

R. v. LAVALLEE: A REVIEW ESSAY

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Twenty years ago when the Royal Commission on the Status of Women in Canada issued its report, there was no discussion of the ways in which some of the central concepts in the criminal law reflected male experiences of the world. While the report does include a chapter entitled "Criminal Law and Women Offenders", the chapter focuses on some of the blatant examples of sexism in the Criminal Code, and on the characteristics of female offenders and their treatment by the correctional system. The decision of the Supreme Court of Canada in R. v. Lavallee is an indication that there has been some progress in terms of women's equality within the criminal law since 1970. By recognizing that battered women may legitimately respond in self-defence in circumstances and in ways that differ from the standard of the "reasonable man", Lavallee invites a reconsideration of the basic precepts of criminal law to determine whether they adequately incorporate the experiences of women. This enterprise goes well beyond the concerns elucidated by the Royal Commission and potentially involves a fundamental reshaping of the criminal law.

Lorsque la Commission royale d'enquête sur la situation de la femme au Canada a publié son rapport il y a vingt ans, elle n'a pas discuté les façons dont certains concepts fondamentaux du droit pénal reflétaient l'expérience des hommes. Le rapport comprend un chapitre intitulé «Le droit criminel et la délinquance féminine», mais ce chapitre traite de certains exemples flagrants de sexisme dans le Code criminel, des caractéristiques des contrevenantes et de la façon dont le régime correctionnel les traite. La décision rendue par la Cour suprême du Canada dans l'affaire R. c. Lavallee est une indication des progrès accomplis depuis 1970 en matière d'égalité des femmes dans le domaine du droit pénal. En reconnaissant que les femmes battues pouvaient légitimement répondre par la légitime défense dans des circonstances et avec des moyens différents de ceux acceptés selon la norme de l'« homme raisonnable », l'affaire Lavallee appelle un réexamen des principes fondamentaux du droit pénal afin de déterminer s'ils intègrent suffisamment l'expérience des femmes. Ce réexamen vise beaucoup plus que les préoccupations illustrées par la Commission royale d'enquête et pourrait entraîner une réorganisation fondamentale du droit pénal.

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I. INTRODUCTION

The decision of the Supreme Court of Canada in *R. v. Lavallee*¹ represents an important step towards making the law of self-defence responsive to the life experiences of women. In *Lavallee* the Court recognized the importance of admitting expert testimony on the "battered woman syndrome" in the trial of women who plead self-defence after killing or assaulting their batterers. Twenty-two-year-old Lyn Lavallee had been charged with the murder of her boyfriend, Ken Rust, with whom she had lived for three or four years. Ms Lavallee killed her boyfriend after he had started to beat her and had threatened her life. As Rust was leaving the room, Lavallee shot him through the back of the head. Lavallee argued that she had acted in self-defence.

At trial, defence counsel introduced considerable evidence that Rust frequently beat Lavallee during the course of their relationship. He also produced an expert to testify on the "battered woman syndrome". The trial judge ruled that expert testimony on the battered woman syndrome was admissible, even though much of the information on which the expert relied had been given to him by Lavallee, who did not testify. Lavallee was acquitted. The Court of Appeal² ordered a new trial, the majority³ holding that the trial judge improperly admitted the expert evidence. The Supreme Court of Canada unanimously allowed Lavallee's appeal, holding that the expert's testimony was admissible.

Mme Justice Wilson, with whom five members of the Court concurred,⁴ noted that expert evidence on the dynamics of abusive relationships and on the characteristics of battered women can perform two complementary functions. First, expert evidence can provide a framework in which the jury can meaningfully assess whether the woman's response in killing her batterer was reasonable.⁵ This is critically important in establishing the availability of self-defence to the woman, since her actions to defend herself must be reasonable. Because battered women will often act against their assailants in situations in which it would not be considered reasonable for a man to act, it is crucial that the jury understand how the circumstances surrounding battering may make the woman's actions reasonable. Second, expert evidence can describe the phenomenon of wife battering to the jury and make it comprehensible to the jury why women who

¹ [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97 [hereinafter *Lavallee* cited to S.C.R.].

² (1988), 52 MAN. R. (2d) 274, 44 C.C.C. (3d) 113.

³ *Ibid.* Monnin C.J.A. and Philip J.A. (Huband J.A. dissented).

⁴ *Supra*, note 1. Dickson C.J.C., Lamer, L'Heureux-Dubé, Gonthier and McLachlin JJ. concurred with Wilson J. Sopinka J. wrote separate concurring reasons.

⁵ *Ibid.* at 876-77.

live in violent relationships do not simply leave their spouses.⁶ This second role is important to dispel common images concerning battered women that may be held by judges and jurors.⁷ Jurors may believe, for example, that battered women enjoy being abused and provoke the violence, or that battered women who really did not like what was happening to them could simply pick up and leave. Without the benefit of expert evidence on either point, a battered woman who pleads self-defence is at risk of being denied a fair trial because of a concept of self-defence that is derived from a male norm, and because of widely held myths regarding the phenomenon of both wife assault and battered women.

The recognition that the realities of battered women must be considered by a jury deliberating on the availability of self-defence to a woman charged with murdering or assaulting her batterer is a welcome extension of the criminal law. *Lavallee* is a clear statement that it will be reasonable for battered women to act in self-defence in circumstances and in ways that the law would not consider reasonable for the ubiquitous (and fictitious) "reasonable man". Mme Justice Wilson's acceptance of the significance of the "battered woman syndrome" indicates a willingness on the part of the Court to consider expanding the traditional notion of self-defence to incorporate perspectives of women that differ from the male norm. Movement in this direction is not only important for battered women but is an important step towards gender equality in the criminal law.

Although the Supreme Court's judgment in *Lavallee* is laudable, I wish to sound a cautionary note on the Court's adoption of the "battered woman's syndrome" terminology, and on the future use of the "syndrome" in claims of self-defence in Canada. The term "battered woman syndrome" was coined in the 1970s to describe a pattern of behaviour women who are abused by their partners frequently exhibit. It was intended as a purely descriptive phrase and not as an attribution of pathology to the battered woman.⁸ Drawing on cases and commentaries from the United States, where the battered woman syndrome has gradually gained judicial acceptance since the early 1980s, I argue that the "syndrome" is subject to misinterpretation and misuse by lawyers and by courts who improperly understand the meaning of the defence. When interpreted as a form of psychological disorder or as a clinical diagnosis to which all battered women must conform, the "battered woman syndrome" may disadvantage rather than assist battered women.

⁶ *Ibid.* at 871-72.

⁷ See, e.g., C. Ewing and M. Aubrey, *Battered Women and Public Opinion: Some Realities About the Myths* (1987) 2 J. FAM. VIOL. 257; N.Z. Hilton, *When is an Assault Not an Assault? The Canadian Public's Attitudes Towards Wife and Stranger Assault* (1989) 4 J. FAM. VIOL. 323; and E. Greene et al., *Jurors' Knowledge of Battered Women* (1989) 4 J. FAM. VIOL. 105.

⁸ See *infra*, notes 31-35 and accompanying text.

I begin with a brief overview of the feminist critique of the law of self-defence. I then describe the evolution of the "battered woman syndrome" and its role in pleas of self-defence. In the final section, I argue that some interpretations of the "battered woman syndrome" hinder rather than foster the development of the criminal law to take into account experiences of women that differ from those of men. Rather than attacking the sex bias of the criminal law by including women's experiences, an uncritical acceptance of the "battered woman's syndrome" may reinforce sexist notions of women's behaviour by falling prey to the same sex stereotypes that the "battered woman syndrome" was initially devised to counter.

II. SELF-DEFENCE AND THE FEMINIST CRITIQUE

As its name implies, the plea of self-defence is raised in situations in which the accused admits to having used force against another person, but claims that he or she acted in self-protection. The defence is set out in an unnecessarily complex way in three provisions of the *Criminal Code*.⁹ The *Code* divides self-defence into four scenarios: 1) where an accused is the innocent victim of an unprovoked assault and responds with force but does not intend to kill or cause grievous bodily harm to the assailant (subsection 34(1)); 2) where an accused responds to an unprovoked assault and intends to kill the assailant (subsection 34(2));¹⁰ 3) where the accused has provoked the initial assault (section 35); and 4) where the accused is defending either herself or someone under her protection from assault (section 37). The *Code* specifies different requirements for each type of self-defence. For example, a person who responds to an unprovoked assault and intentionally kills her assailant may plead self-defence only if she can show that she acted under reasonable apprehension of suffering death or grievous bodily harm, and if she reasonably believed that she had no other way of preserving herself from harm.¹¹ By contrast, a person who responds to an unprovoked assault but does not intend to cause death or inflict

⁹ R.S.C. 1985, c. C-46 [hereinafter the *Code*].

¹⁰ Which provision of the *Code* covers self-defence where the accused has killed or caused grievous bodily harm to the assailant has been the subject of some uncertainty. A literal reading of section 34 suggests that subsection 34(1) is unavailable to people who, in responding to an unprovoked assault, have caused death or serious bodily harm. The section appears to imply that people in these circumstances must rely on the more restrictive version of self-defence found in subsection 34(2). However, in *R. v. Baxter* (1975), 27 C.C.C. (2d) 96, 33 C.R.N.S. 22 (Ont. C.A.) [hereinafter *Baxter* cited to C.C.C.], the Court held that subsection 34(1) is available to people who have defended themselves against an assault and have accidentally killed their assailants. See also Dickson J's remarks on the scope of subsection 34(2) in *R. v. Faid*, [1983] 1 S.C.R. 265 at 273-74, [1983] 3 W.W.R. 673.

¹¹ See s.34(2) of the *Code*.

grievous bodily harm need only establish that she used no more force than was necessary to defend herself.¹² If an accused succeeds in convincing the jury he or she acted in self-defence, the law regards the accused's actions to have been justified and the accused is acquitted.

Regardless of the form of self-defence an accused raises, the accused is required to show that particular aspects of his or her conduct were objectively reasonable. Each of the self-defence provisions imposes objective requirements on the use of the defence. Under subsection 34(1) an accused has to establish that she used "no more [force] than is necessary" to repel the attack against herself.¹³ This demands an objective determination of the degree of force necessary to counter the initial assault.¹⁴ To fall within the scope of self-defence under subsection 34(2) (which covers situations in which the accused intended to cause death or serious bodily harm), the accused must show that she acted under *reasonable* apprehension of death or grievous bodily harm and that she *reasonably* believed she had no other options.¹⁵ This form of self-defence involves an objective determination both of the fear under which the accused acted, and of the other options available to the accused. Many battered women who kill or injure their batterers will seek to rely on this form of self-defence, since they will have acted with the intention of killing or severely injuring their batterer. Lyn Lavalley founded her defence on this section of the *Code*.

Until *Lavalley*, all pleas of self-defence were subject to the further requirement that the accused be reacting to an imminent attack. Although the imminent attack requirement is not expressly stipulated anywhere in the *Code*, case law has established it as a necessary component of self-defence.¹⁶ As Mme Justice Wilson explained in

¹² See s.34(1) of the *Code*. The two remaining forms of self-defence contain various combinations of the requirements of subsections 34(1) and (2). Section 35 also imposes a requirement that a person who has provoked an attack retreat before taking action in self-defence, in addition to the requirements of reasonable apprehension and reasonable belief contained in subsection 34(2). Section 37, which deals with prevention of assault to oneself or someone under one's control requires the same objective assessment of the force used to prevent the assault contained in subsection 34(1).

¹³ This requirement is also found in section 37 of the *Code*.

¹⁴ There is conflicting case law on the availability of the defence of mistake of fact in the determination of the degree of force required to repel an assault. In *Baxter, supra*, note 10 at 111, the Ontario Court of Appeal held that mistake of fact was available and, therefore, that subsection 34(1) did not involve a purely objective test. The following year, in *R. v. Bogue* (1976), 13 O.R. (2d) 272, 30 C.C.C. (2d) 403 (C.A.) [hereinafter *Bogue*], Howland J.A., for the same Court, concluded that the test was a purely objective one.

¹⁵ The requirement that the accused act under reasonable apprehension of death or grievous bodily harm also applies to section 35 of the *Code*.

¹⁶ See *Reilly v. The Queen*, [1984] 2 S.C.R. 396, 55 N.R. 274; *Baxter, supra*, note 10; *Bogue, supra*, note 14; and *R. v. Whynot* (1983), 9 C.C.C. (3d) 449, 37 C.R. (3d) 198 (N.S.C.A.).

Lavallee, the justification for the imminence requirement “seems obvious”:

The law of self defence is designed to ensure that the use of defensive force is really necessary. It justifies the act because the defender reasonably believed that he or she had no alternative but to take the attacker's life. If there is a significant time interval between the original unlawful assault and the accused's response, one tends to suspect that the accused was motivated by revenge rather than self-defence. In the paradigmatic case of a one-time barroom brawl between two men of equal size and strength, this inference makes sense.¹⁷

The imminent attack requirement assumes that violence is only justified when it occurs in the heat of the moment. It assumes that an accused has not acted in self-defence unless she responded to “an uplifted knife or pointed gun”.¹⁸ If there has been an opportunity for the accused's “passions” to cool down, or for the accused to escape the situation without resorting to violence, the accused will not be entitled to rely on self-defence. Similarly, an accused will not be entitled to rely on self-defence if the accused acts *before* he or she is really threatened, since violence would not yet be justified.

The requirements in subsection 34(2) of the reasonableness of the accused's apprehension of danger, of the reasonableness of her assessment of available options, and that the accused be responding to an imminent attack, impose three objective standards on battered women who kill their batterers. Battered women who seek to rely on other formulations of self-defence will have to establish other objective components. For example, in those rare situations in which a woman precipitates the attack against herself,¹⁹ she might be required to plead self-defence under section 35 of the *Code* if her conduct constitutes provocation under section 36 of the *Code*, or if she assaults her batterer. Under this provision, the woman would have to establish that she retreated as far as was feasible before using force. Women who plead self-defence under section 37 (prevention of assault) must establish that the force they used was no more than was objectively necessary to prevent an attack.

The difficulty with “objective” determinations is that they are often based on a male point of view and a male experience of

¹⁷ *Supra*, note 1 at 876.

¹⁸ *Ibid.*

¹⁹ According to Dr Lenore Walker, one of the leading experts on battered women, battered women sometimes provoke an attack once they realize that violence against them is inevitable. Dr Walker argues that women engage in this conduct to gain some control over their batterer's violence and to attempt to minimize their injuries. See *infra*, note 22 and accompanying text.

violence.²⁰ The traditional requirements that an assault be imminent, and the violence used in self-defence be no more than is necessary, while reasonable in the sense that they appear to discourage unnecessary violence and deter over-reaction, are premised on the notion that self-defence arises in single and unusual interactions. They do not fit well with situations of recurrent and escalating violence. For example, when a battered woman kills her batterer after recognizing gestures that indicate to her that he is leading up to a severe beating, it may be difficult to establish on the traditional reasonableness standard that the woman was facing an imminent assault, that she was acting under reasonable apprehension that she would suffer serious bodily harm or death, and that she reasonably believed she had no other means available to protect herself. People unfamiliar with the dynamics of abusive relationships might conclude that the woman acted before (or after) it was reasonable to do so, or that the woman could easily have avoided the violence by leaving her batterer. They might also conclude that a battered woman who uses a weapon to kill her batterer resorted to excessive force. These problems are further exacerbated when a woman kills her batterer in his sleep, or while he is in some other way incapacitated, since the reasonableness of her actions against an unconscious person will be increasingly difficult to establish.

The traditional doctrine of self-defence, based upon objective criteria of reasonableness, is inadequate to address the situation of battered women who kill to protect themselves from further abuse. Battered women often kill in different circumstances from men. Sometimes they act when the batterer is asleep, drunk, or in some other way unable to respond because they know that in these situations their batterer will not be able to overpower them. Having become attuned to their batterer's pattern of violence, battered women may also apprehend a threat of violence long before "reasonable" men would feel threatened. In neither instance would an attack against the battered woman "reasonably" be considered imminent. Battered women may also use weapons which might be seen as amounting to unreasonable force, because they know that they are likely to be overpowered if they use less force. The objective standards embodied in the law of self-defence make it difficult for battered women to plead self-defence unless they kill in the same situation as most men pleading self-defence do, in the midst of an ongoing assault.

²⁰ See C.A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence* (1983) 8 SIGNS 635; E.M. Schneider, *Equal Rights To Trial for Women: Sex Bias in the Law of Self Defense* (1980) 15 HARV. CIV. RTS — CIV. LIB. REV. 623; and P.L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defence* (1985) 8 HARV. WOMEN'S L.J. 121.

III. THE BATTERED WOMAN SYNDROME AS AN ASSERTION OF REASONABLENESS

The "battered woman syndrome" as a legal concept emerged in the United States during the late 1970s and early 1980s, as a strategy for overcoming sex bias in the law of self-defence.²¹ Feminist litigators sought to introduce expert evidence on the "battered woman syndrome" as a way of explaining to jurors how the accused woman's actions in killing her spouse could be reasonable in the context of repeated domestic violence. The expert's testimony took the form of describing the cyclical pattern of violence typical of many abusive relationships. The expert might also give evidence on the specific question of whether the woman accused of killing her spouse had been a battered woman.

The legal concept of the "battered woman syndrome" was firmly rooted in the work of psychologists and sociologists, particularly the ground-breaking work of psychologist Dr Lenore Walker. In her pioneering study of wife battering, Dr Walker identified a three-stage cycle of violence that often characterizes abusive relationships.²² The first stage, which Walker termed the "tension building phase", involves a series of minor battering incidents. The batterer repeatedly expresses hostility and anger, but is less violent than during the "acute battering incident". The battered woman typically tries to placate the batterer in the vain hope that she may be able to prevent the violence from escalating. The tension gradually escalates until the second phase, the "acute battering incident", becomes inevitable.

During the second phase, the batterer is completely unable to control the rage that has built up during the phase of tension building and severely batters the woman. The magnitude of the violence and its uncontrolled nature distinguish this phase from the violence that occurs during phase one. Usually, the onset of phase two is unrelated to the conduct of the woman, but instead is provoked by an external event or the internal state of the batterer. Sometimes, however, once she realizes the battering of phase two has become inevitable, the woman precipitates the incident to exert some control over when and where it occurs.

During the third phase, that of "kindness and contrite loving behaviour", the batterer's conduct changes from violence and anger to kindness and acts of love and contrition. The batterer behaves in a

²¹ For a description of the development of the "battered woman syndrome" as a legal defence, see E.M. Schneider, *Describing and Changing: Women's Self-Defence Work and the Problem of Expert Testimony on Battering* (1986) 9 WOMEN'S RTS L. REPORTER 195.

²² Dr Walker describes this theory in her book, *THE BATTERED WOMAN* (New York: Harper & Row, 1979) at 55-70. See also L.E. Walker, *THE BATTERED WOMAN SYNDROME* (New York: Springer Pub. Co., 1984).

caring and charming manner towards the woman, begs her forgiveness and promises never to hurt her again. The woman wants to believe the batterer, and believes that the behaviour he displays during this period is indicative of what he is truly like. This phase of love and tenderness provides the woman with positive reinforcement for staying in the relationship, even though she knows that the calm will eventually give way to the minor battering incidents of the "tension building phase". In addition, because most battered women "adhere to traditional values about the permanency of love and marriage",²³ they often wish to remain in the relationship and help their batterers to work things out.

To explain why women remain in relationships of cyclical violence, Dr Walker proposed the theory of "learned helplessness".²⁴ Dr Walker argued that battered women are psychologically paralyzed because they have "learned" from the repeated beatings that there is nothing they can do to control the violence. Each battering incident reinforces the woman's view of herself as helpless, and she actually becomes "passive, submissive, and helpless".²⁵ Much of the expert testimony on the battered woman syndrome goes to describing and explaining the phenomenon of learned helplessness. Experts depict battered women as primarily passive, incapable of constructive action and incapable of extricating themselves from their violent relationships.

Feminist litigators saw expert evidence on the "battered woman syndrome" as useful on two scores. The central purpose of the testimony was to counteract the assumption that the woman's actions were unreasonable. Establishing the woman's actions as reasonable is crucial if the woman's plea of self-defence is to succeed. As discussed in the previous section, the self-defence provisions of the *Code* all impose various requirements of reasonableness on the part of the person acting in self-defence. Depending on the form of self-defence a woman seeks to invoke, she must show that she used only reasonable force, that she acted under reasonable apprehension of suffering death or grievous bodily injury, and that an attack against her was imminent. Expert testimony can elucidate the reasonableness of the woman's actions on all of these points. For example, experts can explain to the jury that because of the persistent pattern of abuse they have suffered, battered women are adept at reading the batterer's behaviour and recognizing signs that violence is imminent. For an outside observer unfamiliar with domestic abuse, the same behaviour might appear to be insignificant. Similarly, an expert can explain to a jury why, when battered women do act against their batterers, many of them use weapons and kill their batterers. Expert witnesses can describe how,

²³ Walker, *THE BATTERED WOMAN*, *ibid.* at 67.

²⁴ *Ibid.* at 42-54.

²⁵ *Ibid.* at 47.

for most battered women, lethal force is the only way they can ensure that they will prevail in a violent encounter with their batterer. Experts can also explain why battered women feel they have no other way of protecting themselves short of killing their batterers. Experts can show why leaving their batterers is not a "reasonable" option for many battered women.

The secondary purpose of the testimony on the "battered woman syndrome" was to counteract prevalent misconceptions about battered women. Battered women have often been depicted as provoking and even enjoying the violence. The fact that they have not left their husbands, but have remained to suffer continued abuse, plays into the stereotype that battered women are masochistic.²⁶ Experts play an important role in dispelling the masochistic image by explaining to the jury why women who suffer abuse at the hands of their spouses remain in, or return to, violent relationships.²⁷ For example, experts can underscore for the jury how for many battered women, particularly those of modest economic means, there is no place to turn. Many women simply lack the financial resources to support themselves and their children. Many battered women find it difficult to strike out on their own because they have low self-esteem, made lower by the persistent belittling by their batterers. Many battered women also subscribe to a traditional view of marriage, believing that marriage is forever and that they will have failed if they leave.²⁸ Experts also point out that battered women stay, not because they enjoy being beaten, but because their "learned helplessness" prevents them from leaving the relationship.

In addition to rebutting the notion that battered women do not leave their husbands because they enjoy the violence, expert evidence concerning the reasons why battered women stay also counters the disbelief that many people feel upon hearing of the extent of battering. Battered women have been disbelieved on the theory that if the violence had really been as bad as they describe, they would have left the relationship.²⁹ Expert testimony can show the jury that there are many reasons which prevent a woman from leaving an abusive husband, none of which have to do with the woman's desire to be abused.

It is easy to see how, in the absence of expert evidence, the myths and misconceptions about battered women might stand in the

²⁶ Although there is a common belief that a battered woman could simply have stopped the abuse by leaving her batterer, the experiences of battered women show that this is not the case. Many women are pursued and hounded by their batterers after they have left.

²⁷ For a discussion of the reasons why women stay in abusive relationships, see P.J. Caplan, *THE MYTH OF WOMEN'S MASOCHISM* (New York: New American Library, 1987) at 156-62.

²⁸ Walker, *THE BATTERED WOMAN*, *supra*, note 22 at 67.

²⁹ Wilson J. discusses this myth in *Lavallee*, *supra*, note 1 at 871-73.

way of securing a fair trial for women who kill their batterers. Since the reasonableness of the accused's actions is the essence of a plea of self-defence, the jury must have the necessary knowledge with which to assess whether the woman's actions were reasonable. For many people, however, battered women are *prima facie* unreasonable because they remain in relationships that "reasonable" people would have rejected. It is difficult for many jurors to see a battered woman's actions in killing her batterer as reasonable when "reasonable" people would not have permitted themselves to be beaten in the first place. Further, in the minds of many jurors, if "reasonable" people did find themselves being beaten, they would immediately leave their abuser. Without information on battered women, there is a danger that juries will be ill-equipped to evaluate claims of self-defence brought by battered women who kill their mates.

As it was originally conceived by feminist litigators in the United States, the goal of introducing evidence of the "battered woman syndrome" in the defence of women who kill their batterers was to establish the reasonableness of the woman's actions.³⁰ The "battered woman syndrome" was not intended to be a defence that would relieve a woman of all criminal responsibility simply because she was battered. The premise underlying the defence was to ensure that the woman's actions were understood in the context in which they arose, and the reasonableness of her actions evaluated accordingly. In other words, the central issue in the trials of women who kill their batterers in self-defence remains, as it does in all trials where the accused pleads self-defence, the reasonableness of the accused person's actions. The evidence that a woman had been battered by her spouse helps the jury to assess whether her actions were reasonable. The determination that a woman was battered does not become the endpoint of the trial, but is a crucial factor in the jury's evaluation of her plea of self-defence.

IV. THE BATTERED WOMAN SYNDROME IN THE COURTS: THE AMERICAN EXPERIENCE

Although the battered woman syndrome was originally introduced by feminists, in the years since it has gained judicial acceptance, feminist academics and litigators have identified a number of problems arising from its use. First, by adopting the psychological/medical terminology of a "syndrome", the "battered woman syndrome" lends itself to the attribution of pathology on the part of women who are battered. From the standpoint of feminist theory, this is problematic because it reinforces the prevailing assumption that women's experiences that depart from the male norm are deviant. The description

³⁰ See Schneider, *supra*, note 21. See also, Crocker, *supra*, note 20.

of battered women as suffering from a syndrome also gives rise to a practical danger that evidence of battering will be interpreted as evidence that the woman acted under a form of diminished capacity. Second, the psychological profiles of battered women, that experts have drawn in depicting the "battered woman syndrome", while challenging old myths about battered women, establish a new stereotype of their own. The result is that women who depart from the stereotype of the helpless and passive battered woman may be deprived of the benefit of expert testimony on the "battered woman syndrome" since they will be seen as not the kind of woman to whom the syndrome applies.

A. *The Syndromization of Women's Conduct*

Although the feminist litigators who proposed the use of the "battered woman syndrome" in criminal defence work originally conceived of the syndrome as purely descriptive of the circumstances of domestic abuse,³¹ the experience of the use of the syndrome in the United States illustrates that many lawyers and judges have not viewed it in this way. While offering explanations to dispute the myth that battered women were pathologically masochistic, the "battered woman syndrome" unwittingly created a new category of deviance by depicting battered women as helpless victims.³² Elizabeth Schneider, one of the feminist litigators who was instrumental in urging acceptance of the "battered woman syndrome" explains this phenomenon in the following way:

The phrase "battered woman syndrome" was intended simply to describe common psychological and social characteristics of battered women. Research on battered woman syndrome emerged from an effort to counteract the myths and misconceptions that women initiated, provoked and enjoyed the violence; it suggested that battered women were truly victims. Thus, the initial focus of battered woman syndrome was a psychological analysis of battered women's victimization, their sense of paralysis or "learned helplessness". Although the term is purely descriptive, its psychological content and the language and import of the term carry a different message. Regardless of its more complex meaning, the term "battered woman syndrome" has been heard to communicate an implicit but powerful view that battered women are all the same, that they are suffering from a psychological disability and that this disability prevents them from acting "normally".³³

³¹ Schneider, *supra*, note 21 at 207.

³² For a discussion of the creation of a category of deviance for battered women in the psychological literature, see D.R. Loseke and S.E. Cahill, *The Social Construction of Deviance: Experts on Battered Women* (1983-84) 31 SOCIAL PROBLEMS 296.

³³ Schneider, *supra*, note 21 at 207.

Schneider cites a number of cases in which judges have characterized the "battered woman syndrome" as a form of severe emotional disturbance, akin to a mental disease or incapacity.³⁴ In one Georgia case, for example, a judge ordered an assessment of a woman's competency to stand trial when her lawyer applied for funds to hire an expert witness to testify on the "battered woman syndrome".³⁵

The idea that battered women suffer from a "disease" is problematic for several reasons. First, it is troubling that responses to battering which are shared by many women are described in terms denoting pathology. Instead of sending a message that the reactions of battered women to violence at the hands of their spouses are neither atypical nor surprising in a male-dominated society, the "battered woman syndrome" sends a not-too-subtle message that the way many women deal with domestic violence is deviant. The "syndromization" of an experience that is shared by many women provides an example of the feminist critique that women's experiences will not be viewed as valid so long as the legal system adopts values based on men's experiences as its norm.³⁶ The concept that battered women are the victims of a "syndrome" reinforces the notion that common experiences of women which differ from common experiences of men are not legitimate on their own terms. Unless these experiences can be cast as a form of deviance (from an implicit male norm), the legal system is not capable of accommodating them. Other efforts to accommodate women's experiences within the criminal law have also taken the form of syndromization. Psychologists and lawyers have described the reactions common to many women who have been raped as "rape trauma syndrome".³⁷ Even though the behaviours falling under the rubric of the "rape trauma syndrome" are part of the natural healing process in the aftermath of a sexual assault, they are viewed as evidence of a "syndrome". Similarly, psychologists and lawyers have described the hormonal changes some women experience in the days before the onset of menstruation as "pre-menstrual syndrome".

An additional problem with the use of the term "battered women syndrome" is that it centers attention on the woman, instead of inviting consideration of why men batter. To some extent, the focus on the woman's behaviour is inevitable because evidence of the "battered woman syndrome" typically arises when the woman is on trial for *her* actions against her batterer and it is *her* actions that are subject to scrutiny. However, it is important to remember that the concept of a

³⁴ *Ibid.* at 217 n. 148.

³⁵ *Ledford v. State*, 254 GA. 656, 333 S.E.2d 576 (Ga. 1985).

³⁶ See, e.g., C.A. MacKinnon, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (Cambridge, Mass.: Harvard University Press, 1987) at 34, discussing how difference from a male norm is viewed as inferiority.

³⁷ For a brief discussion of rape trauma syndrome, see C. Barron, *Rape Trauma Syndrome* (1984) 7 HARV. WOMEN'S L.J. 301.

"battered woman syndrome" was formulated in a social context in which it was more important to explain why women "allowed" themselves to be beaten than why men batter women. Until comparatively recently, wife beating was neither legally nor socially unacceptable.³⁸ Moreover, the problem of wife battering was either met with disbelief — it couldn't have been so bad, otherwise why would she have stayed? — or with derision — she must have provoked or enjoyed the violence. It is not surprising that psychologists confronted with these beliefs sought to explain the women's behaviour, rather than examining the men's. Though necessary to combat prevailing stereotypes, the unfortunate consequence of the emphasis on explaining the actions of battered women — in particular how women could remain with or return to abusive men — reinforced the underlying assumption of the woman's deviance. The unfortunate consequence of this woman-centered focus is that it perpetuated the underlying assumption that it was the woman who was the deviant member of the relationship. Although one of the central features of the "battered woman syndrome" is that women are not to blame for domestic violence, the syndrome unwittingly falls into the tendency to blame the victim by its exclusive inquiry into explaining the victim's conduct.

The notion that battered women suffer from a syndrome raises the further problem that it medicalizes and individualizes the problem of wife battering. Instead of recognizing that the actions of battered women in staying with their batterers are a function of our society's gender role socialization, the "battered woman syndrome" attributes deviance to individual women. The idea of a syndrome obscures the degree to which the behaviour exhibited by battered women is behaviour that is learned by, and expected of, all women, albeit in a less extreme form. By deeming individual battered women to be suffering from a form of pathology, the "battered woman syndrome" distances the experiences of battered women from those of "normal" women.

³⁸ One need only recall that when wife battering was raised in the House of Commons in May, 1982, as a widespread social problem affecting one in ten Canadian women, many politicians responded with laughter. See L. MacLeod, BATTERED BUT NOT BEATEN . . . PREVENTING WIFE BATTERING IN CANADA (Ottawa: Canadian Advisory Council on the Status of Women, 1987) at 3, citing Canada, House of Commons, DEBATES (12 May 1982) at 17734. In a similar incident, Alberta's Premier Don Getty responded to a journalist's claim that he was a "closet seat-belt abuser" by retorting: "I may whack my kids, beat my wife, but I've never abused a seat belt in my life." See "The Twists and Turns in Family Ties" *The [Toronto] Globe and Mail* (27 February 1989) A6. The common law permitted a man to beat his wife so long as he did not use a stick thicker than his thumb. In the United States, laws protecting women from violence by their husbands began to be passed only in the late 19th century. See Crocker, *supra*, note 20. For analyses of societal response to wife battering, see D. Martin, BATTERED WIVES (San Francisco: Gilde Publishing, 1976); R.E. Dobash, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY (New York: Free Press, 1979); and E. Prizzey, SCREAM QUIETLY OR THE NEIGHBOURS WILL HEAR (Short Hills, N.J.: Enslow, 1977).

The emphasis on the "deviance" of battered women rather than on the similarities of women's experiences in relationship to men, makes it possible to focus on the pathology of battered women rather than on more fundamental questions of the socialization of men and women in a male-dominated society. As Elizabeth Comack argues, "[t]here is no recognition of the structured and pervasive nature of women's subordination in our society and its consequences for those who are trapped in a battering relationship."³⁹

The focus on the woman's deviance is dangerous in yet another way. Viewing the woman as suffering from a psychological syndrome is not far from viewing the woman as operating under a form of diminished mental capacity, such as insanity. This is problematic because diminished capacity defences do not play the same legal role as self-defence. A successful plea of self-defence means that an accused person is justified in acting as he or she did and therefore, he or she cannot be found criminally liable. Diminished capacity defences such as insanity do not assume that the accused's actions were justifiable, but that it is not appropriate to hold the accused criminally liable because of some personal "flaw" of the accused. If the "battered woman syndrome" comes to be viewed as a psychological condition, there is little to distinguish it from the defence of insanity which presupposes a "disease of the mind". In fact, before the "battered woman syndrome" was coined, insanity was the traditional defence used in the United States to represent women who killed their batterers.⁴⁰ Ironically, the congruence between the interpretation of the "battered woman syndrome" as evidence of individual disorder and insanity undermines the original purpose of the evidence. The introduction of evidence of the "battered woman syndrome" in a claim of self-defence was conceived of as explaining the *reasonableness* of the woman's action, not as discrediting the woman's capacity to act.

B. *Resurrecting Stereotypes — The Construction of the Real Battered Woman*

Expert testimony on the "battered woman syndrome" has taken the form of describing the behaviour patterns and psychological characteristics common to many battered women. As discussed earlier, this testimony tends to focus on how the woman was psychologically trapped by the relationship, on her passivity, and on her learned helplessness. While expert evidence on the "typical" battered woman can be extremely useful to the defence where the accused conforms to

³⁹ E. Comack, *Justice For Battered Women? The Courts and the "Battered Woman Syndrome"* (1988) 22 C. DIMENSION 8 at 10. See also E. Comack, *Women Defendants and the Battered Woman Syndrome* (1985) 5 CROWN C.R. 6.

⁴⁰ Schneider, *supra*, note 20 at 630.

the pattern of expected behaviour, it presents problems when the accused woman does not fit the mold. Emphasis on learned helplessness leads to the creation of a stereotype that all battered women are passive and do little, if anything, to defend themselves against their batterers. In light of this stereotype, evidence that a woman has tried to defend herself, or has acted aggressively towards her batterer, can be taken as evidence that a woman is not a "real" battered woman.

Phyllis Crocker relates several occasions in which evidence of a woman's resistance to domestic violence has been tendered to dispute her claim of having been battered.⁴¹ In *State v. Kelly*,⁴² evidence that the accused woman had threatened a neighbour, and when her husband had locked her out of the house had pounded on the house and on her husband's car, was accepted by the Court as relevant to the determination of whether the accused was really a battered woman. Evidence that the accused woman had once stabbed her boyfriend was admitted in *State v. Anaya*⁴³ precisely because the woman's resistance challenged her status as a battered woman by disputing whether she "most frequently react[ed] with passivity".⁴⁴ In *Lavallee*, the Crown relied on the same tactic by introducing evidence that Ms Lavallee had twice threatened her boyfriend with a gun.⁴⁵

The emphasis on the passivity and helplessness of many battered women that characterizes expert testimony on the "syndrome" creates a new version of the traditional stereotype of the passive, incompetent woman. Although some battered women may react with passivity on virtually all occasions, complete submissiveness should not be taken as the hallmark of battered women. Battered women do, in some instances, resist the violence of their batterers. Depicting battered women as passive in every instance distorts the complexity of the women's behaviour and unduly restricts the applicability of the "battered woman syndrome".

V. CONCLUSION

In recognizing the value of testimony on the "battered woman syndrome", the Supreme Court of Canada took an important step towards making the criminal law more amenable to arguments made by women. Mme Justice Wilson's judgment is an extremely cautious and considered one. Although she adopted the language of the "battered

⁴¹ Crocker, *supra*, note 20 at 144-50.

⁴² 33 WASH. APP. 541, 655 P.2d 1202 at 1203 (Wash. Ct. App. 1982).

⁴³ 456 A.2d 1255 (Me. 1983).

⁴⁴ *Ibid.* at 1266.

⁴⁵ *Supra*, note 1 at 858.

woman syndrome", Wilson J. was careful to use the "syndrome" as a descriptive term, rather than as an emblem of pathology. Not once does Wilson J. describe Lyn Lavalée as having or suffering from a syndrome. Mme Justice Wilson's judgment should be viewed as an example of the appropriate use of the "battered woman syndrome".

In using the "battered woman syndrome", we should also seek to avoid the creation of a new female stereotype. We should be mindful of the advice of Elizabeth Schneider who concludes:

[L]awyers should be sensitive to the way in which they understand, characterize and explain the testimony [on the battered woman syndrome] and its relevance, and they should not rely on it to the exclusion of other defence strategies. Battered women who kill need not be portrayed solely as victims with the focus on battering, but as actors and survivors whose actions are reasonable.⁴⁶

Lavalée does all these things, and we must be cautious that it not be misinterpreted.

⁴⁶ Schneider, *supra*, note 21 at 222.