

DOMESTIC VIOLENCE AND THE CONSTRUCTION OF “IDEAL VICTIMS”: ASSAULTED WOMEN’S “IMAGE PROBLEMS” IN LAW

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In large part, the limits of current legal responses [to battered women] are rooted in the same persistent structural inequities and biases which underlie battering itself.¹

I. INTRODUCTION

A significant amount of public attention and legal intervention in the past few decades has focused on the issue of violence against women and children, and especially on domestic violence. This attention and increased public concern is a direct achievement of several decades of activism, scholarship, and advocacy undertaken by those concerned both with ending violence against women and achieving equality rights for women generally.² Yet most mainstream social and legal responses to the problem of violence against women, especially violence against women in intimate relationships, remain inextricably bound up with and shaped by incomplete and distorted representations of the nature, causes, and effects of that violence.³ As a result, some of the ways domestic violence is addressed in the law – even those ways expressly aimed at remedying the defects and inadequacies of traditional legal responses – inadvertently end up reinforcing the problems they seek to rectify.

Two examples of this are found in stereotypical representations of women who are subjected to violence in their intimate relationships. Both of these representations rely on the construction of categories of victims of domestic violence that misapprehend and stigmatize women’s ways of coping with

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1. Evan Stark, *Re-Presenting Woman Battering: From Battered Women Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 979 (1995).

2. *See id.* at 976-77.

3. *Id.* at 979-80.

intimate violence and its effects on their lives.⁴ The first of these is the legal deployment of the victim who suffers from the “battered woman syndrome,” a diagnostic category sometimes used as evidentiary support for the self-defence claims of women who, in fear for their own lives, have killed their violent partners. It is specifically drawn upon to address the often asked question about why assaulted women who have ended up killing their violent spouses did not “just leave” their abusers instead.⁵ The second is the victim who recants and/or who refuses to “cooperate” in the prosecution of her violent male intimate.⁶

Both of these categories of domestic violence “victims” share a set of problematic assumptions about how women who have experienced intimate violence typically react. They share, most fundamentally, a failure to recognize that the decisions made by assaulted women who kill their violent partners to save their own lives, and those who refuse to “cooperate” with criminal prosecutions of their batterers, may be making decisions which are both reasonable and rational when grasped within the particular circumstances of their lives and the social conditions which shape those circumstances.⁷ Most importantly, these representations of domestic violence “victims” reveal fundamental discordances between the way in which domestic violence is understood and processed in criminal justice system and the way in which it is lived and negotiated in the context of assaulted women’s lives.⁸

In this paper, I argue that the use of the “battered woman syndrome” in law represents a double-edged sword. To the extent that it captures the psychological dimensions and harms inflicted by being subjected to violence in an intimate relationship, the “syndrome” has provided critical evidence supporting the self-defence claims of battered women who kill their violent partners. But to the extent it explains the difficulties battered women have leaving their violent partners in terms of a purported psychological incapacity and lacks an acknowledgment of the powerful social forces which inhibit women’s very opportunities for “leaving,” the “syndrome” is a profoundly inadequate conceptualization. Given that there are more effective strategies for educating courts about the contexts and effects of intimate violence, I argue

4. See *id.* at 1000; see, e.g., Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 589-90 (1999).

5. Stark, *supra* note 1, at 973, 981.

6. Mills, *supra* note 4, at 590.

7. See generally Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996) (discussing the difficulty of encouraging a more public response to domestic violence while preserving women’s autonomy from excessive state intervention).

8. See generally *id.*; Mills, *supra* note 4 (discussing the need to reconsider whether mandatory state intervention policies serve the best interest of all battered women).

that the use of the "battered woman syndrome" ought ultimately to be abandoned in the legal arena.

In the same way that the "battered woman syndrome" is an inadequate and distorted conceptualization of intimate violence in women's lives, there is a distinct impression, backed up by an academic literature on the subject, that many assaulted women are "uncooperative victims" in relation to the criminal justice system's processing of domestic violence cases.⁹ Some researchers and, more prominently, many Crown attorneys, prosecutors, and judges express frustration with women who refuse to participate in the prosecution of domestic violence cases, recant while testifying, or otherwise impede the criminal prosecution of domestic violence cases.¹⁰ But the idea that "uncooperative victims" are part of the problem in legal responses to domestic violence represents a failure to grasp the dynamics and impact of domestic violence in women's lives. Moreover, it rests on an undisturbed assumption that the women who have experienced violence in their intimate relationships should be invested in – and therefore "cooperate" with – the process of criminalization, in support of the state's pursuit of this strategy.

The category of the "uncooperative victim" differs from the "battered woman syndrome" insofar as it is not an academically developed psychological descriptor of the impact of violence but is, instead, a (negative) characterization of a common response that some assaulted have to the criminal justice system.¹¹ Along with the "battered woman syndrome," however, the concept of the "uncooperative victim" in domestic violence cases has gained currency and legitimacy in legal circles.¹² However, both illustrate an inadequate understanding of intimate violence and its effects on women's lives, particularly the effects associated with victimization and the social conditions of inequality in which domestic violence takes place. To this extent, each of these "victim" categories typifies the kind of "image problem" that battered women face in law.¹³

Dominant images and legal representations of women who are victims of violence typically fail to apprehend the *co-existence* of women's victimization with women's agency that is often expressed through the context specific strategies of resistance which most women employ when they experience violence perpetrated against them.¹⁴ A consequence of this analytical severing

9. See Mills, *supra* note 4, at 589-90. See also Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 176-77 (1997).

10. Wills, *supra* note 9, at 178-79.

11. *Accord id.*

12. *Id.* at 176-79.

13. The idea that battered women have an "image problem" in law is developed by Martha Mahoney in a seminal article on domestic violence. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

14. Hanna, *supra* note 7, at 1882-85; Mills, *supra* note 4, at 583 n.175.

of victimization from its co-existence with agency is a distorted understanding both of the particular problem of violence in individual women's lives and its effects, as well as the broader social conditions in which this violence takes shape and gets perpetuated. This, in turn, limits the efficacy of legal responses to and interventions in domestic violence.

The two classes of victims I analyse in this paper, the essentially helpless one with the syndrome and the overly active agent who is "uncooperative," are mirror-image and opposite examples of the difficulty incorporating acknowledgement of both victimization and agency in representations of women's experiences of intimate violence. The "battered woman syndrome" describes a woman's utter helplessness in the face of ongoing abuse, e.g., her incapacity is such that she cannot plan for her own safety, and she cannot disentangle herself from her relationship with her abuser.¹⁵ She is a victim whose agency has been obliterated by the abuse. The "uncooperative victim," on the other hand, is seen to have an excessive expression of agency.¹⁶ By declining to participate or by not participating willingly and fully with the prosecution of domestic violence cases, these "uncooperative" women are seen to be non-compliant victims whose assertion of agency in opposition to the needs of the criminal justice system undercuts their victim status and the supportive response they warrant.¹⁷

A critical examination of both of these categories of victims – those suffering from "battered woman syndrome" and those who are seen to be "uncooperative" or "reluctant" witnesses – sheds light on the larger complications which attach to legal images of assaulted women and the paradoxes and limitations of contemporary legal responses to domestic violence. These limitations, in turn, necessarily impede the development of more adequate and nuanced accounts of the dynamics of domestic violence, accounts which are able to grasp simultaneously the contours of women's victimization and the ways in which women negotiate, resist, and cope with this violence in the contexts of their lives.

II. THE SOCIAL CONTEXT OF MEN'S VIOLENCE AGAINST WOMEN

A. *Gender and Power*

As has been demonstrated by a now significant body of research on the topic, the majority of violence against women takes place in the context of intimate heterosexual relationships, and among its more brutal manifestations,

15. See, e.g., Stark, *supra* note 1.

16. See Mills, *supra* note 4, at 589; Hanna, *supra* note 7, at 1883.

17. See Hanna, *supra* note 7, at 1885.

includes repeated physical and sexual assaults.¹⁸ At the micro level, men's violence against women in intimate relationships expresses the greater social power and control they wield; power which is also structured and entrenched at the macro-level of social relations, in terms of their overrepresentation in most positions of power and authority, including in the economic and political spheres.

Gendered violence is a phenomenon that emerges from and reinforces women's subordinate status in society.¹⁹ This has been recognized by the Supreme Court of Canada in cases including *R. v. Seaboyer*,²⁰ *Janzen v. Platy Enterprises*,²¹ and *R. v. Osolin*.²² As Justice L'Heureux-Dubé remarked in *Seaboyer*, "perhaps more than any other crime, the fear and constant reality of sexual assault affects how women conduct their lives and how they define their relationship with the larger society."²³ In recent years there has been an increasing awareness of the prevalence of violence against women, including the specific problem of "woman abuse"²⁴ in the context of spousal relationships.²⁵ It has now become an accepted part of much of the

18. Lori Haskell & Melanie Randall, *Appendix A: The Women's Safety Project*, in CANADIAN PANEL ON VIOLENCE AGAINST WOMEN, CHANGING THE LANDSCAPE: ENDING VIOLENCE – ACHIEVING EQUALITY app. A (1993); LORI HASKELL & MELANIE RANDALL, PRIVATE VIOLENCE/PUBLIC FEAR: RETHINKING WOMEN'S OWN SAFETY (Solicitor General of Canada ed., 1994); Melanie Randall & Lori Haskell, *Sexual Violence in Women's Lives: Findings from the Women's Safety Project, A Community Based Survey*, 1 VIOLENCE AGAINST WOMEN 6, 24 (1995) [hereinafter Randall & Haskell, *Sexual Violence*]; STATISTICS CANADA, THE VIOLENCE AGAINST WOMEN SURVEY (1993). In the research analysed in these studies the perpetrators of the violence against women were overwhelmingly male.

19. Numerous research studies confirm the gender based nature of this violence. For example, the Violence Against Women Survey conducted by Statistics Canada found that 39% of women reported at least one incident of sexual assault by a man since the age of 16. Julian Roberts, *Criminal Justice Processing of Sexual Assault Cases*, 14 JURISTAT 7 (1994). The Women's Safety Project found that 54% of respondents reported an experience of sexual assault or attempted sexual assault at some point in their lives. Randall & Haskell, *Sexual Violence*, *supra* note 18.

20. *R v. Seaboyer*, [1991] 2 S.C.R. 577.

21. *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252.

22. *R. v. Osolin*, [1993] 4 S.C.R. 595.

23. *Seaboyer*, [1991] 2 S.C.R. at 649 (L'Heureux-Dubé, J., dissenting in part).

24. I use this term to refer to what is perhaps more commonly recognized under the label "wife assault." In order to acknowledge the fact that this kind of violence takes place in a variety of intimate heterosexual relationships, including marital and common law spousal relationships, as well as "dating" relationships I prefer the descriptor "woman" to that of "wife." In order to capture the broad range of intrusive, controlling, and violent behaviours manifested in intimate relationships I prefer the more expansive term "abuse" to that of "assault."

25. Stark, *supra* note 1, at 977. Some of the earliest key works on the topic were American and include: SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT (1982); LENORE A. WALKER, THE BATTERED WOMAN (1979).

mainstream discourse on violence against women, for example, that “power and control” are central explanatory concepts in accounting for this violence.²⁶

Yet the concepts “power and control” can nevertheless run the risk of being understood in overly individualized terms if they are not linked to an analysis of the social relations of gender, specifically of the ways in which this violence expresses the imbalances of power embedded in those social relations of inequality. By this I mean that it is possible to think that the men who perpetrate violence against women are deviant individuals with an unhealthy need for power and control, understood in terms of distortions in their personal psyches. While attention to the factors which make some men act out violence towards women while others do not is of crucial importance, the larger point I am making here is that the problem of men’s violence against women is too pervasive to be understood as a pathology of a few individual men. Instead, it must be analysed within the context of the larger patterns of presumed male entitlement, authority, and power constructed in the culture more broadly. The rationalizations used by men who are “batterers” to explain, minimize, or excuse their assaults on their female partners are most telling in this regard for what they reveal about the larger constructs of traditional masculine norms.²⁷ Studying the micropolitics of power, as these are expressed in individual and intimate relationships between men and women, therefore, throws into stark relief the larger patterns of gendered social inequalities and the way in which these shape the conditions of women’s lives.

The pervasive social problem of violence against women, including sexual assault, sexual harassment, and physical and sexual assault in intimate relationships, exists on an international scale²⁸ and cannot be understood apart from the hierarchical and unequal relations of gender in which it is both situated and of which it is a product. Put differently, violence against women simultaneously expresses and reproduces sexual inequality on both individual and societal levels; it is both a cause and effect of sex inequality.

26. See generally CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); DIANA E. H. RUSSELL, RAPE IN MARRIAGE (1982); LIZ KELLY, SURVIVING SEXUAL VIOLENCE (1988); SCHECTER, *supra* note 25; ELIZABETH A. STANKO, INTIMATE INTRUSIONS: WOMEN’S EXPERIENCES OF MALE VIOLENCE (1985); Mahoney, *supra* note 13.

27. See generally R. EMERSON DOBASH ET AL., CHANGING VIOLENT MEN (2000); James Ptack, *Why Do Men Batter Their Wives?*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 133 (Kersti Yllo & Michele Bograd eds., 1988).

28. See, e.g., AMNESTY INTERNATIONAL, BROKEN BODIES, SHATTERED MINDS: THE TORTURE AND ILL-TREATMENT OF WOMEN 2 (2001), available at <http://web.amnesty.org/library/eng-373>; U.N. CENTRE FOR SOCIAL DEVELOPMENT AND HUMANITARIAN AFFAIRS, VIOLENCE AGAINST WOMEN IN THE FAMILY 3-4 (1989); CANADA AND THE UNITED NATIONS GENERAL ASSEMBLY, SPECIAL SESSIONS: WOMEN AND VIOLENCE, STATUS OF WOMEN CANADA, BEIJING +5: FACTSHEETS (June 2002) at http://www.swc-cfc.gc.ca/pubs/b5_factsheets/b5_factsheets_13_e.html.

B. *The Prevalence and Characteristics of Abuse in Intimate Heterosexual Relationships*

Research has consistently demonstrated that approximately one in four women has experienced some kind of physical violence or physical assault in an intimate relationship with a male partner.²⁹ As these studies document, violence against women in intimate relationships can take a variety of forms.³⁰ It can include kicks, slaps, shoving, use of weapons, death threats, repeated punching and beating, the infliction of burns, damage to the woman's possessions, threats of harm against her, her friends, and her family, sexual assault, and a variety of other abusive behaviours.³¹ Far too often the specifically sexual violence, including rape, used by men against their female intimates, is an ignored component of violence against women in spousal relationships because it remains even more privatized and stigmatized than physical assaults.³²

Some women assaulted by their male intimates are subjected to prolonged and brutal beatings with great frequency; others have only been hit or assaulted a single time.³³ Yet the effects of this kind of violence cannot be measured only in relation to variables like the frequency or severity of assault. Instead, the way the violence operates as part of a larger pattern of coercion, control, and domination in the relationship must be taken into account, along, most importantly, with a woman's subjective experience of this violence in order to appreciate for any individual woman what impact the violence has on her and the meaning she makes of it.³⁴ As Lori Haskell has pointed out, a woman may only have been assaulted once in order to "learn" that she must thoroughly accommodate and adapt herself to the controlling tactics of her male partner to avoid further abuse.³⁵

29. Randall & Haskell, *Sexual Violence*, *supra* note 18, at 24. For example, the Women's Safety Project reports that 27% of women interviewed disclosed physical assault by a male intimate. *Id.* Similarly, the original large scale Statistics Canada survey on women's experiences of violence in adulthood, found that virtually the same proportion of women respondents, one in four (or 25%) reported at least one experience of physical assault perpetrated by a male intimate. STATISTICS CANADA, *supra* note 18.

30. See U.N. CENTRE FOR SOCIAL DEVELOPMENT AND HUMANITARIAN AFFAIRS, *supra* note 28, at 21.

31. *See id.* at 21-23.

32. See, e.g., DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 84-87 (1985); RUSSELL, *supra* note 26, at 1-5.

33. *See* SCHECTER, *supra* note 25, at 222-23.

34. See U.N. CENTRE FOR SOCIAL DEVELOPMENT AND HUMANITARIAN AFFAIRS, *supra* note 28, at 21-22; Isabel Marcus, *Reframing "Domestic Violence": Terrorism in the Home*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE 32 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994); SCHECHTER, *supra* note 25, at 222.

35. Lori Haskell, Remarks at Interviewer Training, Women's Safety Project Research (1991) (remarks on file with author).

The idea of “intimate partner terrorism” as a way of conceptualizing violence against women in intimate relationships has gained prominence.³⁶ Other scholars have compared the unsettling effects of violence in intimate relationships with the kind of destabilization of entire communities which results from acts of political terrorism. As Isabel Marcus sees it,

[T]here are strong and striking parallels and similarities between terrorism as a strategy used to destabilize a community or society consisting of both women and men, and the abuse and violence perpetrated against women [by men] in intimate or partnering situations.³⁷

Marcus’s analogy draws the parallel between the disempowering and terrifying aspects and effects of political terrorism against specific communities and the sexual terrorism to which significant numbers of individual women are subjected in their intimate relationships with men.³⁸ This analogy, while powerful, should not eclipse attention to the fact that the compared contexts also differ in highly significant ways. Whereas acts of political terrorism typically take place in a context of declared war or at least overt hostilities between (relatively) clearly defined and identified political groups, men’s acts of sexual violence against women in intimate relationships take place in contexts which are, to the contrary, supposed to be characterized by affective emotional ties, partnership, allegiance, trust, loyalty, and safety.³⁹ This, at least, is what is promised by the dominant discourses surrounding heterosexual marriage and “romantic love.”⁴⁰ To this extent, acts of sexual and physical violence against women in their intimate relationships are striking

36. See, e.g., Michael Johnson, *Patriarchical Terrorism and Common Couple Violence: Two Forms of Violence Against Women*, 57 J. MARRIAGE & FAM. 283, 283 (1995); Marcus, *supra* note 34, at 30-32.

37. Marcus, *supra* note 34, at 32. Marcus elaborates upon this analogy in the following terms:

Like terror directed at a community, violence against women is designed to maintain domination and control, to enhance or reinforce advantages, and to defend privileges. Like other individuals or communities who experience politically motivated terrorism, women whose partnering and intimate relationships are marked by violence directed against them live in a world similarly punctuated by traumatic and/or catastrophic events, such as threats and humiliation, stalking and surveillance, coercion and physical violence. Within a family structure, women are likely to be the targets of violence, and men are likely to be the perpetrators. Whether the violence is identified as the imposition of discipline, as a strategy of family governance, or as an act of masculinity, the consequences are the same. Women learn that they can be kept in their culturally and socially designated “place” by the threat or imposition of physical injury.

Id.

38. *Id.*

39. See *id.* at 12; Martha R. Mahoney, *Victimization or Oppression? Women’s Lives, Violence, and Agency*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE, *supra* note 34, at 60.

40. See Mahoney, *supra* note 39, at 32; Marcus, *supra* note 34, at 32.

aberrations from what the norm is supposed to be and could be understood as a form of "undeclared" intimate warfare.⁴¹ This unnamed and isolating character of violence in intimate relationships makes the experience not only deeply traumatizing, but also deeply confusing for those women who find themselves in the position of trying to reconcile the violence perpetrated against them by the same person from whom they are supposed to receive love and, according to traditional gender scripts, "protection."⁴²

III. LEGAL IMAGES⁴³ OF VIOLENCE AGAINST WOMEN: CONCEPTUAL PROBLEMS AND POLITICAL CHALLENGES REGARDING THE "BATTERED WOMAN SYNDROME"

A. *Recognition of the "Battered Woman Syndrome" in Canadian Law: The Lavallée Decision*⁴⁴

The reasonable man's claims to universality are under siege. The contest comes from those whose experiences are other than his. The problem for them is how to effect a point of entry into the legal discourse of common sense and reasonableness. That discourse, taken as belonging to everyone, is exclusive to those with power over knowledge. So the problem is epistemological: how to alter ways of seeing, understanding and defining the normalcy of the reasonable man.⁴⁵

In Canada, it was *R. v. Lavallée* which provided a legal basis upon which to interject gender into the analysis of reasonableness brought to bear on criminal liability in cases of homicide perpetrated by "battered women."⁴⁶ Specifically, the Supreme Court of Canada decision in *Lavallée* is famous for entrenching legal recognition of the evidentiary support provided through the "battered woman syndrome" to a woman's self-defence claim in a criminal trial in which she stood accused of killing her violent male partner.⁴⁷

41. Marcus, *supra* note 34, at 32.

42. Accord Mahoney, *supra* note 39, at 60; SCHECTER, *supra* note 25, at 222-24.

43. Mahoney, *supra* note 13, at 1-3 (using this descriptor to refer to the image of women, particularly battered women, created by the publicized courtroom trials in domestic violence cases).

44. *R. v. Lavallée*, [1990] 1 S.C.R. 852.

45. Katherine O'Donovan, *Law's Knowledge: The Judge, the Expert, The Battered Woman, and Her Syndrome*, 20 J.L. & SOC'Y. 427, 429 (1993).

46. *Lavallée*, [1990] 1 S.C.R. 852.

47. *Id.* It is important to note that "battered woman syndrome" is not itself a defence to a criminal charge. Instead, it is a psychological explanatory framework, introduced through expert evidence, through which a woman's self defence claims can be evaluated in light of her previous experiences of violence. *Id.*

The defence of self-defence has been often used in Canada in the relatively few cases of spousal homicide perpetrated by women.⁴⁸ In Canadian law, as in most other jurisdictions, legal crime categories and defences differentiate between types of killings to distinguish those considered the most heinous, such as homicides which are “planned and deliberate” for example from those which take place under a range of other circumstances.⁴⁹ In order to recognize the external exigencies and human “infirmitiess” which may contribute to or cause a killing, the law recognizes a number of defences to the crime of murder.⁵⁰ If successful, a self-defence claim excuses the offender from legal liability for the killing.⁵¹ However, in cases of spousal homicide, this defence has not easily fit with dominant social perceptions of the kinds of circumstances in which this crime often takes place.⁵² As Mewett and Manning remark, “defences carry with them, by necessary implication, the problem of the social acceptability of the parameters of such defences.”⁵³ In terms of the self-defence claims of women who kill their violent male partners, the traditional model of the sudden bar room brawl which erupts between two men who engage in physical combat that ends in the death of one of them, is neither an appropriate nor a relevant analogy.

The Canadian Criminal Code contains several provisions relevant to the defence of self-defence. Section 34(1) refers to killings in self-defence which were carried out unintentionally.⁵⁴ The legal challenge in charges laid under this section lies in determining when an unintentional killing is justified and by what standard the determination is made, whether it be according to what the objective so-called “reasonable” person in the situation would assess or according to the subjective appraisal of the accused.⁵⁵ In cases of spousal homicide where battered women who have endured prolonged victimization

48. Alison Young, *Conjugal Homicide and Legal Violence: A Comparative Analysis*, 31 OSGOODE HALL L.J. 761, 781 (1993). “[T]here has been no case in English criminal law where a battered woman has successfully pleaded that the homicide of her abuser was in her self-defence.” *Id.*

49. Martin’s Criminal Code, §§ 219-36; §§ 34-37 (2001) (Can.).

50. Martin’s Criminal Code, §§ 34-37 (2001) (Can.).

51. *Lavallée*, [1990] 1 S.C.R. at 852; R. v. Kandola, [1993] 27 B.C.A.C. 226.

52. See Elizabeth Sheehy, *Battered Women and Mandatory Minimum Sentences*, 39 OSGOODE HALL L.J. 529, 532-34 (2001). See also Brenda M. Baker, *Provocation as a Defense for Abused Women Who Kill*, 11 CAN. J.L. & JURISPRUDENCE 193, 195 (1998).

53. MEWETT AND MANNING, CRIMINAL LAW 746 (3d ed. 1994).

54. The section reads: “Everyone who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to defend himself.” Martin’s Criminal Code, § 34(1) (2001) (Can.).

55. See generally R. v. Cinous, [2002] 2 S.C.R. 3; R. v. Hibbert, [1995] 2 S.C.R. 973; David M. Paciocco, *Subjective and Objective Standards of Fault for Offenses and Defenses*, 59 SASK L. REV. 271, 306-07 (1995).

kill their abusers, this question is of critical importance because the "ordinary" person's perceptions of the actual incident or circumstances surrounding the killing may fail to grasp the context and the psychological effects of prolonged physical brutalization, the fear of further (often explicitly threatened) violence or death, and the perceived (and often very real) lack of options a battered woman may actually have in terms of protecting herself from her partner's violence.

Section 34(2) of the Criminal Code also deals with cases in which the accused killed in self-defence and specifies the extent of justification for this.⁵⁶ As Grant et al. point out, the Supreme Court of Canada decision in *R. v. Lavallée*, which was informed by the analysis offered in the expert testimony relating to "battered woman syndrome," has particularly had far reaching implications for Section 34(2).⁵⁷ The *Lavallée* decision has wide ranging legal repercussions for what it means to be "unlawfully assaulted," the requirement that the accused exercised self-defence in response to an "imminent attack," the common law "duty to retreat," and the interpretation of "reasonableness" in cases of domestic violence.

For example, at common law, the "assault" referred to in Section 34(2) from which the accused defends him or herself had been interpreted narrowly to exclude verbal threats to kill.⁵⁸ However, this kind of narrow reading, which failed to grasp the nature of the often repeated threats made against a battered woman as part of the violence perpetrated against her, was overturned by *Lavallée*.⁵⁹ In delivering the majority judgment for the Court, Justice Wilson clarified that "s. 34(2)(a) does not actually stipulate that the accused apprehend *imminent* danger when he or she acts" and further asserted that it is case law which has "read that requirement into the defence."⁶⁰ Justice Wilson

56. The section reads:

Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

- (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
- (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

Martin's Criminal Code, § 34(2) (2001) (Can.).

57. Martin's Criminal Code, § 34(2) (2001) (Can.); *R. v. Lavallée*, [1990] 1 S.C.R. 852; Isabel Grants et al., *A Forum on Lavallée v. R.: Women and Self Defense*, 25 U.B.C. 23 (1991); Martha Shaffer, *The Battered Woman Syndrome Revisited: Some Complicating Thoughts Years after R. v. Lavallée*, 47 U. TORONTO L.J. 1, 1, 6 (1997).

58. See, e.g., *Lavallée*, [1990] 1 S.C.R. at 852; *R. v. Reilly*, [1984] 2 S.C.R. 396; *R. v. Bogue*, [1976] 70 D.L.R. 603; *R. Whynot*, [1983] 61 N.S.R. 33.

59. See generally *Lavallée*, [1990] 1 S.C.R. at 852.

60. *Id.* at 872-73.

criticized the narrow interpretation of assault in *Whynot*, in the following terms:

The requirement imposed in *Whynot* that a battered woman wait until the physical assault is underway before her apprehension can be validated by law would, in the words of an American court, be tantamount to sentencing her to “murder by installment.”⁶¹

This more expansive view of self-defence in Canadian jurisprudence is also evident in *R. v. Whitten*.⁶² In this decision, Chief Justice Glube referred to the evidence that the accused, a battered woman, was at the point she killed her husband “fending off an attack from him, albeit basically a verbal attack at the time, but which I have no doubt in the past led to physical attacks on upon her.”⁶³

In addition to excising the “imminent attack” requirement, the *Lavallée* judgment is significant for undermining the idea that the “duty to retreat” means that a battered woman who kills is deprived of the defence of self-defence because she should have left her home. The Court clarified that:

[T]raditional self-defence doctrine does not require a person to retreat from her home instead of defending herself A man’s home may be his castle but it is also the woman’s home even if it seems to her more like a prison in the circumstances.⁶⁴

Perhaps most significant in *Lavallée*, however, is the Supreme Court of Canada’s acceptance of the evidentiary support of battered woman syndrome in the self-defence claims made by the accused.⁶⁵ This expert testimony was crucial in allowing for a new interpretation of “reasonableness” from the viewpoint of the battered woman who kills because she sees no other option and/or because she is protecting her own life. As Justice Wilson elaborated:

If it strains credulity to imagine what the “ordinary man” would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical “reasonable man.”⁶⁶

In this way, the *Lavallée* decision can be read as explicitly introducing gender into the “reasonable person” standard and as insisting upon a more contextual reading of what “reasonable” means from the particular life circumstances of the accused, when she is a woman who has been subjected to prolonged and ongoing violence and kills to save herself from this violence.

61. *Id.* at 853.

62. *R. v. Whitten*, [1992] 110 N.S.R.2d 149, at 157.

63. *Id.*

64. *Accord Lavallée*, [1990] 1 S.C.R. at 856-57.

65. *Id.*

66. *Id.*

When women kill their spouses it is most often in the context of a relationship already characterized by extreme and/or repeated episodes of violence. The killing usually takes place when the woman's strategies of resistance and/or other avenues of escape have failed to protect her from further violence. The Supreme Court of Canada's holding in *Lavallée* reflects a judicial decision significantly more sensitized to the social and individual circumstances in which some "battered women" kill to save their own lives and more sensitized to the desperation and fear which usually flow from living with ongoing violence and being threatened with death. By removing the common law restrictions that had made self-defence virtually unavailable to battered women who kill, *Lavallée* offers a contextualized and 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. To this extent, this decision represents a significant, if not unequivocal, step forward.

B. *The Battered Woman Syndrome and the "Cycle of Violence"*

Since its relatively recent acceptance in U.S. and Canadian case law, commentators from a variety of fields have expressed concern about the politically problematic aspects of the "battered woman syndrome."⁶⁷ Some have recommended ways of reconceptualizing this "syndrome" in order to avoid its most obvious limitations,⁶⁸ while others have described it as a "red herring" and called for its elimination in the legal arena altogether.⁶⁹ The trajectory of the "battered woman syndrome" and its reception in academic and legal circles cannot be traced without reference to the work of its originator, Lenore Walker, and her first articulation of the syndrome two decades ago.⁷⁰

67. Shaffer, *supra* note 57, at 1.

68. See, e.g., Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA LAW REVIEW 1191, 1193 (1993); Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1314 (1993); Shaffer, *supra* note 57, at 8-9; Stark, *supra* note 1, at 1009-11.

69. See, e.g., DONALD DOWNS, *MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY AND THE LAW* 223 (1996); Julianne Parfett, *Beyond Battered Woman Syndrome Evidence: An Alternative Approach to the Use of Abuse Evidence in Spousal Homicide Cases*, 12 WINDSOR REV. LEGAL & SOCIAL ISSUES 55, 96 (2001).

70. The identification and popularization of the category "battered woman" was most clearly and explicitly formulated in Walker's widely cited and influential book, entitled *The Battered Woman*. See generally WALKER, *supra* note 25. This text has been regarded as a classic in the field, along with her subsequent books and many articles. See, e.g., LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* (1989) [hereinafter WALKER, *TERRIFYING LOVE*]; LENORE E. WALKER, *THE BATTERED WOMAN'S SYNDROME* (1984) [hereinafter WALKER, *BATTERED WOMAN'S SYNDROME*].

Central to Walker's explanatory account of the "battered woman syndrome" are the related concepts of "learned helplessness" and the "cycle of violence."⁷¹ In Walker's view, "learned helplessness" is a constitutive component of the "battered woman syndrome."⁷² Walker's original formulation of the "battered woman syndrome" drew on the work of Martin Seligman and a team of researchers who conducted research with animals to measure the behavioural effects of electric shocks administered to them while in captivity.⁷³ Based on his laboratory studies of dogs, Seligman postulated the theory of "learned helplessness" to explain their response to abusive stimuli over which they could not exercise any control.⁷⁴ As a result of the shocks, the dogs became listless, complacent, and passive and made no effort to escape their cages even when it was possible for them to do so.⁷⁵ Walker saw this situation as parallel to that experienced by "battered women," who, unable to

Walker provided one of the earliest feminist accounts of the experiences of women abused by their male intimate partners. Her research on, and analyses of woman abuse, including her articulation of the "battered woman syndrome," contain both elements of radicalism in their original conception, as well as the conservative and stereotypical elements which remain so troubling today. For example, in her first book on the topic of woman battering, Walker outlines the various dimensions of this kind of abuse, including attention to women's experiences of both physical *and* sexual assaults, economic deprivation, and social isolation imposed by their male partners. In this way, Walker presents an expansive view of the features of violence against women in intimate relationships and identifies the ways in which violent men not only use physical assaults against the women with whom they live but also seek to exercise control over their female partners in a variety of other spheres. Walker also explicitly identifies sexual subordination as the cause and context of domestic violence. As she puts it, only where there is true equality between males and females can there be a society that is free from violence. WALKER, *supra* note 25, at x. Writing over twenty years ago, Walker explicitly situated the problem of men's violence against women in intimate relationships within the larger social relations of gender inequality.

In spite of these progressive and more contextualized aspects of her analysis, Walker nevertheless describes her research as aimed at studying "battered women's problems" and as intended to illuminate the specific "psychology of battered women as victims." *Id.* To this end, the explanatory model of the "battered woman's syndrome" she developed to explore the special psychology of "battered women" has now become a dominant way of understanding the effects of this kind of violence in women's lives. In this way, then, Walker's work ultimately ends up reinforcing a focus on the "psychology of victims" in ascribing to "battered women" a distinct psychological profile which seems ultimately to attach to the women themselves instead of being understood as a normal response to abnormal external circumstances. Although it is arguably an inadvertent consequence of her research, Walker's work – and the way it has been taken up since it first appeared – has significantly contributed to pathologizing and psychologizing of the lives of women who are assaulted by their male intimates.

71. See WALKER, *supra* note 25, at 42-70.

72. *Id.* at 47.

73. *Id.* at 45-46.

74. Martin E.P. Seligman et al., *Alleviation of Learned Helplessness in the Dog*, 73 J. ABNORMAL PSYCHOL. 256, 258 (1968).

75. *Id.* at 256.

control or stop the violence perpetrated against them, "learned" to become "helpless" in the face of it.⁷⁶ This concept is a foundational component of the "battered woman syndrome."⁷⁷

The concept of "learned helplessness" is one of the fundamental flaws which construct the problems associated with the "battered woman syndrome." The focus on a battered woman's so-called "helplessness," whether learned or not, not only over generalizes by stereotyping the experiences of women who experience violence in their intimate relationships, but it also reveals a deeper problem. Most fundamentally, it focuses the lens on the individual woman's perceived inability to react more effectively to her difficult circumstances and loses sight of two typically co-existing, more significant and determinative phenomena (as I elaborate more fully below). These are, first and foremost, the fact that most battered women are not helpless but are, in fact, actively engaged in pursuing a variety of coping, help-seeking, and resistance strategies.⁷⁸ Second, the "learned helplessness" model entirely overlooks the myriad ways in which the social conditions of inequality so often limit or thwart battered women's help-seeking strategies.

According to Walker, there is also a "cycle of violence" which characterizes violence against women in their intimate relationships with men.⁷⁹ This cycle comprises three distinct phases: the tension building phase prior to an assault, the eruption of violence, and the period of contrition which typically follows, sometimes referred to as the "honeymoon" period.⁸⁰ Yet the notion that violence in intimate relationships follows such a discernible pattern is a rather formulaic, and even static representation. Despite the fact that it is predicated on a view of the cyclical nature of violence, it overemphasizes the "violent event" itself, by defining all of the phases of the cycle in relation to the "violent episode."⁸¹ In this way, the dynamic and ongoing ways in which violent and abusive men exercise control, domination, and coercion over their female partners are obscured in favour of overplaying the significance of the actual and discrete "incidents" of physical assault.⁸² But for a woman living with a violent male partner, there may never be a period she experiences as a "honeymoon" phase, as the absence of physical assault does not eradicate its ongoing consequences, including the woman's need for hypervigilance in

76. See WALKER, *supra* note 25, at 48.

77. *Id.* at 47.

78. See, e.g., EDWARD GONDOLF & ELLEN FISHER, *BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO LEARNED HELPLESSNESS* (1988).

79. *Id.* at 55.

80. *Id.* at 56-70.

81. *Id.* at 59-69.

82. This is in no way to suggest that physical assaults are not highly significant and destructive events; rather, that physical violence is typically only one expression of a larger and often more insidious pattern of domination and control.

guarding against/watching for “the next time” and the ways in which the domination is sedimented through multiple layers of everyday behaviours and areas through which his control is assumed and exerted.⁸³ In this way, the very notion of a “cycle of violence” strips away the complex, ongoing, and relational dimensions of the patterns of male control and domination of which the man’s violence is only a part.

Evan Stark makes a similar point when he observes that:

[W]ork with battered women . . . suggests that physical violence may not be the most significant factor about most battering relationships. In all probability, the clinical profile revealed by battered women reflects the fact that they have been subjected to an ongoing strategy of intimidation, isolation and control that extends to all areas of a woman’s life, including sexuality; material necessities; relations with family, children, and friends; and work.⁸⁴

Findings from the Women’s Safety Project research confirm precisely this point, that in women’s own subjective experience an episode of violence perpetrated by their male intimate partner can impose severe limitations on diverse areas of their lives.⁸⁵

The more generalized patterns of control and subordination which underpin intimate violence, therefore, can be seen in the many areas in which assaulted women report feeling deeply constrained, limited, and restricted in their everyday lives.⁸⁶ To this extent, the “cycle of violence” postulated by Walker misses the ongoing relational aspects of women’s subordination in their relationships with violent male partners, as well as the patterns of domination and subordination which do not evaporate in any so-called “honeymoon phase” and which extend beyond the immediate consequences of men’s discrete acts of violence to powerfully restrain women’s freedom and autonomy.

83. See WALKER, *supra* note 25, at 48.

84. Stark, *supra* note 1, at 986.

85. For example, a majority of the women interviewed for that study who disclosed an experience of physical assault in an intimate relationship with a man reported that as a result of the violence they felt unable to express any criticisms of their partners, ask for his participation in child care responsibilities, or have control over their own money. More specifically, in 53% of the cases in which women reported physical assault in an intimate relationship they also reported that they felt unable to disagree with their partner. In 42% of these cases women reported being unable to spend time apart from their male partners, and 25% reported that they could not wear the clothes they wanted to. Perhaps most telling and most disturbing is that in 40% of cases of physical assault in intimate relationships the women interviewed reported that they did not feel able to refuse unwanted sex, suggesting that they may have often accommodated unwanted sex with their abusive partners in order to avoid further conflict and/or physical assault. See Lori Haskell & Melanie Randall, *Politics of Women’s Safety: Sexual Violence, Women’s Fear and the Public/Private Split*, 26 RESOURCES FEMINIST RES. 113, 141-42 (1999).

86. *Id.* at 142.

C. *Dysfunction, Deficits, and Other Pathologies: The Battered Woman and Her "Syndrome"*⁸⁷

Perhaps the most troubling aspect of the “battered woman syndrome” is the way it calls up and underlines the popular image of a woman who has been subjected to violence as a helpless and utter “victim” and as one who has been rendered totally passive and ineffective as a result of this violence. This image of the “battered women” has now been firmly inscribed in legal discourse surrounding “battered women” who kill, given the way in which expert evidence on the syndrome presented at trial is so often given and/or received.⁸⁸ Martha Shaffer’s review of Canadian case law since *Lavallée*, in which battered woman syndrome has supported a self-defence claim for a woman accused of killing her violent spouse, indicates that the image of the helpless battered woman is potentially tied to the even more dangerous stereotype of the “authentic” and “deserving” battered woman.⁸⁹ Those “battered women” who fail to conform to this stereotype of incapacity, because they are seen as angry, aggressive, or “tough,” may fail to have a jury or judge understand the applicability of the doctrine of self-defence and the *Lavallée* expansion of “reasonableness” to their defence claims.⁹⁰

This tendency towards stereotyping of women’s experiences that inheres in the syndrome has been soundly criticized by a variety of scholars. For example, in Evan Stark’s view, the “battered woman syndrome” provides an “inaccurate, reductionist and potentially demeaning representation of woman battering”⁹¹ insofar as it “emphasizes the disabling effects of violence rather than women’s survival skills.”⁹² For Mary Dutton, a clinical psychologist, one of the major shortcomings of “battered woman syndrome” is that it is taken to represent the psychology of *all* battered women when, in her view, “battered women’s diverse psychological realities are not limited to one particular ‘profile’.”⁹³ Further, according to Martha Shaffer, the “battered woman syndrome” represents battered women as “dysfunctional” and therefore as incapable of autonomy or rationality in their actions.⁹⁴

These critiques are well founded for the emphasis on the psychological incapacitation of “battered women” is not accidental but is absolutely central to the definition of the syndrome itself. Walker, in fact, is explicit in expressing her view that battering produces the state of “learned helplessness” in women

87. See O’Donovan, *supra* note 45, at 427.

88. See generally Shaffer, *supra* note 57; see also Mahoney, *supra* note 13, at 24-33.

89. Shaffer, *supra* note 57, at 25.

90. *Id.* at 30-32.

91. Stark, *supra* note 1, at 975.

92. *Id.* at 1000.

93. Dutton, *supra* note 68, at 1195.

94. Shaffer, *supra* note 57, at 19.

and that the psychological effects of battering result in a form of psychological *impairment*, a diminished capacity in terms of the woman's emotions, cognitions, and behaviour.⁹⁵ As she explains in her book *Terrifying Love: Why Battered Women Kill and How Society Responds*, "the process of learned helplessness results in a state with *deficits* in three specific areas: in the area where battered women think, in how they feel, and in the way they behave."⁹⁶ There is no subtlety or ambiguity in this formulation. Walker is explicit that the psychological consequences of battering are such that the woman becomes psychically "damaged" and, by obvious inference, cannot make the kinds of decisions she would or should make if she were not suffering from the "syndrome."⁹⁷ To this extent, then, the "battered woman syndrome" is arguably little more than a more compassionate and gender sensitive version of the traditional psychiatric view of women as "irrational" or even "insane,"⁹⁸ except that this version incorporates a recognition that the women's alleged "irrationality" or psychological incapacity results from the infliction of abuse upon her by a male intimate. In other words, the abuse is seen to be wrong and not the woman's fault in the "battered woman syndrome," but it is also seen to have made her lack autonomy and rationality.

D. Making Women's Resistance Visible

Both of the formulations – "learned helplessness" and "battered women's syndrome" – emphasize passivity and powerlessness at the expense of recognizing women's struggles and resilience in the face of the conditions of their subordination, of which the violence forms only a part. Moreover, they entirely obliterate the varied and complex strategies of resistance that most women who experience violence actually devise and carry out.⁹⁹

Research with women assaulted by their male partners has consistently demonstrated that women employ a range of creative ways through which they attempt to escape, avoid, minimize, or stop the violence against them.¹⁰⁰ In the Women's Safety Project study, for example, the majority of the 420 women

95. WALKER, TERRIFYING LOVE, *supra* note 70, at 50-51.

96. *Id.* at 36 (emphasis added).

97. See generally *id.* at 42-53.

98. See ANN JONES, WOMEN WHO KILL 158-66, 288-89 (1980) (presenting an analysis of the courts' historical predilection for accepting pleas of insanity in cases of women who killed their violent male spouses over explanations which address the dynamics of the violence and the woman's lack of options).

99. See Melanie Randall, *Agency and (In)Subordination: Victimization, Resistance and Sexual Violence in Women's Lives* (1996) (unpublished Ph.D. dissertation, York University) (on file with author) (analysing women's resistance strategies in the context of violence).

100. See, e.g., MARY ANN DUTTON, EMPOWERING AND HEALING THE BATTERED WOMAN: A MODEL FOR ASSESSMENT AND INTERVENTION 41-43 (1992); GONDOLF & FISHER, *supra* note 78, at 28.

randomly surveyed reported using a variety of resistance strategies in relation to experiences of sexual violence.¹⁰¹ Specifically, in 64% of the (134) cases of physical assault perpetrated by a male intimate, women expressed some form of resistance, as they did in 70.6% of the cases of sexual assault.¹⁰² Even in terms of responding to experiences of sexual abuse and incest in childhood, in 68.8% of these (339) cases women reported that they mounted some kind of resistance.¹⁰³

The problem is that the social conditions of inequality 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 which still prevail and which often hold women accountable for the violence perpetrated against them.¹⁰⁴ For women from racialized groups, immigrant, or refugee women, these conditions are often exacerbated by the relations of racism and the fact that membership in a racial "minority" group and lower socio-economic status are often co-terminus.¹⁰⁵ These conditions of inequality, therefore, seriously constrain the extent to which women can exercise "choice" and autonomy and the extent to which they are able to resist the violence perpetrated against them. Yet in spite of these conditions, what is remarkable is that so many women still find creative and effective ways to resist violence and abuse.

In legal terms, instead of widening the lens through which women's experiences of violence are understood, the "battered woman syndrome" may ultimately replace one set of narrow stereotypes for another. This is because the use of "battered woman syndrome" as evidentiary support for a self-defence claim made by a woman who has killed her violent spouse "furthers a trend away from justification defenses for women defendants" by resting on an account of psychological incapacity.¹⁰⁶ It does this by answering the "why didn't she leave?" question with a psychological account of the battered woman's helplessness which results from her exposure to prolonged violence. As Donald Downs observes, "battered woman syndrome speaks the language of justification and situational excuse, [but] is at heart a defense based on

101. See Randall, *supra* note 99, at 148 (discussing these results).

102. *Id.* These figures exclude cases of sexual assault which also took place in the context of a relationship where the woman was also physically battered as these were included in the data set which documents physical assault in intimate relationships. These figures also refer only to the more "extreme" and narrowly defined cases of sexual violence, documented on the mini-questionnaires. *Id.*

103. *Id.*

104. See Dutton, *supra* note 68, at 1232-40; WALKER, *supra* note 25, at 14-15.

105. Accord Dutton, *supra* note 68, at 1236-38.

106. DOWNS, *supra* note 69, at 226.

incapacity excuses.”¹⁰⁷ In this way the image of the helpless, passive, and debilitated “battered woman” plays into pre-existing social and legal stereotypes about women’s diminished capacities.

E. Misapplications of the “Battered Woman Syndrome” in Law

Battered woman syndrome is, among other things, a tool by which legal authorities, including juries, can bend or tailor stringent legal rules to achieve justice in individual cases.¹⁰⁸

The battered woman syndrome was a watershed in social and legal understandings of domestic violence.¹⁰⁹

The acceptance of the “battered woman syndrome” by the Supreme Court of Canada in *Lavallée* and its use in the Canadian legal system since that decision have not amounted to an unambiguous or unequivocal advance in the law’s response in Canada to the problem of violence against women in intimate relationships generally or in supporting the defence of self-defence for women accused of killing their violent male partners specifically.¹¹⁰ Even aside from its inherent limitations, in terms of achieving relief for individual women who have experienced extreme violence and killed in self-defence, the evidentiary support provided by the battered woman syndrome has made little difference.

In 1995, the Minister of Justice and the Solicitor General of Canada established a Self-Defence Review, headed by Judge Lynn Ratushny, to re-examine convictions of women in light of the Supreme Court of Canada’s finding in *Lavallée*.¹¹¹ The Review’s final report, released in 1997, recommended some kind of relief for only seven of the ninety-eight cases considered and did not result in the release of a single woman from jail, an outcome one commentator has described as “disturbing.”¹¹²

Critically reviewing this review, Elizabeth Sheehy remarks that “feminist activists and lawyers will have to work to generate systematic changes out of the [Self-Defence Review].”¹¹³ Additionally, based on a separate empirical analysis of the impact of *Lavallée* in the five years following the judgment,

107. *Id.* Downs is actually somewhat inaccurate in his language here because “battered woman syndrome” is not itself a defence but simply lends support to a defence of self-defence through the admission of expert testimony.

108. *Id.* at 115.

109. Meier, *supra* note 68, at 1305.

110. See *infra* notes 113-15 and accompanying text.

111. Gary Trotter, *Justice Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review*, 26 QUEEN’S L.J. 339, 340-41 (2001).

112. See *id.* at 341-42; see also Elizabeth Sheehy, *Review of Self-Defence Review*, 12 CAN. J. WOMEN & L. 197, 198 (1999).

113. Sheehy, *supra* note 112, at 198-99.

Martha Shaffer argues that the decision "does not appear to have led to a dramatic increase in successful self-defence claims by women."¹¹⁴ Ironically, then, the "battered woman syndrome" has not had an especially major impact in case law, in Canada at least, certainly not in proportion to the ink which has been spilled in analysing its legal significance.¹¹⁵

The battered woman syndrome, however, has appeared in some legal cases in Canada and elsewhere in surprising and potentially quite troubling ways. For example, in the United States, Dr. Lenore Walker, who, because of her research and writing in the field is considered to be a leading expert on the condition, was scheduled and publicly announced as an expert witness for the defence in the trial of O.J. Simpson.¹¹⁶ Her testimony was solicited by the defence in order to bolster the claim that the accused's history of battering his wife did not predict that he was a murderer.¹¹⁷ Whether or not this is true is less relevant than the fact that a psychological construct developed to describe the experiences and psychological profile of women subjected to ongoing violence from their husbands was now being used as a predictor for whether or not men were likely to kill the women they assaulted.¹¹⁸ Not only is the "battered woman syndrome" based on research with women, and therefore of no utility in explaining the behaviour of abusive men (who would need to be studied directly in order to develop a similar profile, such as a "male batterer's syndrome"), but its attempted utilization as evidence in a defence for a man accused of killing his wife represents a highly distorted and dangerous misapplication.¹¹⁹

In Canada in the infamous legal proceedings around the legal culpability of Karla Homolka for the sexual torture and killings of young women (including her own younger sister) which she alleged were perpetrated exclusively by her husband Paul Bernardo, the "battered woman syndrome" was invoked in her

114. Shaffer, *supra* note 57, at 17.

115. The Supreme Court of Canada recently determined that a self-defence claim must be based on a defendant's reasonable belief that there was no alternative course of action available, so that it was necessary for him to kill to protect himself from death or grievous bodily harm. While the case did involve a question of whether *Lavallée* created a right to "preemptive killings," the Court concluded that the defence was intended to cover situations of last resort. R. v. Cinous, [2000], 2 S.C.R. 3.

116. Melanie Frager Griffith, Note, *Battered Women Syndrome: A Tool for Batterers?*, 64 FORDHAM L. REV. 141, 148 (1996).

117. *Id.* at 148-49.

118. *See id.* Dr. Walker ultimately did not testify at that trial, for reasons which are unclear. As Griffith points out, she may have been dropped by the defence or have withdrawn from the case for her own reasons, especially given the storm of negative publicity in the media generated by her announced appearance, criticism that was especially vocal from advocates for assaulted women. *Id.* at 145 n.27.

119. *See id.* Griffith reports that Dr. Walker has in fact provided expert testimony for the defence in other trials in which men have been accused of killing their wife. *See id.* at 146 n.26.

defence.¹²⁰ While the violence perpetrated by Bernardo against Homolka may be relevant to a complete account of the situation, whether or not it could possibly exonerate Homolka's responsibility for at best not intervening to stop and at worst actively participating in these sexual crimes and murders is another question altogether. In her article on this topic, Melanie Griffith cites numerous other examples of this misapplication and warns that courts must strive to assess relevance and thereby avoid various misuses of "battered woman syndrome."¹²¹ There are also disturbing reports of the "battered woman syndrome" being used to discredit women's parenting abilities in cases of custody disputes where there is a history of domestic violence.¹²² While these misapplications of the "battered woman syndrome" do not necessarily inhere in the description of the syndrome itself, they do, nevertheless, point to troubling ways in which it can be engaged legally.

However, in spite of these more problematic applications of the "battered woman syndrome" there have also been some encouraging legal developments in how it has been understood. In *R. v. Malott*, some members of the Supreme Court of Canada recognized many of the fundamental dilemmas involved in the use of the battered woman syndrome, in the separate opinion written by Justice L'Heureux-Dubé, for herself and Justice McLachlin (as she was then).¹²³ In this opinion, Justice L'Heureux-Dubé articulated a sophisticated feminist analysis which engaged the contemporary academic commentary on the hazards which can accompany the use of the battered woman syndrome and takes judicial note of some of the concerns raised therein.¹²⁴

The case was not especially significant in terms of any new legal developments relating to the battered woman syndrome and the defence of self-defence, as it essentially involved an appeal dismissed unanimously by the Supreme Court, surrounding whether or not the trial judge's charge to the jury supported a conviction for second degree murder for a woman charged with killing her former common law spouse.¹²⁵ The facts of the case were relatively straightforward, and the Court found that the trial judge adequately dealt with the evidence relating to battered woman syndrome in relation to the accused's self-defence claim.¹²⁶ What is interesting about the judgment, however, is Justice L'Heureux-Dubé's expanded articulation of the legal significance of

120. See Anne McGillivray, *A Moral Vacuity in Her Which is Impossible to Explain: Law, Psychiatry and the Remaking of Karla Homolka*, 5 INT'L J. LEGAL PROF. 255, 268 (1998).

121. See Griffith, *supra* note 116, at 175-79.

122. *Id.* at 80.

123. *R. v. Malott*, [1998] 1 S.C.R. 123.

124. *Id.* at 139-45 (L'Heureux-Dubé, J., concurring).

125. *Id.* at 139 (L'Heureux-Dubé, J., concurring).

126. *Id.* at 134.

"battered woman syndrome" and the ways in which it should inform the legal inquiry into a woman's self-defence claim in a criminal proceeding.¹²⁷

Justice L'Heureux-Dubé explained, for example, that it was accepted in *Lavallée* that "a woman's perception of what is reasonable is influenced by her gender, as well as by her individual experience."¹²⁸ This must be the basis from which a self-defence claim is evaluated. Otherwise, Justice L'Heureux-Dubé cautions, "it is possible that those women who are unable to fit themselves within the stereotype of a victimized, passive, helpless, dependent, battered woman will not have their claims to self-defence fairly decided."¹²⁹ Accepting that the "battered woman syndrome" can tend to reinforce a stereotypical view of the woman who has experienced violence as passive and helpless, Justice L'Heureux-Dubé emphasizes the "other elements of a woman's social context which help to explain her inability to leave her abuser," including a lack of economic resources, fear of retaliation, responsibility for children, as well as inadequate social support.¹³⁰ Justice L'Heureux-Dubé went on to stress that these very factors must "necessarily inform the reasonableness of a woman's beliefs or perceptions of, for instance, her lack of an alternative to the use of deadly force to preserve herself from death or grievous bodily harm."¹³¹

Finally, Justice L'Heureux-Dubé advised courts on how they can give practical effect to the principles articulated in the *Lavallée* decision. In her words:

To fully accord with the spirit of *Lavallée*, where the reasonableness of a battered woman's belief is at issue in a criminal case, a judge and jury should be made to appreciate that a battered woman's experiences are both individualized, based on her own history and relationships, as well as shared with other women, within the context of a social and legal system which has historically undervalued women's experiences. A judge and jury should be told that a battered women's experiences are generally outside the common understanding of the average judge and juror, and that they should seek to understand the evidence being presented to them in order to overcome the myths and stereotypes which we all share. Finally, all of this should be presented in such a way as to focus on the reasonableness of the woman's actions, without relying on old or new stereotypes about battered women.¹³²

In this judicial pronouncement Justice L'Heureux-Dubé demonstrated an acute sensitivity and nuanced appreciation of the need for legal recognition of both specificity and generality, the level of the individual and the social, in

127. *Id.* at 139-45 (L'Heureux-Dube, J., concurring).

128. *Malott*, [1998] 1 S.C.R. at 141 (L'Heureux-Dubé, J., concurring).

129. *Id.* at 142 (L'Heureux-Dubé, J., concurring).

130. *Id.* at 143-44 (L'Heureux-Dubé, J., concurring).

131. *Id.* at 144 (L'Heureux-Dubé, J., concurring).

132. *Id.* (L'Heureux-Dubé, J., concurring).

assessing the self-defence claims of battered women who kill. Moreover, she exhorted those in the legal arena to acknowledge a general lack of awareness of the particularities of the experiences of women assaulted by their male intimates and to struggle against their own stereotypes.¹³³ While the effect of this kind of legal analysis coming from at least two members of the Supreme Court of Canada has yet to be seen, its very articulation is an encouraging and necessary development in correcting some of the stereotypical excesses of the syndrome. Yet it is not enough to signal that the battered woman syndrome should be retained in support of the self-defence claims of battered women who kill. The problems with the syndrome are too daunting, and its defects too entrenched. Moreover, there are more sophisticated methods for ensuring that the evidentiary record educates courts about the effects, impacts, and contexts of intimate violence in women's lives.

F. *The "Battered Woman Syndrome": Can It Be Rehabilitated?*

Given judicial notice in Canada of the problems with the "battered woman syndrome"¹³⁴ and given a considerable literature analysing and critiquing the syndrome,¹³⁵ can the concept be salvaged and still be of some utility in legal contexts in which domestic violence comes into play? There have been many critiques of the syndrome, and some attempts at reformulating it in a way that attempts to avoid its worst difficulties in legal contexts.¹³⁶

Mary Dutton, for example, suggests an expanded version of "battered woman syndrome" which can be presented in evidence in legal contexts.¹³⁷ In her view a redefined "battered woman syndrome" can assist in supporting the self-defence claims of assaulted women who kill their abusers, through the provision of carefully crafted expert testimony which addresses factors beyond the psychological reactions to violence and which acknowledges that these psychological reactions do not fit neatly into one singular profile.¹³⁸ Specifically, Dutton advocates a "redefined" version of battered woman syndrome which comprises four elements: first, an account of the history and nature of the violence experienced by the woman; second, an exposition of the particular battered woman's psychological reactions to the violence she has experienced; third, an explication of the strategies she used (or did not use) to escape her abuser prior to killing him; and fourth, an elucidation of the

133. See *Malott*, [1998] 1 S.C.R. at 144 (L'Heureux-Dube, J., concurring).

134. *Id.* at 139-45 (L'Heureux-Dube, J., concurring).

135. See *supra* notes 68-70.

136. See, e.g., Dutton, *supra* note 68, at 1193 n.1 - n.5.

137. *Id.* at 1193-94.

138. *Id.* at 1195.

intervening and contextual factors which influenced the woman's psychological response and coping strategies in relation to the violence.¹³⁹

Dutton's expanded version of the "battered woman syndrome" is a definite improvement over the original version espoused by Walker. By including attention to issues of social context through expert testimony provided to the Court, by highlighting women's resistance strategies, and by attending to differences in the experiences, psychologies, and material resources of women assaulted by their male intimates, Dutton's reformulation addresses and corrects many of the problems which accompany the "battered woman syndrome" in its original version. In particular, it more fully contextualizes the particular woman's experience and attempts to overcome the tendencies towards stereotyping which the original "battered woman syndrome" typically entails.

Following Dutton's recommendations, expert testimony on "battered woman syndrome" would be greatly improved, and an expanded view of the problem of violence against women in intimate relationships would be provided in legal proceedings dealing with it. However, Dutton's redefined version of the "syndrome" still accepts the language of syndromization, which suggests psychological disorder instead of social problem. Additionally, her redefinition is, although expanded, still an essentially psychologically focused account of women's reactions to violence with an emphasis on the individual psyches of women who have been battered by their male intimates. In this way it does not entirely avoid the pitfalls of the "battered woman syndrome" in its traditional version. Nor does it escape evoking the victim-blaming reactions which many judges or juries may have when they focus on an individual woman's reactions to violence and fail to understand her psyche or her actions as "reasonable."

Furthermore, Dutton's emphasis on strategies a "battered woman" has used with regard to the violence she has experienced can still lead to a reinforcement of the idea that it is a woman's responsibility to stop the violence perpetrated against her. This is not so much a reflection on any defect in Dutton's approach as it is a comment on the larger dilemmas surrounding discussions of women's resistance strategies in a society pervaded by victim blaming attitudes. Implicitly, then, a kind of victim-blaming could potentially seep into the legal inquiry if the focus becomes one of evaluating the number and efficacy of the resistance/avoidance strategies any "battered woman" has used. Instead, the inquiry must remain firmly focused on the systematic social failure to provide adequate resources and multiple options for women who are experiencing abuse to leave violent men and reconstruct their lives so that their safety is ensured, while recognizing any efforts a woman was able to make within these constraints.

139. *Id.* at 1202.

Dutton's proposed redefinition of the "battered woman syndrome" in legal contexts is a dramatically more sophisticated and contextualized approach to its traditional use and addresses many of the syndrome's fundamental flaws. In more recent writing, Dutton appears to have strengthened her critique of the "battered woman syndrome," though she continues to "suggest the need for a reformulation of this model"¹⁴⁰ instead of an outright rejection of it. I would argue, however, that the very flaws she identifies are such that any rehabilitative efforts ought to be abandoned in favour of the adoption of entirely new approaches, ones which expressly refuse to make reference to the "battered woman syndrome" at all. Instead of relying upon a formulation which mandates inclusions of certain "pathologies" and decontextualizes critical aspects of the experience of being assaulted to the detriment of grasping this experience in all of its complexity, expert evidence should be marshaled to educate judges and juries about the social causes, contexts, and impacts of intimate violence without reliance on the "battered woman syndrome."

G. Why the Battered Woman Syndrome Should Be Abandoned: Alternative Evidentiary Approaches

Among the most problematic elements of the so-called "battered woman syndrome" is the construct of "learned helplessness" which rests at the core of the syndrome.¹⁴¹ In this view, the battered woman has learned to become helpless through her prolonged exposure to violence at the hands of her husband and is, in fact, characterized as mentally disordered as a result of the abuse she has suffered.¹⁴² But in psychologizing and individualizing the issue in these terms, the focus is deflected away from recognition of first, the social 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.); and second, the many ways in which women who are battered do actively struggle to survive, resist, and fight back against the violence they experience (hardly consistent with the traditional image of the passive, helpless victim which inheres in the battered woman syndrome).¹⁴³

Most fundamentally, the "battered woman syndrome," both in its original conception and in the way it has been taken up in law, reflects a preoccupation

140. Mary Ann Dutton, *Critique of the "Battered Woman Syndrome" Model*, available at <http://www.vaw.umn.edu/documents/vawnet/bws/bws.html> (1996).

141. WALKER, TERRIFYING LOVE, *supra* note 70, at 49-53.

142. *See id.* at 50.

143. *See id.* at 10.

with victimization at the expense of any recognition of agency.¹⁴⁴ This is part of a larger social tendency to understand victimization and agency in dichotomous terms, as existing as binary opposites. Glaringly absent from most representations of violence in intimate heterosexual relationships, then, is attention to the many and complicated ways in which the violence is contested and resisted by assaulted women. Instead, the focus is typically on the ways in which battered women are rendered helpless victims.¹⁴⁵

Equally absent is any acknowledgment of the larger failings of the very systems and institutions that are supposed to protect against and provide remedies for this violence, failings that undercut women's resistance strategies. More importantly still, the larger context of social inequality which produces this violence in women's lives in the first place is typically dropped out of view. This results in most dominant representations, including legal representations of the lives of women who experience *ongoing* violence and abuse from men,¹⁴⁶ failing to incorporate a view of women's lives which reflects both the structures of inequality which shape these lives and the possibilities and expressions of agency within these structures.

It is this broader and skewed depiction of violence against women which underpins the "battered woman syndrome" and its use in legal contexts. This reason, among others, means that the doctrine must ultimately be abandoned in favour of more contextualized and sophisticated psycho-social accounts which can be offered up by qualified experts giving evidence to courts, who grasp both the macro and micro levels of assaulted women's experiences.

If the "battered woman syndrome" should be abandoned because it is conceptually inadequate for the task of educating courts about the causes, contexts, and impacts of domestic violence in women's lives, what is a preferred approach? One Canadian commentator has suggested that critical attention should be paid to more skillful utilization of the already existing defences in criminal law that might assist those battered women who kill in self-defence.¹⁴⁷ Arguing for better use of the structures of the defences "already in place" to bring forth evidence of domestic violence when women

144. Eliane Chiu, *Confronting the Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223, 1224-28 (2001).

145. *Id.* at 1225.

146. In this paper I restrict my analysis to women's experiences of violence in heterosexual relationships. The experiences of women in same-sex relationships with violence and abuse warrant a separate analysis which takes into account the social context of homophobia and the differing ways in which gender is and isn't salient in same-sex relationships. For a thoughtful exploration of these issues, see Mary Eaton, *Abuse by Any Other Name: Feminism, Difference and Intralebian Violence*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE*, *supra* note 34, at 195.

147. Julianne Parfett, *Beyond Battered Woman Syndrome Evidence: An Alternative Approach to the Use of Abuse Evidence in Spousal Homicide Cases*, 12 WINDSOR REV. LEGAL & SOC. ISSUES 55, 79 (2001).

kill their violent male intimate, Julianne Parfett makes the case that, in addition to self-defence, provocation (to diminish culpability), and in some cases insanity, may support the claims of battered women who kill.¹⁴⁸ But in spite of her effective critique of the “battered woman syndrome,” Parfett’s recommendations remain, by her own admission, “individualistic.”¹⁴⁹ While attention to the individual circumstances of any criminal defendant is essential, the set of recommendations Parfett proposes fails to engage with and advance an analysis of domestic violence and its impact that grasps its social contexts and consequences, as these are lived at the level of individual women’s lives. Moreover, Parfett’s recommended reforms would, in fact, aggravate the legal situation given the problematic nature of these defences, particularly provocation.

On a different strategic and evidentiary track, one that expressly engages social conditions, Evan Stark recommends the substitution of what he calls the “coercive control framework” for the current uses of the “battered woman syndrome” in legal contexts.¹⁵⁰ For Stark, this alternative framework more fully captures the “hostage like” conditions of entrapment and subordination in which many “battered women” live.¹⁵¹ Moreover, this framework, which “emphasizes the batterer’s pattern of coercion and control rather than the violent acts of their effect on victim psychology”¹⁵² shifts the focus to:

[T]he basis of women’s justice claims from stigmatizing psychological assessments of traumatization to the links between structural inequality, the systemic nature of women’s oppression in particular relationship, and the harms associated with domination and resistance as it has been lived.¹⁵³

Through this “coercive control framework,” Stark claims that expert evidence can discourage stereotyping of “battered woman syndrome” and accommodate women’s differences including not only their differing reactions to violence (which may include anger instead of passivity) but also their differences in social location, including along lines of class and race.¹⁵⁴

148. *Id.*

149. *Id.* at 56-65.

150. Stark, *supra* note 1, at 975-76.

151. *Id.* at 975.

152. *Id.* at 975-76.

153. *Id.* at 976.

154. Despite these very promising developments in Stark’s alternative explanatory framework, he at times lapses into some problematic language in his analysis. For example, in advocating for the benefits of his own “coercive control framework” he refers to the relative advantage of explanations of battering which start with an affirmative conception of womanhood and proceed to describe how objective dimensions of entrapment have deconstructed the most essential facets of feminine identity. *Id.* at 1021. But what an “affirmative conception of womanhood” or the “essential” facets of a feminine identity are remain unidentified by Stark. Apart from the essentializing tendencies of this formulation, Stark also in places uses language which, despite his efforts to the contrary, reproduces the very problems of stereotyping he seeks

One concern is that Stark's "coercive control model" may be taken up and dismissed in legal contexts as mere "advocacy," a point raised by Joan Meier.¹⁵⁵ To the extent that courts seem to prefer expert testimony which can be characterized as "scientific," Stark's explicitly political model may carry less weight than more "scientific" psychological theories and accounts.¹⁵⁶ Still, this is a strategic issue to be worked out in the context of specific legal cases. At any rate Stark's vision of the kind of expert testimony to be offered in support of battered women's self-defence claims has the definite advantage of deflecting attention away from the "why did she stay" question and focusing more on providing a contextual analysis of violence against women in intimate relationships and its links to the very real and material conditions of sexual inequality in which it is situated and lived.

In addition to expert evidence to educate juries and the judiciary about these material conditions and the way in which they shape and constrain women's choices, a rich psychological literature is emerging, which, when integrated with a gender analysis goes a long way towards explaining the traumatic effects of intimate violence in women's lives.¹⁵⁷ Some of the ground breaking work in this area was undertaken by Judith Herman, whose book *Trauma and Recovery* began to develop an articulation of the intersections between the effects of privatized traumatic events in women's lives such as domestic violence and sexual assault and the way in which this trauma parallels some of the experiences of public, political terrorism.¹⁵⁸ Developing some of the themes in this area and expressly incorporating a gender analysis into the psychological trauma literature, some feminist psychologists are developing accounts of the ways in which post-traumatic stress is the normal response to abnormal events such as violence and abuse in an intimate relationship.¹⁵⁹ Contextualized evidence about post-traumatic stress "disorder"¹⁶⁰ is more appropriate insofar as "it shifts the focus away from the

to avoid. For instance, he begins one paragraph by speaking of "what creates a battered woman," terminology which still evokes that identifiable "class" of "victims" known as "battered women," itself an act of pathologizing. Stark, *supra* note 1, at 1026.

155. Meier, *supra* note 68, at 1320.

156. *Id.*; Stark, *supra* note 1, at 979.

157. Meier, *supra* note 68, at 1321-22.

158. JUDITH HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE – FROM DOMESTIC ABUSE TO POLITICAL TERROR* 2-3 (1992).

159. See, e.g., LORI HASKELL, *FIRST STAGE TRAUMA TREATMENT: A GUIDE FOR MENTAL HEALTH PROFESSIONALS WORKING WITH WOMEN* 1 (2003). For a more general discussion of domestic violence and post-traumatic stress, see generally Anita K. McGruden et al., *Interpersonal Violence and Post-Traumatic Symptomatology: The Effects of Ethnicity, Gender and Exposure to Violent Events*, 15 *J. INTERPERSONAL VIOLENCE* 206 (2000).

160. Haskell, *supra* note 159, at 6. The use of the term "disorder" has been appropriately criticized by feminist writers for its stigmatizing effects. Lori Haskell argues that "this label implies that there is something wrong with the person, rather than acknowledging that the person

'personality' or 'character' of the battered woman, and describes her behaviours as a natural human response to trauma imposed from external sources."¹⁶¹

Expert evidence presented by qualified mental health professionals whose understanding of post-traumatic stress (a recognized diagnostic category in the fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-IV")) expressly incorporates a recognition of gender (and other social) inequalities can be of significant assistance to legal proceedings relating to domestic violence.¹⁶² Specifically, this kind of evidentiary record can enable legal factfinders to situate their knowledge of an individual assaulted woman within an analysis of the social contexts and dynamics of domestic violence generally and how these are relevant to the particular legal issues at play. These richer, socio-psychological accounts offer the opportunity to assist courts in coming to terms with and developing more sophisticated understandings of the conditions of the lives of assaulted women and the circumstances in which they make their individual choices and decisions.

IV. UNCOOPERATIVE VICTIMS AND CRIMINAL JUSTICE SYSTEM: RESPONSES TO DOMESTIC VIOLENCE

A. *Blaming Battered Women for Refusing to Cooperate with Criminal Prosecutions*

It is well documented that many women who have experienced ongoing violence against them in their intimate relationships are reluctant to assist with the criminal prosecution of their partners.¹⁶³ In these situations, women do not cooperate with the Crown attorney or prosecutor in charge of the case in a variety of ways. Most often it is by failing to appear in criminal proceedings relating to the episodes of domestic violence they experienced or by recanting once on the witness stand.¹⁶⁴ The reasons for women's ambivalence about these criminal proceedings are varied and complex and range from (but are not

is dealing with typical and normal repercussions from having experienced a traumatic life event or events." *Id.* She recommends that the term post-traumatic stress "responses" replace the term "syndrome" or "disorder." *Id.*

161. Meier, *supra* note 68, at 1313-14.

162. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS § 309.81 (4th ed. 1994).

163. TIM ROBERTS, SPOUSAL ASSAULT AND MANDATORY CHARGING IN THE YUKON: EXPERIENCES, PERSPECTIVES AND ALTERNATIVES (1996), available at <http://canada.justice.gc.ca/en/ps/rs/re/wd96-3a-e.html>; Lauren Bennett et al., *Systemic Obstacles to the Criminal Prosecution of a Battering Partner*, 14 J. INTERPERSONAL VIOLENCE 761, 762 (1999).

164. Myrna Dawson & Ronit Dinovitzer, *Victim Cooperation and the Prosecution of Domestic Violence in a Specialized Court*, 18 JUST. Q. 593, 594, 596 (2001).

limited to) a belief that the criminal justice system will not meet their needs, fear of retaliation from the abuser, a commitment to reconciliation with the abuser, and a desire to protect him from sanctions.¹⁶⁵ Thus, there is a definite likelihood that the woman who has been the victim of the very violence requiring police intervention will choose not to actively engage with the ensuing processing of the charge through the court system.

It should be pointed out, however, that the emphasis on so-called "uncooperative victims" obscures the important fact that a great deal of women who report violence to the police do continue on and "cooperate" fully in the ensuing criminal prosecution.¹⁶⁶ Nevertheless, the co-existing fact that many women do refuse to participate with the criminal prosecution of their violent male intimates, even after having initially called upon the police seeking intervention, causes considerable frustration, confusion, and resentment on the part of key players in the legal system (including police officers, prosecutors/Crown attorneys, and judges).

In some cases, there is a tendency on the part of court personnel to characterize women who refuse to cooperate as "manipulative" or as having lied about the abuse in the first place.¹⁶⁷ More generally, there is an explicit pinpointing of responsibility for the failure of domestic violence cases either to be processed fully or to result in a conviction, in the corresponding "failure" of the woman victim to assist the state by cooperating fully and testifying against the batterer.¹⁶⁸ As two Canadian researchers point out, "prosecutors often explain low rates of prosecution by emphasizing that victims of domestic violence tend to change their minds about pressing charges, often recanting their testimonies and/or becoming "non-cooperative witnesses."¹⁶⁹ This type of argument may be advanced from either a sympathetic or a critical viewpoint, but in either case it paradoxically assumes that assaulted women have a disproportionate amount of power over the functioning of the criminal justice system.

In any event, there is a perception that the women who are "reluctant" or "uncooperative" victims have not fulfilled their part of the bargain; in other words, they have enlisted the assistance of the state by calling upon the police for help but have then failed to follow through with the system's subsequent

165. Bennett, *supra* note 163, at 764-69.

166. See, e.g., Dawson & Dinovitzer, *supra* note 164, at 610 (reporting that their review of criminal justice system processing of domestic violence cases in one specialized court in Toronto found that "approximately 55% of all victims cooperated with the prosecution").

167. In a thoughtful article critically analysing the debates about mandated participation in domestic violence prosecutions, Cheryl Hanna relays stories of training fellow prosecutors about domestic violence and hearing reactions from her colleagues characterizing assaulted women reluctant to testify as "lying about the abuse or hiding something." Hanna, *supra* note 7, at 1882.

168. See *id.* at 1883.

169. Dawson & Dinovitzer, *supra* note 164, at 594.

requirements.¹⁷⁰ The difficulty with this view, however, is that it assumes that the “system” can, and typically does, effectively respond to the needs of assaulted women. Moreover, it fails to address the inadequacies in legal responses to domestic violence from the point of view of the woman whose rights it is supposed to protect.¹⁷¹

B. Criminalizing “Bad” Victims

Some of the discourse surrounding “uncooperative victims” has revolved around and is directly connected to larger debates about relatively recent legal interventions into domestic violence such as mandatory arrest and mandatory, or “no-drop,” prosecution policies.¹⁷² There is a deeply held assumption, certainly one which is understandable, that a critical component of the strategy aimed at deprivatizing domestic violence, assuming social responsibility for the problem, and holding abusers accountable, requires aggressive criminalization of the problem of domestic violence.¹⁷³ Tied to this is the view that once contact with the police is made, abusers should be arrested and criminal prosecutions should be vigorously pursued.¹⁷⁴ This, in fact, has become a cornerstone of contemporary legal responses to domestic violence, responses which are directly attributable to the advocacy efforts of those associated with social movements committed to ending violence in women’s lives.¹⁷⁵

170. Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 865 (1994).

171. While the criminal justice system is obviously not set up to vindicate individual rights in the way that private law is, there is, nevertheless, the idea that those victimized by crime will see justice done within this system.

172. See generally, e.g., Erin L. Han, Note, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159 (2003).

173. See Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO L.J. 605, 629.

174. Most jurisdictions in North America have implemented policies to this effect. See, e.g., TREVOR BROWN, CHARGING AND PROSECUTION POLICIES IN CASES OF SPOUSAL ASSAULT: A SYNTHESIS OF RESEARCH, ACADEMIC, AND JUDICIAL RESPONSES iii (2000), available at <http://canada.justice.gc.ca/en/ps/rs/rep/rr01-5a-e.pdf>.

175. There is a voluminous literature analysing these policies from a variety of perspectives. It is impossible to reference even a fraction of it, but a few (arbitrary) selections include: ROBERTS, *supra* note 163; STATISTICS CANADA, *supra* note 18; Jacqueline Faubert & Ronald Hinch, *The Dialectics of Mandatory Arrest Policies*, in POST CRITICAL CRIMINOLOGY 230 (Thomas O'Reilly-Fleming, ed., 1996); J.E. Ursel, *Mandatory Charging: The Manitoba Model*, in UNSETTLING TRUTHS: BATTERED WOMEN, POLICY, POLITICS, AND CONTEMPORARY RESEARCH IN CANADA 73 (Kevin Bonnycastle & George S. Rikalos, eds. 1998); Hanna, *supra* note 7; Dennis P. Saccuzzo, *How Should Police Respond to Domestic Violence: A Therapeutic Jurisprudence Analysis of Mandatory Arrest*, 39 SANTA CLARA L. REV. 765 (1999); Lawrence Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137 (1992); Vito Nicholas Ciraco, Note,

The debate about the merits of no-drop or mandatory prosecution in domestic violence cases is a complex one, with highly compelling arguments marshaled on each side of the divide.¹⁷⁶ The crux of the matter is often seen to be the tension between a legitimate social interest in eradicating domestic violence through criminalization and the contradictions inherent in further disempowering already disempowered women whose lives have been damaged by the harmful effects of intimate violence, by stripping from them any choice in the decision to prosecute.¹⁷⁷ My point is not to engage these arguments directly, but is instead to excavate the underlying assumptions which shape the discourse surrounding the role of so-called "uncooperative victims" in domestic violence cases in the criminal justice system.

Some of the criminal law reforms made in the area of domestic violence prosecution address precisely the issue of women's "reluctance" to "cooperate" in the court system.¹⁷⁸ The most of important of these is the attempt to proceed with criminal prosecutions without reliance on the testimony of the victim by relying, for example, on other evidence such as 911 tapes, photographs of injuries, videotaped statements, and evidence from other witnesses (such as neighbours).¹⁷⁹ This form of "enhanced" or "vigorous" prosecution has been formally implemented in jurisdictions such as San Diego and is also one of the models on which the specialized domestic violence courts in Ontario, Canada are premised.¹⁸⁰ The efficacy of these reforms, however, and the extent to which they are actually operationalized has yet to be the subject of systematic or rigorous evaluation (although this has been repeatedly requested by community groups and other key stakeholders in Ontario).

Because "uncooperative victims" are seen to pose such a powerful obstacle to the successful prosecution of domestic violence cases, significant attention has been paid to how they should be treated.¹⁸¹ Some jurisdictions allow for a variety of legal remedies to be taken against women who fail to appear and/or refuse to testify in domestic violence cases.¹⁸² One of the more disturbing of these is the punitive response witnessed in the attempt to criminalize women who refuse to appear or testify in domestic violence cases in which they are

Fighting Domestic Violence with Mandatory Arrest, Are We Winning?: An Analysis in New Jersey, 22 WOMEN'S RTS. L. REP. 169 (2001).

176. See Corsilles, *supra* note 170, at 857.

177. See generally Jessica Dayton, Essay, *The Silencing of a Women's Choice: Mandatory Arrest and No Drop Prosecution Policies in Domestic Violence Cases*, 9 CARDOZO WOMEN'S L.J. 281, 288 (2003).

178. See generally Corsilles, *supra* note 170.

179. Tonya McCormick, Comment, *Convicting Domestic Violence Abusers When the Victim Remains Silent*, 13 BYU J. PUB. L. 427, 437-38 (1999).

180. See STATISTICS CANADA, *supra* note 18.

181. See Han, *supra* note 172, at 161-62.

182. San Diego is just one example of this. See Hanna, *supra* note 7, at 1863.

victim-witnesses.¹⁸³ On this approach, the very women who are victimized by intimate violence in the first place, and who struggle to cope with this violence to the best of their abilities, paradoxically themselves become victims of the coercive power of the criminal law.

In the United States, in a well publicized case in Alaska in 1983,¹⁸⁴ a woman was jailed for refusing to testify, a criminal justice system response which was subject to heated media debate.¹⁸⁵ While this is hardly a widespread reality, there have been numerous similar incidents since that time in North America.¹⁸⁶ Under a policy recently developed in the United Kingdom, the Crown Prosecution Service unveiled guidelines that are intended to see that domestic assaults are treated more seriously than random acts of violence.¹⁸⁷ As part of that strategy, women who refuse to "cooperate" with prosecutions of domestic violence were officially put on notice that they may, in fact, find that they are themselves the subject of criminal prosecution.¹⁸⁸ Citing a study which reported that in eight out of ten times where criminal proceedings were dropped the reason was because the victim had "refused to co-operate," this policy is supposed to demonstrate the "tough on crime" approach to combating domestic violence in Britain.¹⁸⁹

Arguments in favour of using the punitive powers of the criminal justice system against the very women who are the victims of domestic violence are premised on the idea that these "bad" victims need to be brought into line and compelled to assist the state. But this idea utterly fails to come to grips with the costs associated with "engaging the state" faced by assaulted women and the negative repercussions such an engagement often entails. As Elizabeth Schneider argues, the dilemma of the criminalization model in general – also seen in the dilemma of criminalizing battered women for "non-compliance" – is "the promise of an 'autonomous liberal legal self' which does not encompass the human and material experiences of women who are battered or take into account the gendered realities of their lives."¹⁹⁰

183. Casey Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297, 313 (1993).

184. See, e.g., Richard D. Friedman & Bridget McCormack, *Dial in Testimony*, 150 U. PA. L. REV. 1171, 1189 (2001-02).

185. See Hanna, *supra* note 1, at 1866-67.

186. See, e.g., Mark Anthony Drumbl, *Civil, Constitutional and Criminal Justice Responses to Female Partner Abuse: Proposals for Reform*, 12 CAN. J. FAM. L. 115, 149 (1994-1995).

187. See CROWN PROTECTION SERVICE, ZERO TOLERANCE FOR DOMESTIC VIOLENCE, at <http://www.cps.gov.uk/Home/archive/136-01.htm> (Nov. 28, 2001).

188. Brit. Broadcasting Company, *Domestic Violence Victims Face Jail*, available at <http://news.bbc.co.uk/1/hi/england/1680069.stm> (Nov. 28, 2001).

189. *Id.*

190. ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWSUITING* 188 (2000).

C. *"Helpless" Victims and Unhelpful Witnesses: The Costs of Prosecutions on Women*

Women's voices are relatively absent from legal scholarship on the impact and efficacy of legal system in relation to domestic violence, but an emerging literature does reveal some important findings.¹⁹¹ One of the most significant is that assaulted women are not a homogeneous group, and their reasons for their responses to the criminal justice system vary.¹⁹² In spite of this, distinct themes emerge both from the perceptions of Crown attorneys, prosecutors, victim advocates, police officers, and other system personnel about assaulted women's reactions and, more importantly, from the small but important body of research in this area documenting women's own experiences within the criminal justice system.¹⁹³ One of these is the tension between many assaulted women's fear of her violent male intimate and the corresponding levels of fear and/or distrust of the criminal justice system.¹⁹⁴ Essentially, in trying to devise a survival strategy in the face of intimate violence, women's experiences of the criminal justice system reflect a deep ambivalence about its ability to offer a remedy that does not extract more from them than whatever relief or solution it potentially offers.

Studies of assaulted women's reactions to the criminal justice system in Canada show a fairly high degree of support for mandatory arrest but a significantly lower level of support for mandatory prosecution of domestic violence cases.¹⁹⁵ Why is this? One reason appears to lie in the assessments individual women make about the investment their participation requires

191. See generally Burth E. Fleury, *Missing Voices: Patterns of Battered Women's Satisfaction with the Criminal Legal System*, 8 VIOLENCE AGAINST WOMEN, 181 (2002); see also Edna Erez & Joanne Belknap, *In Their Own Words: Battered Women's Assessment of the Criminal Processing System's Responses*, 13 VIOLENCE & VICTIMS 251 (1998) (examining the handling of domestic violence cases by the criminal justice system and the victim's perception of the responses of the system); Tammy Landau, *Women's Experience with Mandatory Charging for Wife Assault in Ontario, Canada: A Case Against the Prosecution*, 7 INT'L REV. VICTIMOLOGY 141 (2000); Joanne C. Minaker, *Evaluating Criminal Justice Responses to Intimate Abuse Through the Lens of Women's Needs*, 13 CAN. J. WOMEN & L. 74 (2001).

192. Minaker, *supra* note 191, at 81.

193. See generally *id.*

194. Erez & Belknap, *supra* note 191, at 260-61. The study reported that:

The victims were requested to rate the importance of various reasons for which they were unwilling to cooperate with prosecution. Fear of the batterer received the highest score, with a mean of 4.51 (on a scale of 1-5 where 5 is the highest score); followed by the ineffectiveness of the system (4.35), concern for the children (4.02), distrust of the criminal processing system (4.02), difficult experiences with the criminal processing system (3.87), emotional dependency on the batterer (3.74), economic dependency on the abuser (3.47), and the least influential factor was lack of support from the family (2.62).

Id.

195. See BROWN, *supra* note 174, at 3. See generally Landau, *supra* note 191, at 147.

against the outcome it entails,¹⁹⁶ as it is essentially a paradigmatically rational cost-benefit analysis.

A British study, for example, based on interviews with assaulted women, found that for some of them the cost was often not worth the sentence.¹⁹⁷ As Carolyn Hoyle explains, in these cases, “victims made rational choices, within the constraints as they perceived them.”¹⁹⁸ The three main reasons offered for not wanting police intervention and/or not wanting to assist with criminal prosecutions were as follows:

Some women did not want to break up the relationship or the family unit; secondly some were afraid of further retaliatory violence; and thirdly, some did not think that the likely sentence would be worth the “costs” incurred by the process. All three reasons concern the high costs, of various sorts, that victims can incur by supporting a prosecution.¹⁹⁹

In other words, the toll taken by participating in the criminal justice system would not be compensated by a sentence sufficiently serious to have made the effort worth it. Clearly this latter concern is quite an indictment of the criminal justice system response to domestic violence from the eyes of those it is supposed to serve.

Even the typically cited fear of reprisal as a reason for “non-cooperation” implicitly reveals a concern with the state’s failure and/or inability to protect assaulted women from further or escalated violence. Studies have found that this fear is, in fact, a major reason cited for electing not to pursue or assist with criminal prosecution of batterers.²⁰⁰ And, given that it has been repeatedly demonstrated that assaulted women are at greatest risk for violence and murder upon separating from violent male intimates, the fear of reprisal is often sufficient to deter an assaulted woman from pursuing prosecution and to keep her in a relationship with a violent man.

The trouble with the idea of the “uncooperative victim,” then, is that the criminal justice system processing of domestic violence cases, with all of the critically important innovations and reforms which have been and continue to be implemented remains, in many instances, at odds with the needs of women coping with violence perpetrated by their male intimates. What is needed, therefore, is a reframe of the idea of the “uncooperative victim” or “reluctant witness,” one that shifts the object of the inquiry away from the woman’s responses and onto the barriers which interfere with and/or limit the possibility

196. See generally EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE SYSTEM 177-89 (3d ed. 2003).

197. CAROLYN HOYLE, NEGOTIATING DOMESTIC VIOLENCE: POLICE, CRIMINAL JUSTICE AND VICTIMS 184 (Roger Hood ed., 1998).

198. *Id.*

199. *Id.*

200. Erez & Balknap, *supra* note 191, at 254; Barbara Hart, *Battered Women and the Criminal Justice System*, 36 AM. BEHAVIORAL SCIENTIST 624, 625 (1993).

of a successful prosecution. In this way, by changing the focus and adjusting the lens of the inquiry, it becomes possible to understand that the choices made by a so-called "uncooperative victim," in many instances, may be quite rational and reasonable ones given the particular circumstances of her life.

D. *Enhancing the Likelihood of Prosecution Without Criminalizing Women Who Are Reluctant Witnesses*

Given that "legal remedies are an essential tool in stopping domestic violence,"²⁰¹ at least part of the state's response will continue be a criminalization strategy. The role of the assaulted woman as victim-witness, therefore, will also continue to be a pivotal one. A study from Toronto's K court, a specialized court established to process domestic violence cases, found that a case is seven times more likely to be prosecuted if the Crown perceives the woman to be a "cooperative" witness.²⁰² But the question of what to do about the "reluctant witness" and/or the "uncooperative victim" in this context should be reposed to focus on what can be done to enhance the possibility of successfully prosecuting cases of domestic violence, which in turn entails ongoing and critical scrutiny of the system itself.

One of the studies of assaulted women's experiences with the criminal justice system found that "the major reasons for willingness to cooperate with the criminal processing system were (1) stopping the abusive behaviour . . . followed by (2) sending a message that the behaviour is criminal . . . , and (3) punishing the abuser."²⁰³ The first reason goes back to and requires a belief that the criminal justice system will actually provide an effective interruption into men's violence against women in intimate relationships. This belief can only be bolstered by the second and third reasons cited by the women interviewed, namely that a conviction will ensue to which a serious penalty will attach.

The same study showed that women's level of satisfaction with criminal justice system personnel was highest for victim assistance staff.²⁰⁴ Other studies have confirmed the critically important role of advocates within the criminal justice system whose role is to inform victim-witnesses about the nature of the proceedings and support them throughout. For example, one study of the processing of domestic violence cases in Toronto found that a woman is three times more likely to be willing to testify and thereby aid the prosecution, if she met with someone from Victim Witness Program.²⁰⁵ Other

201. Lisa G. Lerman, *The Decontextualization of Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 217, 220 (1992).

202. Dawson & Dinovitzer, *supra* note 164, at 613.

203. Erez & Belknap, *supra* note 191, at 262.

204. *Id.*

205. Dawson and Dinovitzer, *supra* note 164, at 614.

research has confirmed this same thing. “Battered women who receive advocacy services . . . are more likely than others to continue their case through to conviction.”²⁰⁶

This points to the need for more resources within the criminal justice system to respond to the complexities and challenges these kinds of cases pose. As one commentator points out,

If the prosecutor adopts a policy of aggressively prosecuting abuse cases but fails to provide victim advocacy services to maintain contact with the victims, attend to their safety needs and help them to understand the law enforcement system, then the prosecutor often is doomed to frustration because the victims of abuse are less likely to remain available to testify.²⁰⁷

Widening the lens further still, a range of other legal reforms are required to deal with domestic violence, some of which are being implemented, and some of which are still to be devised. Along with these reforms, constant evaluation of our efforts to respond to domestic violence through legal means must be undertaken, in order to assess the efficacy of these reform and of the system overall. Wider still, we must keep in mind that legal responses to domestic violence can only ever be a part of a broader strategy aimed at ending a deeply entrenched and multiply constituted social problem such as men’s violence against women and children.

E. Uncooperative Victims and Women’s Agency

As Cheryl Hanna points out, “the question of what the battered woman’s role in the prosecution process ought to be often masks ambivalence about what her role in the abusive relationship is.”²⁰⁸ She also points to characterizations of what a “real” or “ideal” victim of domestic violence is and how she behaves.²⁰⁹ As Hanna continues:

Women who want to follow through with prosecution are seen either as the true victims of domestic violence or as manipulators with an agenda. Women who do not want to proceed are characterized either as agents in the battering – allowing it to continue because of their lack of cooperation with the state – or as true victims who have “learned helplessness.”²¹⁰

The “uncooperative victim,” then, like those afflicted with the “battered woman syndrome,” is part of the complex “image problem” assaulted women have in relation to legal responses to domestic violence.

206. BUZAWA & BUZAWA, *supra* note 196, at 192; see also Arlene Weisz, *Legal Advocacy for Domestic Violence Survivors: The Power of an Informative Relationship*, 80 FAM. IN SOC’Y. 138 (1999).

207. Lerman, *supra* note 201, at 221.

208. Hanna, *supra* note 7, at 1883.

209. *Id.* at 1878.

210. *Id.* at 1883.

In each of these cases, the image problem regarding "victims" reflects the difficulty reconciling victimization with agency, a difficulty also reflected in law. Either the "uncooperative victim" is entirely helpless and fails to appear or refuses to testify about the abuse because she is paralyzed by fear and is thereby a "true victim," utterly without agency, or the "uncooperative victim" is a lying manipulator, expressing an excess of agency by exerting her will in refusing to assist the prosecution, and thereby negates her status as a true victim. Even her credibility is in doubt, as perhaps she is to blame for what happened all along. The "uncooperative victim," therefore, like the "battered woman" with the "battered woman syndrome," exemplifies the polarized and antithetical extremes of the split between victim and agent in representations of assaulted women.

V. RECONCILING THE VICTIM / AGENT DICHOTOMY IN LEGAL ACCOUNTS OF DOMESTIC VIOLENCE

A. *Reifying Victims/Obliterating Agency*

Within broader discourses surrounding violence against women is the tendency to define women who have experienced violence exclusively in terms of this experience, a tendency sharply evident in dominant images of the "victims" of domestic violence. It is as if women's experiences of violence define something essential about *who they are*, as if being a victim becomes an identity in and of itself. Yet this category – "victim" – is one with which most women do not identify, and in which most women do not want to recognize themselves and their own lives.²¹¹ As Elizabeth Stanko observes,

Creating a category "victim" is one way of dealing with women's experiences of male violence. The role and status of "victim" is separate from that of all women. "Victimism", the practice of objectifying women's experiences of male violence, serves to deny the commonality among sexually and/or physically assaulted women . . .²¹²

For example, in the commonly used descriptor "battered woman," universalizing, homogenizing, and static tendencies inhere. In fact, a caricature of *the* "battered woman" as a particular type of "victim" is embodied within the "battered woman syndrome." Not only does it suggest that there is a uniformity to women's experiences of physical abuse in their intimate heterosexual relationships, it also linguistically *constructs* a category of women – *battered* women – who are defined in terms of the violence done to them, and who, as a result, are assumed to be in some fundamental way different and separate from all other ("normal"/non-battered) women.

211. See generally STANKO, *supra* note 26, at 16-19.

212. *Id.* at 16.

Researcher Donileen Loseke describes the gap between “official” definitions (and associated images) of “battered women” and the subjective labeling of experience on the part of women she interviewed who stayed at a shelter for assaulted women in the United States.²¹³ Loseke writes that “it sometimes seemed that women preferred any label other than ‘batterer’ for their partners and any label other than ‘abused wife’ for themselves.”²¹⁴ As she explains,

[O]fficial definitions might not encourage social members to use these images as interpretive devices in the complex process of naming individual troubles. Just as most violence as experienced is not obviously the type defined as “wife abuse” [that is, violence in its most extreme and brutal forms], the morally condemned “killer drunk” image of drinking drivers does not match subjective interpretations where such persons often seem to be merely “social drinkers” who drive without luck.²¹⁵

This resistance to seeing oneself as a “victim” of violence may very well be directly linked to the more troubling aspects of the prevailing representation of the category, in particular its attendant associations with utter helplessness and passivity. In this construction, women’s strengths, survival skills, and strategies of resistance are rendered invisible because the dichotomous opposition of passive-victim/active-agent cannot accommodate victimization and resistance within the same conceptual framework.²¹⁶ Articulating this dilemma in terms of her own refusal of the category “battered woman,” feminist legal scholar Martha Mahoney reveals that one of the experiences of violence relayed in her article theorizing legal images of battered woman is her own.²¹⁷ But, she takes pains to emphasize that:

I do not feel like a “battered woman.” Really, I want to say that I am not, since the phrase conjures up an image that fails to describe either my marriage or my sense of myself. It is a difficult claim to make for several reasons: the gap between my self-perceived competence and strength and my own image of battered women, the inevitable attendant loss of my own denial of painful experience, and the certainty that the listener cannot hear such a claim without filtering it through a variety of derogatory stereotypes.²¹⁸

Mahoney’s sudden and unexpected insertion of her own experience of violence in an intimate relationship, into her scholarly text analysing legal images of battered women, is a powerful and courageous discursive maneuver. It is an

213. Donileen R. Loseke, *Lived Realities and the Construction of Social Problems: The Case of Wife Abuse*, 10 SYMBOLIC INTERACTION 229 (1987).

214. *Id.* at 236.

215. *Id.* at 240.

216. See Mahoney, *supra* note 39, at 62.

217. Mahoney, *supra* note 13, at 8.

218. *Id.* at 8.

intervention which effectively disrupts and then subverts the “us/them” dichotomy which implicitly runs through so much of the writing on violence against women by academics and “experts.”

In fact, in the same article, Mahoney addresses the way in which professional distancing from the problem of domestic violence occurs in the legal system, as elsewhere, through a dominant ideology that denies the profound and personal impacts of oppression.²¹⁹ This is a form of the denial, silence, and minimization which so often takes place in society at large about the subject of violence against women and children, as if it is an unfortunate or impolite topic of conversation, as if it is something which affects other people, not “us.” This denial also manifests itself within courtrooms as well as in the professional and scholarly discourses on the topic.²²⁰ As Mahoney points out: “[D]espite the statistics on the epidemic incidence of domestic violence, there is almost no legal or social science scholarship that describes an author’s experience of violence or even indicates that the author has had any such experience.”²²¹ Yet “it is unlikely,” she notes wryly, “that a disinterested body of social scientists is doing all this research.”²²²

However, the idea persists that there exists a distinct category of women, identifiable by their experiences of physical assault in intimate relationships and the psychological effects of this violence.²²³ It is visible in the very ease with which the category “battered women” is deployed, especially in the legal and psychological literature on the topic.²²⁴ This classification is widely and easily used as if it speaks to a particular class of women.

It is commonly heard in popular discourse, including in the media where there are countless instances and examples. For example, in a CBC radio interview on the inquest recently completed in Ontario into the deaths of a number of “battered women,”²²⁵ the reporter discussed the death of Arlene Mays, a woman whose common law spouse killed her after subjecting her to ongoing and escalating violence, and after every avenue of escape she had tried (including legal interventions and restraining orders) had failed to protect her.²²⁶ In responding to the CBC interviewer’s question, the reporter emphasized that “we” must understand how the system failed “*women like this*,” indicating through this turn of phrase, that there is an identifiable type of

219. *Id.* at 13.

220. *Id.*

221. *Id.* at 14.

222. Mahoney, *supra* note 13, at 14.

223. Loseke, *supra* note 213.

224. *Id.*

225. Coroner’s Inquest, Chief Coroner, Province of Ontario, *Inquest Touching the Deaths of Arlene May and Randy Joseph Iles, Jury Verdict and Recommendations* (1998), available at <http://www.owjn.org/archive/arlene3.htm>.

226. Reporter Mary Wiens, *CBC Radio One* (CBC radio broadcast, Mar. 20, 1998).

woman who needs “help” from “the system.”²²⁷ Note that the reporter did not refer to women who find themselves in a situation like this with a violent and dangerous man or use some other such phrase that would engage a very different representation of the same event.²²⁸ This is no mere terminological quibble. Instead the reporter’s choice of language, “*women like this*,” speaks volumes about the unarticulated assumptions which pervade popular representations of violence against women and which play on implicit (sometimes explicit) stereotypes about which women and which “types” of women get battered.

Even many feminist writers deploy the category and language of “victims” uncritically, as if it were possible to speak of, analyse, and describe a sub-set of the female population that are victimized and brutalized by men in the “privacy” of their intimate heterosexual relationships and that to whom services, policy initiatives, and most of all, sympathy should be extended. However well meaning, there is usually an implicit sub-text operating in writings that address the needs, experiences or issues facing “battered women.” It is that “*they*” are not us.

The language used to describe women who have experienced battering, therefore, is often problematic at best, patronizing at worst. In addition to the descriptions of “battered women” as helpless and passive advanced through the use “battered woman syndrome,” some writers inadvertently reveal an attitude of condescension towards women who have been assaulted.²²⁹ Donald Downs, for example, advances an analysis purportedly sympathetic to the dilemmas facing women who are assaulted.²³⁰ Although he is harshly critical of the “battered woman syndrome” precisely because it denigrates women, in one part of his book he writes that “battered women *may have broken wings.*”²³¹ While he is obviously speaking metaphorically here, through this language Downs is nevertheless guilty of evoking the stereotypical image of the damaged and “broken” “battered woman,” an image he ostensibly seeks to overcome.

The very notion, therefore, that there exists a profile of a typical “battered woman” carries with it an implicit separation of women into groups, as they are divided into those who have been victimized in this way and those who have not. This not only homogenizes the diversity of women (from all age, ethnic, cultural, and socio-economic strata) who have experienced violence in an intimate relationship with a male partner, but it also stigmatizes those women identified as “victims” of this violence and discourages women from

227. *Id.*

228. *Id.*

229. Loseke, *supra* note 213.

230. Downs, *supra* note 69, at 3.

231. *Id.* at 98 (emphasis added).

disclosing their experiences for fear of this stigmatization. Mahoney's hesitations expressed immediately after identifying her own history of violence speaks powerfully to this dilemma.²³²

Dominant narratives commonly deployed to describe violence against women tend to engage in a totalizing discourse on "victims." Through the use of the "battered woman syndrome," for example, the woman's status as "victim" becomes reified. She is at once defined – *the "battered woman"* – entirely in terms of her relationship to the man's violence against her and at the same time pathologized through a psychological account of her incapacity and paralysis. In this way, an enduring stereotype of *the "battered woman"* is constructed, one which lumps together women from an incredible diversity of life situations, unites them solely by virtue of the commonality of the experience of violence perpetrated by their male partners, and obliterates recognition of their resistance, agency, and survival skills in one fell swoop.

B. Blaming "Battered Women" for "Failing to Exit:"²³³ Rendering Inequality Invisible

The popular and legal preoccupation with women's "failure" to leave, or what Martha Mahoney calls "exit,"²³⁴ obscures the conditions of inequality in women's lives which make the "freedom" to leave chimerical. For example, recent research suggests that of women who have ended relationships with violent male partners, approximately one third will be assaulted again by these same ex-partners, demonstrating that leaving the relationship is no guarantee of ending the violence.²³⁵ Similarly, using the criminal justice system is no guarantee of ending the violence in women's lives, not only because the system often cannot deliver on its promise to keep women safe, but also because violent men often retaliate against women who report to police and/or who testify in court. Seen in this light, the decisions made by assaulted women who are "uncooperative victims" make much more sense.

Indeed, in sharp contrast to the prevailing social belief that if a woman simply "leaves" her abusive male intimate she can thereby exercise control and stop the violence, women are at highest risk for being killed in the aftermath of separation.²³⁶ In Canada, a spate of highly publicized intimate femicides occurred in Ontario in the summer of 2000, making this point painfully clear,

232. Mahoney, *supra* note 13, at 8.

233. See generally Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283 (1992).

234. *Id.* at 1283.

235. Ruth E. Fleury et al., *When Ending the Relationship Does Not End the Violence*, 6 VIOLENCE AGAINST WOMEN 1363, 1377 (2000).

236. Margo Wilson et al., *Uxoricide in Canada: Demographic Risk Patterns*, 35 CAN. J. CRIMINOLOGY 263, 386 (1993); Margo Wilson & Martin Daly, *Spousal Homicide*, JURISTAT, March 1994, at 1, 7.

and prompting much media discussion about domestic violence and murder.²³⁷ What is most striking about these highly visible cases – one of which involved a woman being fatally shot after handing her baby over to neighbours who attempted to intervene to save her – is not only that the women had already left their abusive spouses but also that they had *repeatedly* called upon a variety of state agencies and services, including the police, for assistance and protection.²³⁸ This speaks to what some commentators have described as the “rhetoric of protection” offered by the state²³⁹ to women survivors of sexual violence.²⁴⁰

This expectation that women should simply leave, combined with the profound inadequacy of support services, legal protection, and economic resources available to them, creates another classic double bind for women: if they “stay,” they are blamed for the violence and not doing anything about it, but if they “leave” they are often at greater risk for more violence or even death. Yet this expectation of “exit” not only permeates popular consciousness and discourse surrounding the problem of violence in intimate relationships, it also deeply affects legal images of women who have been assaulted²⁴¹ and shapes legal responses to the problem in a number of ways.

Christine Littleton observes how this operates in legal arenas to women’s detriment:

In Walker’s account of learned helplessness, the cause (random, uncontrollable violence inflicted by men) is at least part of the “syndrome.” In the case law, the cause disappears while the syndrome remains. In neither case, however, is the focus explicitly and continuously placed where it belongs – on the intolerable conditions under which women live.²⁴²

As Littleton argues, through the “battered woman syndrome,” women’s victimization becomes transformed into something about the women themselves and allows the legal system to avoid grappling with the

237. See, e.g., Chris Wood, *Why Do Men Do It? A Recent Spate of Brutal Murders Spurs Debate over Disturbing New Theories about Male Violence*, MACLEAN’S, August 7, 2000, at 34-35.

238. *Id.* at 35.

239. See generally Jalna Hanmer & Elizabeth Stanko, *Stripping Away the Rhetoric of Protection: Violence to Women, Law and the State in Britain and the U.S.A.*, 13 INT’L J. SOCIOLOGY L. 357 (1985).

240. Ontario Women’s Justice Network, *Hadley Inquest Jury Recommendations*, at <http://www.owjn.org/issues/w-abuse/hadley2.htm> (Feb. 20, 2002).

241. Christine A. Littleton, *Women’s Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI LEGAL FORUM 23, 37 (1989); Elizabeth M. Schneider, *Women’s Self-Defense Work and the Problem of Expert Testimony on Battering*, 14 WOMEN’S RTS. L. REP. 213, 216-18 (1992).

242. Littleton, *supra* note 241, at 42.

fundamental dynamics of men's violence, men's greater social power and gender inequalities.²⁴³

In an impossible double bind, women's resistance strategies are not seen by a model like the "battered woman syndrome" which stresses women's passivity and immobilization. Yet women are *expected to resist* in so far as the requirement that women "leave" relationships with men in which they are battered is a widely held conviction and expectation. And at the same time, if they resist too much, or in the wrong area, for example, by exerting their will by choosing not to proceed with or facilitate a criminal domestic violence prosecution, they are punished and viewed as "uncooperative" and/or "bad" victims.

The idea that if assaulted women do not "leave" they are culpable and complicit in the violence perpetrated against them is evident in the popularity of the concern about why "battered" women "stay" with men who assault them and the oft-heard question "why doesn't she just leave?" As Martha Mahoney explains:

Once exit is defined as the appropriate response to abuse, then staying can be treated as evidence that abuse never happened. If abuse is asserted, "failure" to exit must then be explained. When that "failure" becomes the point of inquiry, explanation in law and popular culture tends to emphasize victimization and implicitly deny agency in the person who has been harmed.²⁴⁴

In culture and in law, then, the idea that women always can, and always should, simply "leave" reflects a view that sees agency without seeing the limits on the scope of this very agency imposed by the conditions of inequality.

The social expectation that women should "leave" violent men also obscures a range of other perhaps more important and compelling questions. For example, what kinds of social and economic policies and resources would make this option not merely an abstract possibility but a materially viable one for women assaulted by their male intimates? What other kinds of interventions might work to end the man's violence against his female partner? Why doesn't *he* leave? Why are the current social interventions still aimed at supporting *her* departure (i.e. the provision, inadequate as it is, of shelters for assaulted women)? If answers to these questions were seriously engaged, we would already be a considerable distance closer to eradicating men's violence against women and eliminating the social conditions in which it is produced and reproduced.

243. *Id.* at 38.

244. See Mahoney, *supra* note 233, at 1285.

C. Widening the Lens and Transcending Dualisms: Seeing Agency and Subordination in Women's Experiences of Violence

Martha Mahoney's acerbic observation that battered women have an "image problem" in terms of how they are represented and constructed in the legal system, perhaps most pointedly and eloquently captures the essence of the problems surrounding legal responses to domestic violence.²⁴⁵ Speaking specifically about the ways in which these representations impose contradictions and hazards for "battered women" who are engaged in custody battles with their violent male spouses for their children, Mahoney delineates the double-edged sword women face in terms of legal expectations.²⁴⁶ As she explains:

We need to be strong, resourceful, effective as a parent, meeting the needs of the children when we appear in court. On the other hand, if we do that too well, the court may disbelieve our stories because of stereotypes held by judges or psychologists. If the court will consider violence as a factor at all in custody decisions, we may be seen as – or in effect be *required* to appear as – having been weak, helpless, and economically dependent to have "stayed" with the man all these years.²⁴⁷

These "image problems" have far wider manifestations in law and in culture. They speak to the radical individualization of experience and the systemic denial of patterns and relations of social domination. This occurs not only in terms of the social problem of men's violence against women, but also in other struggles waged to prove and protest inequality and discrimination.

The law's relationship to complex social problems like violence against women, then, is both critically important while it remains fundamentally flawed. For as much as the law is a potent force for the realization of social change and a necessary vehicle through which to advocate and struggle for reform, the legal system continues to be mired in and shaped by the unequal relations of gender, class, and race²⁴⁸ in which it seeks to intervene.

While understanding the pervasive social problem of violence against women necessarily entails a recognition of the profound and often brutal ways in which women are subordinated, a complete apprehension of this phenomenon in women's lives at both the macro and micro levels also requires attention to the ways in which women seek to resist this violence. A failure to acknowledge the ways in which women cope with, struggle against, and resist the violence perpetrated against them risks defining women in terms of the

245. *Mahoney, supra* note 13, at 48-49.

246. *Id.* at 48.

247. *Id.* at 49.

248. Gender, race, and class are the three major axes of hierarchical social division but by no means the only ones. Other relations around which inequalities are structured include (but are not limited to) sexual orientation, disability, and age, among others.

violence done to them and renders them objects of this violence rather than subjects in relation to it.

VI. CONCLUSION

As Elizabeth Schneider has recently argued in her book, *Battered Women and Feminist Lawmaking*:

[T]he contradictions of victimization are particularly profound in the area of gender. Victim claims are the only way that women are heard, yet they trigger entrenched stereotypes of passivity and purity . . . concepts of agency are also limited and problematic. Traditional views of agency are based on notions of individual choice and responsibility, individual will and action – perceptions of atomized individuals, acting alone, unconstrained by social forces, unmediated by social structures and systemic hardship.²⁴⁹

These tensions are clearly visible in a critical exposition of the categories of victims that underpin the “battered woman syndrome” and the “uncooperative victim” in domestic violence cases.

The “battered woman syndrome” and the related concept of “learned helplessness” fails to grasp the ways in which women who are assaulted are often not at all incapacitated but are active in struggling against the violence. Furthermore, these concepts individualize and psychologize what is fundamentally a social and political problem with which women must contend in the specific contexts of their individual lives. In this way, the “battered woman syndrome” and “learned helplessness” models are ultimately both decontextualized and individualized formulations of women’s experiences and are severed from an analysis of the deeper structures of sexual inequality. The use of the “battered woman syndrome” has shed light in legal contexts on many of the profound psychological consequences of ongoing subjection to violence in an intimate relationship. Yet it is premised on a depiction of battered women as immobilized by the effects of the violence they have suffered and fails to take into account the many creative, resourceful, and ongoing ways in which women actively resist the violence perpetrated against them. Fundamentally, then, it is by definition precluded from grasping the *reasonableness* of an act of homicide perpetrated to defend against a fear of being killed – a quintessential expression of agency in the context of victimization some assaulted women make when confronted with threats against their own lives.

Similarly, those women who are labeled as “uncooperative victims,” are often seen as lacking credibility, “using” the system, difficult, and even “manipulative.” They are not seen as *reasonable* actors who may have extremely legitimate reasons for assessing the situation as one which does not

249. SCHNEIDER, *supra* note 190, at 76.

reflect their assessment of their best interests and their own safety. Similar to the "battered woman syndrome," this depiction fails to question the causes and consequences of the violence. Moreover, it embodies a corresponding tendency to drop social context out of accounts of violence that remain radically individualized. Finally, this depiction rests on an erroneous assumption that legal responses, especially in terms of the criminal justice system are, while perhaps needing some fine tuning, fundamentally appropriate and adequate to the task of dealing with domestic violence.

As Schneider points out in relation to legal responses to domestic violence, "the enormous credibility problems that women face as complainants and witnesses seem almost insurmountable."²⁵⁰ This is another way of invoking the "image problems" assaulted women face in legal responses to domestic violence. One of the fundamental ways in which we can move towards eliminating these credibility problems is to discard images of victims of domestic violence which fail to reflect a more adequate understanding of the socially produced and individually lived nature of the problem. 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," or as irrational and undeserving victims, as in the "uncooperative victim." Finally, we need a critical interrogation of the efficacy of the criminal justice system response to domestic violence and its victims and a willingness to address the discordance between its bureaucratic and procedural needs and the needs of complex assaulted women. Only through more nuanced, contextual accounts of the conditions of the lives of the women who are victimized by domestic violence can we develop more effective policy and legal interventions to deal with the problem of violence against women at both the macro and the micro levels.

250. *Id.* at 83.