman who has been isolated in an abusive relationship to inquire into State programs available to her. A woman should not be faulted for not knowing that these services exist, and decision makers should not draw negative inferences from a failure to retain State assistance.[314] Social awareness, just as confidence, is built over time.

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from post-separation violence were highly vulnerable to be conceived as obstructive, controlling and alienating by decision-makers).

[311] Cheryl Hanna, "The Paradox of Progress: Translating Evan Stark's Coercive Control Into Legal Doctrine for Abused Women" (2009) 15:12 Violence Against Women 1458 at 1460 [emphasis added].

[312] *Khill*, *supra* note 70 at para 54.

[313] See generally National Inquiry into Missing and Murdered Indigenous Women and Girls, *Final Report*, *supra* note 303; Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Winnipeg: Fernwood, 2017).

[314] For example, the government of Québec has created an emergency fund for victims of violence, providing short-term financial support to victims in covering fees for housing, food, and transportation. Also, provincial labor law provides that victims of IPV are allowed to take leaves of absence without adverse consequences (e.g. group insurance and pension plans). Another example is the provincial compensation regime for crime victims: unlike victims of other crimes, victims of IPV have no time limit to file a qualification application. See *Act Respecting Labour Standards*, *supra* note 6 ss 79.1–9.6; *Act to Assist Persons who Are Victims of Criminal Offences and to Facilitate their Recovery*, *supra* note 6 s 25 para 3.

Like social awareness of State measures and mistrust toward State institutions, recent legislative and judicial modifications made in the name of combatting IPV must not distort the reasonableness inquiry. These changes endorse a punitive approach toward perpetrators of IPV that stands in the way of victims' satisfaction.[315] For example, Grant expresses skepticism about the extent to which section 718.3(8) CrC will contribute to protect victims against further abuse. Based on her case study, Grant stressed that previous terms of imprisonment very often did not deter offenders from committing further acts of IPV[316] and that the need for a provision such as section 718.3(8) CrC remains unclear "given that maximum sentences are almost never imposed for [male intimate partner violence against women] under the current law".[317] Another example of a possible gap between State intervention and victims' confidence comes from the specialized courts for IPV and sexual violence cases. Law professor Anne-Marie Boisvert argues that these courts might strengthen victims' support yet fail to rebuild their trust in the criminal justice system.[318] Specialized courts differ in embracing a multidisciplinary approach, yet their roots remain unchanged. Indeed, these courts reproduce an adversarial system designed to condemn and punish offenders, whereby the role of victims (confined to that of a witness) and the presumption of innocence are constantly and irremediably in tension with victims' needs (e.g. that of being believed, listened to and given the opportunity to take part in the process).[319] Boisvert's argument teaches us that we must be wary of speculating on the impact of specialized courts on

[315] These changes were made both at the provincial and federal levels. See e.g. *An Act to amend the Act respecting the Québec correctional system to provide for the power to require that an offender be connected to a device that allows the offender's whereabouts to be known*, SQ 2022 c 4 (the Québec correctional system's use of monitoring devices on offenders released from prison); CrC, *supra* note 6 ss 515(6)(b.1) (reversal of the burden at the bail hearing stage when the offender was previously convicted of intimate violence), 718.3(8) (possibility for sentencing judges to impose a term of imprisonment greater than the maximum term of imprisonment of the offence when the offender was previously convicted of a crime committed against an intimate partner).

[316] See Isabel Grant, "The Role of Section 718.2(a)(ii) in Sentencing for Male Intimate Partner Violence Against Women" (2018) 96:1 Can Bar Rev 158 at 188.

[317] *Ibid* at note 144.

[318] See Anne-Marie Boisvert, "La création d'un tribunal spécialisé en matière de violences sexuelles et de violence conjugale au Québec: vers une meilleure justice?" (2022) 26 Can Crim L Rev 269 (section "Et si le tribunal spécialisé ne remplissait pas ses promesses?" at 299–306).

[319] See also Maude Pagé-Arpin, "La procédure pénale dans sa forme actuelle peut-elle répondre aux attentes des plaignantes en matière de crimes sexuels ?" (2010) 6 Cahiers PV 19 (although made in a context of sexual violence, Pagé-Arpin's argument is similar to Boisvert's: despite procedural changes meant to improve victims' experience within the criminal justice system, the very roots of this system make it not suited to satisfying victims' needs).

victims' confidence in our criminal justice system. The mere implementation of these courts does not guarantee an improvement in victims' low level of satisfaction toward our justice system.

To contextualize and thus fairly assess reasonableness, caution should be exercised in measuring the impact of any State initiatives meant to encourage women to leave, such as programs and legislative modifications. It would be premature and too simplistic for prosecutors to suggest, or judges to conclude, that a woman's belief in the lack of options is unreasonable simply because measures exist that make options theoretically available.

2. JUXTAPOSITION OF EXPERIENTIAL AND SOCIAL SCIENCE EVIDENCE TO FULFILL THE EVIDENTIAL BURDEN

As mentioned earlier, Lavallee relied on the BWS framework to fulfill the air of reality test of self-defence. This chapter advocates for replacing this framework with the SEF, whereby evidence on the accused's unique experience of victimization (experiential evidence) is connected to social science evidence on IPV. This shift is possible, we argue, for self-defence, duress, and necessity.

Self-defence, duress, and necessity are affirmative defences. In these cases, the persuasive and evidential burdens are divided.[320] The evidential burden, known as the air of reality test, rests upon the accused. Once met, the persuasive burden shifts to the prosecution that must disprove beyond a reasonable doubt the existence of the defence (persuasive burden).[321] To meet the evidential burden, the accused must point to evidence, produced by the Crown and/or the defence, "upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true."[322] The air of reality test only requires the accused to identify an evidential foundation for each element of the defence. Although the evidence might be testimonial (from examination in chief or cross-examination), it might also arise from any other source (e.g. admissions, medical records, and photographs). There is no requirement for the accused to testify.[323]

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[320] Several terms exist for these burdens. See e.g. *R v Schwartz*, [1988] 2 SCR 443, 45 CCC (3d) 97 at para 38.
[321] See e.g. *R v Fontaine*, 2004 SCC 27 at para 56. The Crown must prove beyond a reasonable doubt that (at least) one of the criteria of the defence is not met. See e.g. *R v Levy*, 2016 NSCA 45 at para 107 *in limine*; *R v Meecham*, 2019 ONSC 561 at para 64 *in limine*.
[322] *Cinous*, *supra* note 74 at para 82.
[323] See *Ibid* at para 53. Trials where the accused has not testified are very rare. Lavallee did not testify, yet her written statement to the police was put in evidence. See Sheehy, "Lessons from the Transcripts", *supra* note 15

Experiential evidence is case-specific; it is not limited to evidence on the accused's experience of IPV but includes the aggressor's past use of violence toward others. Social science evidence is general; it complements the experiential evidence with "general conclusions [drawn from] social science research"[324] that conceptualize IPV as a dynamic of control, highlight women's resilience, and juxtapose systems of oppression. Just like BWS, the purpose of social science evidence is two-fold: it (1) allows triers of fact to understand IPV, which prevents stereotypical reasoning that discredits women's narratives (credibility); and (2) normalizes women's conduct, beliefs, and apprehensions (reasonableness). What pieces of information on IPV defence lawyers should introduce depends on the specific facts of each case. Bradfield stresses that social science evidence must be connected to the experiential evidence adduced:

> [t]he precise form that the social framework evidence would take in an individual case would be dependent on the woman's particular situation. For example, if the woman was not an Indigenous woman, then evidence outlining the impact of racial/cultural factors is clearly not relevant. Similarly, "expert evidence on the economic factors that typically affect battered women would not be relevant if the defendant was financially independent." Evidence provided by the accused and/or other witnesses would need to establish a factual foundation for the social framework evidence adduced. For example, evidence of the accused's fear of the dangers of leaving would be necessary in order to make information about the dangers of separation assault relevant.[325]

The chart below (table III) illustrates the legal relevance of the SEF, i.e. how the evidence under the SEF is expected to meet the air of reality test of self-defence, duress, and necessity. Experiential and social science evidence appears in the left column. The legal relevance of this evidence appears in the right column. The right column relies on SCC decisions and details the requirements of each defence: *Khill* for self-defence;[326] *Ryan* for duress (statutory and common law versions);[327] and *Latimer* for necessity.[328] The chart serves secondary purposes, namely to:

(among the 11 cases analyzed by Sheehy, Donelda Kay, charged with second-degree murder of her partner, is the only women who did not testify during her trial).

[324] Walker & Monahan, *supra* note 202 at 560.

[325] Bradfield, *supra* note 201 at 187–88 [footnotes omitted].

[326] The three inquiries under section 34 CrC are "the catalyst" (s 34(1)(a) CrC, i.e. what prompted her to use force?); "the motive" (s 34(1)(b) CrC, i.e. for what purpose has she used force?); and "the response" (s 34(1)(c) CrC, i.e. was her response reasonable?). Elements listed under s 34(2) CrC are relevant factors, rather than conditions, to assess whether the response was reasonable. See *Khill*, *supra* note 70 at paras 51–71.

[327] See *Ryan* SC, *supra* note 146 at para 81. For a discussion on the requirements of duress, see subdivision 3.2A of chapter 1, above.

[328] See *Latimer*, *supra* note 73 at paras 33–4. For a discussion on the requirements of necessity, see subdivision 3.2B of chapter 1, above.

(i) compare two evidentiary frameworks, the BWS framework and the SEF, by highlighting their converging point (both rely on experiential evidence) and diverging points (they differently convey reasonableness and differently prevent stereotypical thinking);
(ii) transpose Bradfield's work, meant to be applied in Australia, to Canadian criminal law; and
(iii) broaden the relevance of Bradfield's work to claims of duress and necessity.

Chapter 3 is devoted to a case law analysis on the implementation of Bradfield's SEF to defend victims-accused who act in self-defence, duress, and necessity in Canada.

Table III: The Use of the Social Evidence Framework to Meet the Evidential Burden of Self-Defence, Duress, and Necessity Claims

Experiential Evidence | Battered Woman Syndrome Evidence | Social Science Evidence

<table>
<tr><th colspan="3">Framework (Evidence to Adduce) ●----------→</th><th colspan="2">Legal Relevance (To Meet the Evidential Burden)</th></tr>
<tr><td colspan="3">**Accused's experience of IPV** (nature, extent, strategies to cope with, and cumulative effect of the violence) and the main aggressor's **propensity to violence**</td><td colspan="2">**Self-defence**: Ss 34(1)(a), 34(1)(b) and 34(1)(c) CrC
Duress (both versions): All requirements, except the criteria of whether the offence is excluded under s 17 CrC
Necessity: All requirements</td></tr>
<tr><td rowspan="2">**Cycle of Violence**</td><td rowspan="2">**Intersectionality (Branch 3)**</td><td>**Reconceptualization of IPV (Branch 1)**</td><td>**Reasonable Apprehension of Danger**
Self-defence: Ss 34(1)(a) (reasonable belief that force is used/threat of force is made); 34(2)(a) (nature of force/threat), 34(2)(b) (imminency); 34(2)(f)/(f.1) (history of violence); and 34(2)(g) CrC (proportionality)
Duress (both versions): Reasonable belief in the execution of the threat; reasonable belief that threat is closely temporally connected to its execution; and proportionality between the threat and the criminal act
Necessity: Reasonable belief in imminent peril</td><td rowspan="2">**Stereotypical Assumptions on IPV**
All defences: Credibility of the accused's account of victimization</td></tr>
<tr><td>**Learned Helplessness**</td><td>**Women's Responses to IPV (Branch 2)**</td><td>**Reasonable Belief in the Lack of Realistic Options**
Self-defence: S 34(2)b) CrC (availability of options)
Duress (both versions): Reasonable belief in the absence of safe avenue of escape
Necessity: Reasonable belief in the absence of legal alternative</td></tr>
</table>

CHAPTER 3

THE IMPLEMENTATION OF THE SOCIAL EVIDENCE FRAMEWORK TO DEFEND VICTIMS-ACCUSED

The previous chapter advocates using a SEF in cases of victims-accused; that is, juxtaposing IPV experiential evidence (case-specific evidence) with IPV social science evidence (general evidence). This chapter pursues two objectives: based on decisions extracted from case law research, it investigates whether the SEF is currently being implemented (part 1) and argues for further implementation of such a framework (part 2).

Methodology & Research Findings

Our case study investigates the judicial treatment of *Lavallee* and *Malott* to determine whether *Lavallee*'s framework was broadened to incorporate social science evidence, the relevance of which was recognized in *Malott*'s concurrent opinion. The period researched begins with the issuance of *Lavallee* (1990) until now.[329] Our research used three Canadian legal databases.[330] All decisions mentioning, citing, or referring to *Lavallee* and *Malott* were examined.[331] A keyword search was also performed.[332] Then, from this substantial body of case law, decisions were extracted based on three cumulative criteria: the accused (i) experienced IPV; (ii) claimed self-defence, duress, or necessity;[333] and (iii) adduced evidence of her experience of IPV to support her defence. Decisions rendered at the sentencing stage were excluded.[334] Of the 35 remaining cases,[335] 16 cases were selected for discussion based on several factors, such as the degree of detail (in summary of evidence and legal reasoning); the extent to which

[329] Our research was last updated in July 2023. Our research period overlaps with that of previous research, but the decisions are analyzed from another angle, that of replacing BWS with a SEF.
[330] Namely WestlawNext Canada, Lexis Advance Quicklaw, and Soquij Intelligence juridique.
[331] Tools that list decisions mentioning/citing/referring to a specific decision were used, namely the *Citing References* tab of WestlawNext Canada; the *Citing Cases* tab in Lexis Advance Quicklaw; and *Le Citateur* tab of Soquij Intelligence juridique.
[332] The following key words were used: Lavallée & légitime défense; Lavallee & self-defence; Lavallee & self-defense; Lavallée & contrainte; Lavallee & duress; Lavallée & nécessité; Lavallee & necessity; Malott & légitime défense; Malott & self-defence; Malott & self-defense; Malott & contrainte; Malott & duress; Malott & nécessité; Malott & necessity.
[333] Our research excludes provocation cases given the limited application (murder charges only) and outcomes (if successful, provocation lowers the charge to manslaughter) of this defence. See CrC, *supra* note 6 s 232.
[334] Our research focusses on the evidence adduced during criminal trials and its impact on legal reasoning.
[335] A list of these decisions is provided in Appendix 2.

experiential/social science evidence was adduced; and the extent to which a SEF could have replaced the BWS framework.[336]

Our research is limited by a few factors, notably the paucity of written decisions.[337] This chapter discusses written decisions, which represent only a sample of the relevant case law corpus. Moreover, although these decisions are excellent sources for understanding judges' legal reasoning,[338] they provide only summaries of the evidence adduced during trials and interpreted by judges. The evidence, in turn, is subjected to a set of rules, which might build a narrative that deviates from the accused's reality, i.e. her lived experience of violence. In this regard, the limitation Sheehy identifies regarding her trial transcripts analysis applies *a fortiori* to our case law analysis: trial transcripts provide "partial glimpse[s] into what happened, as lawyers, witnesses, and judges deploy the rules of evidence to shape the evidence presented in the courtroom."[339]

Despite these limitations, our research finds that the SEF has been sparingly used and confirms that the BWS framework is the most common framework in victims-accused's trials. As mentioned earlier, the BWS framework is an evidentiary structure whereby experiential evidence (the accused's experience of IPV) is juxtaposed with medical evidence (expert opinion on BWS). Our study has led to relevant findings allowing us to question the over-use of the BWS framework. In investigating the current implementation of a SEF (part 1), we observe a judicial openness toward experiential evidence (division 1.1) and a limited use of social science evidence (division 1.2) in assessing reasonableness. Regarding the future implementation of a SEF (part 2), our study engages with the criticisms of the BWS framework[340] and reaffirms that BWS fails to convey women's experiences of IPV in a nuanced and realistic way. The potential of the SEF is striking

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[336] Namely *Boyer c R*, 2023 QCCA 608 [*Boyer*]; *R v Doonanco*, 2019 ABCA 118 [*Doonanco* CA]; *R c Brousseau*, 2006 QCCA 858 [*Brousseau*]; *R c Staudinger*, [2004] JQ no 11665, 2004 CarswellQue 3028 (CA Qc) [*Staudinger*]; *R v Ameralik*, 2021 NUCJ 3 [*Ameralik*]; *R v Mason*, 2020 MBQB 151 [*Mason*]; *R v Sanderson*, 2019 SKQB 130 [*Sanderson*]; *R v Rabut*, 2015 ABPC 114 [*Rabut*]; *R v Knott*, 2014 MBQB 72 [*Knott*]; *R v Ejigu*, 2012 BCSC 1674 [*Ejigu*]; *R v Ryan*, 2010 NSSC 114 [*Ryan* NSSC]; *R v Stephen*, 2008 NSSC 31 [*Stephen*]; *R v LS*, 2001 BCPC 462 [*LS*]; *R c Côté*, 1995 CarswellQue 1714, EYB 1995-72970 (CQ Qc) [*Côté*]; *R v Stevenson*, [1995] YJ No 16 (YK Terr Ct) [*Stevenson*]; *R c AD*, 2009 QCCM 107 [*AD*].

[337] Most decisions are rendered orally, and jury decisions are not reported in databases unless voir-dire decisions are rendered (pre-trial rulings) or an appeal is launched.

[338] I.e. how judges connect the evidence with the applicable rules of law.

[339] Sheehy, "Lessons from the Transcripts", *supra* note 15 at 14.

[340] For a full discussion on the creation of a stereotype (the "real" battered woman) and the pathologization of women's responses, see division 3.1 of chapter 1, above.

when we look at several cases that fostered the use of social science evidence (division 2.1). It comes as no surprise that such a shift in frameworks poses challenges (division 2.2) that might be reduced by practical avenues (division 2.3).

1. CURRENT IMPLEMENTATION

This section is divided into two parts that examine the extent to which experiential evidence (division 1.1) and social science evidence (division 1.2) are implemented in current Canadian case law.

1.1. Experiential Evidence on Intimate Partner Violence (Case-Specific Evidence)

This section addresses how well experiential evidence is integrated in current case law. As discussed in the previous chapter, experiential evidence refers to the accused's experience of IPV and includes the main aggressor's propensity to violence (toward others, things, and animals). Experiential evidence emanates from the accused herself (i.e. her testimony or oral/written statement[s] to the police) and any other evidential source (e.g. witnesses, admissions, medical records, photographs). Experiential evidence may also stem from Crown witnesses who might provide corroborative evidence by being asked whether they witnessed the main aggressor's violent temper, his behaviour toward the accused (e.g. threat, name-calling, monitoring), the accused's responses to the violence (e.g. attempts to leave), and the impact of the violence on the accused (e.g. physical, emotional, and psychological state).

As discussed previously, reliance on experiential evidence is rooted in the Scopelliti rule, developed for self-defence claims. This rule serves a two-fold purpose: past violence known to the accused (such as the violence inflicted upon her) is relevant because it is linked to the reasonableness of her apprehension of danger, and past violence unknown to the accused is relevant because it is linked to the credibility of her claim of abuse. In 2006, the Québec Court of Appeal applied the propensity to violence rule in *Brousseau*. The Court allowed the appeal and ordered a new trial because the trial judge erred in preventing Christine Brousseau from adducing evidence on her partner's use of violence toward his former partner, Brunelle. This violence, unknown to Brousseau at the time of the offence, was nevertheless relevant to her

defence because it would have reinforced her version of the events.[341] *Brousseau* confirmed the relevance of the Scopelliti rule to self-defence claims[342] yet reaffirmed the importance of BWS evidence: for the Court, "la preuve que Mme Brousseau était atteinte [du syndrome de la femme battue] était inextricablement liée à sa défense, qui avait *peu de chance de réussir* autrement."[343]

Our case law study reveals that the scope of the Scopelliti rule was expanded in two ways. First, without being named as such, the rule was applied in duress and necessity claims, which is a logical broadening since credibility and reasonableness—the objectives pursued by the rule— equally come into play in these defences. More importantly, evidence of past violence was applied to establish the reasonableness of both the apprehension of danger and the belief in the lack of realistic options. In nine of the 35 cases, the accused only relied on experiential evidence.[344] In six of the nine cases, the accused was either acquitted or a new trial was ordered, which is positive as it speaks to the value placed on women's experience of violence in their trials.

This part discusses some of these cases to illustrate the importance of providing strong experiential evidence. In *Boyer*, *LS*, and *AD* (cases of impaired driving charges) no evidence on BWS was adduced (subdivision A).[345] In *Rabut* and *Sanderson*, we observe an interesting trend: BWS evidence was introduced, yet judges did not rely on it in assessing reasonableness (subdivision B).

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[341] See *Brousseau*, *supra* note 336 at paras 7–8. Brousseau's version conflicted with that of her partner. She contended that he insulted, threatened, and assaulted her while carrying a knife whilst he denied any violent behaviour on his part.

[342] Although Brousseau sought to adduce evidence on her partner's past violence for the sole purpose of enhancing her credibility in a context of contradictory versions (on whether he was abusive toward her), *Brousseau* should not be read as the Court's refusal to rely on past violence evidence to convey the reasonableness of the accused's conduct.

[343] *Brousseau*, *supra* note 336 at para 28.

[344] These decisions are listed in Appendix 2. See also *Mazerolle*, *supra* note 34 (Stéphanie Mazerolle, acquitted of a charge of operation while impaired, successfully pled necessity and relied exclusively on experiential evidence; this case is not included in the research results because it falls outside the scope of our research, i.e. the case did not cite/refer to/mention *Lavallee* nor *Malott*).

[345] In *Boyer*, *supra* note 336, the accused entirely relied on her experience of abuse but was found guilty and appealed her conviction. The Court of Appeal of Québec allowed the appeal and ordered a new trial. In *LS*, *supra* note 336, and *AD*, *supra* note 336, both women were acquitted based on their experiences of IPV.

A. BWS Evidence not Adduced

Boyer (duress)

Marie-Michelle Boyer, charged with driving while impaired, claimed duress. Boyer described her abusive relationship with her ex-partner[346] and his violence toward her neighbours. She made numerous attempts to leave and sought police and judicial intervention, yet the violence continued: her ex-partner ignored police warnings and kept contacting her despite being prohibited from doing so and after having served custodial sentences for his violence against Boyer.[347] On the day of the event, Boyer went to see him although he was bound by court conditions to protect her. She wanted to convince him to stop contacting her. Given his assertions that he had changed, Boyer agreed to spend the evening with him at her place. During the afternoon, they both consumed alcohol and cannabis. The tension built up to the point that her ex-partner, highly intoxicated, yelled at Boyer. Asked to leave, he ordered Boyer to drive him to his vehicle.[348] He became aggressive toward Boyer, who refused to drive because she had consumed alcohol. Fearing an attack, Boyer got into her car to give him a ride. She was arrested after her car collided with a parked car.

At trial, Boyer was cross-examined as to the existence of options other than driving.[349] The appellant detailed her experience of violence, including her past attempts to deal with her ex-partner's violence, yet the trial judge found her guilty. For the trial judge, Boyer failed to fulfill the evidential burden on the lack of safe options criterion because her perception on alternatives was altered by alcohol.[350] Boyer appealed her conviction, arguing that the trial judge erred in assessing the reasonableness of her belief in the lack of alternatives on a purely objective standard. Her argument is well-founded in law: the lack of safe options criterion must be assessed on the modified objective standard of the reasonable person similarly situated; that is, it must be assessed

[346] Boyer experienced verbal (threats), psychological (e.g. humiliation), and physical violence.
[347] See *Boyer c R*, 2023 QCCA 608 (Factum of the Appellant) [*Boyer*, Appellant's Factum] at paras 6–15.
[348] Her ex-partner's vehicle was parked around 2,7 km of the appellant's residence.
[349] Indeed, the prosecutor cross-examined Boyer on every avenue that she could have (and did not) pursued that evening. For example, she was asked whether she could have lent her vehicle to her ex-partner; verified whether neighbours were present; locked herself in a room in her house; gone to her ex-partner's daughter whose residence was close from hers; and called a taxi or the police.
[350] See Boyer, *supra* note 336 (the trial judge concluded that "la personne raisonnable sobre aurait constaté qu'il existait des moyens de s'en sortir sans danger et sans contrevenir à la Loi" at para 7 *in fine*).

in the light of the appellant's experience of IPV.[351] The reasonableness of the appellant's belief, she claims, stems from her testimony:

> La raisonnabilité de cette croyance [en l'absence d'autres moyens de se soustraire à la menace] a pourtant été démontrée par l'appelante. Elle rapporte que c'est exactement ce qui s'est produit par le passé dans des situations analogues, témoignage que le premier juge n'a pas rejeté. Ainsi, lorsqu'elle prétend que toute tentative de lui échapper aurait précipité la violence et que ses menaces se matérialiseraient imminemment, elle s'appuie sur sa propre expérience.[352]

In 2023, the Court of Appeal of Québec allowed the appeal and ordered a new trial. While Boyer's state of intoxication is a relevant factor in measuring the modified objective standard of the reasonable person, so is her experience of IPV with her ex-partner.[353] During her trial, Boyer relied on her past attempts to deal with her ex-partner's violence (experiential evidence) to explain her belief that she had no alternatives and denied the role of alcohol in her assessment. The Court of Appeal held that Boyer's testimony sufficed to meet the evidential burden.[354]

Regardless of the outcome of Boyer's second trial, Boyer's first appeal is of paramount importance for victims-accused. Indeed, the Court of Appeal's decision is a binding precedent on the role played by experiential evidence. This decision should be read as the possibility, for victims-accused, to fulfill the evidential burden on the sole basis of their testimony (experiential evidence).

***LS* (necessity)**

L.S. and her partner started drinking alcohol while aboard L.S.' vehicle with her two children. The couple started arguing while the car was parked in the parking lot of a restaurant in which the children had gone in to eat. L.S.' partner became very angry, got out of the vehicle, started throwing things out of the vehicle, and pushed L.S. She locked herself in her car with her ten-year-old son. L.S.' partner threatened to break the windows of her car and went into the restaurant to call the police to have L.S. arrested. L.S. drove away with her son and was intercepted not far from the restaurant.

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[351] See *Ryan* SC, *supra* note 146 at paras 47, 81.
[352] *Boyer*, Appellant's Factum, *supra* note 347 at para 59.
[353] *Boyer*, *supra* note 336 at paras 12 *in fine*, 15.
[354] *Ibid* at para 14.

L.S.' successful plea of necessity is noteworthy in many respects. During her five-month abusive relationship, L.S. experienced verbal and emotional abuse. She was not physically assaulted before the parking-lot event.[355] Despite the absence of past physical violence, the trial judge held that L.S. faced imminent peril.[356] Equally important is the judge's analysis of the lack of reasonable alternatives.[357] The judge rejected the Crown's contention that L.S. could have "simply" gone into the restaurant and waited for the police to arrive or locked herself in her car, asserting that "both options were available if the situation is examined from the point of view of a detached and calm observer."[358] Instead, he "consider[ed] L.S.' particular background and perspective as a victim of domestic violence when deciding whether she ha[d] a 'safe avenue of escape'".[359] The judge insisted on the presence of L.S.' son, L.S.'s knowledge "of Mr. E.C. and the way that his anger could escalate until it was out of control."[360]

***AD* (necessity)**

Like in *LS*, Andréa Drolet, tried for impaired driving and driving over .08, was acquitted based on necessity. She described her experience of IPV, which was corroborated by her partner's criminal record and violence toward others. Drolet spent the night at her partner's residence and the tension quickly built up. Due to her partner's aggressivity, Drolet decided to leave although she had had a few drinks. As she was about to leave, Drolet's partner grabbed her by the throat. She managed to get out of his grip and drove away but was quickly intercepted by two female police officers. Drolet's partner arrived on the scene and asked to talk to the accused. Terrified and convinced that two female officers could not protect her, Drolet fled.

The judge analyzed two sequences of driving: one when Drolet left her partner's residence and another when Drolet left the place where she was intercepted. While the imminency of peril was obvious in the first driving sequence, the judge relied on Drolet's past experience of violence to explain why she drove her car: "elle n'a pas tenté de chercher de l'aide aux appartements autour ou encore auprès de commences sur sa route puisqu'elle connaissait Savary et savait qu'il s'en

[355] The judge also noted that L.S.' partner had a criminal record for violent offences.
[356] See *LS*, *supra* note 336 at paras 43–4.
[357] See *Ibid* at paras 45–54.
[358] *Ibid* at para 47.
[359] *Ibid* at para 19.
[360] *Ibid* at para 53.

prendrait à toute personne dont elle pourrait demander l'assistance."[361] When addressing the second driving sequence, Drolet invoked her partner's propensity to violence: based on her experience, she explained, two female officers could not have stopped her partner when he started heading toward her. The judge accepted her explanation and pronounced an acquittal, noting her partner's persistence in following Drolet and approaching her despite the officers' presence. Disturbingly, he noted that Drolet's behaviour could not be assessed rationally, a comment at odds with his conclusion that she acted reasonably (in necessity).[362]

The ensuing discussion illustrates a more subtle form of judicial reliance on experiential evidence. In *Rabut* and *Sanderson*, two self-defence cases, BWS evidence was adduced but bore no weight in the reasonableness analysis.

B. BWS Evidence Adduced but not Relied on in the Reasonableness Analysis

In *Rabut* and *Sanderson*, BWS evidence was adduced, yet judges barely referred to it, suggesting its little importance in the reasonableness inquiry. Indeed, since it is incumbent upon judges to justify their conclusions,[363] the little weight attached to BWS in judges' reasoning is noteworthy and calls into question the necessity of BWS evidence. The emphasis placed on the accused's experience of IPV has to do with the codification of the Scopelliti rule in 2012:[364] the current version of self-defence provides that the history "of any relationship between the parties to the incident"[365] is relevant in determining whether the act committed was reasonable.

Rabut (self-defence)

Trina Kimberly Rabut was accused of stabbing her partner (aggravated assault) and was acquitted. The judge mainly relied on Rabut's version of the violence she experienced during her six-year intimate relationship.[366] Her testimony was corroborated by the couple's tenant, who lived

[361] *AD*, *supra* note 336 at para 32.
[362] Perhaps what the trial judge meant was that Drolet's conduct could not be assessed from an outsider's perspective. This formulation (on the accused's rationality) should be avoided because of its pathologization effect. For a full discussion on the pathologization of women's responses, see division 3.1 of chapter 1, above.
[363] See *R v Sheppard*, 2002 SCC 26. See also *R v REM*, 2008 SCC 51.
[364] See *Citizen's Arrest and Self-Defence Act*, *supra*, note 104 s 2.
[365] CrC, *supra* note 6 s 34(2)(f).
[366] See *Rabut*, *supra* note 336 at paras 51–65.

in the basement of the house occupied by the couple.[367] Dr. Dalby, a psychologist, testified on her behalf and opined that Rabut suffered from BWS. Interestingly, when asked why abused women stay in abusive relationships, Dr. Dalby enumerated several contextual factors pertaining to the SEF, such as promises to change, financial dependence, lack of support, and fear of retaliation. He also explained abused women's hypervigilance as a symptom of PTSD.

An analysis of *Rabut* suggests that the judge could have reached the same conclusion in the absence of BWS evidence. Indeed, the BWS framework was absent in the judge's reasoning; rather than BWS evidence, the judge relied on the violence Rabut experienced during her marriage, which seems to be a proper application of the propensity rule. First, in assessing whether Rabut's apprehension of danger was reasonable (under s 34(1)(a) CrC), the judge held that the history of abuse Rabut experienced caused her "to have a heightened sensitivity" to her partner's violence.[368] Then, in assessing whether the stabbing was reasonable (under s 34(1)(c) CrC), the judge considered the following circumstances: the past injuries sustained by Rabut;[369] Rabut's experience to avoid her partner's violence by running away;[370] and the ever-present threat Rabut was facing.[371]

Sanderson **(self-defence)**

Courtney Marie Sanderson, indicted for aggravated assault, adduced extensive evidence of her experience of violence at the hands of her partner, including how she coped with the violence.[372] Her partner's "volatile nature"[373] was corroborated by two witnesses. Crown

[367] See *Ibid* at paras 44–50. He heard "yelling and screaming, and name-calling" (at para 45), saw Rabut with a black eye and was threatened by Rabut's partner for having called the police. He qualified Rabut's partner as a grumpy and "angry drunk" (at para 48), whose anger was unpredictable.
[368] The trial judge "accept[ed] that on December 15, 2013, given [Rabut's] knowledge of Mr. Rabut, and her experiences with him in the marriage, she reasonably interpreted what she saw in the conduct of Mr. Rabut as he sat on the chesterfield" (at para 105).
[369] See *Ibid* at para 110.
[370] See *Ibid* at para 111. See also excerpts of Rabut's testimony, e.g. when asked whether she considered leaving the room or running away, Rabut mentioned: "[Mr. Rabut] always got me – always. He's either catch me by the back of my hair. He's pulled chunks of my hair before" (at para 60).
[371] See *Ibid* ("[t]he violence suffered by Ms. Rabut at Mr. Rabut's hands was *cumulative*: the threat of it was ever-present; though its ultimate occurrence was fairly certain, the precise timing of the violence was not" at para 116 [emphasis added]).
[372] For example, she purchased a home with her mother and would seek refuge there with her children when her partner drank excessively.
[373] *Sanderson*, *supra* note 336 at para 118.

counsel, who acted fairly in conceding that Sanderson had met the air of reality test, had to disprove at least one element of the defence beyond a reasonable doubt.

The reasonableness of Sanderson's apprehension of danger (under s 34(1)(a) CrC) did not pose challenges, as the evidence revealed that her partner got angry and physically violent toward Sanderson before being stabbed; he even told Sanderson that he would kill her. As for the reasonableness of Sanderson's response, the stabbing (under s 34(1)(c) CrC), the judge's analysis of Sanderson's coping strategies is noteworthy. The judge considered the fact that Sanderson called the RCMP at least ten times (usually when her partner was physically violent)[374] and that Sanderson left home with her children and went to the home she owned with her mother when "circumstances at home deteriorated significantly."[375] She was occasionally prevented from leaving by her partner, who would block her way out. The trial judge insisted on section 34(2)(h) CrC, as he concluded that "in light of many years of physical abuse and assaults she had endured, her response of picking up a hot knife and stabbing Mr. Obey was reasonable in all of the circumstances."[376]

As noted in chapter 2, adducing strong experiential evidence is only a first step toward applying the SEF. The second step is to connect this evidence with social science evidence.

1.2. Social Science Evidence on Intimate Partner Violence (General Evidence)

Social science evidence was adduced in only two of the 35 cases:[377] *Staudinger*, in which it was presented to understand why women are reluctant to leave violent partners (subdivision A); and *Ameralik,* in which it was offered to understand how limited Inuit women's options to deal with IPV are (subdivision B).

[374] See *Ibid* at para 110. Each time the RCMP did safety checks at the couple's house, the judge remarked, Sanderson "would downplay what had happened, tell them everything had calmed down" (at para 111), and no further intervention would occur.
[375] *Ibid* at para 112.
[376] *Ibid* at para 127.
[377] As explained above, 35 cases were extracted from our case law research. A list of these cases is provided in Appendix 2.

A. Women's Reluctance to Leave (Branch 2)

Staudinger (self-defence)

Rendered by the Court of Appeal of Québec, *Staudinger* is the only binding precedent of social science knowledge of IPV being introduced in a criminal trial. Indicted of first-degree murder for shooting her partner while asleep, Sandra Staudinger successfully raised self-defence. She called two experts, Dr. Nowakowski, a psychiatrist who testified on BWS, and Clément, a social worker who testified on the obstacles faced by women to end IPV. The Crown appealed the acquittal, claiming, among other things, that the trial judge erred in allowing Clément to testify as an expert witness.

The Court of Appeal of Québec confirmed that a social worker from a women's shelter could explain, as an expert witness, the reluctance of abused women to leave violent relationships. Clément named, among the factors that might discourage women from leaving, the social pressure to keep the family united, the social isolation in which women like Staudinger are immersed and the criminal justice system's inability to meet women's safety needs.[378] *Staudinger*, though, suffers from a significant limitation: the Court only complemented (rather than replaced) BWS evidence with social science evidence on IPV. Indeed, two psychiatrists debated over whether Staudinger suffered from BWS.

B. Inuit Women's Reluctance to Leave (Branches 2 & 3)

Ameralik (self-defence)

Sandra Ameralik, charged with second-degree murder after stabbing her partner, was acquitted based on self-defence. In the introductive part of her judgement, the trial judge seemed to have taken judicial notice of the high rate of IPV in Inuit communities. IPV, she wrote, is

> a serious problem in Inuit communities. Women are most often the targets of intimate partner violence, though men experience violence in the context of their intimate relationships as well. It is incumbent upon the Nunavut Court of Justice to consider the high number of Inuit who live in abusive and violent situations, have deep and traumatic memories of abuse, or have witnessed a close family member being abused, assaulted, or killed. These factors must inform this Court's judgments in situations involving intimate partner violence.[379]

[378] See Bélanger, *supra* note 124 at 153–55.
[379] *Ameralik*, *supra* note 336 at para 3.

The violence suffered by Ameralik (experiential evidence) was evidenced by her testimony, as well as that of her parents, her friends, and seven RCMP occurrence reports. No expert evidence on BWS was adduced. Having concluded that Ameralik was justified in stabbing her partner, the trial judge cited portions of a report prepared by Pauktuutit Inuit Status of Women:[380] "[l]acking a systematic and coordinated approach, efforts to prevent victimization in Inuit communities are hindered by gaps in services; inequitable distribution of resources; burnout and loss of trained staff; an absence of training and support for front-line workers; and incomplete program evaluation."[381] For the judge, Ameralik's partner's death, including the emotional burden carried by the accused for stabbing her partner, is a tragedy that could have been avoided had Ameralik received the support she needed. In exposing "the systemic shortcomings in how justice is administered in Nunavut,"[382] the trial judge placed responsibility for the stabbing on the systemic failure to respond to IPV experienced by Inuit women.[383]

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The cases discussed above teach us that experiential evidence assumes an important role in victims-accused's trials yet reveal that the SEF—a substitute of BWS evidence—is rather unapplied in Canadian criminal law. Indeed, *Ameralik* is the only case that applied the SEF as an independent framework, raising the question of what the future holds for the SEF.

2. FUTURE IMPLEMENTATION

This section reflects on the future implementation of the SEF. More specifically, it demonstrates the potential of this framework (division 2.1), discusses the specific challenges posed by its implementation (division 2.2), and points to some practical implications that clarify how this framework can be implemented (division 2.3).

[380] I.e. the national representative organization of Inuit women, which advocates for social justice in Canada.
[381] *Ameralik*, *supra* note 336 at para 66, citing Pauktuutit Inuit Women in Canada, National Strategy to Prevent Abuse in Inuit Communities and Sharing Knowledge, Sharing Wisdom: A Guide to the National Strategy (2006) at 2, online (pdf): <https://pauktuutit.ca/wp-content/uploads/InuitStrategy_e.pdf>.
[382] *Ameralik*, *supra* note 336 at para 66.
[383] See generally National Inquiry into Missing and Murdered Indigenous Women and Girls, *Final Report*, *supra* note 303, at vol 1a, 229–314 (chapter 4 on "Colonization as Gendered Oppression").

2.1. Potential & Viability of Social Science Evidence on Intimate Partner Violence

The following section is divided into four parts: (A) conceptualization of IPV as a pattern of control; (B and C) women's resilience; and (D) overlapping inequities. To demonstrate the viability of the SEF, this part scrutinizes seven cases of victims-accused.[384] In six of these cases, women were acquitted based on self-defence, duress or necessity. These cases were chosen for two reasons. Firstly, most of them exemplify the critiques of BWS. In *Stephen*, the accused's behaviour was compared to that expected of a battered woman (stereotype of the "real and authentic battered woman"). In five cases, despite clear evidence of the obstacles the accused faced, their coping strategies were analyzed via the cognitive theory of learned helplessness (pathologization of women's responses). Secondly, all these cases (the evidence adduced and/or the judge's reasoning) fostered the introduction of social science evidence.

A. The Ongoing Danger Posed by Intimate Partner Violence (Branch 1)

The following discussion compares *Ryan* and *Stephen* to demonstrate why understanding IPV as an ongoing threat both negates the need for evidence on BWS and is essential to apprehending the all-pervasive nature of danger victims face. BWS evidence was adduced in both cases, yet judges' understanding of the dangers posed by IPV differed significantly. Whereas the judge in *Ryan* understood IPV as a pattern of control, the judge in *Stephen* conceived IPV as isolated incidents of violence. These divergent understandings of IPV reveal the advantages of adducing social science evidence in victims-accused's trials. In *Ryan*, social science evidence might have replaced BWS evidence without affecting the judge's finding of the threat faced by the accused. In *Stephen*, evidence framing IPV as a pattern of control would likely have benefited the accused in conveying the ongoing danger she faced.

Ryan (duress)

Nicole Patricia Ryan stood charged with counselling the commission of an offence (murder) for hiring a hit man, an undercover police officer, to kill her abusive husband. Ryan claimed duress and was initially acquitted. The Nova Scotia Court of Appeal dismissed the Crown

[384] Namely *Mason*, *supra* note 336; *Knott*, *supra* note 336; *Ejigu supra* note 336; *Ryan* NSSC, *supra* note 336; *Stephen*, *supra* note 336; *LS*, *supra* note 336; *Côté*, *supra* note 336.

appeal,[385] confirming that Ryan's claim of duress met the air of reality test. The SCC, however, allowed the Crown's appeal but entered a stay of proceedings.[386]

Ryan is well-known for the SCC's narrow interpretation of the defence of duress,[387] yet the evidence adduced at trial is worthy of attention. The experiential evidence consisted of (i) Ryan's testimony on the violence she suffered (all forms of IPV, including several controlling tactics that isolated and intimidated Ryan) and her countless attempts to end the violence; and (ii) several testimonies and documentary evidence corroborating Ryan's partner's violent temper and its impact on Ryan. A forensic psychiatrist (Dr. Hucker) and a clinical social worker (Deveau) met Ryan and testified on her behalf.

The trial judge was aware of the power dynamics between Ryan and her husband who "was a manipulative, controlling, and abusive husband, that sought at every turn to control the actions of his wife, be they social, familial or marital."[388] On appeal, the Nova Scotia Court of Appeal, tasked with analyzing whether the threat Ryan faced was temporally closed from her criminal offending, rejected the Crown's contention that the trial judge ignored the temporal link requirement: "while the last expressed threat may have pre-dated the 'crime' by months, the peril it generated, lingered."[389] This finding (on temporality) seems to rely on the evidence provided by Deveau. Deveau elaborated on Ryan's constant fear of her husband,[390] whereas Dr. Hucker explained the cyclical nature of the violence (i.e. violence manifests as violent outbursts).[391] Interestingly, a passage of Deveau's testimony consisted of social science evidence: in commenting that "the most dangerous time for victim[s] is when they assert themsel[ves], leave and/or stop all contact,"[392] Deveau alluded to the safety issues faced by victims-accused

[385] See *Ryan* CA, *supra* note 164.
[386] See *Ryan* SC, *supra* note 146. Ryan, the SCC concluded, had been unduly affected by the confusion surrounding the law of duress. Given the years of judicial proceedings and the abuse she suffered, it would be unfair to subject Ryan to another trial.
[387] The SCC decision was rightly characterized as a missed opportunity for the SCC to interpret the defence of duress in a sensitive and meaningful way for abused women like Ryan. See Jason MacLean, Nadia Verrelli & Lori Chambers, "Battered Women under Duress: The Supreme Court of Canada's Abandonment of Context and Purpose in R. v. Ryan" (2017) 29:1 Can J Women & L 60; Kimberly Crosbie, "*R. v. Ryan* and the Principle of Moral Involuntariness" (2014) 67 SCLR (2d) 459.
[388] *Ryan* NSSC, *supra* note 336 at para 56.
[389] *Ryan* CA, *supra* note 164 at para 104.
[390] See *Ryan* NSSC, *supra* note 336 at para 100.
[391] See *Ibid* at para 76.
[392] *Ibid* at para 94.

(post-separation violence).[393] Deveau's testimony might have gone further in explaining the lethal and sub-lethal risks associated with controlling behaviours. Had it done so, Deveau's testimony, combined with the experiential evidence, would likely have sufficed to convey the ongoing danger faced by Ryan. The trial judge could thus have grasped the dangerous nature of IPV without expert evidence on BWS.

***Stephen* (duress)**

Conversely, if violence is viewed as episodical, it is likely that the temporal link criterion will not be satisfied. Melanie Jane Stephen, indicted with possessing and laundering crime proceeds,[394] claimed duress. The experiential evidence she provided was complemented by expert medical evidence on BWS. Dr. Bloom (a psychiatrist for the Crown) and Haylock and Dr. Bourget (a psychotherapist and a psychiatrist for the defence, respectively) debated over whether Stephen was a battered woman entitled to rely on BWS as a defence. Based on Stephen's testimony detailing the violence she suffered, the trial judge accepted that Stephen had been physically and psychologically abused during her marriage.[395] However, he held that the last episode of violence was too remote from the commission of the offence to meet the temporal link requirement: "other than [Stephen's] testimony about being threatened in early February 2000, there is no other evidence from Stephen or any other source to show that during the period between February 5, 2000, and April 14, 2000, when the home was refinanced, Stephen was assaulted or threatened with violence."[396] This comment demonstrates that the judge viewed IPV as distinct episodes of violence in which the danger arises and dissipates as incidents occur. Given this misunderstanding, evidence meant to frame IPV as a dynamic of power (such as the Power and Control Wheel) might have allowed the judge to grasp the pervasiveness of the violence in Stephen's life. Independent evidence, combined with the experiential evidence provided by Stephen, could have conveyed the ongoing danger she faced.

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[393] The trial judge connected this comment to Ryan's experience of IPV. See *Ibid* at para 94.
[394] These offences were included in the *Controlled Drugs and Substances Act*, SC 1996, c 19, ss 8–9. These sections were repealed in 2001 by *An Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Acts*, SC 2001, c 32, s 48.
[395] See *Stephen, supra* note 336 at paras 141–43.
[396] *Ibid* at para 332.

B. Violent Resistance: Reconciliation of Women's Fear and Anger (Branch 2)

A common strategy the prosecution pursues is pointing to an accused's anger toward her partner, suggesting that revenge rather than fear motivated her to commit the crime. This strategy raises the issue of violent resistance, a coping mechanism displayed by victims of IPV. As discussed in chapter 2, violent resistance ought to be distinguished from IPV because each is enacted according to different purposes: the former attempts to resist the violence, while the latter seeks to control.

Independent evidence that differentiates violent resistance from IPV[397] has not yet been introduced in criminal trials. Nevertheless, in *LS* and *Knott*, the trial judges explicitly reconciled the accused's fear and anger. This nuanced reasoning, consistent with the notion of violent resistance, contrasts with *Stephen*, in which the accused's aggressiveness worked against her in discrediting her claim that she feared her partner.

Knott (self-defence)

Cassandra Lydia Knott was charged with second-degree murder for stabbing her partner. She testified and her legal team called Dr. Kolton, a psychologist, on the possibility that she suffered from PTSD and BWS. The evidence revealed that Knott's partner was physically and verbally violent toward her on the day of the stabbing. In the couple's kitchen, Knott's partner approached her and she backed up. Her brother-in-law tried to stop Knott's partner, who kept trying to get at her. She stabbed him in the chest with a steak knife. In her recorded statement to the police, which was admitted into evidence, the accused mentioned being mad at her partner for threatening her earlier in the day and trying to get at her in the kitchen. When asked by the police officer who took her statement whether she stabbed her partner because she was angry with him, she replied: "I just don't like the way he treats me (…). He put me in the hospital last year."[398] Analyzing whether Knott acted to defend herself (s 34(1)(b) CrC), the judge stressed that "the accused repeatedly testified that she was scared of the deceased,"[399] concluding that "being mad and being scared are *not mutually exclusive*."[400] From the judge's point of view, the stabbing might

[397] For a full discussion on the three forms of intimate violence, see Johnson's typology of intimate violence discussed in the introduction and subdivision 1.2B of chapter 2, above.
[398] *Knott*, *supra* note 336 at para 95.
[399] *Ibid* at para 96.
[400] *Ibid* [emphasis added].

have resulted from Knott being angry at her partner while simultaneously being afraid of him. In reconciling Knott's fear with her attempt to assert herself, the judge challenged the false dichotomy between agency and victimization. The judge referred to Dr. Kolton's testimony on the physiological similarities between fear and anger; however, the coexistence of these feelings could have been explained by the notion of violent resistance[401] and general knowledge of the consequences of IPV, thus eliminating the need for expert testimony on BWS.[402]

LS (necessity)

In *LS*, the trial judge reached a conclusion similar to that of the judge in *Knott*. During the argument that occurred in a restaurant parking lot, L.S. got extremely angry with her partner and scratched his face and neck.[403] The judge concluded that L.S. faced imminent peril and wrote that L.S. "admitted that she was very angry, that she was embarrassed and that she was yelling and screaming just as [her partner] was,"[404] but "she also said that she was scared and that she just wanted to get herself and her son out of there."[405] Like in *Knott*, the accused's attempt to assert herself did not prevent the trial judge from concluding that she faced imminent peril "even though she was the only one who inflicted visible injury."[406] This line of reasoning sheds light on women's resilience and departs from the victimization model of BWS.

Stephen (duress)

Knott and *LS* contrast sharply with *Stephen*, in which the accused's assertive conduct undermined her self-defence claim.[407] Stephen could not, from the judge's point of view, be simultaneously assertive and fearful toward her partner. She had to be one or the other. The judge palpably expressed skepticism regarding Stephen's claim that she was a fearful "battered

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[401] See Johnson, *Typology of domestic violence*, *supra* note 24 at 53.
[402] Distress, fear, anxiety, and anger are documented consequences of IPV. See generally Jean Boudreau et al, *Introduction to Intervention with Crime Victims* (Montréal: Association Québécoise Plaidoyers-Victimes, 2011) at 134.
[403] The police observed scratch marks on L.S.' partner's face and neck.
[404] *LS*, *supra* note 336 at para 44.
[405] *Ibid*.
[406] *Ibid*. Similarly, in *Knott*, *supra* note 336, before stabbing her partner in the chest, Knott tried to defend herself with a mop: she swung the mop to prevent her partner from getting to her. The trial judge held that "in the timeframe leading up to the stabbing, *the deceased was the aggressor* by reason of his verbal and physical abuse of the accused, notwithstanding some unsuccessful attempts by her to fend him off" (at para 134 [emphasis added]).
[407] See *Stephen*, *supra* note 336 at paras 145–48.

spouse" in writing that "while proffering that she was a battered spouse who feared her husband, [Stephen] admitted to being verbally aggressive with Patriquen when he argued with her or struck her."[408] Equally shocking is the example the judge provided of Stephen being "verbally forceful and aggressive":[409] after Stephen's partner told her to keep her "fucking mouth shut,"[410] Stephen told him "that he [was] not going to speak to her like that in the house,"[411] "that he should pack his bag and leave,"[412] and "that she [was] getting him out of the house today."[413] Stephen also admitted to having assaulted her partner with a pair of scissors on another occasion, which led the judge to conclude that this assault and other instances of Stephen being "verbally confrontational with Patriquen [are] highly relevant to her claim that she was a battered spouse and in particular that she was suffering from battered woman syndrome."[414] Stephen's aggressive behaviour, he added, is relevant "to her defence of duress (…) [and] speak[s] *against her claim* that she lived in fear of Patriquen."[415]

The expert evidence led by the defence consisted of the testimonies of Haylock (psychotherapist) and Dr. Bourget (psychiatrist). Dr. Bloom (psychiatrist) was called in a rebuttal by the prosecution. The debate primarily centered on whether Stephen conformed to the victimization model of BWS, especially whether she experienced helplessness. The fact that Stephen had an independent life and acted aggressively did not accord with how "Dr. Bloom *pictured* a woman suffering from battered woman syndrome."[416] The presumed incompatibility between Stephen's anger and her fear was thus based on psychiatric evidence. Had Stephen's aggressivity been considered via an approach that frames her violence as a common coping mechanism, such as the SEF, it is likely that her credibility might have been preserved.

[408] *Ibid* at para 145.
[409] *Ibid* at para 147.
[410] *Ibid* at para 145.
[411] *Ibid*.
[412] *Ibid*.
[413] *Ibid*.
[414] *Ibid* at para 148.
[415] *Ibid* [emphasis added]. The judge made a finding of mutual violence in the relationship (at para 84).
[416] *Ibid* at para 268 [emphasis added]. The judge concluded that Stephen did not display the lack of autonomy and passivity expected from battered women (at paras 269–73).

C. The Importance of Departing from Learned Helplessness to Understand "Why She Didn't Leave" (Branch 2)

The BWS framework explains women's inability to leave according to the cognitive theory of learned helplessness: women do not leave because the violence makes them unable to perceive options available from an outsider's perspective. Conversely, the SEF contextualizes women's reluctance to leave. Women's options (or the lack thereof) to deal with the violence are circumscribed by several obstacles (exacerbated by vulnerability contexts and systems of oppression): some emanate from the violence *per se* (e.g. isolation, fear, and coercion) while others are social, legal, economic, and safety-related hurdles.[417]

The following analysis, based on the evidence given in four cases, considers women's criminal conduct using another lens, one that fully contextualizes women's decisions. Although Ryan, Côté, and Knott were acquitted and Stephen was found guilty, their cases share a common thread: despite experiential evidence brought forward by the women related to the obstacles they faced in leaving their violent partners, judges relied on the notion of learned helplessness as part of the BWS framework to inquire whether a safe avenue of escape existed.

Ryan (duress)

Ryan detailed her numerous attempts to deal with her husband's violence, such as attempts to obtain a peace bond; several calls to the RCMP, victim services, and 911; and a request to divorce, to which her husband reacted violently. The trial judge recognized the system's indifference toward Ryan's suffering, outlining that "it seems somewhat ironic the system which had failed to address the issues that Ryan had with her husband was only too eager to come to her aid and provide a solution when it would potentially result in her committing a criminal offence."[418] Assessing the safe avenues of escape requirement, the judge mentioned some of the steps taken by Ryan to end the violence, yet he referred to her human frailties and her "condition," notably her state of dissociation, despondence and helplessness. The use of the BWS framework is even more explicit in the Nova Scotia Court of Appeal decision, which noted that "an expert confirm[ed] that Ms. [Ryan] was a victim of 'psychological entrapment' who suffered

[417] For a full discussion on the contextual factors shaping women's options, see subdivision 1.2B of chapter 2, above.
[418] *Ryan* NSSC, *supra* note 336 at para 74.

'battered woman syndrome' and who could see 'no way out'."[419] In light of Ryan's testimony that she "use[d] every avenue available to her to resolve [her safety] concerns,"[420] it is curious that her experience was connected to BWS evidence. Instead, it could have been complemented by social science evidence like that adduced in *Staudinger*, and the outcome (the judge's finding that Ryan lacked a safe avenue of escape) would likely have been the same.

Côté (self-defence)

Linda Côté was tried for manslaughter and successfully raised self-defence. The evidence revealed that Côté's husband had threatened her and their daughter all night. Côté waited until he fell asleep with a firearm pointed at her, took the gun and shot him dead. Côté testified on the violence she and her children suffered for years and her past efforts to end her husband's violence and their outcomes. Among these, (i) she sought refuge with her brother but returned to the family home because her husband denied her access to their daughter;[421] (ii) her mother sought police intervention, yet the responding police officer sought to find an agreement in discussions with Côté's husband[422] (iii) after Côté returned home, her husband took control of her earnings, which made her entirely dependent on him;[423] and (iv) she moved with her children, yet her husband managed to find her new residence and ordered their return home.[424] Her account of violence was complemented by psychiatric evidence provided by Dr. Roy, who indicated that Côté suffered from BWS. Among the syndrome's characteristics, he described women's "restricted perceptions"[425] of how to deal with violence. He opined that Côté's criminal offending resulted from women's state of helplessness and their "altered ability" to find alternate solutions. Like in *Ryan*, the accused's testimony laid the grounds to introduce social science evidence on IPV. BWS evidence could have been replaced by independent evidence documenting (i) the dilemma Côté faced and that is shared by many women, that is the need to protect her children (which often means staying) and the need to protect herself (which means leaving, hiding, going

[419] *Ryan* CA, *supra* note 164 at para 125.
[420] *Ryan* NSSC, *supra* note 336 at para 51.
[421] See *Côté*, *supra* note 336 at para 35.
[422] See *Ibid*.
[423] See *Ibid*.
[424] See *Ibid* at para 44.
[425] *Ibid* at paras 44, 110.

underground); (ii) the unresponsiveness of police intervention; (iii) economic violence leading to economic dependence, a significant barrier to separation; and (iv) post-separation violence.

Knott (self-defence)

Like in *Ryan* and *Côté*, the trial judge in *Knott* unduly focused on helplessness. Knott explained that she did not call 911 on the day of the events (when the tension kept rising) because she knew, from her past attempts to leave her partner, that he would always pursue her. Despite her account, the judge referred to the psychiatrist's explanations on BWS to understand "why women tend to not be more active in pursuing their own self-interest, where they would either leave or call for help or do something that would end the cycle."[426] Yet what Knott described is known as separation violence, which entails an "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."[427] Women's fear of retaliation was also mentioned in *Malott*'s concurring opinion as a factor of a "woman's context which help[s] to explain her inability to leave her abuser."[428] Given such clear evidence on Knott's experience of separation violence, why was her experience connected to psychiatric evidence on helplessness? Instead of such evidence, a social worker might have described the phenomenon of separation violence and its prevalence. Most importantly, a social worker might have explained how separation violence impedes separation, which would have normalized Knott's conduct of not seeking police intervention.

Stephen (duress)

The outcome of the expert debate, centered around the question of whether Stephen suffered from BWS, determined whether the accused feared her partner and whether she had safe avenues of escape. The trial judge's reasoning illustrates the dichotomous and unnuanced approach of the BWS framework: if Stephen was thought to have suffered from BWS, learned helplessness would have accounted for her failure to leave her partner; if she was not, she presumably could have left but chose not to.

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[426] *Knott*, *supra* note 336 at para 122.
[427] Mahoney, "Redefining the Issue of Separation", *supra* note 20 at 65. See generally Sara Ahmed, "Sexism: A Problem with a Name" (2015) 86:1 New Formations 5 (problems, such as sexism, must be named: naming a problem "can change not only *how* we register an event but *whether* we register an event" at 8 [emphasis in original]).
[428] *Malott* SC, *supra* note 16 at para 42 *in limine*.

Stephen very briefly explained that although she could have left when her partner was incarcerated (three times during lengthy periods), she did not leave because she has young children and because her mother pressured to tolerate the violence.[429] The accused also mentioned several times that she feared her partner. Her explanations were complemented by Haylock, her psychotherapist, who explained that

> a battered woman does not leave an abusive relationship because of (1) fear, that is because traumatic bond is established and the woman knows she is trapped; (2) for economic reasons such as who will take care of her and the children; (3) to protect the children; and (4) because of shame, that is not wanting others to see that she could not maintain a relationship.[430]

Haylock's conclusion was complemented by Dr. Bourget, a psychiatrist called by the defence, who explained that "Stephen not leaving the relationship when her husband was away [incarcerated] was not inconsistent with battered woman syndrome because an abused woman has a *distorted view of things*."[431] The trial judge attached little weight to Haylock's testimony, believing that she lacked objectivity. Worse still, he found that Stephen did not display learned helplessness, as he could not conclude that "Stephen's behaviour both inside and outside the home was the product of learned helplessness"; nor could he conclude that "Stephen adopted a passive and compliant stance as a means of survival."[432] The accused's "irreconcilable" attitude with that expected of a battered woman led the judge to draw very harsh and damaging conclusions: "Stephen never considered leaving Patriquen. It was not that she considered the option and rejected it because of fear for herself or her children; *it was simply that she never even considered it*."[433]

One might wonder whether the judge's finding would have been different had BWS not monopolized the debate as it did. What if Stephen had strengthened her experiential evidence (in detailing why she did not leave) and had only called a social worker as an expert witness to insist on factors that discourage women from leaving (such as fear, children, and social pressure)? A social lens could likely have normalized her failure to leave. Indeed, Stephen could have explained in more depth how and why her fear, the presence of her children, and her mother's pressure to tolerate the violence prevented her from leaving. This experiential evidence might have enabled

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[429] See *Stephen, supra* note 336 at para 150.
[430] *Ibid* at para 182.
[431] *Ibid* at para 217 [emphasis added].
[432] *Ibid* at para 340.
[433] *Ibid* at para 345 [emphasis added].

(i) a social worker to connect Stephen's experience to that of several women; and (ii) the trial judge to assess the criterion of safe avenues of escape from the stance of a reasonable woman who shares Stephen's experience of violence.

D. Intersectional Lens to Grasp Women's Level of Entrapment (Branch 3)

The reasonableness analysis must go beyond that of the accused's identity as a battered woman. Juxtaposing a woman's disadvantages allows for a realistic understanding of the danger she faced and her level of entrapment at the time of her criminal offending. Three cases are worthy of attention, as they can be placed on a continuum: *Ejigu*, in which the accused's acute vulnerability was absent in the analysis; *Manson*, in which the accused's oppressive life circumstances were mentioned but could have been connected to social science evidence on violence inflicted upon Aboriginal women and girls; and *Ameralik* (discussed above), in which evidence on systemic oppression led to the conclusion that abused Inuit women like Ameralik are left to their own devices to end the violence.

Ejigu (self-defence)

Ayelech Ejigu stabbed her abusive husband in 2010 and faced charges of attempted murder, aggravated assault, and assault with a weapon. She testified for her defence, filed a report on BWS prepared by Dr. Koopman (clinical forensic psychologist) and was ultimately acquitted. The evidence revealed, among other things, that she and her husband were born in Ethiopia, where it is customary and culturally accepted for women to be beaten by their husbands. They immigrated to Canada in the 2000s, where the violence continued. Ejigu was unable to find a job, was isolated and "had no one she could speak to."[434] Her major language barrier exacerbated her isolation and her vulnerability to violence: her husband attended her doctor appointments to translate and to make sure she would lie about the source of her injuries.[435] Not surprisingly, Ejigu's doctor visits led to inadequate responses that intensified her entrapment.[436]

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[434] *Ejigu*, *supra* note 336 at para 54.
[435] Ejigu's language barrier was even more apparent during her trial: the judge observed that her "evidence was made difficult for several reasons" (at para 45) including the need to translate it from Amharic.
[436] For instance, when she sought medical attention because she started bleeding after being kicked in her stomach during her pregnancy, the doctor sent her home for 17 days.

The trial judge's analysis relied on Dr. Koopman's opinion of Ejigu's perceptions.[437] Although he mentioned "cultural expectations, finances and the need to provide a family for her sons,"[438] Dr. Koopman also referred to Ejigu's passive nature and emotional state, concluding that "*in her mind*, she had no alternatives."[439] Social science evidence could have identified the specific barriers faced by immigrant women like Ejigu. The experiential evidence revealed the very few occasions where Ejigu could have been helped, namely her visits to her doctor. Yet the evidence also revealed that her doctor failed to detect the violence she was experiencing. Evidence on the importance and necessity of training health workers to identify IPV situations could have shed light on the system's failure to protect Ejigu. This systemic failure could have been brought forward as an important consideration to understanding Ejigu's increased level of entrapment.

***Mason* (self-defence)**

Cheryl Lynn Mason, indicted with manslaughter for stabbing her partner, was acquitted based on self-defence. The experiential evidence revealed notably that (i) Mason was exposed to violence at a very young age and was both physically and sexually assaulted;[440] (ii) Mason's former intimate partners were abusive toward her;[441] (iii) Mason lived in the family house with her parents, her siblings, her siblings' partners and children, and her children,[442] where "noise and commotion"[443] were usual; (iv) Mason's siblings did not involve themselves in her intimate relationship;[444] and (v) Mason's partner kept abusing and controlling her even while he was incarcerated and despite her numerous attempts to end the relationship.[445] The couple lived in the family residence in the St. Theresa Point First Nation community. Although the trial judge never

[437] See *Ejigu*, *supra* note 336 at para 80.
[438] *Ibid* at para 75.
[439] *Ibid*.
[440] See *Mason*, *supra* note 336 (the judge remarked that Mason "recalled [her parents] fighting from ages 5 to 25, whereupon her dad would strike her mother on a weekly basis. Instruments such as a cord, knife and fire were utilized" at para 24).
[441] See *Ibid*.
[442] See *Ibid* at para 2.
[443] *Ibid* at para 88.
[444] See *Ibid*.
[445] See *Ibid* at para 27.

explicitly mentioned it, Mason is likely an Aboriginal woman given that she and her partner reportedly argued "all the time,"[446] both in English and Oji-Cree.[447]

The judge held that Mason had no other means to protect herself. Although he highlighted the accused's poor social support,[448] he relied heavily on the psychologist's opinion regarding the notion of learned helplessness. The judge referred to this notion to explain Mason's "loss of control over the outcome of others' actions upon her," her "ultimate resignation" and her affected "ability to have an escape and ability to stop what was transpiring."[449] We argue that the notion of learned helplessness was not seem suited to the evidence adduced at trial, which pointed to a culture trivializing the violence against Indigenous women and girls. Normalization of the violence, rather than learned helplessness, was the backdrop of Mason's narrative that limited her means to deal with her partner's violence. Evidence on the prevalence of violence against Indigenous women and girls and its normalization in Aboriginal communities[450] could have complemented the evidence concerning Mason's tragic life circumstances. This shift would most likely have led the judge to the same conclusion.

2.2. Challenges to the Introduction of Social Science Evidence on Intimate Partner Violence

The case law discussed above reveals the existence of three specific challenges to introducing social science evidence in victims-accused's trials. Firstly, in using the BWS framework to assess reasonableness, judges tend to overlook the role of systemic failures in women's criminal conduct (subdivision A). Secondly, some criminal justice actors erroneously conceive BWS evidence as necessary, which places undue importance on the BWS framework

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[446] *Ibid* at para 16 (the accused's sister's testimony).

[447] Oji-Cree is the main dialect of the St. Theresa Point First Nation community in which the accused lived; English is the community's everyday language. In addition to the accused's place of residence and the fact that the couple argued in Oji-Cree, Mason's presumed Aboriginal status is also supported by the fact that the accused and the deceased are part of the Flett and Mason families, which are members of the Council of St. Theresa Point First Nation. See generally St. Theresa Point First Nation, "About St. Theresa Point First Nation", online: <http://www.stpfirstnation.com/about-us>.

[448] See *Mason, supra* note 336 at para 88.

[449] *Ibid* at para 89.

[450] See e.g. National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: A Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Kepek – Quebec* (2019) at 96–101, online (pdf): <www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_2_Quebec_Report-1.pdf> (omnipresence and normalization of violence against Indigenous women and girls).

and forecloses adopting any alternative framework (subdivision B). The final challenge pertains to the lack of consistency among decision makers: discrepancies in judges' understanding of IPV make it difficult to predict their receptiveness toward "sources of information [other than BWS evidence] which may help to explain women's experiences"[451] (subdivision C).

A. Criminal Law's Reluctance to Consider State Blame

Ryan, *Côté*, *Knott*, *Stephen*, *Mason*, and *Ejigu*, shed light on judicial resistance to go beyond the BWS framework and to acknowledge that the State contributes to women's criminal conduct. Judges' analyses of the unavailability of alternatives is disconnected from the experiential evidence adduced, which pointed to collective and systemic failures (branches 2 and 3 of Bradfield's framework). *Ameralik* is the only case in which the trial judge connected the accused's experience of violence with social science evidence on how the State failures limit Inuit women's options.

The emerging concept of State blame has started to attract scholarly attention. Law professor Marie Manikis developed a typology of State blame and a complementary framework to account for this blame at the sentencing stage.[452] Among the forms of State blame discussed by Manikis, there are "state policies that promote various forms of inequalities that are *known to perpetuate criminogenic conditions*."[453] In the context of victims-accused, this "State criminogenic conduct"[454] includes intersectional socio-economic inequalities[455] but could also be understood as State failures to provide all the necessary conditions known to enable women to free themselves from IPV, including but not limited to effective protective measures;[456] sufficient safe

[451] Boyle, "Syndrome and Self-Defence", *supra* note 71 at 177.
[452] See Marie Manikis, "Recognising State Blame in Sentencing: A Communicative and Relational Framework" (2022) 81:2 Cambridge LJ 294.
[453] *Ibid* at 308 [emphasis added]. Manikis defines criminogenic conditions as "conditions in which it is more likely that crimes will be committed" (at 308).
[454] *Ibid* at 310.
[455] In the context of IPV, Manikis mentions intersectional inequities based on gender, colonialism, and socio-economic factors. She discusses a sentencing case in which the Québec Court of Appeal insisted on Indigenous female victims' vulnerability and the offender's alcohol issues yet did not consider the State colonialist's role to women's vulnerability and alcohol issues. See *Ibid* at 308.
[456] For our legal institutions responses to be effective, our institution must, among other things, gain a realistic understanding of IPV, i.e. one that captures the realities of women's experiences. For example, criminal law's episodic construction of IPV (rather than a course of conduct) significantly impedes its ability to protect women. Indeed, the protective measures are incomplete because they respond to situations of IPV that are minimized, both in terms of the harm inflicted and the seriousness of the danger women face. See House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 43-2, No 18 (4 February 2021) (Heidi

housing; measures easing women's economic independence; as well as measures raising social awareness on notions of coercive violence, post-separation violence and our collective responsibility to end IPV. The framework suggested by Manikis, akin to that of Bradfield, entails a mix of empirical research and experiential evidence.[457]

Discounting "the State's contributory responsibility"[458] at the sentencing stage is one thing; acknowledging this responsibility at the conviction stage is quite another thing. As Manikis argues, since State blame is different from individual blame,[459] treating them separately at the sentencing stage enables a more nuanced analysis of how blamable the offender's conduct is (the offender's degree of moral blameworthiness). At the conviction stage, though, where the ultimate question is whether the offender's conduct is blamable (the offender's guilt or innocence), judges are more reluctant to nuance the inquiry in considering State blame. Law professor Benjamin L. Berger explains this reluctance as a consequence of the necessity to avoid any "haemorrhaging of blame."[460] Seeking to understand why the threshold for being declared not criminally responsible because of mental disorder is so onerous,[461] Berger argues that the restrictive approach taken by the doctrine of mental disorder is explained by the necessity to assign blame at the individual level—rather than the socio-political level—to preserve the legitimacy of our criminal justice system.

Illingworth), online (pdf): <www.ourcommons.ca/Content/Committee/432/JUST/Evidence/EV11093829/JUSTEV18-E.PDF> (IPV "is treated as an episodic or one-time event and the repetitive dynamics of coercive control are not recognized. This makes it extremely difficult for *law enforcement to intervene effectively*" at 1215 [emphasis added]).

[457] See Manikis, *supra* note 452 at 318 (empirical research would be introduced by experts while experiential evidence would be introduced by offenders, victims, and communities affected by the State conduct).

[458] *Ibid* at 303.

[459] See also *R v Turtle*, 2020 ONCJ 429; Sonia Lawrence & Debra Parkes, "*R v. Turtle*: Substantive Equality Touches Down in Treaty 5 Territory" (2020) 66 CR (7th) 430 ("*Turtle* succeeds in reversing, even momentarily, the colonial legal system's gaze, normally focused on individual responsibility or brokenness. In Justice Gibson's view, overincarceration of Indigenous people should not be the focus: 'the issue is not overincarceration, *per se*, but rather the direct extension of the corrosive effects of colonialization'" at 435).

[460] Berger, *supra* note 11 at 133. This hemorrhaging would jeopardize the process of allocating individual blame—a process that is inherent to criminal law—in that the blame would "circulate, touching social and political institutions broadly" (at 133).

[461] Berger argues that there is a gap between our current knowledge of mental disorders and the narrow application of the doctrine of mental disorder. For example, he explains that high proportions of our prison population suffer from mental conditions such as Foetal Alcohol Spectrum Disorder and Anti-Social Personality Disorder. These conditions may impede human reasoning as required by section 16(1) CrC, yet the doctrine of mental disorder excludes them.

In the context of victims-accused, the BWS framework, just like the defence of mental disorder, is binary[462] and thus well suited to the "guilty/not guilty"[463] analysis performed during trials. Berger's argument resembles the criticisms leveled against BWS: in relying on a diagnosis, the BWS framework decontextualizes women's decisions (e.g. to stay with abusive partners) and masks our collective responsibility to end IPV. If an accused suffers from BWS, her inability to leave is explained according to the cognitive theory of learned helplessness. This explanation leaves no room for a nuanced discussion on systemic failures to support women, "concealing the lines of collective, social and political responsibility that we are loath to confront."[464] Based on Berger's argument, we believe that judges' over-emphasis on the BWS framework is the corollary of their reluctance to acknowledge—at least at the conviction stage— the State's responsibility.

B. Distorting Effects of the BWS Framework on the Trial Process

Lavallee made it very clear that the focus must remain on whether the accused acted reasonably, not on whether the accused is a battered woman.[465] Nonetheless, in practice, we observe that implicit to the BWS framework is the question of who the woman is, a question that shifts the focus away from where it should be (i.e. determining whether the accused acted reasonably).

This shift manifests itself in a number of ways among the cases analyzed. Some criminal justice actors conceive BWS as a criminal defence *per se*[466] or make the question of whether the accused was a battered woman the central issue (e.g. *Doonanco*).[467] Equally problematic is understanding the BWS framework as an essential framework, rather than a possible avenue, to

[462] See Berger, *supra* note 11 ("[o]ne either has those psychiatric features or deficits that preclude the attribution of criminal responsibility or one does not" at 123).
[463] *Ibid* at 137.
[464] *Ibid*.
[465] See *Lavallee, supra* note 12 at 890 line h to i. This nuance was reiterated by the concurring judges in *Malott*. See *Malott* SC, *supra* note 16 (BWS "is not a legal defence in itself such that an accused woman need only establish that she is suffering from the syndrome in order to gain an acquittal" at para 37 *in limine*).
[466] See e.g. *Sanderson, supra* note 336 ("[t]he battered spouse syndrome defence is a species of self-defence" at para 78). *Contra R c Graveline*, 2005 QCCA 574 (the trial judge reframed the role of BWS [erroneously qualified by the defence lawyer as a defence], mentioning that BWS "in itself is not a defence but it's a context that will be given to you [jurors] which leads to defence of self-defence" at para 46).
[467] See also *Rabut, supra* note 336 (one of "the contested questions relate to [Rabut's] contention that she was a 'battered woman'" at para 2).

normalize the accused's conduct (e.g. *Staudinger*, *Boyer*). These conceptual errors must be avoided because they convey the wrong idea that the BWS framework is necessary for a defence to succeed and thus preclude any alternative framework.

Doonanco (self-defence)

Doonanco illustrates how the BWS framework distorts the reasonableness inquiry in focusing on whether the accused suffered from BWS. Deborah Lee Doonanco appealed her convictions by a jury for counts of second-degree murder of her partner; indecent interference with his remains; and arson of the couple's residence. The Alberta Court of Appeal dismissed the appeal, but Bielby J.A., dissenting, concluded that the Crown's conduct caused an unfair trial and that the only effective remedy was to order a new trial. Doonanco's case raised issues of trial fairness: the credibility of Dr. Walker, the expert witness for the defence, was directly attacked by Dr. Glancy, the rebuttal expert witness called by the Crown, in a way that breached the rule set out in *Browne v Dunn*.[468] More specifically, Dr. Glancy criticized the methodology Walker employed in determining that Doonanco suffered from BWS.[469] He drew the jury's attention to several factors (present or absent in Doonanco's case) atypical of BWS.[470] The "BWS defence,"[471] as its name suggests, focused on whether Doonnanco suffered from BWS, a question vigorously debated by Drs. Walker and Glancy. For the dissent, which the SCC confirmed,[472] expert evidence (on whether Doonanco suffered from BWS) was closely tied to the issue of Doonanco's guilt or

[468] (1893), 6 R 67 (UK HL). This rule prohibits a party to impeach a witness' credibility (either with another piece of evidence or in pleadings) on a determining aspect without having provided this witness, in cross-examination, the opportunity to explain the matter. See also *R c Chandroo*, 2018 QCCA 1429 (the *Browne v Dunn* principle seeks "to enhance the fairness of an adversarial trial by minimizing the risk of impeachment by ambush" at para 12).

[469] Walker opined that at the time of the offences, Doonanco was suffering from BWS, PTSD, a major depressive disorder and displayed a dissociative state.

[470] See *Doonanco* CA, *supra* note 336 (passages of Dr. Glancy's report were reproduced in the ABCA decision; Glancy wrote that "[t]his case appears to be somewhat different than to the reported cases involving Battered Women's Syndrome. The use of this syndrome in [Doonanco's] defence appears to push the limits of this syndrome as a defense beyond previous limits. In particular the short duration of the second relationship, suggesting that she had not had time to develop learned helplessness; … the fact that she had extricated herself from a previous relationship with him; the fact that she had not tried any avenues of escape; this despite the fact that she ... was well connected in the town; the fact that she [had] the financial wherewithal to leave; the fact that she had evidence prior to the relationship of depression and little evidence of posttraumatic stress disorder actually caused by the relationship; *all these factors seem atypical in this case*" at para 254 [emphasis added]).

[471] *Ibid* at paras 190, 204.

[472] See *R v Doonanco*, 2020 CSC 2.

innocence: although "[a] significant possibility remains that the jury would have convicted Doonanco of manslaughter only, or even acquitted her, had Dr. Walker and other witnesses been able to respond to Dr. Glancy's evidence."[473]

***Staudinger* (self-defence)**

Berger's position is helpful to analyzing *Staudinger* (discussed above), in which Clément, a social worker, elaborated on contextual factors impeding women to leave, including the criminal justice system's inadequate responses. Clément testified alongside with two psychiatrists, who debated over whether Staudinger suffered from BWS. According to the Québec Court of Appeal, Clément's testimony was relevant because it established that abused women like Staudinger have a "distorted"[474] perception regarding the availability of alternatives. In implying that women's minds are the only barrier to leaving, the word "distorted"—rather than reasonable— reinforces the pathologization effect of the BWS framework and strengthens the reliance on this framework to explain women's conduct. The word "distorted" dilutes the purpose of Clément's testimony—to normalize Staudinger's perception that she had no choice—and raises the question of whether Staudinger would have been acquitted had Clément been the only expert witness to testify on her behalf.[475] Would the jury have felt confident to free her from criminal liability without being assisted by BWS evidence?

***Boyer* (duress)**

This case (discussed above) illustrates the undue weight given to BWS evidence, which might very well explain the tendency to overlook other relevant sources of information. Recall that the defence chose to rely exclusively on Boyer's version. This lawyering decision, grounded in the Scopelliti rule (as in *LS* and *AD* discussed above), was not successful at first instance. The appellate, however, argues that the trial judge erred in assessing whether she had safe avenues to escape because he did not measure this criterion on the modified objective standard of the

[473] *Doonanco* CA, *supra* note 336 at para 264.
[474] *Staudinger*, *supra* note 336 ("[l]e témoignage [de Clément] était donc pertinent puisqu'il tendait logiquement à établir un des faits en litige, soit que les femmes violentées développent une *perception faussée* de leur situation" at para 36 *in fine* [emphasis added]).
[475] Indeed, two psychiatrists testified during Staudinger's trial and debated over whether she fit BWS' criteria. See *Ibid* (Dr. Chamberland, psychiatrist for the Crown, opined that Staudinger's behaviour "ne correspond pas au modèle classique de la personne atteinte du syndrome [de la femme battue]" at para 10).

reasonable person. Had he done so, the appellant claims, she would have been acquitted: a reasonable woman sharing Boyer's experience of violence would not have perceived other options than driving her car.[476] The Court of Appeal of Québec ordered a new trial. It is worth discussing the Crown's factum despite this new legal development in the case, as the Crown's position exemplifies the perverse effects of BWS.

The Crown's factum reveals not only how little weight is given to Boyer's experience of violence but also how BWS operates as a guardianship[477] for abused women in restricting the use of other sources of information (in this case, experiential evidence) and forcing women to rely on BWS evidence. When referring to the appellant's version on the inexistence of lawful options, the Crown used the word "présumer,"[478] which consists in assuming facts whose certainty have not yet been verified. Why does the Crown insist on avenues that Boyer should have taken when the unavailability of these options is grounded in reality, in Boyer's experience of violence? The Crown dilutes the importance of Boyer's history of violence in the reasonableness inquiry by suggesting that "l'appelante ne pouvait prédire avec exactitude la suite des évènements en se basant sur deux évènements qui s'étaient déroulés en 2017."[479]

Equally disturbing is the Crown's statement that the reasonableness of Boyer's belief in the lack of options could have been established had a medical expert opined that "en raison du fait que l'accusée souffrait d'un trouble mental ou d'un traumatisme découlant de ses experiences personnellles, *sa capacité à réfléchir et discerner d'autres solutions était considérablement diminuée*."[480] Put differently, the Crown maintains that Boyer's testimony did not suffice in that it was based on suppositions although a psychiatric lens on her "diminished capacity" to perceive

[476] Boyer testified on her unsuccessful past attempts to deal with her partner's violence, including seeking police intervention (police intervention turned out to take place after the fact or was ineffective); trying to leave during a dispute (she was further abused); seeking refuge in her car (her partner smashed the window); asking help from her neighbours (her aid requests were unanswered); and trying to phone the police during an aggression (her partner broke her cellphone).
[477] See Poulin, *supra* note 127.
[478] *Boyer c R*, 2023 QCCA 608 (Factum of the Crown) at paras 6, 8. The Crown has contended that Boyer "[a] oppos[é] des scénarios hypothétiques," "[des] excuses purement subjectives et invérifiables" (at para 43). For the Crown, Boyer "[a] présum[é] de ce qui serait arrivé si elle avait tenté l'une ou l'autre des avenues suggérées" (at para 43).
[479] *Ibid* at para 43. This passage is highly problematic not only because it constructs IPV as episodes but also because it distorts Boyer's testimony: she testified that the violence occurred daily, took several forms (ranging from psychological to physical violence), and she recounted the 2017 events not as the only two times she experiences violence but rather as two significant events in her whole experience of IPV.
[480] *Ibid* at para 46 [emphasis added].

other options might have sufficed. From the Crown's point of view, thus, it seems inconceivable that Boyer acted reasonably without having suffered from any mental disorder.

C. Discrepancies in Case Law

Discrepancies in case law can be grouped into two categories: the extent to which (1) judges resist stereotypical assumptions about IPV; and (2) judges rely on medical evidence of BWS to assess the reasonableness of the accused's conduct.

Discrepancies #1: Stereotypical Assumptions on IPV

Relying on stereotypical assumptions to assess one's credibility constitutes an error of law subject to appellate review.[481] To differing extents, judges resist stereotypes about IPV.[482] For instance, *Stevensen, Knott,* and *Stephen* can be placed on a continuum.

In *Stevenson,* in which Henrietta Stevenson hit her partner with the heel of her shoe, no evidence on BWS was adduced. Although unassisted by expert evidence, the trial judge rejected the stereotypical reasoning suggested by the prosecution. Indeed, the prosecutor urged the Court to conclude that (i) a previous incident of violence against Stevenson did not occur (as she claimed) because she lied about the source of her sprained wrist when seeking medical attention, yet the judge acknowledged that "it is a common-place that victims of assault, in the context of a relationship, often provide other reasons for injury";[483] (ii) Stevenson was not assaulted by her partner in the past (as she alleged) because no one witnessed these assaults, yet the judge remarked that "it is an unhappy truth that many assaults in this context occur behind closed doors";[484] and (iii) Stevenson was not afraid of being assaulted by her partner (as she contended) because she let him back into her home after their argument, yet the judge indicated that "the act of letting him in could, in some circumstances, be equally consistent with fear."[485]

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[481] See e.g. *JL, supra* note 255 at paras 71–86.
[482] Many of the stereotypical assumptions on IPV revolve around the behaviour expected of women, which include the question of "why didn't she leave?". See *Lavallee, supra* note 12 at 871 line h to j (Wilson J. enumerated several stereotypes on IPV). For a full discussion on the rule prohibiting the reliance on stereotypes, see *R v JC,* 2021 ONCA 131.
[483] *Stevenson, supra* note 336 at para 3.
[484] *Ibid* at para 4.
[485] *Ibid* at para 13.

Then, in *Knott*, the Crown argued that Knott's after-the-fact conduct was inconsistent "with a mind overrun by fear."[486] In rejecting this argument, the judge referred to the psychologist's explanations on the cyclical nature of IPV and how women typically feel safe during the third phase, the "post-acute battering." We wonder whether the judge would have rejected this stereotypical reasoning without being assisted by BWS evidence.

At the end of the spectrum, in *Stephen*, evidence on BWS was the source of stereotypical assumptions. Stephen's financial independence and assertiveness, which diverged from the victimization model of BWS, contributed to findings that undermined Stephen's defence, namely that she did not fear her partner and that she chose not to leave him although she was able to.[487]

Discrepancies #2: Reliance on BWS Evidence

Further inconsistencies in case law stem from the need to introduce expert evidence, which differs from one decision to another. For example, it is difficult to reconcile *Rabut* with *Knott*. Despite very similar experiential evidence (on past violence and past attempts to end it), the reasonableness of the accused's response (s 34(1)(c) CrC) was analyzed through different prisms. In *Rabut*, the trial judge relied on Rabut's experience of violence and did not refer to the psychologist's evidence (on BWS).[488] In *Knott*, though, the trial judge relied on the psychologist's testimony, namely on the notion of learned helplessness (in examining the availability of other means to respond to the danger) and on PTSD resulting from the repeated violence (in examining the history of the couple's relationship).[489]

Complementarity of Experiential & Social Science Evidence

These discrepancies generate unpredictable outcomes, thus making it difficult for defence lawyers mandated with presenting a defence to assess whether evidence on past violence (experiential evidence) only will suffice to acquit their clients. This unpredictability, we believe, reinforces the importance of Bradfield's SEF. Experiential and social science evidence go

[486] *Knott*, *supra* note 336 at para 112. In pointing to the facts that Knott went into a confined space with her partner (rather than locking herself in the suite) and called 911 for her partner (rather than calling 911 for her own safety), the Crown invited the judge to draw adverse inferences based on how abused women are expected to behave.
[487] See *Stephen*, *supra* note 336 at para 343.
[488] See *Rabut*, *supra* note 336 at paras 109–24.
[489] See *Knott*, *supra* note 336 at paras 105–49.

together: evidence on past violence must be complemented by broader knowledge of IPV adapted to the particular facts of each case.

2.3. Practical Considerations

Implementing a SEF raises some practical considerations. First, an important nuance must be drawn regarding the use of medical evidence: under the SEF, medical evidence on the effects of trauma and social science evidence might work together (subdivision A). Beyond this complementarity, our research also reveals the effectiveness of lawyering strategies discussed in scholarly work (subdivision B). Finally, it is imperative to discuss procedural avenues to introduce social science evidence on IPV in criminal trials (subdivision C).

A. Medical Evidence to Preserve the Accused's Credibility

Medical evidence beyond BWS exists and remains relevant. The argument advanced in our thesis—that criminal justice actors must consider replacing the BWS framework with a SEF— does not mean that medical evidence is no longer appropriate. Sheehy, Stubbs, and Tolmie advise defence lawyers to encourage their clients to seek professional help with recovery from traumatic events.[490] Along with this professional help, defence lawyers might consider adducing expert evidence on the effects of trauma. For example, the accused might display symptoms of PTSD (e.g. memory loss, concentration problems, avoidance of traumatic details, anger and irritability) likely to impede her credibility and the probative value of her account.[491] Medical evidence in such instances could serve to preserve the accused's credibility (rather than demonstrating that she acted reasonably because she suffered from a mental disorder) and is thus perfectly compatible with the SEF.

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[490] See Sheehy, Stubbs & Tolmie, "Securing Fair Outcomes", *supra* note 52 ("long-term abuse often will further undercut a woman's self-confidence and her ability to communicate her experience and, at the same time, inflame her defensiveness" at 702).

[491] Credibility and reliability, both factual determinations, are different concepts in criminal law. Factors such as anger, irritability, and avoidance might adversely reflect on the accused's good faith, honesty, and willingness to tell the truth (credibility). Memory loss, avoidance, and concentration problems might affect the accused's ability to observe, recount, and remember the events (reliability). See e.g. *R v Kishayinew***,** 2019 SKCA 127 at para 59. See also Sheehy, "Lessons from the Transcripts," note 15 (in addition to PTSD, traumatic brain injuries such as the mild traumatic brain injury and the post-concussive syndrome might cause "confusion, anxiety, and amnesia [that] interfere with a woman's ability to instruct counsel and to testify coherently and credibly in her own defence" at 293).

For instance, in *Knott* and *Rabut*, medical experts testified on BWS but also discussed the impact of repeated abuse on the accused's brain. In both cases, the Crown suggested that the accused was not credible,[492] yet the trial judges believed the accused's version in relying on the experts' explanations. Knott's "inability to recall important aspects of the trauma" was explained as a form of "cognitive avoidance," a PTSD symptom "where individuals actively try to repress memories of those traumatic events."[493] Likewise, the trial judge accepted that Rabut's inability to recall important details and her flashes of the events resulted from dissociative amnesia and intrusive memories, both symptoms of PTSD.[494]

B. Successful Lawyering Strategies to Strengthen Experiential Evidence

The importance of experiential evidence cannot be overemphasized: a compelling narrative (on the violence and the obstacles faced to end it) reinforces the accused's credibility while setting the evidentiary foundation to introduce relevant pieces of social science evidence. The case law implemented two lawyering strategies discussed by Sheehy, Stubbs, and Tolmie, namely that of (i) adducing evidence that corroborates (directly or indirectly) the violence recounted by the accused without (ii) restricting this evidence to the violence inflicted on the accused.[495] Case law reveals that these strategies complement each other: corroborative evidence usually encompasses evidence of past violence toward the accused, other people, things, and animals.

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[492] See e.g. *Knott supra* note 336 at paras 53–4 (the accused gave more details of her experience of violence during her trials than she gave on earlier occasions, i.e. to the police or her psychologist).
[493] *Ibid* at para 59.
[494] See *Rabut, supra* note 336 at para 72.
[495] See Sheehy, Stubbs & Tolmie, "Securing Fair Outcomes", *supra* note 52 (evidence on the aggressor's violence seeks to achieve the twin objectives of "bolstering the credibility of the accused's account of the [aggressor's] violence toward her" and of "demonstrat[ing] that his violence was his problem, a manifestation of his need to dominate, by any means necessary in relationships" at 683–84). See e.g. *Knott, supra* note 336 (the trial judge enumerated significant corroboration of Knott's account of the abuse, such as Knott's injuries evidenced by a shelter worker's notes; and a call Knott made to the police evidenced by police officer's notes, where "she sounded like she was chocking and a male voice was in the background repeatedly apologizing" at para 60).

Defence lawyers are encouraged to adduce experiential evidence, from testimonies and any source (e.g. medical records,[496] criminal records,[497] and incident reports filed by the police[498]), on the following facts:

(i) the nature of the violence inflicted on the accused;[499]

(ii) the extent of the violence inflicted on the accused;[500]

(iii) the cumulative effect of the violence inflicted on the accused;[501]

(iv) the accused's coping strategies (including leaving and staying)[502] and their outcomes;[503] and

(v) the aggressor's violence toward other people, animals, and things.[504]

Case law reveals that these factual elements are, to a large extent, overlapping. For example, in *Boyer*, Boyer explained that her partner's violence caused her to feel afraid and

[496] Both those of the accused and those of the main aggressor. See e.g. *Knott*, *supra* note 336 (Knott's physical injuries was evidenced by several health professionals' notes from diverse hospitals); *Ryan* NSSC, *supra* note 336 (medical records corroborated Ryan's husband's "longstanding history of violence" at para 141).
[497] See e.g. *AD*, *supra* note 336 at para 28 (Drolet's partner's 2005 conviction of assault on her was filed at trial).
[498] See e.g. *Ameralik*, *supra* note 336 at paras 30–41 (seven occurrence reports from RCMP were filed at trial). Ideally, an occurrence report is filed by its author or with the consent of the Crown. In the absence of the Crown consent and without the author's report, the occurrence report will have little corroborative effect: given the rule prohibiting hearsay, the report only establishes its mere existence.
[499] I.e. a description of the different types of violence, including the controlling tactics deployed over time. See e.g. *Boyer*, Appellant's Factum, *supra* note 347 at para 9 (Boyer explained that the violence ranged from humiliation to physical violence and provided examples).
[500] I.e. the pervasiveness of the violence in the accused's life, established by the period during which the violence occurred, its frequency, and its evolution over time. See e.g. *Ryan* NSSC, *supra* note 336 (Ryan mentioned that when her husband got retired as a full soldier, he returned home permanently and the "situation got progressively worse" in that "[t]he control and possessiveness increased" at para 34).
[501] E.g. dependance; isolation; entrapment; low self-esteem; feelings of fear, guilt, and shame. See e.g. *Ibid* at paras 103–33 (Ryan's friend and some of her co-workers testified on Ryan's psychological and physical state in the months, weeks and days prior to the event, such as Ryan's fear of her husband, her increased anxiety, her feeling "that she 'had no hope'", and her loss of weight).
[502] E.g. attempts to leave; violent resistance; and help-seeking behaviour, including police intervention and/or judicial intervention. See e.g. *Ibid* at paras 47–52.
[503] E.g. post-separation violence; breach(es) of conditions; and promises to change. See e.g. *Boyer*, Appellant's Factum, *supra* note 347 at paras 14–5; *LS*, *supra* note 336 at para 29.
[504] See e.g. *Ryan* NSSC, *supra* note 336 at paras 134–36, 140 (Ryan's husband's violent temper was evidenced by a witness who testified on a road rage incident; another witness testified on an incident where Ryan's husband attacked him randomly); *AD*, *supra* note 336 (Drolet testified on her partner's violence toward her and others, which led the Court to conclude that Drolet's partner was "extrêmement dangereux, imprévisible et violent" at para 50).

entrapped (cumulative effect of the violence); these feelings explain why she stayed with her ex-partner, allowing us to frame "staying" as a coping strategy.[505]

C. Procedural Avenues to Introduce Social Science Evidence on Intimate Partner Violence

Our chapter could not end without a brief word on procedural considerations to introduce social science evidence on IPV. The law of evidence provides that facts, including social facts, are either proven or fall within the scope of judicial notice.[506] In *Le,* a constitutional matter on section 9 of the *Charter*, the SCC specified that social science evidence consists of social facts derived from judicial notice (avenue #1), admissions (avenue #2), or direct evidence (avenue #3).[507] In the context of victims-accused, we recommend the latter avenue given the innovative character of a SEF in their trials.

Avenue #1: Judicial Notice

Courts may take judicial notice of facts, including social facts, "that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy."[508] The more precise, relevant and essential a fact is for disposing of a specific case, the more strict the test for judicial notice is.[509] For example, in *Le,* it was held that relations between police and racialized groups should be known to the reasonable person in the section 9 *Charter* analysis. Social science evidence on these relations is situated halfway along the spectrum: "it is neither dispositive of when Mr. Le was detained, nor mere background information."[510] Relying on authoritative reports such as the Tulloch Report and some issued by the Ontario Human Rights Commission, the SCC inquired for social facts that would not be the "subject of a reasonable dispute" and recognized, as an undisputed social fact, that the police and the criminal justice system disproportionately target members of racialized groups.

We believe that *Le*'s conclusion cannot be transposed *mutatis mutandis* to victims-accused's trials, in which social science evidence plays a more critical role: more than one consideration

[505] See *Boyer*, Appellant's Factum, *supra* note 347 at para 12.
[506] See *R v Williams*, [1998] 1 SCR 1128, 124 CCC (3d) 481 at para 54 *in limine.*
[507] See *Le*, *supra* note 204 at para 83.
[508] *R v Find*, 2001 SCC 32 at para 48.
[509] See *Le*, *supra* note 204 at para 85.
[510] *Ibid* at para 86.

among many, the knowledge within the three branches of Bradfield's SEF is tied to criminal defence (self-defence, duress, and necessity). It is thus to be expected that the test for judicial knowledge would be strictly applied. In the book *Le contexte social du droit dans le Québec contemporain : l'intelligence culturelle dans la pratique des juristes*,[511] Jean-François Gaudreault-Desbiens discusses the doctrine of judicial notice in the context of a SEF. He opines that social facts are unlikely to meet the test for judicial notice because of judicial resistance to recognizing social sciences as sources of indisputable accuracy.[512] For example, the author refers to *Lavallee* on the necessity of adducing expert evidence on IPV, a complex phenomenon for the average person. Gaudreault-Desbiens' reasoning, published in 2009, is far from being outdated: in light of recent literature reporting jurists' lack of awareness of IPV,[513] how can we pretend that this knowledge constitutes notorious and undisputable facts? Lawyers are encouraged, Gaudreault-Desbiens concludes, to act with prudence and proactivity in proving social facts rather than pleading judicial knowledge:

> [L]'avocat qui estime important que des éléments de contexte social influent sur la décision du juge devrait autant que possible les mettre en preuve ou à tout le moins procurer au juge une amarre factuelle à laquelle s'arrimer pour utiliser le contexte social d'une espèce comme une grille de lecture de la preuve par ailleurs présentée. Autrement dit, *l'avocat doit impérieusement tendre une perche quelconque au juge dès qu'il est question de contexte social*.[514]

Added to practitioners' documented lack of awareness concerning IPV is the scarcity of cases in which social science evidence was adduced to defend victims-accused. Defence lawyers are invited to prove social facts by seeking admissions from the prosecution or, better still, by adducing direct evidence.

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[511] Jean-François Gaudreault-Desbiens & Diane Labrèche, *Le contexte social du droit dans le Québec contemporain : l'intelligence culturelle dans la pratique des juristes* (Cowansville : Éditions Yvon Blais, 2009) at 150–60.

[512] See *Ibid* (Gaudreault-Desbiens defines a social framework as "sciences sociales visant à éclairer, dans une perspective macroscopique, des faits en litige et, le cas échéant, à aider le juge à privilégier une théorie de la cause plutôt qu'une autre" at 150).

[513] See e.g. Jennifer Koshan, "#Don'tDisbelieveHer: Towards Recognition of Myths and Stereotypes about Intimate Partner Violence at the Supreme Court of Canada" (April 13, 2022), online (pdf): <http://ablawg.ca/wp-content/uploads/2022/04/Blog_JK_IPV_Myths_April_2022.pdf> (very few SCC decisions explicitly recognized stereotypical assumptions on IPV); Corte & Desrosiers, *supra* note 9 (chapter 14 "Répondre aux besoins de formation en matière d'agression sexuelle et de violence conjugale" at 209–16).

[514] Gaudreault-Desbiens & Labrèche, *supra* note 511 at 159 [emphasis added]. See also Danielle Pinard, "Le domaine de la connaissance d'office des faits" in Jean-Claude Paquet, ed, *Actes de la XVIe conférence des juristes de l'État* (Cowansville : Éditions Yvon Blais, 2004) at 351–57 (the test for judicial notice is so onerous that it might be more prudent to prove the fact rather than pursuing the avenue of judicial notice).

Avenue #2 Admissions

Admitting that a social fact exists is open to parties. Such an admission effectively exempts the party from being obliged to prove the admitted fact. Nevertheless, this avenue is a double-edged sword. Resource-efficient, admitted facts are usually articulated so succinctly that they deprive triers of fact from being presented more convincing social science evidence likely to fully contextualize the accused's conduct. For example, in cases like *Boyer*, *Côté* and *Sanderson*, in which the experiential evidence pointed toward ineffective and unresponsive police intervention, it could have been possible to complement the experiential evidence with an admission to the effect that "victims of intimate partner violence do not trust the justice system, which includes the police". This social context fact—that of a broken trust—is the premise of the 2020 report *Rebâtir la confiance.* Ideally, though, to fully situate Boyer's, Côté's and Sanderson's experiences of IPV within the landscape of the criminal justice system, the report should be filed to courts, allowing decision-makers to become aware of the many flaws in our justice system and to connect the accused's experience with these findings.[515]

Avenue #3: Direct Evidence

We argue that the most viable avenue consists in adducing direct evidence, i.e. evidence that directly demonstrates a social fact. Direct evidence stems either from documentary or *viva voce* evidence. Most importantly, direct evidence might be brought by social workers and researchers.

Documentary Evidence

Reliable reports,[516] such as those issued by coroners, commissions, governmental and well-established community organizations, can be filed in courts. Following the rule prohibiting

[515] Corte & Desrosiers, *supra* note 9 (these documented flaws generated 192 recommendations to rebuilt victims' trust, which are drawn from consultations with almost 100 organizations and 1500 crime victims).

[516] Several reliable reports are mentioned in chapter 2, such as the coroner's report on intimate partner feminicides in Québec (*supra* note 291); the reports from the National Inquiry into Missing and Murdered Indigenous Women and Girls (*supra* notes 303, 450); and the report from the Conseil du statut de la femme (*supra* note 289). Well-established community organizations (such as the Fédération des maisons d'hébergement pour femmes; the Alliance des maisons d'hébergement de 2e étape pour femmes et enfants victimes de violence conjugale; and SOS Violence-conjugale) also publish enlightening documentation on their website.

hearsay, prosecution consent is needed for a report to be filed without its author(s). Without such consent, defence lawyers must *subpoena* the author(s).[517]

Viva Voce Evidence: Social Workers and Researchers

Last but not least, defence lawyers can also consider calling an expert witness to the bar. To ensure better access to justice, experts might, with the Court's approval, testify by videoconference.[518] Sheehy recommends "changing the definition of 'expert' to include branches of *expertise that do not explain social problems in terms of individual pathology*. It would also mean … that the right questions are asked: those which focus on the *defendant's circumstances and alternatives* rather than her psychological state."[519] Two categories of experts share this potential of framing IPV as a social problem: social workers and researchers. Social workers possess unique expertise through their daily contacts with women (and their children) victims of IPV, and researchers from various fields (e.g. law, social work, and sociology) produce highly relevant material on IPV.

Social workers should be given a voice in women's criminal trials. In this regard, *Staudinger* is a very promising legal precedent. The Québec Court of Appeal recognized the social worker who testified on Staudinger's behalf as an expert witness. Specifically, it acknowledged the social worker's experience in a women's shelter as a special knowledge warranting her expert qualification. In doing so, the Québec Court of Appeal has opened the doors for interveners from diverse backgrounds to be recognized as expert witnesses. The social worker who provided expert evidence in *Staudinger* never personally met Staudinger, yet she was permitted to explain women's reactions to IPV, such as their reluctance to seek help and to leave their partners. This knowledge of IPV situated Staudinger's experience "within the [broader] context of women's experiences,"[520] which departed from the individual pathologized approach of BWS. Accordingly, social workers from various backgrounds (e.g. women's shelters, crime victims' assistance centers, and crisis lines) are well placed to provide general knowledge on IPV.

[517] This would allow the prosecution to cross-examine the author on the content of the report, which could then be properly filed to the court to prove the truth of its content.
[518] The prosecution's consent is not determining but might help convincing the Court. See CrC, *supra* note 6, ss 715.22, 715.25.
[519] Sheehy, Stubbs & Tolmie, "Defending Battered Women", *supra* note 129 at 394.
[520] Bradfield, *supra* note 201 at 184.

Social workers might testify on several topics, such as power dynamics, homicidal risks (such as those associated with controlling behaviours and separation), post-separation violence, and obstacles encountered by women who leave violent partners.[521]

Researchers can also testify on their research results. Scholars such as professors Simon Lapierre,[522] Elizabeth Sheehy,[523] Julie Desrosiers,[524] Carmen Gill[525] and Patrina Duhaney[526] can provide compelling social science evidence.

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In conclusion, our research offers mixed results on the current implementation of the SEF. On the one hand, it shows that Canadian courts display an increasing interest toward women's narratives of violence (experiential evidence). Relying on a woman's experience of violence to assess whether she acted reasonably is a positive trend that can be read as a step toward ending the tradition whereby women's accounts need to be complemented by BWS evidence to receive some credit in the eyes of the law. On the other hand, our study also demonstrates that the BWS framework remains, to this day, the most common evidentiary approach used in victims-accused' trials. Social science evidence was adduced in only two cases (*Staudinger* and *Ameralik*) and was used independently of the BWS framework in one instance (*Ameralik*).

Turning to the future of the SEF, our case law analysis demonstrates how the SEF might benefit victims-accused: in departing from the victimization model of the BWS framework, the SEF frames victims' criminal offending as a logical and tragic continuation of their struggle with IPV. Yet the biggest advantages of the SEF—that of realistically conveying experiences of IPV and analyzing criminal responsibility with greater nuance—seem to be the very same reasons the SEF is infrequently implemented. In adding nuance and realism to inquiries on victims' criminal responsibility, the SEF sheds light on our many blind spots in how we deal with IPV, which, in

[521] The mission of women's shelters, for example, includes that of educating the public on the phenomenon of IPV. See e.g. Regroupement des maisons pour femmes victimes de violence conjugale, "*Boîte à outils : Comprendre, repérer et intervenir face au contrôle coercitif*" (2023), online: <https://maisons-femmes.qc.ca/campagnes-de-sensibilisation/ameliorer-la-pratique-judiciaire-pour-accroitre-la-securite-des-femmes-victimes-de-violence-conjugale/>.

[522] E.g. on children's experiences of IPV, including mother-child relationships in IPV contexts, parental alienation and IPV in family courts, and child protection services.

[523] E.g. on criminal law's responses to male violence against women.

[524] E.g. on victims' experiences within the justice system.

[525] E.g. on coercive controlling behaviours and justice system responses, including police responses to IPV.

[526] E.g. on Black women's experiences of IPV, including those with the police.

turn, might compromise the State's legitimacy to allocate blame at the individual level. It also entails conceiving the BWS framework as one evidentiary approach (among others) and, thus, breaking the alliance of law and psychiatry that has remained unquestioned for too long.

Overall, we observe a blatant lack of consistency in judges' level of awareness of IPV, which can be placed on a continuum, ranging from a stereotyped to a nuanced understanding on IPV. These discrepancies generate unpredictable findings among case law, which (i) make the sole reliance on experiential evidence highly uncertain and risky; and (ii) reinforce the complementarity of experiential and social science evidence. This complementarity is achieved in connecting the accused's account of the violence she suffered (an account that is comprehensive, corroborated and, if needed, rehabilitated by medical evidence on the effects of violence) with relevant social science evidence (reports and testimonies produced by social workers and researchers from various fields).

CONCLUSION

Our thesis continues a conversation driven by decades of feminist scholarship keen to ascertain whether *Lavallee* brings justice for victims of IPV who face criminal charges. Chapter 1 explored how *Lavallee* has drastically modified the judicial landscape for victims-accused: to fairly assess Lavallee's self-defence claim, the objective standard applicable to her case was contextualized to her experience as a woman who endured IPV. IPV, though, is a complex phenomenon that goes far beyond common sense. As a result, the SCC held that expert evidence on BWS was necessary for two reasons: first, to prevent myths and stereotypes (such as "why didn't she leave?") likely to impede Lavallee's credibility; and second, to normalize her conduct by comparing it to that of a reasonable battered woman afflicted with a mental disorder, BWS.

Chapter 1 also elaborated on the impact of *Lavallee*, which has been written about extensively. Scholars have studied the use of BWS, whose legal relevance in criminal trials was recognized in *Lavallee,* and have stressed that BWS depicts the phenomenon of IPV in a way that is quite removed from the lived experiences of IPV. In depicting women as irrational actors and expecting them to display helplessness and resignation in the face of violence, BWS is not suited for many women whose conduct shows quite the opposite: resilience, strength, and rationality in highly adverse life circumstances. Research has also found that *Lavallee* is applied to other criminal defences in which reasonableness is at issue (duress, necessity, and provocation), allowing more victims-accused to benefit from the contextualized reasonableness test. Lastly, against all expectations, *Lavallee* has had a very mitigated impact on women's self-defence claims in homicide cases, prompting scholars to decry prosecutorial practices of pursuing murder charges and accepting guilty pleas on lesser included offences. By documenting the impact of *Lavallee*, chapter 1 situated the contributions of chapters 2 and 3, which revisited *Lavallee*'s framework; that is, the evidence adduced to meet the legal requirements of self-defence, duress, and necessity.

Starting from the premise that the BWS framework has failed in its aim (to normalize victims-accused's conduct in conveying their experiences of IPV), chapter 2 concentrated on a SEF as a promising alternative framework. Such a framework is already used in Canadian criminal law in other contexts at various stages of the criminal process (such as *Charter* analyses, provocation claims, and s 718.2e) CrC). Chapter 2 built on both *Malott*, which recognizes

the relevance of a woman's social context in the reasonableness analysis, and on the SEF created by Rebecca Bradfield. The BWS framework and the SEF serve a similar dual purpose, that of preventing stereotypical assumptions about IPV (preserving the accused's credibility) and normalizing the accused's conduct (establishing its reasonableness). However, these frameworks operate quite differently. Although both require that a woman's narrative of IPV be introduced in her trial (experiential evidence), they differ in their approach to this narrative: the BWS framework complements a woman's IPV narrative with BWS evidence, whereas the SEF supplements it with social science knowledge on IPV (social science evidence). Social science evidence is divided along three branches connected to the legal requirements of self-defence, duress, and necessity: evidence pertaining to branch 1 recasts IPV as a dangerous dynamic of controlling behaviours (existence of danger); evidence concerning branch 2 outlines victims' resilience, such as the panoply of obstacles that shape their options to deal with the violence (lack of options); and evidence relevant to branch 3 supports an intersectional approach whereby systems of oppression and vulnerabilities exacerbate a woman's level of entrapment (i.e. level of danger and unavailability of options). Chapter 2 developed Bradfield's SEF by adding the notion of violent resistance to the analysis of women's resilience, transposing this framework in Canadian criminal law, and broadening its scope to duress and necessity claims.

Via case law research, chapter 3 investigated the implementation (current and future) of the SEF in victims-accused's trials. Evidence on women's experiences of IPV (experiential evidence) is gaining relevance in the reasonableness analysis, but the data reveals that more needs to be done to implement social science evidence. The BWS framework is overwhelmingly used, yet, we argue that the SEF allows for a more accurate analysis of victims' criminal responsibility. A major finding in our study is the judicial reluctance towards social science evidence on IPV, which takes the form of judicial blindness towards State failures. We also observe misconceptions of the role played by BWS evidence in victims' trials. Equally problematic is the inconsistency in judges' understanding of IPV. That is, judges reach different conclusions regarding issues on the identification of stereotypical assumptions on IPV (pertaining to the accused's credibility) and on the necessity of BWS evidence (pertaining to the reasonableness analysis). This irreconcilability in legal reasoning confirms the importance of educating decision makers on the phenomenon of IPV and reaffirms the need for a complementary approach between experiential and social science

evidence. Defence lawyers are invited to strengthen the experiential evidence and follow the existing procedural avenues to introduce social science evidence relevant to the facts of the case.

This complementarity, we believe, is about enabling victims-accused to have their victimization trajectories fully considered in assessing their criminal responsibility. In 1995, Evan Stark wrote that "the challenge in the next decade is to embody the *lived reality* of battered women in criminal and civil law."[527] Almost three decades later this challenge remains and may be even more difficult to meet because the "presumption is that lawyers and judges have now adjusted to the *Lavallee* decision and that women are receiving its benefits."[528] In fact, though, this adjustment refers to courts relying primarily on the BWS framework, which prevents us from grasping the multiple dimensions of IPV and its impact upon women. The richness of the SEF thus lies in its multidisciplinarity—a key approach to combatting IPV—in bringing together decades of scholarly work from diverse disciplines such as law, social work, sociology, victimology, and medicine.

This alliance—between law and social sciences—is fundamental: it tackles the inconsistency of our criminal justice system in how it treats victims of IPV. The over-use of the BWS framework speaks to an important tension, if not a contradiction, within our criminal justice institutions. Criminal law's understanding of IPV differs depending on whether a victim acts as a complainant or stands accused. How is it that in cases of a victim complainant, IPV is explicitly recognized as it is—a social scourge—,[529] whereas in cases of a victim-accused, IPV is analyzed from an individual perspective? When victims are accused, the focus on learned helplessness makes invisible the diversity of obstacles women face and shields us from accountability. It is true that *Lavallee* has thinned the "victim-offender" border, yet we must recognize that there is still some way to go for this case to achieve its full potential.

We might ask what it means for victims-accused to fully benefit from *Lavallee*. Groundbreaking work is being conducted in victimology, a branch of criminology, and is interested in the meaning victims give to the word "justice" within the criminal justice system. For victims, justice is a matter both of outcome and process.[530] For victims-accused, thus, justice

[527] Stark, "Re-Presenting Woman Battering", *supra* note 21 at 1026.
[528] Sheehy, "Lessons from the Transcripts", *supra* note 15 at 297.
[529] See e.g. *Gosselin c R*, 2012 QCCA 1874 at para 42; *R c Paiement*, 2021 QCCQ 10265 at paras 29, 72; *R c Buhara*, 2019 QCCQ 3129 at para 94.
[530] See e.g. Deborah P Kelly, "Victims' Perceptions of Criminal Justice" (1984) 11:5 Pepp L Rev 15; Mike Maguire, "The Impact of Bulgary Upon Victims" (1980) 20:3 Brit J Crim 261. See generally *Canadian Victims*

demands that those who had no choice other than breaking the law should be freed from criminal liability (justice as outcome), yet at the trial stage, justice also commands a thoughtful consideration of their victimization contexts (justice as process).

Criminal justice actors who hold power play a crucial role in *Lavallee* taking on its full meaning of justice. Prosecutors greatly influence the criminal justice process and its outcome. Due to their vast discretionary power, prosecutors can make fair decisions at the earliest stage of the criminal process that might prevent exacerbating victims' traumatic experiences ("secondary victimization").[531] In addition to avoiding pursuing murder charges when self-defence is arguable, fair prosecutorial practices include carefully considering, before laying charges, any plausible defence that benefits from *Lavallee*'s contextualization of reasonableness (self-defence, duress, necessity, and provocation). Prosecutors could also nuance their understanding of IPV so that suspects whose conduct does not raise a defence but constitutes violent resistance are not disqualified from diversion programs.[532] In prosecuting primary victims (who acted in self-defence, duress, and necessity), prosecutors must bear in mind that they "take on a difficult ethical role in which they face conflicting pressures regarding the public interest."[533] As for judges and jurors, assessing reasonableness in victims-accused's trials is a delicate exercise of "imaginative empathy."[534] Putting themselves in victims' shoes demands that they acknowledge their privileges and the extent to which these privileges might shape (and often, limit) their view of the world.

These reflections raise a very difficult question, that of whether we recognize that, despite valiant efforts, we still fail in many ways to protect victims of IPV. This question forces us to accept our collective responsibility for victims' criminal conduct, but, "it seems, the last place that

Bill of Rights, SC 2015, c 13, s 2 (granting victims participation and information rights along the criminal process).

[531] "Secondary victimization" is a term derived from the work of Martin Symonds on crime victims' "second injury." See Martin Symonds, "The 'second injury' to victims of violent acts" (1980) 70:1 Am J Psychoanalysis 34.

[532] In Québec, the "Programme de mesures de rechange général pour adultes" and the "Programme de traitement non judiciaire de certaines infractions criminelles commises par des adultes" do not apply to acts of IPV. Prosecutors are encouraged to rely on Johnson's typology of intimate violence to avoid assimilating violent resistance to IPV.

[533] Sheehy, "Lessons from the Transcripts", *supra* note 15 at 303.

[534] Tolmie et al, *supra* note 30 at 191.

we want our blaming gaze to fall is on a mirror."[535] Yet this is a question that we, as a free and equal society, must urgently address to honour the legacy of *Lavallee*.

[535] Berger, *supra* note 11 at 135.

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APPENDIX 1

THE DULUTH MODEL: THE "POWER AND CONTROL WHEEL"

APPENDIX 2

LIST OF DECISIONS EXTRACTED FROM CASE LAW RESEARCH

*Cases marked with * are discussed in chapter 3*

Reference	Defence(s) raised	Evidence adduced		
		Battered woman syndrome	Social science	Experiential only[1]
Boyer c R, 2023 QCCA 608*	Duress			X
Brousseau c R, 2006 QCCA 858*	Self-defence	X		
R c AD, 2009 QCCM 107*	Necessity			X
R c Côté, 1995 CarswellQue 1714, EYB 1995-72970 (CQ Qc)*	Self-defence	X		
R c Graveline, 2005 QCCA 574, rev'd 2006 SCC 16	Non- mental disorder automatism; self-defence	X		
R c Lafleur, [1996] JQ no 1145, 50 CR (4th) 386 (CS Qc) (air of reality test)	Intoxication; self-defence			X
R c Staudinger, [2004] JQ no 11665, 2004 CarswellQue 3028 (CA Qc)*	Self-defence	X	X	
R c Vaillancourt, [1999] RJQ 652, JQ no 571 (CA Qc)	Self-defence	X		
R v Ameralik, 2021 NUCJ 3*	Self-defence		X	
R v Bear, [1999] SJ No 262, 1999 CanLII 12386 (Sask Prov Ct (Crim Div))	Self-defence	X		
R v Butler, [1990] NJ No 406, 271 APR 221 (Nfld Prov Ct)	Self-defence			X
R v Chase, 2010 ABPC 4	Self-defence; ss 35, 37, 41(1) CrC			X
R v Craig, 2011 ONCA 142[2]	Self-defence; s 37 CrC; negation of *mens rea*	X		
R v Doonanco, 2019 ABCA 118, aff'd 2020 CSC 2*		X		

[1] This column refers to cases in which the accused relied only on experiential evidence (i.e. experiential evidence was not complemented with battered woman syndrome evidence nor social science evidence).

[2] Dr Evan Stark, a psychologist, testified on battered woman syndrome and coercive control. His evidence on coercive control is not seen as social science evidence because it was case-specific.

R v Ejigu, 2012 BCSC 1674*	Self-defence	X		
R v Hernando, 2009 MBQB 214	Self-defence; necessity	X		
R v Kahnapace, 2014 BCSC 2410	Self-defence	X		
R v Knott, 2014 MBQB 72*	Self-defence	X		
R v Lalonde (1995), 22 OR (3d) 275, 37 CR (4th) 97 (Ont Gen Div)	Necessity; negation of *mens rea*	X		
R v Li, 2016 ONCA 573	Duress			X
R v LS, 2001 BCPC 462*	Necessity			X
R v Machan, [1995] AJ No 269, 26 WCB (2d) 507 (ABCA)	Duress	X		
R v MacKenzie, 2012 NBCA 29	Self-defence, defence of one's dwelling house, intoxication, accident, provocation	X		
R v Markoff, 2015 ONSC 7741	Duress			X
R v Mason, 2020 MBQB 151*	Self-defence	X		
R v Meecham, 2019 ONSC 494 (admissibility of expert evidence on BWS) *R v Meecham*, 2019 ONSC 561 (verdict)	Duress	X		
R v Poucette, 2019 ABQB 423, aff'd 2021 ABCA 157	Self-defence	X		
R v Rabut, 2015 ABPC 114*	Self-defence	X		
R v Ryan, 2010 NSSC 114, aff'd 2011 NSCA 30, rev'd in part 2013 SCC 3*	Duress	X		
R v Sanderson, 2019 SKQB 130*	Self-defence	X		
R v Stephen, 2008 NSSC 31*	Duress	X		
R v Stevenson, [1995] YJ No 16 (YK Terr Ct)*	Self-defence; s 41(1) CrC			X
R v TLC, 2004 ABPC 79	Necessity	X		
R v Trombley (1998), 126 CCC (3d) 495, 40 OR (3d) 382 (ONCA), aff'd 1 SCR 757, 134 CCC (3d) 576	Self-defence	X		
R v Young, 2008 BCCA 393 (2nd trial) *R v Young*, 2005 BCCA 340 (1st trial; new trial ordered)	Self-defence	X		